

# MIGRANT WORKERS AND THE RIGHT TO SOCIAL SECURITY: AN INTERNATIONAL PERSPECTIVE\*

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## 1 Introduction

An estimated 175 million people, nearly three percent of the world's population, are international migrants.<sup>1</sup> This figure includes refugees, displaced persons, stateless persons, and (important for the purposes of this paper) migrant workers. The increase in migration in the contemporary age of globalisation means that “nearly all States have become or are becoming more multi-ethnic, multi-cultural, multi-racial, multi-religious, and multi-lingual”.<sup>2</sup> The movement of migrant workers is said to be caused by so-called “push” and “pull” factors. The “push” factors include the desire for a better standard of living, new opportunities and a better future, while the “pull” factors refer to the availability of relatively well-paid work in the receiving country.<sup>3</sup> The labour migration process is further aided by ever-improving systems of communication and transportation.

However, it must be noted that these “push” and “pull” factors are not exhaustive, and do not reflect the involuntary nature of a large portion of labour migration. Many people also migrate to escape situations of violence, persecutions, environmental degradation and human rights violations. It is increasingly difficult to make a clear distinction between migrants who leave their countries because of the latter factors and those who do so in search of conditions of well-being that do not exist in their countries of origin.<sup>4</sup> The common theme is that migrants want to improve their quality of life. Most migration is between neighbouring countries, but the aforementioned greater access to global information and cheaper transport means that geography now poses less of

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<sup>1</sup> See Sivakumaran “The Rights of Migrant Workers One Year On: Transformation or Consolidation?” 2004 *Georgetown Journal of International Law* 113. The term “international migrant” is defined in part 2.

<sup>2</sup> Taran “Human Rights of Migrants: Challenges of the New Decade” 2000 *International Migration* 7. 9. Even though South Africa will not be the focus of this paper, it may be worth mentioning that it is estimated that South Africa itself attracts between 500,000 and 1,5 million migrants annually, of which 75% are migrants from other African countries. See Fakier *The Internationalization of the South African Labour Markets: The Need for a Comparative Research Agenda* 14. Paper presented to a workshop on *A Decent Work Research Agenda for South Africa* University of Cape Town 4-5 April 2007.

<sup>3</sup> See Sivakumaran 2004 *Georgetown Journal of International Law* 113.

<sup>4</sup> United Nations Commission on Human Rights, Report of the Special Rapporteur *Human Rights of Migrants* (January 2000) par 30.

a barrier to movement than it had in the past.<sup>5</sup> It is clear that the global migrant workforce has increased significantly in recent years, especially within the low- and semi-skilled job sectors.<sup>6</sup> It is estimated that there are today over 80 million economically active migrants (excluding refugees) the world over, of whom some 27 million are in the developing regions.<sup>7</sup>

For many people, international migration can be a productive experience. This is especially true for highly skilled migrants who are concentrated at the top of the employment ladder. Millions of professional workers travel to other countries every year in search of higher wages or greater opportunities.<sup>8</sup> Most countries welcome the arrival of professionals from other countries, with some (most notably Australia and Canada) even actively encouraging it.<sup>9</sup> On the other hand, for many migrants at the bottom of the employment ladder, the situation is often very different. They tend to do the jobs that are dirty, dangerous and difficult (so-called “3-D” jobs), which once they become “migrant jobs”, tend to remain migrant jobs.<sup>10</sup> Migrants in these jobs tend to suffer poor working and living conditions, often far inferior to those available to the citizens of the home countries themselves. This holds especially true for “irregular” migrants,<sup>11</sup> whose unauthorised status (however defined) makes them subject to removal and possible prosecution for immigration violations at all times. These migrants usually lack access to many, if not most, civil and labour rights and social benefits, and they are afraid to avail themselves of the rights that they may enjoy for fear of exposure to immigration authorities.<sup>12</sup>

In this respect, the role of international and regional human rights instruments in protecting the human rights of all migrant workers has become increasingly important. The extent to which these international instruments protect the human rights of migrant workers, in particular their right of access to social security, will be the focus of this paper. Although migrant workers enjoy the protection, as do all individuals, of a range of international<sup>13</sup> and

<sup>5</sup> International Labour Office *Towards a Fair Deal for Migrant Workers in the Global Economy* (2004) 3

<sup>6</sup> See Paoletti “Human Rights for All Workers: The Emergence of Protections for Unauthorized Workers in the Inter-American Human Rights System” 2004 *Human Rights Brief* 5

<sup>7</sup> ILO *Fair Deal for Migrant Workers* 7

<sup>8</sup> While the foreign labour force in OECD countries between 1995 and 2000 grew by 3–4 per cent per year, the highly educated migrant labour force grew much faster – on average 35 per cent annually in the United Kingdom and 14 per cent in the United States: ILO *Fair Deal for Migrant Workers* 10

<sup>9</sup> These two countries have introduced point systems that make it easier for professionals from developing countries to enter as immigrants: ILO *Fair Deal for Migrant Workers* 10. Other countries with similar policies to attract skilled labour include New Zealand, Germany, United Kingdom and the United States. See International Labour Office *ILO Migration Survey 2003* 1

<sup>10</sup> ILO *Fair Deal for Migrant Workers* 10

<sup>11</sup> For the difference between “documented”, “undocumented”, “regular”, “irregular”, “legal” and “illegal” migrants, see part 2 *infra*

<sup>12</sup> As Taran 2000 *International Migration* 7 notes, “[u]nauthorised migrants are often treated as a reserve of flexible labour, outside the protection of labour safety, health, minimum wage and other standards, and easily deportable”

<sup>13</sup> Here I am referring to the so-called “International Bill of Rights”, namely the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Other instruments include the Convention against Torture and Other Cruel Inhuman or Degrading Treatment and Punishment, the International Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

regional<sup>14</sup> human rights instruments, a discussion of all these instruments falls beyond the scope of this paper. This study will focus on those instruments that relate *specifically* to the protection of migrant workers and their families, and whether and to what extent they safeguard the right to social security. These are the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by the United Nations (UN) in 1990, as well as the following instruments adopted by the International Labour Organisation (ILO): Migration for Employment Convention (Revised) (No 97) and Recommendation (Revised) (No 86), adopted in 1949, and the Migrant Workers (Supplementary Provisions) Convention (No 143) and the Migrant Workers Recommendation (No 151), adopted in 1975.

