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Protection of Fundamental  
Human Rights at Work for  
Migrant Workers in the  
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# Summary

This thesis is focusing on the protection of fundamental human rights at work for third country migrant workers in the European Union, a region which attracts more and more migrant workers in recent years. The first Chapter introduces the background briefly, the methodology and the sources on which the research is conducted on and provides the scope and definition of the issues which are under discussion. Following this part, further detailed information relating with migration into EU and the situation concerning the four fundamental principles and rights at work for migrant workers are presented by analysing the collected data, news from media, reports and surveys targeting at this issue by international organizations. This part also explains the reasons for doing this research. The third Chapter explains what the fundamental rights at work are and their legal basis as well as the importance of protection of these rights for the vulnerable migrant workers. The fourth and Fifth Chapter are composed of the legal analysis. The fourth part introduces the relevant international instruments from the UN and ILO which are most relevant and supportive with migrant workers' fundamental rights at work. The comments made by the Committee of Experts on the Application of Conventions and Recommendations of ILO which supervises the implementation of those conventions in the ratified countries: whether the national legislation is in compliance with the international standards; how the conventions are applied in practice; the difficulties arising from the practice. The fifth Chapter emphasises on the European legal instruments, by analysing the relevant articles in the European and EU Conventions, Resolutions and Directives and case laws. This research aims to examine the extent the migrant workers' fundamental rights could be protected by the regional legal mechanisms. In the final Chapter, the thesis concludes the importance of ratification of those international conventions, and looks for methods to improve the protection of fundamental human rights at work for migrant workers.

## **Acknowledgement**

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## Abbreviations

CEACR	Committee of Experts on the Application of Conventions and Recommendations of ILO
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFA	Committee of Freedom of Association
ECMW	European Convention on the Legal Status of Migrant Workers
ESC	European Social Charter (revised in 1996)
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	The International Convention on the Elimination of All Forms of Racial Discrimination
ILC	International Labour Conference
ILO	International Labour Organization
UDHR	The Universal Declaration of Human Rights
UN	United Nations
UNCMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
UNPD	United Nations Population Division

# **Chapter I: Introduction**

## **1.1 Background**

Along with the globalization, migration flow in the world is increasing year after year. Labour migration is a leading part of the migration and it brings benefits for both the original and host states. However, more and more media news about complaints from the migrant workers alleging violations of basic human rights are reported. In the meanwhile, quite a lot of the migrant workers keep silence of the violations they suffered due to the lack of awareness of their rights. The protection of migrant workers' human rights is a challenging issue which requires efforts made by multiple partners, including state authorities, the employers' and workers' organizations and the enterprises which employ the migrant workers. The protection from a right-based approach through legislation, with provisions which entitle the rights to migrant workers, and which also establish a complaint mechanism is a fundamental and effective method. Legal instruments have been developed at the international, regional and national level respectively and indeed have promoted and protected of migrant workers' human rights in a certain extent on the condition that a state has ratified those conventions and has applied those international standards into its national legislation. However, the ratification number of the relevant migrant workers conventions is not high neither of those developed by the United Nations nor the International Labour Organization (ILO). The European Union (EU) has a rapid growing number of migrant workers according to their domestic demands even during the economic crisis in recent years. The 27 Member States are obligated to comply with the international conventions as well as the EU legal instruments and their national legislation. However, only a few of the EU states have ratified the relevant migrant workers conventions. This thesis is going to examine whether this triple-channel protection mechanism can effectively protect the fundamental human rights at work for migrant workers, by the way of analysing legal instruments mainly at the international and regional levels, together with comments made by international supervisory bodies and cases before European tribunals concerning the application in practice.

## **1.2 Sources and methodology**

This thesis is conducted by doing desk research, focused on the research questions which have been proposed at the beginning of this paper. In the first part, statistical reports, governmental reports, institutional reports and

news reports concerning the rights violations are supporting and describing the migration situations and the feature topics. After defining the rights at issue, the thesis focuses on the legal research and analysis. Legal instruments related with migrant workers will be examined, from the UN human rights instruments, relevant ILO fundamental conventions and specialized conventions, to the European instruments and the EU legislation. Comparative legal studies between international legal framework and the EU legislation is aimed at checking the gaps between them and trying to find out whether the rights provided by the international instruments which are not widely ratified by EU countries can be protected by the EU legislation. Comments and observations from UN and ILO supervisory mechanisms and cases from European or EU tribunals are devoted to analysing how the legal protection has been implemented by the member states. The concluding part will be consisted of the importance of ratification, the obstacles of non-ratification and the recommendations of the way forward in order to better protect third country migrant workers in the EU.

Therefore, the sources supporting this thesis are international and regional legal instruments, reports, statistics and comments made by international organizations or institutes, and cases from relevant judiciary bodies.

### **1.3 Definitions and Scope**

Before doing this research on the protection of fundamental rights at work for migrant workers, there are several definitions and terms should be clarified in the beginning.

The first one is the definition of migrant workers. Several conventions which are referred in this article have their definition of migrant workers respectively. Most of them are similar but still with differences. There have been developments of the definitions in the international legal instruments on the subject of migrant workers according to the year of adoption.

The ILO's Migration for Employment Convention (Revised), 1949 (No.97)<sup>1</sup> (hereinafter as C97) is the first international convention addressing migrant workers. There is no direct definition of migrant workers but the convention states that "the term migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than

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<sup>1</sup> Convention concerning Migration for Employment (Revised 1949) (Entry into force: 22 Jan 1952) Adoption: Geneva, 32nd ILC session (01 Jul 1949).

on his own account and includes any person regularly admitted as a migrant for employment”<sup>2</sup>. It excluded frontier workers, short term entry of members of the liberal professions and artistes, and seamen out of the scope of protection. But in the interim Recommendation, namely Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (No.100)<sup>3</sup> (hereinafter as R100), it makes explanations that the term migrant worker means “any worker participating in such migratory movements either within the countries and territories.....whether he has taken up employment, is moving in search of employment or is going to arranged employment, and irrespective of whether he has accepted an offer of employment or entered into a contract. Where applicable, the term migrant worker also means any worker returning temporarily or finally during or at the end of such employment.”<sup>4</sup>

In the Migrant Workers (Supplementary Provision) Convention, 1975 (No.143)<sup>5</sup> (hereinafter as C143), migrant workers are defined as follows: “migrant worker means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker”<sup>6</sup>. In comparison with ILO C97, C143 excludes persons coming for education and training, and workers for specific duty or fixed term as migrant workers rather than only frontier workers, short term artistes and members of liberal professions, and seamen in ILO C97.

In the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>7</sup> (hereinafter as UNCMW), which provides that 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”<sup>8</sup>. In the next paragraph of Article 2 and the following Article 3, the Convention

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<sup>2</sup> C97 Article 11.

<sup>3</sup> Recommendation concerning the Protection of Migrant Workers in Underdeveloped Countries and Territories. Adoption: Geneva, 38th ILC session (22 Jun 1955) - Status: Instrument with interim status (Technical Convention).

<sup>4</sup> R100, paragraph 2.

<sup>5</sup> Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Entry into force: 09 Dec 1978), Adoption: Geneva, 60th ILC session (24 Jun 1975).

<sup>6</sup> C143 Article 11.

<sup>7</sup> Adopted by General Assembly resolution 45/158 of 18 December 1990.

<sup>8</sup> UNCMW Article 2.1

makes much clearer on the scope of migrant workers and explains its exclusions. Compared with other definitions of migrant workers, the UNCMW is a broader one. It also includes both migrant workers who are documented or in a regular situation, or non-documented and in an irregular situation.<sup>9</sup> UNCMW has also made exclusions on the scope of protection which means it does not apply to international organization staffs and persons perform official function outside their state, persons sent or employed by a State or on its behalf outside its territory in development programme and other co-operation programme, persons as investors to resident in a State other than their State of origin, students and trainees, and seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.<sup>10</sup>

This thesis will examine the protection of migrant workers' human rights at work in this specific region, EU. Therefore, it is necessary to check the definitions of migrant workers in the legal instruments developed in the region.

In the European Social Charter (revised)<sup>11</sup> (hereinafter as ESC), it states in its preamble paragraph 19 that the rights provided in this Charter are applied to "Migrant workers who are nationals of a Contracting Party and their families have the right to protection and assistance in the territory of any other Contracting Party."<sup>12</sup> This means third country nationals if their state of origin is not a contracting party of this Charter, they will not be protected under ESC. The exclusion of third country nationals as migrant workers also happen in European Convention on the Legal Status of Migrant Workers (Hereinafter as ECMW)<sup>13</sup>, the term of migrant worker is defined as "a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment"<sup>14</sup>. This thesis is aimed at examining the protection of third country nationals who are labour migrants in the EU. Therefore, the

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<sup>9</sup> UNCMW Article 5.

<sup>10</sup> UNCMW Article 3.

<sup>11</sup> Be adopted on 18/10/1961 in Turin, and revised in Strasbourg on May 3, 1996, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>

<sup>12</sup> ESC Preamble, paragraph 19.

<sup>13</sup> European Convention on the Legal Status of Migrant Workers, Strasbourg, 24.XI.1977 Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/093.htm>

<sup>14</sup> ECMW Article 1.

definitions from the ESC and ECMW will not be accepted to use in this thesis.

To conclude, through a review of the definitions of migrant workers in different legal instruments, this thesis will be based on the definition from the UNCMW, namely, 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, for the reasons that the UNCMW's definition is broader and more specific. The term of migrant workers will mean both documented migrant workers and migrants in irregular situation, which also includes persons who enter the territory without being authorized or after their legal documents' expiration. It is also necessary to clarify that the migrant workers in EU referred to in this thesis do not have the right of "free movement", which is only applied for the EU citizens. The term of migrant workers in EU only refers to the third country nationals who migrate into the EU member states, as non-EU citizens.

The second issue should be clarified in the beginning is about the scope of rights which will be discussed in this thesis. Obviously, a variety of fundamental human rights and the work related rights are recognized for migrant workers, including the right to work and receive wages, equal pay for work of equal value, non-discrimination, freedom from forced labour, the right to get social security, the occupational safety and health at work and etc. However, the labour rights at issue in this thesis are focused on the labour standards which are promoted as fundamental labour rights by the ILO Declaration on Fundamental Principles and Rights at Work and its follow up<sup>15</sup> (Hereinafter as ILO 1998 Declaration). This Declaration calls for special attention to migrant workers who are the persons with special social needs.<sup>16</sup> It covers four categories of rights which are viewed as fundamental principles and rights at work, namely:

- (1) Freedom of association and the effective recognition of the right to collective bargaining;
- (2) Elimination of all forms of forced or compulsory labour;
- (3) Effective abolition of child labour;
- (4) Elimination of discrimination in respect of employment and occupation.

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<sup>15</sup> Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

<sup>16</sup> ILO 1998 Declaration Preamble paragraph 4.

With regard to the migrant workers in the EU, all these rights have been violated in certain extent. The severity of the violations of rights can be represented by the statistics. But some of the violations that cannot be reflected directly will be shown in the next Chapter.

The third issue needs to be explained is that the scope of subjects in this thesis. Although many statistics from international organization are using data collected in the whole Europe, the destination countries of this research are EU member states rather than the European states. Choosing EU member states as target are for the reasons that EU has a strong economic system and includes developed countries which have attracted most of the migrants to Europe. The second reason to select EU as the research target is that they have more comprehensive legal mechanism than other European states which are not members of the EU. Migrants in EU are presumed to be protected by international human rights conventions, specific ILO conventions, the European human rights instruments, the EU legislation and national laws in the EU member states.

The main aim of this research is to check up whether there is complete legal mechanism on protection of fundamental labour rights for third country migrant workers in EU in the circumstances that not all the EU member states have ratified the relevant UN and ILO conventions. Whether there is any other legislation from the EU level to fill up the legal gaps? And what are the solutions towards good management and better protection for migrant workers? Due to the limited access to available statistics of the topics under discussion, various types of labour migration, regular and irregular, high skilled and low skilled workers, will all be taken into account when discussing the general labour migration situation in EU.

## Chapter II. Labour Migration in the European Union

During the past 20 years, the estimated number on population of international migration made by the United Nations Population Division (UNPD) has increased from 156 million in 1990 to 214 million in 2010<sup>17</sup>. There are several types of migration which can be distinguished when doing specific research. The first type is labour migration, including temporary or permanent migrants, seasonal workers as well as international students who will become members of the work force after their studies. The second type is migration related with family reunion and the third type is categorized as asylum seekers. The fourth type belongs to undocumented immigrants, who may enter the territory illegally or stay after their permits expired. However, when regarding to the term migrant workers, if there is no specific indication, it means both the migrant workers in regular or irregular status.

The International Labour Office estimated that economically active migrants (including refugees) holding a number of 105.4 million in 2010 across the world, representing 44 per cent of the total migrant population<sup>18</sup>.

### 2.1 Globalization and International Labour Migration

Issues related to international labour migration are attracting increasing attention from different aspects. Globalization has been acting as a 'push' and 'pull' factor<sup>19</sup> for migration. Disparities of resources and inputs have led to unbalanced working opportunities, income, social environment, living conditions and the protection of human rights during globalization, which push forward the migration flowing from developing or underdeveloped countries to the developed countries in order to search for employment, better work and life. At the same time, there is also increasing demand of both high and low skilled workers from the destination countries, from high-skilled information technology and professional jobs, to low-paid, less skilled jobs in agriculture, cleaning and maintenance, construction, domestic

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<sup>17</sup> United Nations Department of Economic and Social Affairs (UN DESA), Trends in International Migrant Stock: The 2008 Revision, Data also are available on <http://esa.un.org/migration>.

<sup>18</sup> International Labour Migration A right-based approach, International Labour Office, Geneva, 2010. Page 18

<sup>19</sup> *Ibid*, P13

service, and health care. Therefore, globalization has facilitated the linkages of the global labour markets and improved the migration flow from countries to countries. Most South–North migration is headed for Europe and the United States, while North–North migration mainly takes place within Europe and across the Atlantic.