While many extol the virtues of these international standards, others are more critical and more sceptical of their efficacy. In this paper, these competing claims will be investigated and analysed. After providing some definitional clarification in part 2, part 3 is devoted to an examination of the international instruments, in particular their treatment of the right to social security. Two important common themes, namely equality of treatment and maintenance of acquired rights and rights in the course of acquisition, are examined. In addition, the role of bilateral and multilateral international agreements is discussed – agreements that play a vital role in defining and strengthening the rights of migrant workers to social security. In part 4, a number of issues come under closer scrutiny, including the (lack of) enforcement of international standards, whether the UN Convention provides effective protection to irregular migrants, and why, in practice, social insurance and social assistance are often subjected to differential treatment (and whether and to what extent that is justifiable). Part 5 contains some concluding remarks.

## 2 Definitional clarification

In the literature, reference is often made to the term “international migrants”, of which “migrants” or “migrant workers” constitute one (albeit sizeable) part. Apart from migrant workers, the term “international migrants” also includes refugees,<sup>15</sup> stateless persons and displaced persons. The focus of this article is on the extension of the right to social security specifically to migrant workers, although many of the arguments also apply, *mutatis mutandis*, to other categories of international migrants.

There is no commonly accepted generic or general legal concept of the “migrant worker” in international law.<sup>16</sup> Different definitions can be found in the various international instruments dealing with international migration. However, a useful starting point is to consider the definition contained in the

<sup>14</sup> Such regional instruments include the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples’ Rights, and the American Convention on Human Rights

<sup>15</sup> Art 1A(2) of the Convention Relating to the Status of Refugees, 1951 as modified by the 1967 Protocol, defines a refugee as a person who, “owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”

<sup>16</sup> United Nations Commission on Human Rights, Report of the Special Rapporteur *Human Rights of Migrants* par 28

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (hereafter Migrant Workers Convention). The Convention<sup>17</sup> defines a migrant worker as

“a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national” (own emphasis).

The first distinction to be drawn is therefore the distinction between citizens (or nationals) and non-citizens (or non-nationals), with migrant workers, by definition, falling into the latter category.<sup>18</sup> For the purposes of this study, all those who have not acquired the citizenship of the State of employment and are working or have worked in that country, are included in the definition of “migrant worker”.

The question of citizenship is normally a matter regulated by domestic law in particular laws on immigration. Based upon the principle of “territorial sovereignty”, it is generally accepted that a State has the power to exercise exclusive control over its physical domain, subject to limitations imposed by international law.<sup>19</sup> This principle is also reflected in the Migrant Workers Convention<sup>20</sup> itself, where it is stated that

“(n)othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families”.

There is a clear and direct link between immigration policies and the question of access to social security, because “undocumented” (or “irregular” or “illegal”)<sup>21</sup> immigrants and asylum seekers are usually excluded from a country’s social security system.<sup>22</sup> As mentioned earlier, the power of a sovereign State to regulate the entry of aliens and the discretion to confer nationality is not absolute, but is limited by principles of international law. These include limitations imposed by human rights instruments such as the International Covenant on Civil and Political Rights, the African Charter of Human Rights and the European Convention on Human Rights,<sup>23</sup> as well as by accords (be they bilateral, regional or specialised) regarding migration for employment – accords through which States effectively relinquish their discretion to control the entry and expulsion of foreign nationals. In addition, the principle of *non-refoulement*, which is the principle that prevents States from expelling or returning

<sup>17</sup> Art 2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (hereafter Migrant Workers Convention)

<sup>18</sup> There are of course many other distinctions that can be drawn, eg between long-term or short-term migrants and, within the category of short-term migrants, between frontier workers, seasonal workers and those studying or pursuing their careers abroad. These finer distinctions are examined in part 3 *infra*

<sup>19</sup> See Bosniak “Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention” 1991 *International Migration Review* 742-743: “States’ power to refuse entry and to expel aliens, and their discretion to confer nationality has been treated as an integral part of ... territorial sovereign power since the late nineteenth century. As one analyst expressed it, ‘if a state is not free to decide who will enter its territory according to its own criteria and to regulate the conditions of such ingress, it is severely impeded in its function as the governing authority of the territory in question’” See also Fournalos *Sovereignty & Ingress of Aliens* (1986) 57

<sup>20</sup> Art 79

<sup>21</sup> This distinction will be further discussed in this part, *infra*

<sup>22</sup> See Vonk “Migration, Social Security and the Law: Some European Dilemmas” 2002 *European Journal of Social Security* 317

<sup>23</sup> Arts 13, 12(4) and (5), and 4 of the Fourth Protocol, respectively

aliens who qualify as refugees to States where they run the risk of persecution, is now generally regarded as a principle of customary international law.<sup>24</sup>

This brings us to the second important distinction – one that flows directly from the first. Within the category of non-nationals or non-citizens, a distinction can be drawn between migrants legally authorised to be in the country (so-called “regular” migrants) and those who enter or work in countries without legal authorisation (so-called “irregular” migrants). For many years, the term “illegal” was attributed to migrants falling into the last category, but this characterisation has been criticised as normative and conveying the idea of criminality.<sup>25</sup> As Taran writes,

“[the] ‘illegalization’ of migrants is the most dramatic manifestation of the ... [tendency] to associate migrants and migration with crime and criminality, unemployment, disease, and other social ills”.<sup>26</sup>

It has also been pointed out that most migrants falling into this category have some place in the world where they can live lawfully.<sup>27</sup> In response, the term “undocumented” was suggested, but this was similarly rejected as being incomplete since it does not apply to migrants who enter the host country legally (with tourist documents, for example), but then later violate their conditions of entry by working.<sup>28</sup>

As a result, the term “irregular” is now generally used to describe migrants falling into this category, and will also be used in this paper.<sup>29</sup> It avoids the overtly normative connotation of the term “illegal”; does not disqualify those who entered legally but later violated their conditions of entry; and implies that the current status of the migrant may have arisen at various points (be it departure, transit, entry or return) and that it may be remedied at some point in time (either when the migrant returns to a place where his or her stay is permitted, or through an individual or collective regularisation of the migrant’s status by the host country).<sup>30</sup> Bosniak<sup>31</sup> provides a useful definition of who constitute the group of irregular migrants:

“As a rule, irregular migrants ... are people who have arrived in the state of employment or residence without authorization, who are employed there without permission, or who entered with permission

<sup>24</sup> See Bosniak 1991 *International Migration Review* 743 Art 33(1) of the Geneva Convention Relating to the Status of Refugees, 1951 provides that “no Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”

<sup>25</sup> ILO *Fair Deal for Migrant Workers* 11

<sup>26</sup> Taran 2000 *International Migration* 23

<sup>27</sup> Groenendijk *Introduction* in Bogusz et al (eds) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004) xix

<sup>28</sup> ILO *Fair Deal for Migrant Workers* 11

<sup>29</sup> The Migrant Workers Convention appears to consider “undocumented” and “irregular” as interchangeable terms. In art 5, the difference between the two categories of migrants are described as follows: “For the purposes of the present Convention, migrant workers and members of their families: (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party; (b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article”

<sup>30</sup> See Groenendijk *Introduction* xix and ILO *Fair Deal for Migrant Workers* 11

<sup>31</sup> 1991 *International Migration Review* 742. It is estimated that between 10 to 15 per cent of all migrants are irregular. In 2000, in Europe and the United States alone, there were an estimated 11 million irregular migrants. See ILO *Fair Deal for Migrant Workers* 11

and have remained after the expiration of their visas. The term frequently includes de facto refugees (persons who are not recognized as legal refugees but who are unable or unwilling to return to their countries for political, racial, religious or violence-related reasons), as well as those who have migrated specifically for purposes of employment or family reunion.”

It becomes clear, when speaking of social security for non-citizens, that the position of both regular and irregular migrants must be investigated. More specifically, in examining the provisions of international instruments related to migrancy, the importance of the distinction (if any) between regular and irregular migrants has to be investigated. In other words, to what extent are the rights of migrant workers to social security affected by their status?

This brings me to a final conceptual clarification. In this paper, the concept of social security refers to the traditional twin pillars of social insurance and social assistance. *Social insurance* encompasses formalised programmes such as pensions, health insurance, maternity benefits and unemployment benefits and is financed by contributions that are either related to earnings or collected through payroll taxes. *Social assistance*, on the other hand, are formal programmes usually financed from tax revenues and include targeted resource transfers such as disability benefits, single-parent allowances, and “social pensions” for the elderly poor that are financed publicly. However, there are many who argue that this is too narrow a construction of the concept of social security, and that it is preferable to talk of the broader concept of “social protection”, of which social insurance and social assistance are but two elements.<sup>32</sup> Those who adopt a broad approach to social protection include various programmes not normally viewed as part of conventional social security systems, such as universal primary education, micro-credit and job creation programmes, while others go even further and conceptualise social protection so broadly as to include the majority of development activities.<sup>33</sup> However, in this paper, given the focus on the role of international organisations, especially the ILO, the narrower or more traditional definition of “social protection” as used by the ILO will be used. The ILO broadly defines “social protection” as old-age, survivor, and disability benefits, as well as unemployment compensation, financed by social insurance; tax-financed and means-tested social assistance; and universal benefits (such as health care and child support), which are

<sup>32</sup> See Sabates-Wheeler & Waite *Migration and Social Protection: A Concept Paper 6* Working Paper T2 Institute of Development Studies, Essex, December 2003 The terms “social security” and “social protection” are used rather loosely The former generally refers to social security programs that are directed at meeting a specific need, are usually financed on the basis of contributions, and are available to beneficiaries on the basis of their participation and entitlements (although benefits are not necessarily proportional to contributions on an individual basis) The latter term is intended to encompass both social security programs and other forms of benefits and services (such as family benefits, universal health care services, and minimum-income provisions) that are generally available on a universal basis without regard to participation, contribution or employment status (although they may include a test of means) In any event, the distinction is not a rigorous one See Gillion “Social Security and Protection in the Developing World” 1994 *Monthly Labor Review Online* 24

<sup>33</sup> See Sabates-Wheeler & Waite *Migration and Social Protection 6*

also tax-financed but not means-tested.<sup>34</sup> As will become clear, the distinction between social insurance and social assistance is particularly significant in the context of access to social security for non citizens. As a rule, access to social assistance for non citizens has always been more problematic than access to social insurance.<sup>35</sup>

### 3 International instruments

#### 3.1 ILO instruments

Migration has been one of the key issues for the ILO since its foundation in 1919. The preamble to the Constitution of the ILO (Revised) emphasises the “protection of the interests of workers when employed in countries other than their own”.<sup>36</sup> At the First Session of the International Labour Conference in 1919, a recommendation<sup>37</sup> was adopted which already reflected the two main aims of the ILO in this area, namely equality of treatment between nationals and migrant workers, and coordination of migration policies between States.<sup>38</sup> The Declaration of Philadelphia (concerning the aims and purposes of the ILO) in 1944 also singled out the problems of migrant workers for special attention.<sup>39</sup>

The standard-setting of the ILO in this area has been concentrated in two main directions. In the first place, the Conference has endeavoured to establish the right to equality of treatment between nationals and non-nationals in the field of social security and, at the same time, to establish an international system for the maintenance of acquired rights and rights in the course of acquisition for workers who transfer their residence from one country to another.<sup>40</sup> In this regard, four Conventions and two Recommendations have been adopted, namely the Equality of Treatment (Accident Compensation) Convention, 1925 (No 19) and Recommendation, 1925 (No 25); the Maintenance of Migrants’ Pension Rights Convention, 1935 (No 48); the Equality of Treatment (Social Security) Convention, 1962 (No 118); and the Maintenance of Social Security

<sup>34</sup> See ILO *World Labour Report: Income Security and Social Protection in a Changing World* (2000) 29; ILO *Principles of Social Security* (1998) 8. See also Brand “Social Protection of Work” 2001 *Monthly Labor Review Online* (page number unknown)