Along with that, the international labour migration has made significant contributions to the world economy. Every year, migrant workers send home countries large volumes of remittances to support their families. The estimated number was around USD 132 billion in 2000 to USD 440 billion in 2010, even with a slight decline due to the current economic crisis.<sup>20</sup> Besides the remittances, the transference of capital and skills through returning migration also benefit the origin countries. In the same time, labour migration contributes to the economic growth and prosperity in the destination countries. Migrants contribute to economic growth in numerous ways – by filling labour market needs in the high-skill and low-skill segments of the market, rejuvenating populations, improving labour market efficiency, promoting entrepreneurship, spurring urban renewal, and injecting dynamism and diversity into destination countries and societies.<sup>21</sup>

## **2.2 Current Situation of Labour Migration in the European Union**

According to *Migrants in Europe 2011*<sup>22</sup>, in 2008, 3.8 million people migrated to and between the EU-27 Member States, including also migration between EU-27 Member States;<sup>23</sup> 1.8 million Immigrants to EU - 27 Member States were non-EU citizens. Among them, Moroccans were the largest group, followed by citizens of China, India, Albania and the Ukraine. The largest numbers of foreign citizens reside in Germany, Spain, the United Kingdom, Italy and France.<sup>24</sup>

As what have been mentioned before, the reasons for people to migrate are various and labour migration accounts as the largest part. According to the estimation by the International Labour Office, migrant workers in Europe

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<sup>20</sup> World Bank's Migration and Remittances Fact book 2011, <http://go.worldbank.org/QGUCPJTOR0>

<sup>21</sup> *Supra* 18. Page 57

<sup>22</sup> *Migrants in Europe*, 2011 edition. A statistical portrait of the first and second generation. Luxembourg: Publications Office of the European Union, 2011

<sup>23</sup> Source: Eurostat (online data code: migr\_imm1ctz)

<sup>24</sup> Source: Eurostat (online data code: migr\_pop1ctz)

populated at 69.8 million, which took up 32.6 per cent of the total number worldwide.<sup>25</sup>

The reason for the EU states as continuous destination countries attracting labour force can be concluded by one of the Communications from the European Commission. “With regard to economic immigration, the current situation and prospects of EU labour markets can be broadly described as a “need” scenario. Some Member States already experience substantial labour and skills shortages in certain sectors of the economy, which cannot be filled within the national labour markets. This phenomenon concerns the full range of qualifications - from unskilled workers to top academic professionals.”<sup>26</sup>

When appreciating the advantages be taken to the EU member states by migrant workers, it is also very necessary to view the other part, whether migrant workers’ situations related with employment are treated equally as the nationals. Obviously, a negative answer will be got immediately. The following selected tables and figures are aimed at extruding the most differential aspects between nationals and migrant workers, helping to elaborate the situations and making the issues more explicit for future research and analysis.

The statistics used are from Eurostat<sup>27</sup>, they do not explicitly state the target group as workers, but they focus on the age group 25-54 and explain that “the use of this age group minimizes the effect of migration related to non-economic reasons such as study and retirement. It also reduces the effect of the very different age structures of the national/ native-born and the foreign/foreign-born populations. As a result, it creates a more homogeneous population group for comparisons to be made.”<sup>28</sup>

Employment rate and unemployment rate are good indicators to show the differences between nationals and non-nationals when looking at the general employment situations. The employment rate is computed as the ratio between the employed population and the total population.<sup>29</sup> Contrary to the

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<sup>25</sup> *Supra* 18, Page 17

<sup>26</sup> Communication from the Commission - Policy Plan on Legal Migration {SEC(2005)1680}, Commission of the European Communities, Brussels, 21.12.2005

<sup>27</sup> Statistical Office of European Union. Web page:

<http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/>

<sup>28</sup> *Supra* 22. P7

<sup>29</sup> *Ibid*, P 94

employment rate, the unemployment rate is calculated as the ratio between the unemployed population and the economically active population.<sup>30</sup>

### Employment Rate

Table 1: Employment rate of persons aged 25-54 by groups of country of citizenship, gender and duration of residence in the receiving country, EU-27, 2008 (%) (Resource: Footnote 22, Table 2.10)

	Nationals	Foreign citizens	Of which			
			EU-27 citizens	Third-country nationals	of which from countries with	
					high HDI	low and medium HDI
EU-27	80	71	78	67	70	65
Men	87	82	87	79	82	76
Women	73	59	68	55	57	52
Recent migrants	66	68	77	64	66	62
Settled migrants	76	72	79	69	71	67
Born in the host country	81	76	80	73	75	64

This table shows that the employment rate of foreigners aged 25–54 was 9 per cent points below that of nationals in 2008 at the EU level. When focusing on the employment rate of third- country nationals, which are the ‘migrants’ be defined in this thesis, the gap is much larger, 67 per cent in comparison with 80 per cent of the nationals. When turning to the figures for women, there is a dramatic distinction of 13 per cent points between the employment rate of EU-27 citizens and third-country nationals. Furthermore, 18 per cent gap is between nationals and third-country nationals. These data indicate there are greater labour market integration difficulties for third-country nationals.

### Unemployment Rate

Table 2: Unemployment rate of persons aged 25-54 by groups of country of citizenship, gender and duration of residence in the receiving country, EU-27, 2008 (%). (Resource: Footnote 22, Table 2.7)

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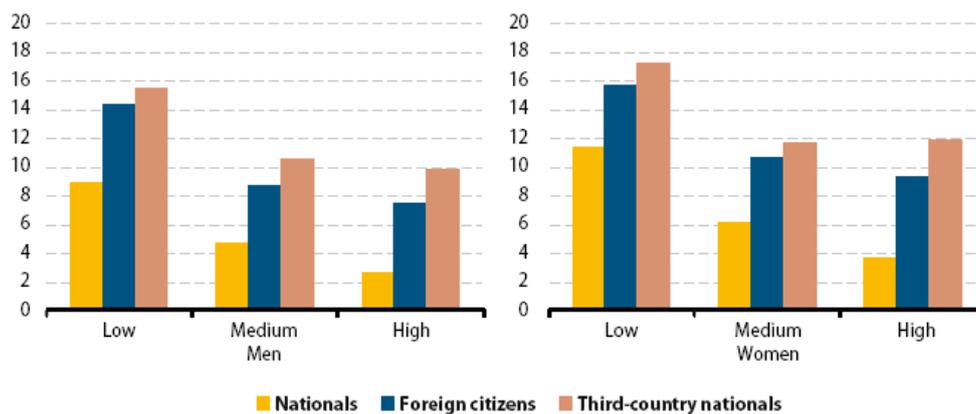
<sup>30</sup> *Ibid*, P 88

	Nationals	Foreign citizens	Of which			
			EU-27 citizens	Third-country nationals	of which from countries with	
					high HDI	low and medium HDI
EU-27	6	11	8	13	12	14
Men	5	10	7	13	11	14
Women	6	12	9	14	13	15
Recent migrants	14	12	9	14	12	15
Settled migrants	8	11	7	13	11	14
Born in the host country	6	11	8	13	12	19

In 2008, the unemployment rate of persons aged 25–54 was 6 per cent, 8 per cent and 13 per cent for nationals, EU-27 citizens and third-country nationals respectively. This table explicitly indicates that foreign citizens, especially the third-country nationals suffer worse labour market disadvantages than the nationals. The evidence is even much clearer when doing the analysis of unemployment rates.

After laying out the two tables above, a general view of inequality between nationals and migrant workers is presented obviously. And some further details will show the inequality between the two groups concerning the issue of employment.

Table 3: Unemployment rate of persons aged 25-54 by groups of country of citizenship, gender and highest level of educational attainment, EU-27, 2008 (%) (Resource: Footnote 22, Figure 2.15)



Education level is an important factor among the possibilities of participation in the labour market. Since the EU member states are in need of both the low-skill and high-skill workers, EU attracts migrant workers with different education background. It is useful to examine whether holding a higher education degree could help migrants be as competitive as nationals on the same level in the labour market. However, on the contrary,

the gap of unemployment rate is even larger between nationals and third-country nationals with higher education background. This comparison indicates that high unemployment of third-country nationals cannot just be attributed to poor educational background. Some other factors such as the non-recognition of qualifications, skills, and language efficiency may lead to the migrants less favoured, but it is obviously that discrimination results a higher unemployment rate of foreigners.

### Over qualification

Table 4: Overqualification rate of employed persons aged 25-54 by groups of country of citizenship, gender and duration of residence in the receiving country, EU-27, 2008 (%) (Resource: Footnote 22, Table 2.14)

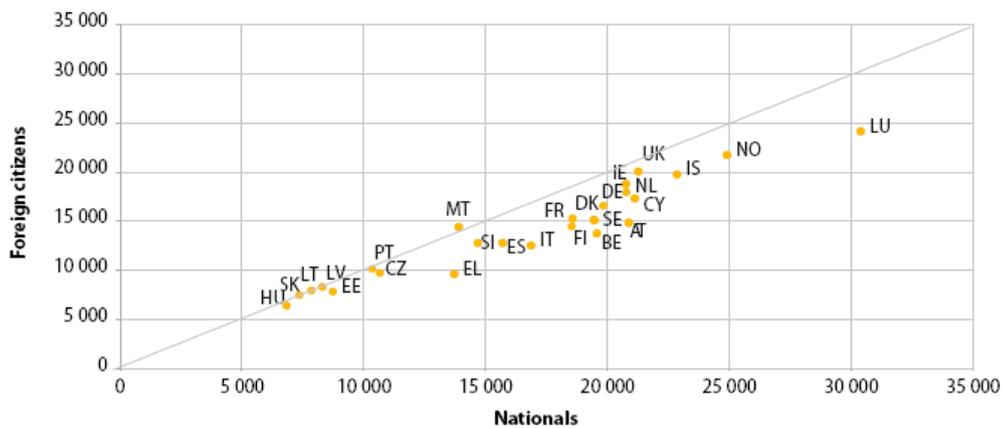
	Nationals	Foreign citizens	Of which			
			EU-27 citizens	Third-country nationals	of which from countries with	
					high HDI	low and medium HDI
EU-27	19	39	31	46	38	53
Men	19	37	29	44	36	49
Women	20	41	33	49	40	58
Recent migrants	36	43	37	48	38	54
Settled migrants	25	36	25	46	39	52
Born in the host country	19	25	23	28	29	:

The migrants could not get rid of inequality if they are employed. This table shows the over qualification rate, which is defined as the share of persons with tertiary education working in a low or medium skilled jobs among employed persons having achieved tertiary education.<sup>31</sup> In short, over qualification means the state of being more skilled or educated than the real requirements of job position. This table demonstrates the over qualification rate of third-country nationals as 46 per cent, which is two more times than the nationals with a rate of 19 per cent. This gap indicates a potential misuse of migrants' skills and qualifications as well as discrimination in the recognition of their educational qualifications and skills.

### Income

Table 5: Median annual equalised disposable income—comparison of foreign citizens with nationals (persons aged 25-54), 2008 (PPS) (Resource: Footnote 22, Figure 2.21)

<sup>31</sup> *Ibid*, P102



(†) Data not reliable or unavailable for foreign citizens for BG, PL and RO; data not available for the remaining EU countries.

Income is also a very good indicator to reflect equality at work between foreign citizens and nationals. From this figure, it can be seen that in 2008, for almost all Member States, the median annual equalised disposable income for foreign citizens, were considerably lower than those for nationals. It shows that the migrants do not get equal payment as nationals. These statistics above can only prove that discrimination related with employment for migrant workers exists in wide aspects, which should be eliminated in line with one goal from the ILO 1998 Declaration. But these statistics are based on the documented migrants. There is no specific figure of undocumented migrants; only with a latest statistics of irregular migrants is estimated at 5 to 8 million in EU alone.<sup>32</sup> Because of the irregular status of these migrants, they are afraid to be repatriated so they would avoid any contact with the authorities. Rights of education, access to justice, medical care and other rights cannot be fully protected for the migrants in irregular status and their family members. If they are in very bad working conditions, kept working for extremely long hours, exploited at work or involved as forced labour, they are afraid and lack of access to report to the authority and claim the violations. Therefore, these undocumented migrants usually cannot enjoy work for equal value and suffer discrimination. They have less protection than the documented migrant workers. Unlike the limited access to statistics of the discrimination issues at workplace, the irrefutable facts on issues of forced labour and lack of trade union rights, freedom of association and the effective recognition of the right to collective bargaining, are even

<sup>32</sup> Report: Human rights of irregular migrants, Rapporteur: Mr Ed van Thijn, Netherlands, Socialist Group, Committee on Migration, Refugees and Population. Doc 10924, 4 May 2006. Available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10924.htm>

fewer. However, it cannot be denied that there are numbers of migrant workers who are exploited and work as forced labour because of the lack of protection of fundamental rights at work.

The latest estimation of the number of forced labourers in EU was launched in June 2012 as a part of the ILO 2012 Global Estimate of Forced Labour.<sup>33</sup> The ILO estimates that 20.9 million people are victims of forced labour globally, trapped in jobs into which they were coerced or deceived and which they cannot leave. The number is increasing compared with the number estimated in 2005, a minimum of 12.3 million persons in forced labour.<sup>34</sup> It also reveals that about 880,000 people are currently in forced labour in the EU, statistically 1.8 persons per 1,000 inhabitants.<sup>35</sup>

There is no specific data showing the percentage of third country migrant workers among the number of forced labourers in the EU. The distinction between forced labour and labour exploitation is also blurred in the reported figures. However, it cannot be denied that migrant workers, who have been trafficked to the EU (or Europe) are conducted as forced labour and been exploited. Migrant workers are a group at high risk of trafficking for forced labour. Due to their insecure and vulnerable situation, they are an easy target for exploiters. Other factors such as isolation, lack of knowledge of rights and multiple dependencies<sup>36</sup> of migrant workers, the restrictive nature of immigration regulations in destination countries, threat of violence and other means of coercion are the main reasons affecting the exploitation of migrant workers and resulting migrant workers to end up in forced labour.<sup>37</sup> Taking migrants from countries such as China, Vietnam or Ukraine as examples, they often have contacts only within their own communities because of the language barriers and the encouragement from the employers and intermediaries. This kind of isolation makes the migrants invisible and

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<sup>33</sup> ILO 2012 Global Estimate of Forced Labour, Geneva, 2012 June. Available at [http://www.ilo.org/sapfl/Informationresources/ILOPublications/WCMS\\_182004/lang--en/index.htm](http://www.ilo.org/sapfl/Informationresources/ILOPublications/WCMS_182004/lang--en/index.htm)

<sup>34</sup> A Global Alliance Against Forced Labour, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 2005. International Labour Office, Geneva

<sup>35</sup> Forced Labour: The EU Dimension. Available at [http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms\\_184976.pdf](http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms_184976.pdf)

<sup>36</sup> Trafficking for Forced Labour in Europe, Report on a study in the UK, Ireland, the Czech Republic and Ireland. Anti-Slavery International 2006. Page 10

<sup>37</sup> Ibid., Page 10-17.

leaves both documented and undocumented migrant workers in a vulnerable situation to be exploited, such as long working hours, precarious working conditions, and abuse by the employers. Migrant workers from China are often covered to be exploited, for instance the 58 Chinese who were found dead in a lorry at Dover in 2000<sup>38</sup>, 23 Chinese cockle pickers were drowned in Morecambe Bay<sup>39</sup>, and Chinese ‘specialty cooks’ in Germany were made to work extremely long hours, lower wages than specified in the contracts, and under threat of dismissal<sup>40</sup>. Belgium is mainly a transit and destination country for men, women, and children trafficked for the purposes of economic and sexual exploitation. Women and girls are trafficked to Belgium primarily from Nigeria, Russia, Eastern Europe and China.<sup>41</sup> France is seen as a destination country mainly for trafficked women, though there are also reports of Chinese and Colombian men be trafficked into bonded or forced labour.<sup>42</sup> Hungary is mainly a transit country for trafficking, and to a lesser extent as a source and destination country<sup>43</sup>. Men who are trafficked for forced labour through Hungary to European countries come from Afghanistan, Bangladesh, Iraq and Pakistan.<sup>44</sup> These migrants may incur high debts, and were unaware of their rights so that many of them endure these exploitative working conditions without ever seeking legal assistance. Cases of exploitation for domestic work<sup>45</sup> and prostitution are

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<sup>38</sup> 58 dead in port lorry, BBC News, June 19, 2000. Available at [http://news.bbc.co.uk/2/hi/uk\\_news/796791.stm](http://news.bbc.co.uk/2/hi/uk_news/796791.stm). Visited on September 11, 2012.