<sup>35</sup> This will be explored in part 4 *infra*

<sup>36</sup> See Constitution of the International Labour Organization (April 1919) available at <http://www.ilo.org/public/english/about/iloconst.htm> (last accessed on 26 February 2007). For a detailed analysis of the early activities of the ILO in the area of migration, see Karatani “How History Separated Refugee and Migrant Regimes: In Search of their Institutional Origins” 2005 *International Journal of Refugee Law* 522-526

<sup>37</sup> The Reciprocity of Treatment Recommendation, 1919 (No 2)

<sup>38</sup> ILO *Migrant Workers* (87th Session of the International Labour Conference (1999)) par 32. It must be noted that the standards were worded in vague terms and granted equal treatment only with respect to specific fields of social security and under the conditions of reciprocity. See Hasenau “ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and their Genesis” 1991 *International Migration Review* 690

<sup>39</sup> It stressed that a part of the ILO’s obligations was “the provision ... of facilities for training and the transfer of labour, including migration for employment and settlement”. See Karatani 2005 *International Journal of Refugee Law* 522

<sup>40</sup> ILO *Migrant Workers* par 34

Rights Convention, 1982 (No 157) and Recommendation, 1983 (No 167).<sup>41</sup> Secondly, the Conference also adopted instruments that are concerned with finding comprehensive solutions to the particular problems facing migrant workers. These are the Migration for Employment Convention (Revised) (No 97) and Recommendation (Revised) (No 86), both adopted in 1949, and the Migrant Workers (Supplementary Provisions) Convention (No 143) and the Migrant Workers Recommendation (No 151), both adopted in 1975 to supplement the 1949 instruments. These instruments will be the focus of this study.

Finally, it must be noted that with the exception of the instruments relating to migrant workers and other special categories of workers, the Conventions and Recommendations adopted by the ILO are of general application. That means that they cover *all* workers, irrespective of citizenship. The most significant of these are the rights contained in the ILO Declaration on Fundamental Principles and Rights at Work.<sup>42</sup> These relate to the topics of freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

### 3.2 The role of the United Nations

Within the United Nations (UN) system, standard-setting on migrant workers fall squarely within the ILO's sphere of competence. The ILO alone, among UN organisations, is constitutionally charged with the "protection of the interests of workers when employed in countries other than their own".<sup>43</sup> However, for a variety of reasons, political and otherwise,<sup>44</sup> the ILO was circumvented in 1990 when the UN adopted the Migrant Workers Convention – an instrument that has been described as the "epitome of international human rights"<sup>45</sup> and is considered to be one of the seven fundamental human rights instruments that define basic, universal human rights and ensure their explicit extension to vulnerable groups worldwide.<sup>46</sup> The Convention entered into force on 1 July

<sup>41</sup> The last two instruments have particular relevance for migrant workers. Convention 118 provides for equality of treatment to be granted to workers of other ratifying countries as regards all nine branches of social security (medical care, sickness, unemployment, old-age, employment injury, family, maternity, invalidity, and survivors' benefits), although the obligations of the Convention may be accepted in respect of only one of these branches. The Convention provides that the payment of long term benefits shall be guaranteed, even when beneficiaries are resident abroad. These are guaranteed both to nationals of the ratifying State as well as to nationals of any other State that has accepted the obligations of the Convention for the corresponding branch. Convention 157 provides for the establishment of an international system for the maintenance of rights under all branches of social security for persons who are working and staying outside their own countries.

<sup>42</sup> Adopted in 1998.

<sup>43</sup> See Böhning "The ILO and the New UN Convention on Migrant Workers: The Past and the Future" 1991 *International Migration Review* 698-700.

<sup>44</sup> For a discussion of these, see Böhning 1991 *International Migration Review* 700-702.

<sup>45</sup> See Vargas "U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights" 2001 *San Diego LR* 79; Sivakumaran 2004 *Georgetown Journal of International Law* 115.

<sup>46</sup> See Taran 2000 *International Migration* 17, referring to a discussion paper of the United Nations High Commissioner for Refugees *Reconciling Migration Control and Refugee Protection in the European Union: a UNCHR Perspective* (2000). The other six human rights instruments are the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Racial and Racial Discrimination (CERD), the Convention against Torture (CAT), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC).



2003, and has a total of 35 ratifications and 28 signatures to date.<sup>47</sup> The fact that it took more than ten years for the Convention to receive enough ratifications for it to enter into force is often viewed as a reflection of the broader general resistance to the recognition of the application of human rights standards to migrants, particularly irregular migrants.<sup>48</sup>

The Convention has four stated purposes.<sup>49</sup> These are:

- to unify the body of law applicable to migrant workers;
- to complement other instruments;
- to improve the distinctive status of migrant workers and their families; and
- to reduce clandestine trafficking.

Although the UN Migrant Workers Convention is the most comprehensive instrument on the topic of migrant workers, it inevitably overlaps in some respects with the other ILO instruments referred to earlier.<sup>50</sup>

### 3 3 International instruments and social security rights

In general, the approach of international instruments to the protection of social security rights are similar, being confined to statements of general principles rather than concerning themselves with the intricate details of the subject. The reason for this is the belief that the affirmation and maintenance of fundamental principles and general guidelines are better ensured at the universal multilateral level, whereas the technical matters arising in what is arguably a complex and diverse field are best left to bilateral or specific multilateral treaties.<sup>51</sup>

Before examining the social security provisions in the specific migrant workers instruments, an outline of other ILO standards concerned with social security warrant description, if only to indicate their degree of overlap with (and sometimes even divergence from) the specialised migrant worker instruments.<sup>52</sup> Convention 102 of 1952 concerning Minimum Standards of Social Security entrenches, in article 68(2), the principle of equality of treatment between national and non-national workers in respect of *contributory* social security schemes, subject to any conditions of reciprocity provided for in bilat-

<sup>47</sup> The most recent update of the list occurred on 26 January 2006. It is interesting to note that the countries that have signed and/or ratified the Convention consist only of so-called “sending States”. None of the major “labour-receiving” countries, that is States which primarily attract migrant labour, have to date either signed or ratified the Convention. South Africa has neither signed nor ratified the Convention. For a list of current signatories and ratifications, see <http://www.ohchr.org/english/countries/ratification/13.htm> (last accessed on 26 February 2007).

<sup>48</sup> See Taran 2000 *International Migration* 18.

<sup>49</sup> See the preamble of the Convention.

<sup>50</sup> It has been pointed out by Nafziger & Bartel “The Migrant Workers Convention: It’s Place in Human Rights Law” 1991 *International Migration Review* 785 that this overlap with other ILO instruments, as well as with human rights instruments (such as the UDHR, ICESCR, ICCPR, ESC, etc), could turn out to be problematic: “For example, what happens when language in the (UN) Convention conflicts with corresponding language in another instrument? What happens if the language coincides, but interpretations under different enforcement mechanisms conflict?”

<sup>51</sup> See Cholewinski *Migrant Workers in International Human Rights Law* (1997) 114.

<sup>52</sup> The ILO’s Committee of Experts have observed that the social security provisions in the migrant workers instruments should be read in the context of the other ILO standards concerned with social security. See Cholewinski *Migrant Workers* 114.

eral and multilateral agreements. Echoing provisions contained in instruments that deal specifically with migrant workers, it permits exclusions of non-nationals in cases where benefits or part of benefits are payable wholly out of public funds.<sup>53</sup> In other words, States parties have the right to exclude non-nationals from tax-funded or non-contributory social security benefits.<sup>54</sup> One other convention is specifically concerned with equal treatment between nationals and non-nationals in the area of social security. Convention 118 of 1962 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security provides for equal treatment between nationals and non-nationals from other States parties in respect of the accepted branches of social security.<sup>55</sup> Benefits are to be awarded without any condition of residence.<sup>56</sup> There are nonetheless exceptions to this general principle. Similar to the provision in Convention 102 that allows States some flexibility in respect of non-contributory benefits, it provides that conditions of residence of a prescribed duration may be prescribed for receipt of such benefits. However, article 4(2) of Convention 118 excludes medical care, sickness benefit, employment injury benefit and family benefit from this requirement. In other words, non-nationals may have to fulfil prescribed periods of residence to be eligible for non-contributory benefits *other than* the four benefits specifically referred to and mentioned above. Finally, Convention 157 of 1982 concerning the Establishment of an International System for the Maintenance of Social Security Rights applies to all branches of social security, and establishes an international framework for the maintenance of acquired rights and rights in the course of acquisition for workers who transfer their residence from one country to another.<sup>57</sup> It further ensures the effective provision of benefits abroad when they return to their country of origin.<sup>58</sup> The Convention permits States parties to give effect to their obligations by concluding bilateral and multilateral agreements. However, these agreements need not cover all branches of social security, nor apply to all categories of people.

The provisions of the instruments specifically focused on migrant workers, namely ILO Conventions 97 and 143, ILO Recommendations 86 and 151, and the UN Migrant Workers Convention, will now receive more detailed discussion. Like its predecessors, ILO Convention No 97 (and Recommendation No 86) contains a set of standards on the organisation of migration and equality of treatment.<sup>59</sup> However, in contrast to the earlier instruments, the set of standards in Convention 97 is more elaborate, while simultaneously reflecting a more flexible response to the needs of migrant workers. It is important to note

<sup>53</sup> See art 68(1)

<sup>54</sup> This issue is discussed in more detail in part 4 *infra*

<sup>55</sup> Art 2(1) provides that member States may accept the obligations of this Convention in respect of any one or more of the following branches of social security for which it has in effective operation legislation covering its own nationals within its own territory: (a) medical care; (b) sickness benefit; (c) maternity benefit; (d) invalidity benefit; (e) old-age benefit; (f) survivors' benefit; (g) employment injury benefit; (h) unemployment benefit; and (i) family benefit

<sup>56</sup> Art 4(1)

<sup>57</sup> Part III

<sup>58</sup> Part IV

<sup>59</sup> The preceding 1939 Convention had by 1946 not been ratified by any State and therefore did not come into force

that neither Convention 97 nor Convention 143 draws any distinction between workers who have migrated for permanent settlement, and those who have migrated for short-term or even seasonal work.<sup>60</sup> However, certain categories of migrants are expressly excluded from the protection afforded by one or the other of the two instruments. These are:

- frontier workers;<sup>61</sup>
- members of the liberal professions and artistes who are given permission to enter for an (undefined) short duration;<sup>62</sup>
- persons coming specifically for the purposes of training and education,<sup>63</sup> and
- employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments for a limited and defined period of time and who are required to leave that country on the completion of their duties or assignments.<sup>64</sup>

This last provision essentially applies to those workers who have special skills and who go to another country to undertake specific short-term assignments.<sup>65</sup> However, the Committee of Experts of the ILO has pointed out that the provision does not imply that all fixed-term workers can be excluded from the provisions of Convention 143.<sup>66</sup> Finally, the Committee of Experts point out that seasonal migrant workers are not excluded from Conventions 97 and 143, and “should therefore benefit from equality of opportunity and treatment”.<sup>67</sup> However, the extent to which they will really be able to benefit from national policy will depend on the length of time they stay in the country of employment.<sup>68</sup> It should be noted that the UN Migrant Workers Convention goes beyond the definitions contained in the ILO instruments by including categories of workers thus far excluded, namely frontier workers, seasonal workers, seafarers, workers on offshore installations, itinerant workers, project-tied

<sup>60</sup> The only exception can be found in Convention 97 (and also the Model Agreement annexed to Recommendation 86), which contains a few provisions that grant more far-reaching rights for migrants and their families who have been admitted on a permanent basis. See Böning *The Protection of Temporary Migrants by Conventions of the ILO and the UN*, Presentation to the Workshop on Temporary Migration: Assessment and Practical Proposals for Overcoming Protection Gaps at the International Institute for Labour Studies, Geneva (18-19 Sept 2003)