<sup>39</sup> Tide kills 18 cockle pickers, BBC News, February 6, 2004. Available at [http://news.bbc.co.uk/2/hi/uk\\_news/england/lancashire/3464203.stm](http://news.bbc.co.uk/2/hi/uk_news/england/lancashire/3464203.stm). Visited on September 11, 2012.

<sup>40</sup> Andreas Ulrich: Slaving over the Wok: 180 Restaurants Raided. August 20, 2009. Available at <http://www.spiegel.de/international/germany/slaving-over-the-wok-chinese-restaurants-accused-of-human-trafficking-a-643945-2.html>. Visited at September 11, 2012.

<sup>41</sup> Together Against Trafficking in Human Beings. Available at <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Belgium>. Visited at September 11, 2012.

<sup>42</sup> Roger Plant, Forced labour, migration and trafficking. Global Perspective, Page 64 Available at <http://library.fes.de/pdf-files/gurn/00075.pdf>.

<sup>43</sup> ANNEX 1 - TRAFFICKING IN PERSONS REPORT, 2004 - (IOM). Available at <http://www.iom-nederland.nl/dsresource?objectid=669&type=org>.

<sup>44</sup> Forced labour, Child labour and Human Trafficking in Europe: An ILO Perspective. Technical paper for the EU/IOM STOP “European Conference on Preventing and Combating Trafficking in Human Beings”, 18-20 September 2002, Brussels, Belgium. p7.

<sup>45</sup> According to the survey from several organizations, Kalayaan in UK, KASAPI HELLAS in Greece, Commission for Filipino Migrant Workers in The Netherlands, and Migrant Resource Center Ireland, migrant domestic workers are suffered physical, psychological and sexual abuse, not enough food, long working hours (more than 16 hours a day), locked

also hard to be discovered and intervened from the outside. Although without specific data, migrant workers are likely to suffer highly exploitative situations which could amount to forced labour.<sup>46</sup> Therefore, more attention should be paid to the elimination of migrant workers into forced labour.

Although Europe has achieved higher ratification levels than any other region for the core ILO Conventions covering freedom of association and collective bargaining,<sup>47</sup> migrant workers are among those most often denied the right of freedom of association and collective bargaining in law or practice. Undocumented migrant workers or workers in irregular situations are more vulnerable than the documented migrants, even though the ILO supervisory bodies emphasize that all migrant workers, whether or not they are documented, have the right to join and form trade unions. Agricultural workers, domestic workers, workers in informal economies are particularly easily get into abuse and the denial of fundamental rights at work, including the rights to organize and collective bargaining. In a few countries, restrictions on trade union membership generally remain, particularly for migrant workers in irregular or unauthorized situations. Legislation limits the right of migrant workers to organize, such as to form trade unions. Those migrant workers in irregular status cannot enjoy freedom of association. The ILO Committee of Freedom of Association (CFA) received cases of migrant workers alleging the violation of their trade union rights. For example, in Case No, 2121<sup>48</sup>, it was alleged that ‘irregular’ foreign workers were denied the right to organize and strike, freedom of assembly and association, the right to demonstrate and collective bargaining rights in Spain by its new law on foreigners, namely Act No. 8/2000 on the Rights of Foreigners in Spain and their Social Integration. The CFA made a recommendation requesting the Spanish Government, as concerned the

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in the house where they worked, no private room, passport kept by employers, no social benefits and etc. Migrant Domestic Workers in Europe. Respect Network Campaigning for the Rights of Migrant Domestic Workers in Europe and Internationally, Amsterdam, September 2009.

<sup>46</sup> Trafficking for forced labour – how to monitor the recruitment of migrant workers, Training Manual, Special Action Programme to Combat Forced Labour, ILO, 2005. p1.

<sup>47</sup> Global Report under the Follow-up to the ILO Declaration 2004, Freedom of Association and the Right to Collective Bargaining: Europe. Available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_decl\\_fs\\_3\\_en.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_3_en.pdf)

<sup>48</sup> Case No 2121 (Spain) - Complaint date: 23-MAR-01. The General Union of Workers of Spain (UGT)

legislation in cause, to take into account the terms of Article 2 of Convention No. 87 according to which workers, without distinction whatsoever, have the right to join organizations of their own choosing.<sup>49</sup>

During these years, the EU is dominated by a continuing economic crisis, which made several states to amend their labour laws to implement austerity measures. This has eroded trade union rights across the region; particularly undermine national and sectorial level collective bargaining systems, to the detriment of working people and trade unions.<sup>50</sup> In the Czech Republic, abuses of migrant forestry workers (mainly from Vietnam, Slovakia, Romania and Ukraine) were widely reported in 2011, where a great number of complaints have been received by the Trade Union of Workers in the Woodworking Industry, Forestry and Management of Water Supplies concerning the violation of trade union rights, including failure to provide information and to consult, obstructions in the process of collective bargaining, as well as of workers' rights (unlawful cuts in wages, bullying, pressure to terminate contracts of employment).<sup>51</sup>

Concerning the issue of child labour within the migration, the research and statistics are even fewer. Usually there are three categories of child migrant workers: children of migrant workers, children migrants alone and children being trafficked.<sup>52</sup> If without a support system in the destination countries, such as birth registration, schools and health service, these children may turn to the labour market and are vulnerable to the worst forms of child labour, including begging, domestic work, agriculture and manufacture, and the sex industry.<sup>53</sup> For instance, in South-eastern Europe (including Bulgaria as an EU member state), 90 per cent of foreign women working in prostitution are alleged victims of trafficking and 10-15 per cent of these women are girls under the age of 18. Younger children, both boys and girls,

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<sup>49</sup> Definitive Report - Report No 327, March 2002. Case No 2121 (Spain) - Complaint date: 23-MAR-01 – Closed, paragraph 562.

<sup>50</sup> Annual Survey of violations of Trade Union Rights: Europe. Available at <http://survey.ituc-csi.org/Europe-Global.html?lang=en>

<sup>51</sup> International Trade Union Confederation, 2012 Annual Survey of Violations of Trade Union Rights - Czech Republic, 6 June 2012, available at: <http://www.unhcr.org/refworld/docid/4fd88955c.html> [accessed 7 September 2012]

<sup>52</sup> United Nations Children's Fund: A Child-rights Approach on International Migration and Child Trafficking: A UNICEF Perspective. Page 1-2.

<sup>53</sup> *Supra* 44, Page 2

are being trafficked for forced labour.<sup>54</sup> Also in Europe, young women and even children from Albania, Moldova and the Ukraine, forced into prostitution in countries of Central and Western Europe.<sup>55</sup> It is glad to find out that the number of child labour in EU is much lower than other regions in the world but the abolition of child labour is also a very important issue.

### **2.3 Concluding Remarks**

According to the facts and figures collected from different reports, it can be found that the fundamental human rights at work for migrant workers are at risk. Discrimination against migrant workers is reflected by their high unemployment rates, the lack of recognition of their skills and experience, and their low income. Equal opportunity and integration are among the most difficult challenges raised by international labour migration today.<sup>56</sup> A significant number of migrant workers are exploited as forced or compulsory labour. And the denials of freedom of association and workers' rights for migrant workers are very usual. These fundamental rights should be well protected so that other rights at work can be further enjoyed by migrant workers.

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<sup>54</sup> UNICEF, UNOHCHR, OSCE ODIHR, *Trafficking in Human Beings in South Eastern Europe*, 2003, p. XIII

<sup>55</sup> *Ibid.*

<sup>56</sup> *International Labour Migration and Development: the ILO Perspective*. International Migration Programme, International Labour Office, Geneva, June 2007. Paragraph 20.

# **Chapter III. Migrant Workers and Fundamental human rights at work**

## **3.1 Migrants as a vulnerable group**

Because of their alien status, migrants are usually vulnerable to be violated of human rights. As an alien group in a society, migrants might be excluded by the majority because of the differences between appearances, languages, and culture backgrounds. Their limited awareness of the laws and rules in the hosting country leads to a lack of assertion of the rights. Migrants are not citizens of the country where they currently stay in, so that they hardly can enjoy the same rights as nationals even if the laws in the hosting country have entitled equal rights for migrant workers as nationals. Discrimination is very common phenomena which easily make the migrants under unequal treatment and unequal opportunities in ordinary life or at work. Racism and xenophobia are also very common for migrants to face with when they are in different social situations.

The situation of migrants and their human rights are very easily to be polarized, integration and equality on one side, and exclusion and discrimination on the other. The high skilled migrant workers can be protected better and easier to get access to claim their rights than the low skilled migrants and irregular migrants, who usually have the '3D' (dirty, dangerous and degrading) work which the nationals reject to do, or with illegal status to stay in the hosting country. When a migrant enters another country illegally, or stays in the country after the expiration of legal status, his or her vulnerability to abuse and exploitation will increase dramatically and their access to human rights protection and justice is even fewer.

Therefore, the alien status of migrants in another country determines their vulnerability which should get more attention from the hosting country and international society. A right-based approach is one of the best ways to protect the human rights of migrant workers.

## **3.2 International Labour Standards and Human Rights**

Since the foundation in 1919, ILO has launched for setting international standards to improve working conditions through the adoption of labour conventions and recommendations. These international labour standards have set up obligations for member states and gradually have formed the

basis for social and labour legislation in many countries. Therefore, they have made steps for protecting workers' rights. By the year of 2012, ILO has already adopted 189 conventions and 202 recommendations.

The labour standards regulated by the ILO conventions have been reflected in other international human rights instruments, which have been gradually mainstreamed into the human rights field. The protection of human rights for migrant workers and the promotion of equal opportunities and treatments for all human beings are also embedded in the Preamble to the Constitution of the International Labour Organization in 1919 and the Declaration of Philadelphia in 1944<sup>57</sup>. In the Declaration of Philadelphia the ILO moved into human rights territory by stating its aims in terms of human values and aspirations: "all human beings, irrespective of race, creed or sex, have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."<sup>58</sup>

In the 1998 Declaration, ILO has focused on eight core conventions in four key areas. These fundamental conventions contain the relevant human rights at work. These labour standards are a series of rules and principles regarding the minimum standards which have been recognized by the international community. They also have set obligations for governments and employers to treat workers humanely.

These fundamental human rights at work are provided by both of the ILO conventions and other international human rights instruments in general or with specialization in different aspects, such as ICCPR, ICESCR, CEDAW, CRC, ICERD and CMW. Thus, complaint procedures can be applied in international human rights mechanisms and the ILO supervisory systems.

### **3.3 Fundamental human rights at work for migrant workers**

In 1998, ILO adopted a new declaration in its 86<sup>th</sup> International Labour Conference, called the Declaration on Fundamental Principles and Rights at Work. The Declaration commits Member States to respect and promote

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<sup>57</sup> Declaration concerning the aims and purposes of the International Labour Organisation.(DECLARATION OF PHILADELPHIA, 26<sup>th</sup> International Labour Conference, 1944.

<sup>58</sup> Lee Swepston: The International Labour Organization and Human Rights Access to the ILO. Available at <http://www.leeswepston.net/moller.htm>

principles and rights in four categories, whether or not they have ratified the relevant Conventions. It states in its second paragraph of the main content that “all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.” These fundamental principles and rights cover four areas, which are: (1) Freedom of association and the effective recognition of the right to collective bargaining; (2) Elimination of all forms of forced or compulsory labour; (3) Effective abolition of child labour; (4) Elimination of discrimination in respect of employment and occupation.

In the Declaration’s preamble, it addresses the particular attention to “persons with special needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems.” It means the principles and rights are universal and apply to all human beings in all countries, regardless of nationality or residence or migrant status. The four categories of principles and rights must be observed in all stages of the migration process in order to protect migrants well in different status.

### **3.3.1 Trade Union Rights**

The trade union rights, mainly discussed as freedom of association and the right of collective bargaining are considered as the basic and fundamental labour rights. The ILO Constitution affirms the principle of freedom of association in its preamble as one of the means to improve working conditions and to ensure peace. In the 1944 Declaration of Philadelphia, which forms part of the Constitution of the ILO, reaffirms that the “fundamental principles on which the Organisation is based” includes “freedom of expression and of association are essential to sustained progress”<sup>59</sup>. As to the right of collective bargaining, the 1944 Declaration of Philadelphia sets it as one of the “the solemn obligation of the International Labour Organization to further among the nations of the world programmes”<sup>60</sup> to achieve. The trade union rights are embodied in the Freedom of Association and Protection of the Right to Organize

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<sup>59</sup> *Supra* 57, I.

<sup>60</sup> *Supra* 57, III.

Convention, 1948 (No. 87)<sup>61</sup> (Hereinafter as C87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98)<sup>62</sup> (Hereinafter as C98). The former one has 151 ratifications and the later has 161 ratifications until now<sup>63</sup>. The ILO Multilateral Framework on Labour Migration, which was adopted in 2006 with the support of both the employer and worker participants, calls for respecting the freedom of association for migrant workers.

C87 provides workers and employers the right to establish and join organizations of their own choosing without previous authorization by its Article 2 and prescribes that “Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom” and “public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise” by its Article 3. C98 ensures the workers and employers the rights to organize<sup>64</sup> and the right of collective bargaining, by regulating as “to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers and workers...by means of collective agreements”<sup>65</sup>. Migrant workers can enjoy the right to a collective voice at work through their representatives in trade unions asserting their labour and employment rights, and improving their working conditions.