<sup>61</sup> The term is not defined in either of the ILO Conventions. It seems to refer to workers who cross national borders on a temporary basis to work, and who return daily, weekly or monthly to their place of domicile. In Germany, for example, a frontier worker is a person who, “while maintaining his domicile in the frontier region of a given country, is employed as a wage-earner in the frontier region of a neighbouring country and returns to his place of domicile at least once a week”. Malaysia interprets the term to mean “persons crossing national frontiers with temporary permits or visas to work and recrossing the frontiers after each day’s work or after a short period of work, e.g., one week or one month continuously”. See ILO *Migrant Workers* par 112. However, it is defined as follows in art 2 of the UN Migrant Workers Convention: “The term ‘frontier worker’ refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week”

<sup>62</sup> Art 11 2(b) in both Conventions

<sup>63</sup> Art 11 2(d) Convention 143

<sup>64</sup> Art 11 2(e) Convention 143

<sup>65</sup> ILO *Migrant Workers* par 115

<sup>66</sup> ILO *Migrant Workers* par 115

<sup>67</sup> ILO *Migrant Workers* par 378

<sup>68</sup> ILO *Migrant Workers* par 378

workers, and self-employed workers.<sup>69</sup> Part V of the Convention (articles 57-63) establishes special protections for these categories of workers.

Article 6 of Convention 97 confirms the principle of equality of treatment, and prohibits inequality of treatment between “immigrants lawfully within its territory” and nationals in four areas, namely employment rights, trade union rights, social security rights, and accommodation rights. Social security benefits are those stemming from legal provisions in respect of employment injury, maternity, sickness, invalidity, old-age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme.<sup>70</sup> In contrast, Convention 143 (which supplements Convention 97) refers to “social security” in general, but this provision has to be read in conjunction with the aforementioned provision of Convention 97.<sup>71</sup>

The principle of equal treatment is, however, narrowly applied, in that inequality of treatment is only proscribed when it is “regulated by law or regulations, or [is] subject to the control of administrative authorities”.<sup>72</sup> The principle is expanded by the subsequent Convention 143,<sup>73</sup> which provides that the State undertakes to promote and guarantee

“equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory”.

Nevertheless, the equality of treatment is subject to the following express limitations: there may be appropriate arrangements for the maintenance of acquired rights in the course of acquisition,<sup>74</sup> and, more importantly, national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds,<sup>75</sup> and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.<sup>76</sup>

It has been pointed out that, while Convention 143 represents an improvement over Convention 97, a number of problems remain. In the first place, as equality is sought with nationals, where the treatment of nationals themselves is poor, the situation of migrant workers is not affected.<sup>77</sup> Secondly, where migrants are carrying out work not done by nationals, the lack of comparator may make it difficult, if not impossible, to compare differential treatment.<sup>78</sup> Thirdly, and most significantly, none of the ILO instruments protect migrants in an irregular situation – the very group of persons arguably most in need of protection. In this regard, the UN Migrant Workers Convention breaks new

<sup>69</sup> For definitions of all these terms, see art 2 UN Migrant Workers Convention

<sup>70</sup> Art 6 1(b) Convention 97

<sup>71</sup> Art 10 Convention 143

<sup>72</sup> Art 6 1(a)

<sup>73</sup> Art 10

<sup>74</sup> Art 6 1(b)(i) Convention 97

<sup>75</sup> This means that social security benefits financed out of public funds on a non-contributory basis may be restricted to nationals. See Cholewinski *Migrant Workers* 113

<sup>76</sup> Art 6 1(b)(ii) Convention 97

<sup>77</sup> See Sivakumaran 2004 *Georgetown Journal of International Law* 120

<sup>78</sup> Sivakumaran 2004 *Georgetown Journal of International Law* 120. The author points out that this is a very real problem given the fact that migrant workers often undertake work that nationals are unwilling to carry out

ground. In the first place, it includes the families of migrant workers within the scope of the Convention.<sup>79</sup> Secondly, it is applicable to all migrant workers, regardless of reciprocity<sup>80</sup> and irrespective of their status.<sup>81</sup> In this regard, it has been hailed as the “most ambitious statement to date of international concern for the problematic condition of undocumented migrants”.<sup>82</sup> In the preamble, the Convention recognises that “workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers”, and that “the human problems involved in migration are even more serious in the case of irregular migration”.<sup>83</sup>

However, despite acknowledging the precarious situation of non-documented migrants, the Convention nevertheless still differentiates between regular and irregular migrant workers by providing the former with additional rights. Part III of the Convention extends certain rights to *all* migrant workers and their families, while Part IV provides additional rights only to those workers and their families who are documented or in a regular situation. It thus creates, in effect, two classes of human rights protection. For example, States parties are entitled to discriminate against undocumented migrants with respect to rights to family unity, liberty of movement, participation in the public affairs of the State of employment, equality of treatment with nationals as regards the receipt of various social services, equality of treatment for family members, freedom from double taxation, and further employment protections and trade union rights, among others.

<sup>79</sup> In art 4, “members of a family” are defined as persons who are married to migrant workers, plus their dependent children. However, these also include persons who are in a relationship with migrant workers “that ... produces effects equivalent to marriage”. The vagueness of this definition has been criticised. See Nafziger & Bartel 1991 *International Migration Review* 786-787.

<sup>80</sup> This principle (of non-reciprocity) is also enshrined in ILO Conventions 97 and 143. This means that so long as the country of employment has ratified the Convention in question, the social security rights of migrants are to be respected, irrespective of whether the migrant worker’s home country has ratified the instrument. However, during negotiations on the drafting of the UN Migrants Convention, the German representative, joined by others, had argued unsuccessfully for inclusion of a reciprocity clause that would have permitted a State to limit its obligations under the Convention to nationals of other State parties. Such a reciprocity clause would have avoided the asymmetry of requiring a State to protect the rights of particular nationals without a positive assurance that the State’s own nationals would enjoy protection in the territory of the other State – i.e., in the State of the protected nationals. It has been pointed out that the absence of such a clause may inhibit ratification and accession to the Convention. See Nafziger & Bartel 1991 *International Migration Review* 786. This may be one of the reasons for the fact that as of December 2005, the Convention has been ratified only by so-called “migrant sending” countries.

<sup>81</sup> For the sake of completeness it must be mentioned that the recent *ILO Multilateral Framework on Labour Migration*, adopted by a tripartite meeting of experts in November 2005, proposes that “where appropriate”, social security coverage and portability of benefits should be extended to “migrant workers in an irregular situation” (par 9.9). The document is available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb295/pdf/tmmflm-1.pdf> (last accessed on 26 February 2007).

<sup>82</sup> Bosniak 1991 *International Migration Review* 740. The extension of certain rights to irregular migrants did not occur without significant opposition. During the drafting process, many countries argued that extending rights to these workers would encourage and even reward someone for violating a country’s borders. Many of those in favour of extending rights to irregular migrants in the end used instrumental as opposed to normative reasoning to support their position. They argued that extending rights to migrants in an irregular situation “would discourage employers from hiring such workers and improve conditions for national workers”. See Cholewinski *Migrant Workers* 187.

<sup>83</sup> However, it must be noted that the Convention does distinguish between regular and irregular migrant workers by providing the former with additional rights (Part III provides rights to all migrant workers and their families, while Part IV provides additional rights only to those workers and their families who are documented or in a regular situation). It thus creates, in effect, two classes of human rights protection.

This differentiation between regular and irregular migrants must be viewed against the background of the persistent tension that the entire field of human rights suffers from, namely between the principles of universal human rights and those of State sovereignty. In the migration context, human rights and territorial principles meet and compete in two different regulatory domains.<sup>84</sup> In the first, namely that governing matters concerning the admission and expulsion of aliens into and from a national territory, the tension “has largely been resolved in favor of the State”.<sup>85</sup> The second domain concerns the States’ general, non-immigration-related treatment of aliens who are present within their territory. Here, Bosniak<sup>86</sup> points out, “the interplay between the principles of States’ territorial powers and their human rights obligations is more complex”. Generally speaking, in this internal domain, all human beings are viewed as theoretically entitled to internationally-guaranteed standards of treatment with respect to fundamental rights. Yet no State is required to treat aliens, including legal resident aliens, identically with citizens. Restrictions for aliens are written into various human rights instruments, but even in the absence of such explicit restrictions, States themselves limit a variety of rights to nationals, and such action is generally treated as legitimate under international law.<sup>87</sup> Just how much and to what extent States may limit rights granted to aliens is a matter of ongoing controversy. However, it is clear that “(t)he discrimination permitted against undocumented aliens exceed, by far, the discrimination permitted against most other classes of aliens”.<sup>88</sup>

For a variety of reasons,<sup>89</sup> international law treats the power of States to discriminate as both greater and more vital with respect to irregular immigrants.<sup>90</sup> This is also reflected in the UN Convention, which, despite extending substantial human rights protections to undocumented migrants, also makes it clear that their irregular status makes these migrants less entitled to international protection than other migrants.<sup>91</sup>

However, as far as social security is concerned, the UN Convention extends this right to all migrants, irrespective of status.<sup>92</sup> Article 27 reads as follows:

<sup>84</sup> See Bosniak 1991 *International Migration Review* 753

<sup>85</sup> Bosniak 1991 *International Migration Review* 753

<sup>86</sup> 1991 *International Migration Review* 753

<sup>87</sup> See Bosniak 1991 *International Migration Review* 754

<sup>88</sup> Bosniak 1991 *International Migration Review* 755

<sup>89</sup> States mainly view the presence of irregular migrants both as a violation of their sovereign exclusionary powers and as a breach of the social contract which bind the nation. See Bosniak 1991 *International Migration Review* 755

<sup>90</sup> See Bosniak 1991 *International Migration Review* 755

<sup>91</sup> The hope is that the carrot of additional benefits and protections for migrants in a regular situation may encourage undocumented migrants to seek to regularise their status. See Nafziger & Bartel 1991 *International Migration Review* 784

<sup>92</sup> Cholewinski *Migrant Workers* 165-166 points out that it is not entirely clear from the drafting history of the Convention whether art 27 applies to irregular migrants to the same extent as it does to regular migrants. A clause in the draft text explicitly limited the application of the equality principle in respect of irregular migrants to those social security benefits to which they had contributed. However, this clause was removed during the second reading of the text. Cholewinski nevertheless concedes that the presence of art 27 in Part IV, which applies to all migrants, irrespective of status, removes any doubt that it was intended to apply to both regular and irregular migrants. It must be noted that extending social security rights to all workers, irrespective of status, reflects the position adopted in other human rights instruments. See UDHR arts 22 and 25(1), ICESCR art 9, ICEAFRD art 5(e) and ESC art 12

- “1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.
2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.”

Article 27(1) is a “framework provision” and not self-executing. The reason is that it refers not only to the applicable legislation, but also to the terms of bilateral and multilateral agreements that have to be fulfilled. By virtue of these provisos, States parties can adopt provisions that would, for example, differentiate between regular and irregular migrants, thereby negating the protection that the article is meant to confer on all migrants, irrespective of their status. The article does not require reciprocity for social security provisions to take effect, and therefore applies to migrant workers who are nationals of States that have not ratified the Convention. Article 27(2) applies to migrant workers’ rights in the course of acquisition. This refers to migrant workers who have left their employment in the country in which they are not nationals, have acquired rights in that State, but not the right to receive benefits abroad. The protection that article 27(2) provides is rather weak, urging States to “examine the possibility” of reimbursing the contributions of migrant workers and their families in cases where the applicable legislation does not permit them to receive benefits. This is in contrast to more strongly worded protection offered by the relevant ILO instruments.<sup>93</sup> It must also be noted that the lack of definition of “social security” raises doubts whether the term includes non-contributory benefits, from which migrant workers are often excluded.<sup>94</sup> Finally, article 27 is a statement of general principle and therefore does not define the scope of social security. However, at least two branches of social security are covered by other Convention provisions. Article 25 refers to equality of treatment between nationals and migrant workers in respect of remuneration and other conditions of work, and arguably covers the right to employment injury benefits.<sup>95</sup>

Article 28 covers emergency medical care. It provides that

“(m)igrant workers and their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their life on the basis of equality of treatment with nationals of the State concerned ... [and] ... [s]uch emergency care shall not be refused them by reason of any irregularity with regard to stay and employment”.