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA) have repeatedly reaffirmed the fundamental rights of workers, including migrants and those in irregular status, to form and join trade

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<sup>61</sup> Convention concerning Freedom of Association and Protection of the Right to Organise (Entry into force: 04 Jul 1950) Adoption: San Francisco, 31st ILC session (09 Jul 1948).

<sup>62</sup> Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Entry into force: 18 Jul 1951) Adoption: Geneva, 32nd ILC session (01 Jul 1949)

<sup>63</sup> By the day of December 10<sup>th</sup>, 2012. Available at

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312232:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232:NO) and

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312243:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312243:NO).

<sup>64</sup> *Supra* 62, Article 3.

<sup>65</sup> *Supra* 62, Article 4.

unions and to be protected against any act of discrimination on the grounds of trade union activities.<sup>66</sup>

### 3.3.2 The Elimination of Forced or Compulsory Labour

The two ILO Conventions dealing with the abolition of forced or compulsory labour are the most widely ratified conventions: as of 2012 July, the Forced Labour Convention, 1930 (No. 29)<sup>67</sup> (Hereinafter as C29), had been ratified by 175 States and the Abolition of Forced Labour Convention, 1957 (No. 105)<sup>68</sup> (Hereinafter as C105), had received 172 ratifications.

C29 defines the term ‘forced or compulsory labour’ as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”<sup>69</sup> and makes the exception of the circumstances of forced labour. C105 requires the states parties to take effective measures to secure the immediate and complete abolition of forced or compulsory labour<sup>70</sup>.

The principle of elimination of forced labour applies to all workers regardless of their status, including migrant workers, who are particularly vulnerable to forced labour. Among them, the irregular migrant workers are on top of being at risk. The forced workers are usually suffer excessive low wages or no payment, retention of passports or other documents, long working hours, bad working conditions and physical violence.

Grave concerns have shown by the ILO supervisory bodies on forced labour, including debt bondage of migrant workers and trafficked migrant workers, forced prostitution and domestic workers, with hope of increase penal sanctions on the perpetrators of forced labour or trafficking of migrant workers.<sup>71</sup>

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<sup>66</sup> *Supra* 18, Page 121

<sup>67</sup> Convention concerning Forced or Compulsory Labour (Entry into force: 01 May 1932). Adoption: Geneva, 14th ILC session (28 Jun 1930).

<sup>68</sup> Convention concerning the Abolition of Forced Labour (Entry into force: 17 Jan 1959) Adoption: Geneva, 40th ILC session (25 Jun 1957)

<sup>69</sup> *Supra* 67, Article 2.

<sup>70</sup> *Supra* 68, Article 2.

<sup>71</sup> Referred to Human Trafficking and Forced Labour Exploitation, Guidance for Legislation and Law Enforcement. Special Action Programme to Combat Forced Labour 2005, International Labour Office, 2005.

### 3.3.3 Abolition of Child labour

The principle of abolition of child labour is enshrined in both of the Minimum Age Convention 1973 (No. 138)<sup>72</sup> (Hereinafter as C138), with 175 ratifications<sup>73</sup>, and the Worst Forms of Child Labour Convention, 1999 (No. 182)<sup>74</sup> (hereinafter as C182), with a ratification number of 175.<sup>75</sup>

C138 represents the minimum age for children to work in different types of work. It prohibits the recruitment of children under 18 to engage in hazardous work which may jeopardize the health, safety or morals of young persons. And C138 also prescribes that when employing children no less than the age of 16 years, the conditions of health, safety and morals of the young person must be fully protected and the young person need to receive adequate and specific instruction or vocational training in the relevant branch of activity.

C182 defines the worst forms of child labour as (1) slavery and trafficked as forced labour, including forced recruitment in armed conflict; (2) child prostitution and pornography; (3) production and trafficking drugs; and (4) the circumstances harm the health, safety and moral of children.<sup>76</sup> Children accompanying with migrant workers and migrant children should not be admitted to employment or work before they have reached the minimum age, which has been specified by the national law concerning the type of work concerned.

### 3.3.4 Non discrimination of employment and occupation

Non-discrimination is a fundamental principle no matter in the international human rights instruments or the ILO conventions, which is reflected throughout all the legal mechanism. The Equal Remuneration Convention,

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<sup>72</sup> Convention concerning Minimum Age for Admission to Employment (Entry into force: 19 Jun 1976) Adoption: Geneva, 58th ILC session (26 Jun 1973)

<sup>73</sup> As the day of December 10<sup>th</sup>, 2012.

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312283:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283:NO)

<sup>74</sup> Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Entry into force: 19 Nov 2000). Adoption: Geneva, 87th ILC session (17 Jun 1999)

<sup>75</sup> As the day of December 10<sup>th</sup>, 2012.

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312327:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327:NO)

<sup>76</sup> *Supra* 74, Article 3.

1951 (No. 100)<sup>77</sup> (hereinafter as C100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)<sup>78</sup> (hereinafter as C111) are the core labour conventions representing the non-discrimination principle.

C100 provides that equal remuneration for men and women workers for work of equal value refers to the rates of remuneration without discrimination based on sex. It is mainly on a gender based approach aiming to stress the equality between men and women. In C111, the term discrimination includes “(a) 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 or treatment in employment or occupation”<sup>79</sup>. The terms of ‘employment and occupation’ have also been explained as a broad scope, including the access to vocational training, the access to employment and to particular occupations, and the terms and conditions of employment.<sup>80</sup> These two conventions are applied to all workers without distinction, regardless of nationals or non-nationals.

Migrant workers are often the victims of discrimination in workplace at every stage, the recruitment, income, terms and conditions of work, promotion opportunities, and keeping the job, because of their alien status. They may be hired at times of labour shortages, but then they are the first ones to be dismissed when the employer has less work.<sup>81</sup> Although nationality is not listed in C111, ILO supervisory bodies have repeatedly affirmed that migrant workers are protected by this instrument in so far as they are victims of discrimination in employment and occupation on the basis of any of the expressly prohibited grounds of discrimination.<sup>82</sup>

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<sup>77</sup> Equal Remuneration Convention, 1951 (No. 100) (Entry into force: 23 May 1953). Adoption: Geneva, 34th ILC session (29 Jun 1951). With 169 ratifications.

<sup>78</sup> Convention concerning Discrimination in Respect of Employment and Occupation (Entry into force: 15 Jun 1960) Adoption: Geneva, 42nd ILC session (25 Jun 1958), with 170 ratifications.

<sup>79</sup> *Ibid*, Article 1.1(a).

<sup>80</sup> *Ibid*, Article 1.3

<sup>81</sup> Marilyn O'Rourke: Legal prohibitions against employment discrimination available to migrant workers employed in Europe: A review of international instruments and national law in four selected countries. International migration programme, International Labour Office, Geneva, 2008. Page 5.

<sup>82</sup> *Supra* 18, P 124

# **Chapter IV: International Legal Framework on the protection of fundamental human rights at work for migrant workers**

The protection of the human rights for migrant workers has raised international attention for years and has been reflected in the international human rights legal framework. The fundamental human rights at work are part of the rights under protection. The migrant workers' basic human rights at work are contained in the general human rights instruments, which are applied to all human beings regardless of their nationalities and legal status, as well as some special conventions only aim at the protection of migrant workers. This part will introduce the current legal framework of the protection on migrant workers' human rights, from the international level to the regional level at issue, which includes the human rights instruments developed by UN, the ILO conventions and EU legislation. The focus will be on both of the relevant provisions in different instruments and the legal complaint mechanisms to get access to remedy.

## **4.1 The International Human Rights instruments**

Migrant workers, as human beings, are entitled to all human rights provided in International Bill of Human Rights<sup>83</sup>, which is composed by Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, and other basic human rights instruments, such as International Convention on the Elimination of All Forms of Racial Discrimination, The Convention on the Elimination of All Forms of Discrimination against Women, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. These UN instruments are of potential importance in terms of protecting migrants from discrimination and exploitation on grounds other than their non-national status.<sup>84</sup>

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<sup>83</sup> Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights, available at <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1.en.pdf>

<sup>84</sup> Report III(1B) Migrant Workers, International Labour Conference, 87<sup>th</sup> Session, June 1999 Geneva. Paragraph 53.

### 4.1.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (hereinafter as UDHR), adopted by the UN General Assembly in 1948<sup>85</sup>, is a milestone of human rights instruments in history and has been widely recognized. It sets out for the first time, fundamental human rights to be universally protected. Although UDHR is a non-binding document, most of its provisions are recognized as customary international law and the rights provided in it are foundation of other human rights law.

The rights embodied in UDHR are basic rights for “human beings”<sup>86</sup>, which means they apply to everyone without distinction. In the preamble, the General Assembly proclaims “THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.” Here, “the peoples of territories under their jurisdiction” includes the non-nationals of the member states, which can be interpreted as migrants. Later in the content, non-discrimination clause is clarified by “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”<sup>87</sup>, as well as “All are equal before the law and are entitled without any discrimination to equal protection of the law”<sup>88</sup>. Undoubtedly, migrants are included. Provisions related with fundamental human rights at work are also contained in UDHR. For example, Article 4 prohibits forced labour, expressing as “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”. The most relevant provisions entitled working rights are Article 23, 24 and 25, which include the right to work, free choice of employment, just and favourable conditions of work and protection against unemployment; right

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<sup>85</sup> Universal Declaration of Human Rights adopted by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217. Available at <http://www.un.org/en/documents/udhr/>

<sup>86</sup> *Supra* 18, Page 118

<sup>87</sup> UDHR, Article 2.

<sup>88</sup> UDHR, Article 7.

to equal pay for equal work without any discrimination; right to get remuneration and social protection; right to form and join trade unions<sup>89</sup>; and reasonable limitation of working hours and periodic holidays with pay.<sup>90</sup>

The UDHR states that “everyone has the right to an “effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”<sup>91</sup> which provides with a channel for the access to remedy in the national level. After the domestic remedies are exhausted, complaints can be filed by any person or groups of persons including NGOs<sup>92</sup> to the United Nations Human Rights Council<sup>93</sup> to address consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms occurring in any part of the world and under any circumstances.<sup>94</sup>

#### **4.1.2 International Covenant on Civil and Political Rights**

International Covenant on Civil and Political Rights<sup>95</sup> (hereinafter as ICCPR) is one of the International Bill of Human Rights, which adopted by the UN General Assembly in 1966, requires its parties to commit to protect the rights embodied in the covenant. The principle of non-discrimination is enshrined in ICCPR by Article 2(1).<sup>96</sup> Also in its Article 26, it states that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”, which includes migrants as a subject under protection.

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<sup>89</sup> UDHR, Article 23.

<sup>90</sup> UDHR, Article 24.

<sup>91</sup> UDHR, Article 8.

<sup>92</sup> 5/1.Institution-building of the United Nations Human Rights Council, adopted on 18 June 2007, 87 (d).

<sup>93</sup> The Human Rights Council is an inter-governmental body within the United Nations system made up of 47 States responsible for the promotion and protection of all human rights around the globe, which was established by UN General Assembly Resolution 60/251 on 15 March 2006.

<sup>94</sup> *Supra* 92, paragraph 85.

<sup>95</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) Of 16 December 1966, entry into force 23 March 1976.

<sup>96</sup> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The relevant human rights at work are ensured by this covenant. Forced or compulsory labour is prohibited, and no one shall be held in slavery or servitude.<sup>97</sup> The right to form or join trade unions<sup>98</sup> is also provided as “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests”.

This covenant requires states parties to guarantee the access to get remedies by “undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”.<sup>99</sup> Thus, it can be ensured that there exists effective remedy<sup>100</sup>, the access to get the remedies<sup>101</sup> and the enforcement of remedy<sup>102</sup>. The Optional Protocol to ICCPR authorizes Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant<sup>103</sup> as well as monitoring the implementation of ICCPR by reviewing regular reports submitted by member states.<sup>104</sup> All the EU states have ratified ICCPR and its Optional Protocol, except United Kingdom which has not ratified the Optional Protocol.<sup>105</sup>

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<sup>97</sup> ICCPR, Article 8.

<sup>98</sup> ICCPR, Article 22 (1).

<sup>99</sup> ICCPR, Article 2(2)

<sup>100</sup> ICCPR Article 2(3a), To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

<sup>101</sup> ICCPR Article 2(3b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

<sup>102</sup> ICCPR Article 2(3c) To ensure that the competent authorities shall enforce such remedies when granted.

<sup>103</sup> Optional Protocol to the International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

<sup>104</sup> Human Rights Committee Monitoring civil and political rights

<http://www2.ohchr.org/english/bodies/hrc/index.htm>

<sup>105</sup> Available at

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en)

### 4.1.3 International Covenant on Economic, Social and Cultural Rights

International Covenant on Economic, Social and Cultural Rights<sup>106</sup> (hereinafter as ICESCR) was adopted in the same year as ICCPR, in 1976, and is binding for its states parties. All the EU member states have ratified ICESCR but only Slovakia and Spain have ratified the Optional Protocol.<sup>107</sup> The same as ICCPR, the rights contained in ICESCR are for “all members of the human family” and “everyone”<sup>108</sup>, including migrant workers. And the states parties should “guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”<sup>109</sup>. It also emphasizes in the following paragraph that the rights recognized in the covenant for non-nationals should be guaranteed by developing countries according to its economy.<sup>110</sup>

The right to work is among the economic rights.<sup>111</sup> The fundamental human rights at work are referred in this Covenant. Taking the non-discrimination principle as an example, states parties should recognize the right of everyone to the enjoyment of just and favourable conditions of work, such as equal pay for equal work, safe and healthy working conditions, equal opportunity for promotion in employment, and paid holidays.<sup>112</sup> The trade union rights are also ensured in ICESCR, “the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests”,<sup>113</sup> and “the right to strike, provided that it is

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<sup>106</sup> International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

<sup>107</sup> Available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> and [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en).

<sup>108</sup> ICESCR Preamble.

<sup>109</sup> ICESCR Article 2(2).

<sup>110</sup> ICESCR Article 2(3).

<sup>111</sup> *Supra* 18, Page 119/

<sup>112</sup> ICESCR Article 7.

<sup>113</sup> ICESCR Article 8(1a).

exercised in conformity with the laws of the particular country.”<sup>114</sup> Prohibition of child labour is reflected by Article 10(3).<sup>115</sup>

Access to get remedy should be ensured by states parties to “take steps... to the maximum of its available resources...by all appropriate means, including particularly the adoption of legislative measures” according to Article 2(1). The Committee on Economic, Social and Cultural Rights (CESCR)<sup>116</sup> is the body to monitor the implementation of ICESCR by its states parties by means of reviewing regular reports submitted by the states parties and dealing with individual complaints which have exhausted national remedies and meet other criteria.<sup>117</sup>

#### **4.1.4 International Convention on the Elimination of All Forms of Racial Discrimination**

The International Convention on the Elimination of All Forms of Racial Discrimination<sup>118</sup> (hereinafter as ICERD), was adopted and entered into force even earlier than ICCPR and ICESCR. All the EU member states have ratified it.<sup>119</sup> In Article 1 of ICERD, racial discrimination is defined 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.” Attention should be paid to the following provisions in Article 1, “This Convention shall not

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<sup>114</sup> ICESCR Article 8(1d).

<sup>115</sup> ICESCR Article 10(3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

<sup>116</sup> The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985.

<sup>117</sup> According to Optional Protocol GA resolution A/RES/63/117, adopted by the General Assembly as on 10 December 2008.

<sup>118</sup> Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969.

<sup>119</sup> Available at

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en)

apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”, and “nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.”<sup>120</sup> Although the migrant workers discussed here are international migrants holding different nationalities, they are also in different racial and ethnic group so that they can claim basing on racial grounds.<sup>121</sup> Many human rights problems affecting migrants arise from discrimination and racism, and concern integration and cultural identity.<sup>122</sup> These problems often lead the migrant workers to the situation of unequal treatment and opportunities. Therefore, this convention is much more related with migrant workers before the adoption of a special convention on protection of migrant workers. In regard to the four fundamental principles and human rights at work, the ICERD has covered two aspects of the four, the non-discrimination in employment and treatment<sup>123</sup>, and the trade union rights<sup>124</sup>.

Article 6 of ICERD requires states parties to assure everyone within their jurisdiction having effective protection and remedies, through the competent national tribunals and other State institutions. A Committee on the Elimination of Racial Discrimination is established by Article 8 of the convention, aiming at monitoring the implementation of the Convention through reviewing regular reports and communications from individuals or groups who are victims of rights violations by the states parties.<sup>125</sup>

Besides those UN conventions mentioned above, there are several other instruments in relevance to the protection of migrant workers. The Convention on the Elimination of All Forms of Discrimination against Women<sup>126</sup> (hereinafter as CEDAW) consolidates the provisions of existing

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<sup>120</sup> ICERD Article 1(2) and 1(3).

<sup>121</sup> *Supra* 81. P6.

<sup>122</sup> Stefanie Grant, International Migration and Human Rights, A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005.

<sup>123</sup> ICERD Article 5 e(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.

<sup>124</sup> ICERD Article 5 e(ii) (ii) The right to form and join trade unions.

<sup>125</sup> ICERD Article 14.

<sup>126</sup> CEDAW, adopted by the United Nations General Assembly on 18 December 1979.

UN instruments concerning discrimination on the basis of sex and applies to citizens and non-citizens.<sup>127</sup> Provisions relevant to working rights are Article 11, which stipulates the right to work, same employment opportunities, equal remuneration, and right to social security should be equality. But these are from a gender perspective. Therefore, migrant workers are hardly to make complaints on this basis if they are distinguished by their nationality.

#### **4.1.5 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

As the increasing of the migration flow worldwide, the issue has attracted more and more international attention and urged for a particular convention on the protection of migrant workers. In 1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UNCMW) was adopted, and entered into force in 2003. In this Convention, the definition of migrant workers<sup>128</sup> and the scope<sup>129</sup> in this convention are clarified. A non-discrimination clause is set up before going into details of the rights, which be read as “States Parties... to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for...without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.”<sup>130</sup> The rights provided in UNCMW cover many areas during the entire migration process. It recognizes that migrant workers and members of their families, being non-nationals residing in states of employment or in transit, are being protected, and no matter what their status are. However, there are distinctions of rights under protection for regular migrant workers comparing with undocumented migrant workers.

This convention covers a wide range of human rights for migrant workers, including freedom of movement (Art.8), right to life (Art 9), right not be subject to torture or to cruel, inhuman or degrading treatment or punishment (Art.10), freedom of thought, conscience and religion (Art.12), right to

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<sup>127</sup> International Legal Framework for the Protection of Migrant Workers. P25-34 Available at <http://www.osce.org/eea/19246>

<sup>128</sup> UNCMW Article 2. The definition has already been discussed in the beginning of this thesis.

<sup>129</sup> UNCMW Article 3.

<sup>130</sup> UNCMW Article 7.

property (Art.15), right to liberty and security of person (Art.16), equal access to justice (Article 18 )as well as the rights related to employment (Article 11, 25 and 26).

The fundamental human rights at work are all embodied in this convention. The prohibition of slavery, servitude, forced or compulsory labour is provided by Article 11. Equal treatment concerning employment, such as remuneration, conditions of work, including overtime, hours of work, weekly rest, holidays with pay, safety, health, and termination of the employment relationship, should be ensured that migrant workers shall enjoy treatment not less favourable than nationals by the State of employment.<sup>131</sup> The elimination of child labour is also enshrined in UNCMW by Article 25(1b), which states “Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters...” States parties shall take all appropriate measures to ensure those rights for irregular migrants.(Article 25(3)). In addition, the regular migrant workers have more rights to equality of treatment with nationals guaranteed by this convention, such as vocational guidance and placement services, vocational training and retraining<sup>132</sup>, protection against dismissal, unemployment benefits, Access to public work schemes intended to combat unemployment, and access to alternative employment in the event of loss of work or termination of other remunerated activity<sup>133</sup>. The freedom to choose remunerated activity is stipulated in Article 52, which requires a certain years of residence for regular migrants. And the equality of treatment with nationals is addressed in Article 55 for migrant workers who have been granted permission to engage in a remunerated activity. Furthermore, the standards of fitness, safety, health and principles of human dignity should be kept the same for regular migrant workers as nationals.<sup>134</sup> As to trade union rights, there are also distinctions between migrant workers with different status. For both migrant workers in regular and irregular situations, they have the right to join freely, take part in meetings and activities, and to seek the aid and assistance of trade unions and other associations. But for the migrant workers in regular situation, they have an extra right to form trade unions compared with undocumented migrants.<sup>135</sup>

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<sup>131</sup> UNCMW Article 25.

<sup>132</sup> UNCMW Article 43 (1b and c).

<sup>133</sup> UNCMW Article 54 (1)

<sup>134</sup> UNCMW Article 70.

<sup>135</sup> UNCMW Article 40.

Regarding access to remedies, states parties shall ensure effective remedy when the recognized rights are violated, the claims of seeking remedy should be reviewed by authorities, and the remedies can be enforced if granted.<sup>136</sup> A Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as "the Committee") is established by the Article 72 of the convention, which is responsible to review regular reports submitted by states parties. The Committee will also consider individual communications after 10 states, as required by Article 77, to accept the procedure. But the procedure is accepted by only two states, which cannot make it enforce. Unfortunately, none of the EU member states have ratified this convention.

#### **4.2 International Labour Organization and its supervisory system**

Most of the international labour standards are set out by International Labour Organization, established by Treaty of Versailles in 1919, as a UN specialized agency. The main aims of ILO are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.<sup>137</sup> ILO's unique tripartite structure enables governments, employers and workers have equal voice to develop international labour standards adopted through International Labour Conference. The conventions are legally binding for the states which have given ratification while the recommendations are not in the need of ratification because they are only guidance or supplementary interpretation of the relevant conventions.

There is a unique supervisory system to ensure that states parties of have implemented the relevant international labour standards. The application of labour standards by states parties are regularly examined by the ILO supervisory mechanism in order to improve the implementation. The ILO has developed diverse means to supervise the application of international labour conventions, in law and practice, including a regular system of supervision and special procedures.

The regular system of supervision is provided by Article 19 (5e), Article 19(6d) and Article 22 of ILO Constitution, requires member state to submit annual report to the International Labour Office on the measures taken to give effect to the provisions of Conventions to which it is a party. The

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<sup>136</sup> UNCMW Article 83.

<sup>137</sup> <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>

Committee of Experts on the Application of Conventions and Recommendations and The International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations are two bodies in the ILO to conduct the regular supervision functions.

Besides the regular system, there are three other special procedures, (a) procedure for representations on the application of ratified Conventions<sup>138</sup>, (b) procedure for complaints over the application of ratified Conventions<sup>139</sup>, and (c) special procedure for complaints regarding freedom of association (Freedom of Association Committee<sup>140</sup>). It is important to note that the ILO functions mainly on regular reporting and supervision, and that the complaints procedures are relatively little used<sup>141</sup> except the freedom of association procedure. Complaints could be filed regardless of whether a State has ratified the ILO Conventions concerning the labour standards at issue.

The supervisory mechanisms are the same for the application of international labour standards set out by the ILO Conventions so as the access to get remedies. Therefore, the methods to get access to remedies are not going to be discussed under every relevant ILO Conventions.

### **4.3 ILO's Legal Framework on the Protection of Fundamental Human Rights At Work for Migrant Workers**

All the ILO Conventions and Recommendations are presumed to apply to all workers irrespective of their nationalities. Thus, migrant workers shall enjoy the same rights as the nationals. From this perspective, all the international labour standards shall be applied to protect for the sake of migrant workers by the member states.

The most relevant conventions concerning fundamental rights at work are the eight core conventions, in which principal rights are further confirmed by the 1998 ILO Declaration. The Declaration makes it clear that these rights are universal, applying to all people in all States. States have obligations to protect the core labour rights no matter whether they are

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<sup>138</sup> Established under ILO Constitution Article 24.

<sup>139</sup> Established under ILO Constitution Article 26.

<sup>140</sup> The Committee on Freedom of Association was set up by the ILO in 1951 for the purpose of examining complaints about violations of freedom of association.

<sup>141</sup> Lee Swepston: Human Rights at Work Supervisory Mechanisms of the International Labor Organization. Available at <http://www.leswepston.net/supersys.htm>

parties to the Declaration. It also addresses that “the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers.”<sup>142</sup> The eight core Conventions are among the most highly ratified conventions.<sup>143</sup> Some Conventions make it clear that there are no exclusions for any kind of worker.<sup>144</sup> These eight core conventions and the rights enshrined in them have been already reviewed in the former part, therefore, there is no need of further explanations.

#### **4.4 Conventions Particularly For Migrant Workers**

In addition to the common conventions, ILO has developed several conventions and recommendations particularly for the protection of migrant workers. Migration for Employment Convention, 1949 (Revised) (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) (C143) and their supplementary recommendations, Migration for Employment Recommendation (Revised), 1949 (No. 86)<sup>145</sup> (hereinafter as R86) and Migrant Workers Recommendation, 1975 (No. 151)<sup>146</sup> (hereinafter as R151). These conventions and recommendations provide for more comprehensive solutions to the problems faced by migrant workers during all stages of migration and guarantee to assist migrant workers and their families.

These two conventions, C97 and C143 apply to persons who migrate from one country to another with a view to being employed otherwise than on his own account, and include any person regularly admitted as a migrant worker. There are exceptions to the application of the two conventions, namely in relation to seamen, frontier workers, and artists and members of the liberal professions who have entered the destination country on a short-term basis while C143 has more exceptions on trainees and employees admitted temporarily to carry out specific duties or assignments.<sup>147</sup>

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<sup>142</sup> ILO 1998 Declaration, Preamble.

<sup>143</sup> Numbers of ratification can be checked by <http://www.ilo.org/dyn/normlex/en/f?p=1000:12001:0::NO::>

<sup>144</sup> C87 Article 2, Workers and employers, without distinction whatsoever, shall have the right to...

<sup>145</sup> Recommendation concerning Migration for Employment (Revised 1949). Adoption: Geneva, 32nd ILC session (01 Jul 1949).

<sup>146</sup> Recommendation concerning Migrant Workers. Adoption: Geneva, 60th ILC session (24 Jun 1975)

<sup>147</sup> C97 Article 11 and C 143 Article 11.

#### 4.4.1 Migration for Employment Convention (C97)

C97 is the first international convention devoted to migrant workers which includes all the issues occurring at all stages, departure, journey and reception of migrants for employment.<sup>148</sup> C97 and its supplementary Recommendation R86 do not make distinctions between permanent migrant workers and temporary migrants but only apply to migrants in legal status. C97 and R86 focus on the standards applicable to the recruitment of migrants for employment and their conditions of work. C97 has three Annexes, two are on the issue of recruitment placing and conditions of labour of migrants for employment in the situations whether they are recruited under government sponsored arrangements for group transfer or not. The third Annex is about the importation of the personal effects, tools and equipment of migrant workers. Among the member states of EU, ten of them have ratified this convention.<sup>149</sup>

In regarding with the fundamental principles and rights at work, some of them are reflected in this Convention. C97 requires the Member States to treat migrant workers, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, no less favourably than nationals.<sup>150</sup> It thus does not cover undocumented migrants. Equality of treatment in employment, such as the remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on homework, minimum age for employment, apprenticeship and training, women's work and the work of young persons are under the member states' obligation to guarantee by Article 6. Also in the same Article, it stipulates that the migrant workers can enjoy the same membership of trade unions and the benefits of collective bargaining as nationals. The abolition of forced labour is only regulated by the term 'minimum age for employment' in Article 6. In terms of forced or compulsory labour, there are no provisions in C97 to stipulate on this issue.

R86 supplements C97 with more details on assistance to migrant workers, recruitment and placement, providing access to schools for migrants' children and their families, providing medical assistance, protection upon loss of employment and etc. It reaffirms that the regular migrants should "as far as possible be admitted to employment in the same conditions as

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<sup>148</sup> C97 Article 4

<sup>149</sup> These countries are: Belgium, Cyprus, France, Germany, Italy, the Netherlands, Portugal, Slovenia, Spain, and United Kingdom.

<sup>150</sup> C97 Article 6.

nationals.”<sup>151</sup> An Annex of Model Agreement on Temporary and Permanent Migration for Employment is attached to this recommendation, which addresses various matters and lists the rights under protection.

In the latest International Labour Conference Report, the CEACR has given notice of the communication from General Confederation of Labour (CGT) concerning the increasing rigidity of the legislative and normative framework covering migration and the general situation of migrant workers in France, including Roma migrants. The French Government is considered not to comply with Article 3 (steps against misleading propaganda), Article 6 (equality of treatment) and Article 7(2) (free services provided by public employment agencies).<sup>152</sup>

Also in the same conference, communication concerning the equality of treatment with respect to the conditions of work in Slovenia is made to the CEACR by the Association for Free Trade Unions of Slovenia (AFTUS). AFTUS alleged that under the Employment and Work of Aliens Act of Slovenia, a foreigner with an employment permit could only take up employment with the employer to which the permit for employment was issued. This may cause the worker’s dependency on an individual employer and the risk of non-respect of statutory provisions regarding conditions of work. The Committee asks the Slovenia Government to indicate the specific measures taken to ensure full application to migrant workers of the labour law provisions concerning remuneration, hours of work, overtime arrangements, rest periods and annual leave.<sup>153</sup>

There are also some direct requests made to the EU countries which have ratified this convention, such as direct requests made to Belgium<sup>154</sup>, Germany<sup>155</sup>, The Netherlands<sup>156</sup>, Portugal<sup>157</sup>, Spain<sup>158</sup>, and United

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<sup>151</sup> R86 paragraph 16.1.

<sup>152</sup> Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 101st Session, 2012. Page 906

<sup>153</sup> *Ibid*, Page 911.

<sup>154</sup> Direct Request (CEACR) - adopted 2008, published 98th ILC session (2009), Migration for Employment Convention (Revised), 1949 (No. 97) – Belgium. Available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_I D:2300557](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_I D:2300557) access on September 6, 2012.

<sup>155</sup> Direct Request (CEACR) - adopted 2008, published 98th ILC session (2009), Migration for Employment Convention (Revised), 1949 (No. 97) – Germany. Available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_I D:2300588](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_I D:2300588) access on September 6, 2012.

Kingdom<sup>159</sup>. The most relevant ones among which concerning migrant workers are the Direct Request made to Belgium, Germany and the Netherlands.

In the Direct Request made by the Committee of Experts to Belgium in 2008 on C97, the Committee noted that the three new laws amended in 2007 creating general framework for combating any form of discrimination are not fully complied with the convention. In section 7(2) of the Belgium Act, it states that “any direct distinction based on nationality constitutes direct discrimination, unless it is objectively justified by a legitimate purpose and the means of achieving this objective are appropriate and necessary”<sup>160</sup>, which means there would be exceptions of discrimination on the basis of nationality. However, this direct distinction based on nationality be justified is prohibited by EU law and not in compliance with C97 on its Article 6 concerning protection by law of equal treatment and non-discrimination.

In the Germany case, the Committee noted the German Residence Act, which regulate that “the Federal Employment Agency may approve the granting of a residence permit authorizing the foreigner to take up employment on condition that, among other things, the foreigner is not employed on terms less favourable than those which apply to comparable German workers. Should this condition not be respected, the approval to

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<sup>156</sup> Direct Request (CEACR) - adopted 2008, published 98th ILC session (2009), Migration for Employment Convention (Revised), 1949 (No. 97) – The Netherlands. Available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_I D:P11110\\_COUNTRY\\_ID.P11110\\_COUNTRY\\_NAME.P11110\\_COMMENT\\_YEAR:23:00613,102768,Netherlands,2008](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_I D:P11110_COUNTRY_ID.P11110_COUNTRY_NAME.P11110_COMMENT_YEAR:23:00613,102768,Netherlands,2008), access on September 6, 2012.

<sup>157</sup> Direct Request (CEACR) - adopted 2008, published 98th ILC session (2009), Migration for Employment Convention (Revised), 1949 (No. 97) –Portugal. Available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_I D:2300630](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_I D:2300630) access on September 6, 2012.

<sup>158</sup> Direct Request (CEACR) - adopted 2007, published 97th ILC session (2008), Migration for Employment Convention (Revised), 1949 (No. 97) – Spain. Available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_I D:2280821](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_I D:2280821) access on September 6, 2012.

<sup>159</sup> Direct Request (CEACR) - adopted 2008, published 98th ILC session (2009), Migration for Employment Convention (Revised), 1949 (No. 97) - United Kingdom. Available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_I D:2300593](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_I D:2300593) access on September 6, 2012.

<sup>160</sup> *Supra* 154.

grant a residence permit for the purpose of employment can be revoked”.<sup>161</sup> This act may cause migrant workers at risk of losing their residence permit as the result of their employer applying terms of conditions less favourable than those applying to comparable German workers. Therefore, the mechanisms for addressing situations of non-respect of the migrant workers’ right, to be entitled to treatment no less favourable than nationals might be not accessible and effective which need the country to provide with more information.

As to the Direct Request to the Netherlands, the Committee requested the government to provide information on cases from courts and the Equal Treatment Commission regarding discrimination of migrant workers especially matters enumerated in Article 6(1)(a) to (d) of the Committee<sup>162</sup>, for the reasons that there were extensive cases dealt with discrimination based on race or nationality with respect to recruitment and selection of job applications by the Equal Treatment Commission.

#### **4.4.2 Migrant Workers (Supplementary Provisions) Convention (C143)**

After the adoption of C97, the situation of migration had been changed over the years. More concerns are upon the unemployment and increase in irregular migration by governments. The focus shifted from facilitating the migration of surplus labour to bringing migration flows under control.<sup>163</sup> C143 is therefore adopted expressly to supplement C97 and the Discrimination (Employment and Occupation) Convention.<sup>164</sup> The term of discrimination does not include distinctions on the basis of nationality in the Discrimination Convention<sup>165</sup>, while C143 takes nationality into it. The focus of this Convention is to bring migration flows under control, the protection of irregular migrants in abusive conditions, and to further promote equality of opportunity and treatment of migrant workers.

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<sup>161</sup> *Supra* 155.

<sup>162</sup> *Supra* 156.

<sup>163</sup> *Supra* 18. Page 129

<sup>164</sup> *Supra* 81. Page 17. 16. Discrimination (Employment and Occupation) Convention.

Adopted on 25 June 1958 by the General Conference of the International Labour Organisation at its forty-second session

<sup>165</sup> Discrimination Convention Article 1(1a), “...any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin...”

Article 1 of C143 requires member states to respect the basic human rights of all migrant workers even if member states have the right to determine illegally employed migrant workers on its territory<sup>166</sup> and shall take all necessary and appropriate measures to suppress clandestine movements of migrants for employment and illegal employment of migrants, and against the organizers of illicit or clandestine movements of migrants for employment.<sup>167</sup> Also, member states shall make their national laws or regulations for the effective detection of the illegal employment of migrant workers and apply administrative, civil and penal sanctions to them.<sup>168</sup> However, migrants in irregular status are granted equality of treatment in respect of rights arising out of past employment as regards remuneration, social security and other benefits<sup>169</sup> as well as working conditions.<sup>170</sup> The respect and protection of rights for irregular migrants are an improvement made in this Convention.

As to the fundamental principles and rights at work, C143 mentions them very generally. Attention of the equality of treatment for both migrant workers in regular or irregular status are raised as mentioned before, which cover the employment and occupation, trade union, cultural rights and individual and collective freedoms.<sup>171</sup> There is no specific provision in relevance to the elimination of forced or compulsory labour and abolition of child labour. The Recommendation R151 supplementing C143 prescribes more details on the right of equality of opportunity and treatment. The rights have been listed such as access to vocational guidance and placement services, vocational training, employment of their own choice, advancement, security of employment, the provision of alternative employment, relief work and retraining, remuneration for work of equal value, conditions of work, including hours, rest periods, paid holidays, occupational safety and health, social security, welfare and benefits provided in connection with employment, membership and exercise of trade union rights, rights of full membership in co-operative, and conditions of life<sup>172</sup> for migrants in legal status. As to irregular migrant workers, they

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<sup>166</sup> C 143 Article 2 (1).

<sup>167</sup> C143 Article 3.

<sup>168</sup> C143 Article 6.

<sup>169</sup> C143 Article 9(1).

<sup>170</sup> C 143 Article 12(g).

<sup>171</sup> C 143 Article 10.

<sup>172</sup> R 151 Paragraph 2

enjoy the right of trade union membership as well as those mentioned in C143, remuneration, social security and other benefits.<sup>173</sup>

As to the ratification of C143, only 5 of the EU member states, namely Cyprus, Italy, Portugal, Slovenia and Sweden have given ratification. The CEACR has made observations and direct requests for several of them indicating the problems of compliance with the convention and asks the states to make clarifications or to further improve the implementation of the convention. In the latest session report<sup>174</sup>, the CEACR made direct requests to Italy<sup>175</sup> and Slovenia<sup>176</sup> on certain points.

The Committee made requests regarding certain points are being addressed directly to Italy concerning the issues of migration in abusive conditions, the employment of workers having migrated in illegal conditions, minimum standards of protection, and the national policy on equality of opportunity and treatment of migrant workers lawfully in the country. Because of the global economic crisis and its impact, Italy adopted a moratorium measure on the entry of non-seasonal, non-EU workers in 2009-10, instead of the Programmatic Document 2009-11 which included measures to address the exploitation of immigrants. Together with the legislation transposing EU Sanction Directive<sup>178</sup> which might in favour of preventing the human trafficking into labour and sexual exploitation, the Committee requested the Italian Government to provide more information on the developments and measures they have taken. As to the migrant workers in irregular status

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<sup>173</sup> R 151 Paragraph 8.3

<sup>174</sup> Conference paper | 02 March 2012, Report III(1A): Report of the Committee of Experts on the Application of Conventions and Recommendations. Available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_174843.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174843.pdf)

<sup>175</sup> Direct Request (CEACR) - adopted 2011, published 101st ILC session (2012), Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) - Italy .Available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101\\_COMMENT\\_ID:2700066](http://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:2700066). Also on Page 908 of the Report III(1A) 2012. access on September 6, 2012.

<sup>176</sup> Direct Request (CEACR) - adopted 2011, published 101st ILC session (2012) Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) - Slovenia (Ratification: 1992), available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID,P11110\\_COUNTRY\\_ID,P11110\\_COUNTRY\\_NAME,P11110\\_COMMENT\\_YEAR:2700070,103533,Slovenia,2011](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2700070,103533,Slovenia,2011).

<sup>178</sup> European Directive 2009/52/EC, adopted on 18 June,2009. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:168:0024:0032:EN:PDF>.

coming from Africa, Asia and Eastern Europe who are illegally employed, especially in construction and agriculture sectors in Italy, are marked by high incidence of labour exploitation, and be violated of their basic human rights. But there are few reported offences and perpetrators with respect to these migrant workers in irregular situation. Therefore, it could bring forward the difficulties in effectively monitoring the conditions of migrants in irregular situations in Italy. Also the Italian Legislative Decree No.286/1998 which introduced the offence of illegal entry or residence would further marginalize and stigmatize migrant workers in an irregular situation and increase their vulnerability to exploitation and violation of their basic human rights. And the Code of Criminal Proceedings may prevent these migrant workers from filing complaints with regard to the violations of their rights. Furthermore, the labour inspections carried out in Italy are mainly focusing on controlling illegal employment and legal status of migrant workers, which ignore the conditions of work for these undocumented migrants. Therefore, the legislation and measures taken in practice to protect migrant workers in Italy are not in compliance with C143.

#### **4.5 Concluding Remarks**

These conventions introduced above have touched upon all the matters concerning the protection of migrant workers' rights, not only the fundamental labour rights but also other human rights for the migrant workers and members of their families. However, most of these conventions are enforced on the condition of ratification by states. Only the member states or states parties are bound to comply with the conventions they have ratified. In some countries, these conventions cannot be applied directly but need to be incorporated into the state's national laws.

As to those particular conventions for migrant workers, the UNCMW, ILO C97 and C143, all of them are not highly ratified, 10 for C97, 5 for C143 and none for UNCMW among the EU member states. Even for the EU member states, which have established relatively good legal systems and have good reputation on the protection for human rights, the fundamental human rights at work for migrant workers are also at risk, proved by the facts, figures and communications before the ILO supervisory mechanism which have been mentioned in Chapter II of this thesis. The situation in other countries are even worse.

Since EU member states are bound by the EU legislation and some European legal instruments, which have provided with legal mechanism to complain. These might be another part of legal protection for migrant

workers in EU countries for the reasons that migrant workers have another channel in access to complain and get remedies.

# Chapter V: The Protection of the Fundamental human rights at work for Migrant Workers in the European Union

Besides the ratified international conventions, the EU member states are also bound by the legal instruments developed by the Council of Europe if they give ratification, the EU legislation, namely treaties, regulations, decisions and directives automatically except they make opt-out. These legal instruments have prescribed the protection of the third country migrant workers to some extent, while some make distinctions concerning the rights of migrant workers from member states of EU.

## 5.1 Convention for the Protection of Human Rights and Fundamental Freedoms

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter as ECHR) was adopted by Council of Europe in 1950<sup>179</sup> and has been ratified by all the Member States of the Council of Europe<sup>180</sup>, accordingly, the 27 Member States of EU. The protection of human rights is proclaimed that “High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms”<sup>181</sup>. The Article 14 further explains the non-discrimination principle, reaffirms that the rights and freedoms in this Convention shall be without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>182</sup> It has not listed nationality as one of the grounds but usually, third country migrants can make complaints on the basis of minority. It means the migrant workers are covered by this convention and the rights embodied in it can be applied to them. This Convention has contained basic human rights provisions mainly in the field of civil and political rights.

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<sup>179</sup> Be adopted on 4/11/1950, Rome. The latest edition was amended by Protocols No. 11 and No. 14 with the date of its entry into force on 1 June 2010. Available at

<http://conventions.coe.int/treaty/en/treaties/html/005.htm>

<sup>180</sup> Available at

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>

<sup>181</sup> ECHR Article 1.

<sup>182</sup> ECHR Article 14.

As to the fundamental principles and rights at work, there are some provisions in this convention. The prohibition of forced labour is enshrined in Article 3 “No one shall be subjected to torture or to inhuman or degrading treatment or punishment” together with Article 4 as “No one shall be held in slavery or servitude” and “No one shall be required to perform forced or compulsory labour”. The right to form and to join trade unions is included in the right to freedom of peaceful assembly and to freedom of association, for the protection of one’s interests.<sup>183</sup> In regard to the issues of abolition of child labour and elimination of discrimination of employment and occupation, there are no specific provisions except the general non-discrimination principle stated in Article 14 as mentioned before.

The European Court of Human Rights is established by Article 19 of this Convention, which can receive complaints made by individuals or groups of people against a Member State if those people claim they are victims of violation of human rights.<sup>184</sup> But to meet one of the criteria, national remedies must be exhausted before the case goes to the Court.<sup>185</sup> Right to get effective remedy from a national authority<sup>186</sup> is also contained in ECHR as to form part of the legal mechanism to protect the human rights.

In the case of *Siliadin v. France*<sup>187</sup>, the applicant is a Togolese national who submitted that French criminal law did not afford her sufficient and effective protection against the ‘servitude’ in which she had been held, or at the very least against the ‘forced and compulsory labour’ she had been required to perform, which in practice had made her a domestic slave. The Court adjudicated that there is violation of Article 4 under ECHR. The Court stated that in addition to the Convention, numerous international treaties had as their aim the protection of human beings from slavery, servitude and forced or compulsory labour. As the Parliamentary Assembly of the Council of Europe had pointed out, although slavery was officially abolished more than 150 years ago, “domestic slavery” persisted in Europe and concerned thousands of people, the majority of whom were women.<sup>188</sup>

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<sup>183</sup> ECHR Article 11.

<sup>184</sup> ECHR Article 34.

<sup>185</sup> ECHR Article 35(1), The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken..

<sup>186</sup> ECHR Article 13.

<sup>187</sup> *Siliadin v. France*, 73316/01, Council of Europe: European Court of Human Rights, 26 July 2005.

<sup>188</sup> *Siliadin v. France* Paragraph 111.

The Court also considered that, in accordance with contemporary norms and trends in this field, the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalization and effective prosecution of any act aimed at maintaining a person in such a situation incompatible with Article 4. When interpreting Article 4 of ECHR, the Court refers to a previous case (*Van der Musselle v. Belgium*<sup>189</sup>) which has already been taken into account to the ILO Forced Labour Conventions and determined the situation of this case falls within the term of forced labour. The Court found that the applicant's 'employers' were prosecuted under Articles 225-13 and 225-14 of the (French) Criminal Code, which make it an offence, respectively, to exploit an individual's labour and to submit him or her to working or living conditions that are incompatible with human dignity.<sup>190</sup>

There are also pending cases *Elisabeth Kawogo (Tanzanian) v. United Kingdom* (application no. 56921/09)<sup>191</sup> and *C. N.(Ugnadan) v. United Kingdom* (application no. 4239/08)<sup>192</sup> before the Court. The applicants claimed they are subject to forced labour under Article 4.

## 5.2 European Social Charter (Revised)

While the ECHR focus mainly on the protection of civil and political rights, the Council of Europe developed a document which emphasizes social and economic rights. The European Social Charter (ESC) has not been ratified by all the Member States in the Council of Europe and has got 22 ratifications from the EU Member States.<sup>193</sup> The ESC highlights the modern policy principles of mainstream treatment, inclusion and positive action.<sup>194</sup> Based on international treaties and ECHR, ESC comprises economic and social rights as well as civil rights, such as rights related to employment, health, education, social welfare etc, aiming to protect all people, particularly workers, children, women, disabled persons and migrant workers.

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<sup>189</sup> *Van der Musselle v. Belgium*, Application No. 8919/80, Judgement of 23 November 1983.

<sup>190</sup> *Siliadin v. France* Paragraph 135

<sup>191</sup> Communicated to the Government in June 2010.

<sup>192</sup> Communicated to the Government in March 2010

<sup>193</sup> Available at

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=035&CM=&DF=&CL=EN> Bulgaria, Estonia, Lithuania, Romania and Slovenia have not ratified the ESC.

<sup>194</sup> Matti Mikkola: Social Human Rights of Migrants Under the European Social Charter. Available at [http://www.helsinki.fi/oikeustiede/omasivu/mikkola\\_matti/pdf/migrants.pdf](http://www.helsinki.fi/oikeustiede/omasivu/mikkola_matti/pdf/migrants.pdf)

The four categories of fundamental human rights at work are under protection within this Charter except the abolition of forced labour. As to the equality on employment and occupation, ESC requires the contracting parties to meet the obligations, to protect and respect the rights such as right to work (Article 1), right to just conditions of work (Article 2), safe and healthy working conditions (Article 3) and fair remuneration (Article 4). Regarding to trade union rights, contracting parties shall ensure or promote the freedom of workers and employers to form and join local, national or international organizations for the protection of their economic and social interests. However, the contracting parties can decide the extent to which can these rights be applied to persons by their national legislation and policies.<sup>195</sup> The right to collective bargaining is also embodied in ESC by its Article 6. Contracting parties shall promote the consultation between workers and employers (Article 6.1), promote necessary and appropriate machinery for voluntary negotiations between employers and workers organizations (Article 6.2) and promote to establish machinery to settle working disputes (Article 6.3). The right to strike is also included in this Charter (Article 6.4). As to the protection of children, ESC limits the minimum age of admission to employment on the conditions of whether the work is dangerous, health for their physical or moral.<sup>196</sup> There is another particular provision of protecting and assisting migrant workers and their families. The basic rights at work, such as the equal remuneration and other employment and working conditions, membership of trade unions and the enjoyment of the benefits of collective bargaining, are granted to migrants with not less favourable than those grant to nationals.<sup>197</sup>

However, although almost all of the fundamental rights at work are guaranteed, there is one important precondition set out at the beginning of this Charter, “Migrant workers who are nationals of a Contracting Party and their families have the right to protection and assistance in the territory of any other Contracting Party.”<sup>198</sup> Therefore, it is obvious to see that this Charter is based on reciprocity but not universal applied to all. And the migrant workers from third countries hardly can be protected under this Charter, except the European countries which have ratified this Charter.<sup>199</sup>

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<sup>195</sup> ESC Article 5.

<sup>196</sup> ESC Article 7.

<sup>197</sup> ESC Article 19.4

<sup>198</sup> ESC Part I.19

<sup>199</sup> Other European countries has ratified this Charter are Iceland, Norway, The Former Yugoslav Republic of Macedonia and Turkey. Also available at

This Charter has not been widely applied but has influenced on the later adopted European legal instruments.

### **5.3 European Convention on the Legal Status of Migrant Workers**

The European Convention on the Legal Status of Migrant Workers (ECMW) is a legal instrument particularly for migrant workers, which was adopted by the Council of Europe in 1977. This Convention is concerned with the principal aspects of the legal situation of migrant workers, in particular recruitment, medical examinations, occupational tests, travel, residence permits, work permits, the reuniting of families, working conditions, the transfer of savings and social security, social and medical assistance, the expiry of working contracts, dismissal and re-employment.

Regarding to the fundamental human rights at work concerned by this thesis, this Convention only emphasizes the conditions of work, and requires Contracting Parties to provide migrant workers with treatment not less favourable than that which applies to national workers by virtue of legislative or administrative provisions and collective labour agreement or custom.<sup>200</sup> A Consultative Committee was instituted to examine Parties' reports on the application of the Convention. On the basis of these documents, the Consultative Committee draws up reports for the attention of the Committee of Ministers.

However, there are limitations of this Convention because of its reciprocal character, only the migrant workers from the Contracting Party can enjoy the protection by this Convention. It provides in Article 1, that “the term ‘migrant workers’ shall mean a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment”. Furthermore, like other Conventions particularly for the protection of migrant workers, this European one has not received high ratification either. For the EU Member States, only France, Italy, the Netherlands, Portugal, Spain and Sweden have ratified this Convention.<sup>201</sup> Besides these EU member states, only six other countries,

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<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=035&CM=&DF=&CL=ENG>

<sup>200</sup> European Convention on the Legal Status of Migrant Workers. Article 16.1

<sup>201</sup> Available at

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=093&CM=1&DF=&CL=ENG>

Albania, Norway, Moldova, Montenegro, Turkey and Ukraine gave ratification. Because of its reciprocity principle of this Convention, it will not be applied broadly to protect fundamental labour rights for migrants due to its low ratification and the lack of specific provisions provided in this Convention.

#### 5.4 Treaty on the European Union

The Treaty on the European Union (hereinafter as EU Treaty) and the Treaty on the functioning of the European Union are core functional treaties lay out how the EU operates and have been amended many times during these years. The latest version is known as the consolidated versions.<sup>202</sup> The two Treaties provide foundation to develop further legislation in various areas. The EU Treaty put forward that EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms<sup>203</sup> ...and the Union shall “respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950..., as general principles of Community law.”<sup>204</sup> And also, it confirms “the fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers” in its preamble.

Article 141 of the EC Treaty requires each Member State to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. A bunch of cases before the European Court of Justice, such as *Sotgiu v. Deutsche Bundespost*<sup>205</sup>, *Rinke v. Ärztekammer Hamburg*<sup>206</sup>, and *Jenkins v. Kingsgate*<sup>207</sup>, are claimed under this Article. However, Article 141 emphasizes on the gender bases. Cases relating with discrimination on nationality have not been located with this Article.

One right that should be mentioned is the freedom of movement for workers. Such freedom of movement shall entail the abolition of any discrimination

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<sup>202</sup> European Union Consolidated Versions of the Treaty on European Union and of The Treaty Establishing the European Community. 16 April 2003. Available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf>

<sup>203</sup> EU Treaty Title I, Common Provisions Article 6.1

<sup>204</sup> EU Treaty Title I, Common Provisions Article 6.2

<sup>205</sup> *Giovanni Maria Sotgiu v. Deutsche Bundespost*, 12 February 1974 Case 152-73.

<sup>206</sup> *Katharina Rinke v Ärztekammer Hamburg* ,Case C-25/02 ECJ

<sup>207</sup> *Jenkins v Kingsgate* [1981] ECJ

based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.<sup>208</sup> The freedom of movement is an improvement on the protection for migrant workers while this rule can only be applied to the nationals of EU Member States. Third country migrant workers cannot enjoy this right.

## **5.5 Community Charter of the Fundamental Social Rights of Workers**

The Community Charter of the Fundamental Social Rights of Workers was adopted on 9 December 1989 by a declaration of all Member States, with the exception of the United Kingdom.<sup>209</sup> This Community Charter establishes the major principles which the European labour law model is based on and it represents a foundation of minimum common provisions to all the EU Member States. The Charter includes the areas such as free movement of workers, employment and remuneration, improvement of working conditions, social protection, freedom of association and collective bargaining and protection of children, adolescents, elderly persons and disabled persons.

In the Community Charter, it requires Member States to ensure equal treatment by combating any form of discrimination and social exclusion. The Charter also asks for the Member States to guarantee that the workers from non-member countries and members of their families who are legally reside in a Member State of the European Community are able to enjoy, as regards their living and working conditions, and treatment, comparable to those be enjoyed by workers who are nationals of the Member State concerned.<sup>210</sup>

The Community Charter is only a political declaration. The social rights contained in it have been further developed into the Charter of Fundamental Rights of the European Union and have been confirmed by the Treaty on European Union as mentioned above.

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<sup>208</sup> Part III, Community Policies Title III, Article 39.2.

<sup>209</sup> Available at

[http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/community\\_charterofthefundamentalsocialrightsofworkers.htm](http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/community_charterofthefundamentalsocialrightsofworkers.htm)

The Charter was adopted by the United Kingdom in 1998 as part of the integration of the principles of the Charter into the Amsterdam Treaty.

<sup>210</sup> Preamble of the Community Charter of the Fundamental Social Rights of Workers.

## 5.6 The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union<sup>211</sup> did not have binding force at the beginning of its adoption in 2000, but became legally binding with the ratification of the Treaty of Lisbon on 1 December 2009. It sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU.<sup>212</sup> The rights in this Charter are corresponding to the rights in ECHR and ESC.

EU Charter has covered all the aspects of the fundamental human rights at work. It prohibits slavery and forced labour by its Article 5 providing that “No one shall be held in slavery or servitude” and “No one shall be required to perform forced or compulsory labour.” It sets out that everyone has the right to freedom of peaceful assembly and freedom of association at all levels, in particular in political, trade union and civic matters. It also further emphasizes that the right of everyone to form and to join trade unions for the protection of his or her interest should be protected.<sup>213</sup> Moreover, the right of collective bargaining and right to strike are granted to the workers and employers by Article 28 stating that “Workers and employers, or their respective organizations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.” As to the non-discrimination at workplace, there is no specific provision in the EU Charter which stresses this issue. But it indirectly implicates that, the workers have the right to fair and just working conditions<sup>214</sup> and everyone should be equal before the law<sup>215</sup>, without discrimination on grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation and, any

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<sup>211</sup> It is signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000, 2000/C 364/01.

<sup>212</sup> Available at [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm) Article 45.

<sup>213</sup> EU Charter Article 12.1.

<sup>214</sup> EU Charter Article 31.

<sup>215</sup> EU Charter Article 20.

discrimination on grounds of nationality shall be prohibited.<sup>216</sup> Prohibition of child labour is made explicitly in this Charter by Article 32.

The European Court of Justice is in charge of the litigation if the rights and freedoms guaranteed under this charter are violated by Member States.

## 5.7 European Council Resolutions

Above mentioned are some European and EU conventions and charter which aim at protecting all the people's rights, include but not specifically on the migrant workers. Although non nationals are protected by some of them, there are distinctions on the range of entitled rights between nationals, internal migrants and third country migrants. European Council has issued several Resolutions which in relevance to migrant workers.

Early in 1974, the European Council issued a Council Resolution<sup>217</sup> in order to call for establishing a social action programme, including an action programme for migrant workers and members of their families in order to improve the conditions of free movement within the Community of workers from Member States, and migrant workers who are nationals of Member States or third countries.

According to the previous Resolution, the European Council issued another Resolution in 1976 concerning an action programme for migrant workers and members of their families.<sup>218</sup> One purpose of the Resolution is to improve the circumstances of workers who are nationals of third countries and members of their families who are allowed to work in the Member States. The resolution also aims at improving the equality between migrant workers and nationals of the Member States and members of their families concerning the living and working conditions, wages and economic rights.<sup>219</sup>

After that, another European Council Resolution was issued in 1995, on the fight against racism and xenophobia in the fields of employment and social

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<sup>216</sup> EU Charter Article 21.1 and 21.2.

<sup>217</sup> Council Resolution of 21 January 1974 concerning a social action programme. Available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31974Y0212\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31974Y0212(01):EN:HTML)

<sup>218</sup> Council Resolution of 9 February 1976 on an action programme for migrant workers and members of their families.

<sup>219</sup> *Ibid*, Preamble.

affairs.<sup>220</sup> In regard to the fundamental human rights at work, this Resolution has made efforts to eliminate the discrimination in employment, and calls upon the Member States to make progress towards achieving common objectives such as guaranteeing protection for persons against all forms of discrimination on grounds of race, colour, religion or national or ethnic origin; promoting employment and vocational training as significant means of integrating persons legally reside in the Member State concerned; fighting all forms of labour discrimination against workers legally resident in each Member State; promoting equal opportunities for the groups most vulnerable to discrimination, in particular women, young people and children.<sup>221</sup>

## **5.8 EU Directives relevant to migrant workers**

Together with the laws and resolutions, EU Directives also have binding force on the EU Member States. There are several Directives issued by the Council in regard with protection of migrant workers from different perspectives, mainly from non-discrimination principle, to achieve equal treatment on employment and occupation. Member States are obliged by the Directives while they can choose their form and method to enact within the framework of their own legal systems. But they need to ensure their national laws are in conformity with the norms laid down in the Directives. If the Member States do not comply with the directives within the required time, individuals can directly make complaints applying to the Directives in the national courts.<sup>222</sup>

### **5.8.1 Council Directive 2000/43/EC and Council Directive 2000/78/EC**

The European Council issued the Directive 200/43/EC<sup>223</sup> in 2003, aiming at implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.<sup>224</sup> It is the first Directive designed to combat

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<sup>220</sup> Resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council of 5 October 1995. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41995X1110:EN:HTML>

<sup>221</sup> *Ibid*, Paragraph 7 (a)(b)(c)(d).

<sup>222</sup> *Supra* 81, Page 21.

<sup>223</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:EN:HTML>

<sup>224</sup> Council Directive 2000/43/EC, Article 1.Purpose

discrimination of potential relevance to migrant workers who have been the victims of employment discrimination<sup>225</sup> as well as other areas such as healthcare, social advantages, education and access to public goods and services.<sup>226</sup> The concept of discrimination in this Directive focuses on racial or ethnic origin<sup>227</sup> as mentioned by its title. Discrimination based on nationality is not covered by this Directive and without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.<sup>228</sup> Therefore, from this perspective, migrant workers are merely the potential subjects of this Directive because they have different racial and ethnic origin from nationals.

The provisions in this Directive mainly touch upon the principle of elimination of discrimination in employment and occupation, such as conditions for the access to employment; access to vocational guidance, vocational training; employment and working conditions; membership and involvement in an organization of workers or employers.<sup>229</sup>

There are a series of measures ensuring the non-discrimination and protecting the victims. This Directive requires the Member States to designate a body or bodies for the promotion of equal treatment for all persons without discrimination on the grounds of racial or ethnic origin. It provides the access to make complaints by individuals, to conduct surveys, and publish reports and give recommendations.<sup>230</sup> Member States shall also adopt laws, regulations and administrative provisions necessary to comply with this Directive and lay down rules for sanctions which may comprise the payment of compensation to the victim. And these sanctions must be effective, proportionate and dissuasive.<sup>231</sup>

After issuing Directive 2000/43/EC, the European Council developed another Directive concerning the establishment of a general framework for equal treatment in employment and occupation, namely the Council

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<sup>225</sup> *Supra* 81. Page 21.

<sup>226</sup> Council Directive 2000/43/EC, Article 3(1).

<sup>227</sup> Council Directive 2000/43/EC, Article 2(1).

<sup>228</sup> Council Directive 2000/43/EC, Article 3(2).

<sup>229</sup> Council Directive 2000/43/EC, Article 3(1)

<sup>230</sup> Council Directive 2000/43/EC, Article 13.

<sup>231</sup> Council Directive 2000/43/EC, Article 15.

Directive 2000/78/EC.<sup>232</sup> The modes in the two Directives are very similar concerning the areas to be equally respected and the remedies or sanctions mechanism.

### **5.8.2 Directive 2011/98/EU: Single Permit Directive**

Comparing with the two Directives mentioned before, the Directive 2011/98/EU of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State,<sup>233</sup> is much more direct on the protection of third country migrant workers.

The purpose to establish a single application procedure a combined title encompassing both residence and work permits will lead to simplifying and harmonizing the rules currently applicable in Member States which will make for a more efficient procedure both for the migrants and for their employers, and has allowed easier controls of the legality of their residence and employment.<sup>234</sup> With the single permit, the holder will be authorized rights at least to enter and reside in the issuing State, free access to the entire territory of the State, exercise the specific employment activity authorized under the single permit, and be informed about the rights linked to the permit conferred by this Directive and/or by national law.<sup>235</sup>

In terms of the rights to equal treatment relating with employment, this Directive entitles third country workers to enjoy equal treatment with nationals of the Member State with regard to the working conditions, including payment and dismissal as well as health and safety at the workplace, freedom of association and affiliation and the membership of an organization representing workers or employers or of any organization whose members are engaged in a specific occupation (including the benefits conferred by such organizations), without prejudice to the national provisions on public policy and public security; education and vocational

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<sup>232</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

<sup>233</sup> Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:343:0001:01:EN:HTML>, access on September 22<sup>nd</sup>.

<sup>234</sup> Directive 2011/98/EU, Recital (3).

<sup>235</sup> Directive 2011/98/EU, Article 11.

training; recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures; and branches of social security etc.<sup>236</sup> The emphasis on the recognition of diplomas, certificates and other professional qualifications is a good point which might reduce the over qualification rate of third country migrant workers.

This Directive requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 December 2013 and requires the Commission to present a report to the European Parliament and the Council on the application of this Directive in the Member States and to propose amendments it deems necessary by 25 December 2016.<sup>237</sup>

## **5.9 Concluding Remarks**

After analyzing the EU legislation relevant to fundamental human rights at work from the perspective on the protection of third country migrant workers, it can be found out that there still exists gap between the EU legislation and the international conventions developed by UN and ILO. The Conventions or Charters which contain full protection on the four categories of fundamental rights at work do not apply to third country migrant workers directly, and meanwhile, the legislation which covers third country migrants do not contain all the fundamental labour rights. The field of migrants' rights is a clear weakness of the European protection system.<sup>238</sup> These omissions have resulted in the discrimination of migrant workers, the existence of forced or child labour, and the migrant workers cannot claim their rights or interest through their representatives. These phenomena have been reflected by the facts and figures in the beginning part of this thesis. Besides that, there are distinctions on the rights enjoyed by migrant workers and nationals, which lead the migrants into a weak and vulnerable situation.

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<sup>236</sup> Directive 2011/98/EU, Article 12.

<sup>237</sup> Directive 2011/98/EU, Article 15.16

<sup>238</sup> Migrant Workers Rights in Europe, published by Europe Regional Office of the Office of High Commissioner for Human Rights. P 15. Available at [http://europe.ohchr.org/Documents/Publications/Migrant\\_Workers.pdf](http://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf)

## **Chapter VI : Conclusion: Promote the protection for migrant workers**

With the increasing of migration flow to the EU, and the facts that migrant workers, especially the irregular migrant workers are maltreated, the protection of migrant workers arises and attracts more attention from different aspects of the world. From the right-based approach on the protection of migrant workers, well established legal mechanisms, including good legislation, effective implementations, and feasible monitoring mechanism, enable the protection of migrant workers' human rights come true.

The review of international human rights instruments on the protection of fundamental labour rights at work and the legal instruments developed by the EU, have shown the differences and gaps on the rights covered by these documents. If an EU Member State has not ratified the relevant migrant workers conventions, it is very difficult to fulfil the fundamental human rights which are mentioned by the ILO 1998 Declaration. Unfortunately, none of these conventions are highly ratified, see Annex I. Therefore, elevating the ratification of migrant workers conventions, namely the UNCMW and ILO C97 and C143 are the most important step. Not only for the implementation of the international labour standards, but also for the long term concern of all the human rights for migrant workers.

### **6.1 The importance of the Ratification of Relevant Migrant Workers Conventions**

By ratifying a convention, a state party is legally bound by the obligations under the convention and to obey the rules set out in it and comply with the monitoring mechanism. Obviously, it is with high importance to ratify the three conventions relevant with migrant workers, the UNCMW, ILO C97 and ILO C143.

Firstly, if a state ratifies these conventions, it means the reorganization of the rights and principles set out in the conventions by the state. The most crucial point is recognizing that migrant workers are entitled the same fundamental human rights as the nationals. It reflects the principle that all human beings are equal. Secondly, by ratifying the conventions, the state shows its concerns of the vulnerability of migrant workers in different circumstances, the civil and political rights or the rights at work. Also the

state expresses its determinations to adopt measures in law or in practice to respect and protect the migrant workers' human rights. Lastly, the ratification of conventions means the state shall comply itself with the monitoring system provided by the conventions, by submitting reports and under the supervision system.

From the migrant workers side, as the subject under concern, they will benefit a lot if their hosting countries ratify the conventions which aim at the protection of human rights for migrant workers. They will enjoy the same rights and equal treatment no less favourable than nationals in the hosting country. Most importantly for the migrant workers, the fundamental rights at work will also under protection. The migrant workers will confront equal treatment in respect to employment and occupation, such as the conditions of work, working hours, equal value for equal work, and their qualifications with recognition. They can have the rights to a collective voice through trade unions asserting their labour rights for their interest. As to the irregular migrants, who are much more vulnerable in the labour market, can claim their rights if they are exploited or be as forced labour without the fear to be expelled.

## **6.2 Obstacles of the ratification**

All EU Member States have ratified most of the international human rights instruments leaving the migrant workers conventions apart although some ratifications of the ILO Conventions have shown some commitment to the rights of migrant workers. EU Member States have expressed their opinions of refusing to sign and ratifying the UNCMW. Now they have reached a sort of de facto consensus whereby no Member State would dare ratify the UNCMW without ratification being agreed at the regional level.<sup>239</sup> The lack of ratification by EU Member States is seriously undermining the credibility of their external policy efforts to promote the improvement of human rights situations in other parts of the world by encouraging or exhorting non-European States to ratify other international human rights instruments.<sup>240</sup> Going deep to see the unwillingness to ratify the conventions and find out

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<sup>239</sup> *Ibid*, P 17 Available at

[http://europe.ohchr.org/Documents/Publications/Migrant\\_Workers.pdf](http://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf)

<sup>240</sup> Amnesty International, "Human rights must top the agenda: Amnesty's appeal to the Austrian Presidency of the EU", 13 January 2006. Available at <http://www.amnesty.eu/en/press-releases/human-rights-in-the-eu/security-and-human-rights/human-rights-must-top-the-agenda-amnesty-s-appeal-to-the-austrian-presidency-of-the-eu-0249/>

the key obstacles of ratification will help to clarify the problem and then find the solutions for this issue.

The obstacles for non ratification are various from countries to countries. For instance, some countries have only a small number of migrant workers in their territory so they consider it unnecessary; governments prefer to give nationals more opportunities than non nationals during a period of economic instability and high unemployment rates; the lack of the necessary infrastructure to apply the conventions and high cost of implementing the instruments (especially for the irregular migrants); governments' reluctance to enter into multilateral commitments in the area of policy on foreigners, or the governments think the conventions are no longer appropriate.<sup>241</sup> Although the survey has been done before the UNCMW entry into force, the reasons for not ratifying the Convention have not developed too much.

UNESCO has published a study on the obstacles to the ratification of UNCMW by European States in 2007 based on seven country reports. It presented the findings of the country reports according to the nature of the obstacles, and categorized as legal, financial, administrative and political obstacles.<sup>242</sup>

The UNESCO study showed that legal obstacles invoked by States as reasons not to ratify derived from incompatibilities between the current national legislation or overarching principles, and the content of the UNCMW. The major concern is the state sovereignty. Administrative and financial issues are not main obstacles which the political obstacles, namely the wills of the decision makers, are the core reason about the ratification by European States. If the decision makers have decided to take accounts the protection of migrant workers, these obstacles will be overcome and won't prevent the ratification.

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<sup>241</sup> Feature Report: ILO Reviews Instruments on Protection of Migrant Workers Rights, Supplement to pilot issue of MIGRANTS RIGHTS BULLETIN, October-November 99. Available at [http://www.migrantsrights.org/ILO\\_report101199.htm](http://www.migrantsrights.org/ILO_report101199.htm)

<sup>242</sup> Euan MacDonald and Ryszard Cholewinski, The Migrant Workers Convention in Europe - Obstacles to the Ratification of the International Convention on the Promotion of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives, 2007, UNESCO. Available at <http://unesdoc.unesco.org/images/0015/001525/152537e.pdf>

### 6.3 The way forward

It is obvious that increasing ratification helps to establish a well legal system of protection on human rights for migrant workers which requires efforts made by all aspects, national, regional and international.

In order to encourage the Member States to step forward, the European Parliament has repeatedly called on all Member States to ratify the UNCMW by addressing the importance of migrant workers' contribution to the EU and attaching high importance to the migrant workers in irregular status. For example, the Parliament urged "all Member States to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and fully honour their international commitments with regard to the protection of migrant workers and their families"<sup>243</sup> The European Parliament also made statement that "most people who work without being in possession of the appropriate immigration documents are doing work which is legal and essential to Europe's economies, such as fruit picking, construction or maintenance work, and care of the sick, the elderly and children".<sup>244</sup> And the European Parliament pointed to the fact that irregular migrant workers are in fact contributing to European economies.

Since none of the EU Member States has ratified UNCMW and they had implied that no Member States can move forward without the whole EU, it is hardly to make breakthrough. It seems more likely to get improvement on the protection system by urging the EU Member States to ratify the ILO Conventions relevant with migrant workers as there are several ratifications from the EU. It will be a step forward to make the system better on protection of third country migrant workers regarding the human rights at work.

Besides these legal approaches, the protection of migrant workers can also be carried on by international cooperation, political commitments from conference and bilateral or multilateral agreements between the original countries and destination countries. International cooperation can be conducted by various forms and measures, some facilitative, some

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<sup>243</sup> European Parliament, Resolution on development and migration, INI/2005/2244, 6 July 2006, point 80

<sup>244</sup> European Parliament, Resolution on the situation of fundamental rights in the European Union 2004-2008, INI/2007/2145, 14 January 2009, point 158.

regulatory and other remedial,<sup>245</sup> at the bilateral level, regional level or global level. Both the original states and the receiving states shall also take into account some non-binding principles or guidelines developed by international organizations, such as the ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration.<sup>246</sup> Nowadays, more and more regional or global conference have been held to address the issue of labour migration which would also be a good occasion to develop bilateral or multilateral agreements between states and make efforts to good governance of the labour migration and meanwhile, devote to the protection of human rights for migrant workers.

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<sup>245</sup> *Supra* 18. Page 192.

<sup>246</sup> Adopted by the Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration, Geneva, 31 October-2 November 2005.

## Annex I: Ratification of Relevant Conventions

	C97	C143	UNC MW	ESC	EUM W
Austria				1	
Belgium	1			1	
Bulgaria					
Cyprus	1	1		1	
Czech Republic				1	
Denmark				1	
Estonia					
Finland				1	
France	1			1	1
Germany	1			1	
Greece				1	
Hungary				1	
Ireland				1	
Italy	1	1		1	1
Latvia				1	
Lithuania					
Luxembourg				1	
Malta				1	
Netherlands	1			1	1
Poland				1	
Portugal	1	1		1	1
Romania					
Slovakia				1	
Slovenia	1	1			
Spain	1			1	1
Sweden		1		1	1
United Kingdom	1			1	
Total	10	5	0	22	6

C97: Migration for Employment Convention, 1949 (Revised) (No. 97)

C143: Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

UNCMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

ESC: European Social Charter (Revised)

EUMW: European Convention on the Legal Status of Migrant Workers

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9. The Equal Remuneration Convention, 1951 (No. 100). Adoption: Geneva, 34th ILC session (29 Jun 1951)
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