<sup>93</sup> Eg, art 9(1) of Convention 143 protects the social security rights of migrant workers arising out of “past employment”, and Recommendation 151 stipulates in par 34(1)(c)(ii) that all migrant workers who leave the country of employment should be entitled to “reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements”

<sup>94</sup> See discussion in part 4 *infra*

<sup>95</sup> See Cholewinski *Migrant Workers* 167

The right to emergency care has been called the “bottom line with regard to access to social benefits for illegal migrant workers”.<sup>96</sup> What is considered as “emergency care” and how access to it is guaranteed, differ across countries. In a recent survey, Pieters & Schoukens<sup>97</sup> report that while the right to emergency care is not questioned, some countries would charge the person who entered the country with the sole purpose of obtaining free care. Some countries go even further and allow the undocumented migrant in need of urgent care to be treated by a medical doctor, but the patient is then obliged to refund the costs for the delivered health care.<sup>98</sup> Undocumented migrants are thus in practice often not entitled to subsidised care for emergency medical treatment. As far as the definition of emergency care is concerned, the authors report that despite the evolving interpretation of the term, there is common understanding that undocumented migrants should be covered for the following: outpatient and hospital care which is urgent or otherwise essential even if continuous; medical programmes which are preventive or which safeguard individual and collective health; maternity coverage; health coverage of minors; vaccinations foreseen by public health law; diagnosis, treatment and prevention of infective diseases; and activities of international prevention.<sup>99</sup>

### 3 4 International agreements

International social security agreements between countries – whether bilateral or multilateral – have been in use for a long time.<sup>100</sup> In 2003, the ILO reported that most countries surveyed had signed bilateral agreements, mainly on labour migration and social security.<sup>101</sup> The ILO survey<sup>102</sup> also confirmed that most of these agreements were signed in the last fifteen years, verifying the trend of a revival of these agreements. The advantages of these agreements are that they can be adapted to the particularities of specific groups of migrants, and that both the sending and receiving State can share the burden of ensuring adequate living and working conditions as well as monitoring the migration processes.<sup>103</sup>

<sup>96</sup> Pieters & Schoukens *Exploratory Report on the Access to Social Protection for Illegal Labour Migrants* Paper presented at the ISSA European Regional Meeting *Migrants and Social Protection* in Oslo (21-23 April 2004) 11

<sup>97</sup> *Exploratory Report* 11

<sup>98</sup> Pieters & Schoukens *Exploratory Report* 11

<sup>99</sup> Pieters & Schoukens *Exploratory Report* 11

<sup>100</sup> The history of international social security agreements goes back to the latter part of the 19th century. The first treaties were concerned with accidents at work. Eg, the 1882 agreement and 1897 Convention between France and Belgium introduced the fundamental principle of all subsequent international social security agreements, namely that of equal treatment. See Roberts *Migration and Social Security: Parochialism in the Global Village* in Sigg & Behrendt (eds) *Social Security in the Global Village* (2002) 214

<sup>101</sup> ILO *ILO Migration Survey* 2

<sup>102</sup> 2

<sup>103</sup> ILO *Migrant Workers* par 76. The purpose of bilateral agreements has been described as follows: “Although international standard-setting activities provide a framework which may be regarded as indispensable for the elaboration of bilateral agreements between the countries of origin of migrant workers and the host countries, such bilateral agreements are still necessary in order to give precise application to international principles and settle specific problems.” See 26 UN ESCOR Commission for Social Development *Welfare of Migrant Workers and Their Families. Principles Concerning Migrant Workers and Their Families Already Embodied in International Instruments Adopted by United Nations Organizations: Report of the Secretary-General* 11 (UN doc E/CN.5/564 (1978))



The ILO has actively recommended the adoption of bilateral instruments as a means of managing migration flows more effectively. For example, Recommendation No 86 contains a model bilateral agreement, and several provisions of Conventions 97 and 143 emphasise the importance of bilateral cooperation in the field of migration.<sup>104</sup>

The purpose of these agreements<sup>105</sup> is to ameliorate the various disadvantages faced by migrants by regulating the respective reciprocal obligations of the signatory countries. Indeed, the underlying principle informing such agreements is reciprocity of the treatment afforded to migrant nationals of the two contracting countries.<sup>106</sup> In general, five *principles* underpin international agreements. These are:

- *equality of treatment* (or the prohibition of discrimination on grounds of nationality in respect of rights and obligations under the legislation of each of the contracting parties);
- *determination of applicable legislation* (to prevent migrant workers from being insured in both countries or, in the worst case scenario, from not being insured in either country's scheme);
- *maintenance of acquired rights* (ensuring that any right to a benefit, or paid-up prospective right, should be guaranteed to the migrant in either country, even if it has been acquired in the other);
- *maintenance of rights in the course of acquisition* (ensuring that where a right to a benefit is conditional upon the completion of a qualifying period, account should be taken of periods served by the migrant worker in each country); and finally,
- *payment of benefits abroad* (ensuring that there is no restriction on the payment, in any of the countries concerned, of benefits for which the migrant has qualified in any of the others).<sup>107</sup>

It is important to note that these principles, which are the cornerstone of bilateral and multilateral instruments, are reflected in a variety of ILO instruments on social security.<sup>108</sup>

International social security agreements use five *methods* to ameliorate the disadvantages faced by migrants. These are:

<sup>104</sup> ILO *Migrant Workers* par 77

<sup>105</sup> See ILO *Introduction to Social Security* (1989) 152 *et seq*

<sup>106</sup> See Paparella *Social Security Coverage for Migrants: Critical Aspects* Paper presented at the ISSA European Regional Meeting *Migrants and Social Protection* in Oslo (21-23 April 2004) 17

<sup>107</sup> See, eg. ILO *Standards for the XXIst Social Security* (2002) 41-44; ILO *Social Security for Migrant Workers* (1996) 8-20; ILO *Social Security for Migrant Workers* (1996) 3; Creutz "The ILO and Social Security for Foreign and Migrant Workers" 1968 *International Labour Review* 351 and Netter "Social Security for Migrant Workers" 1963 *International Labour Review* 31

<sup>108</sup> See the Equality of Treatment (Accident Compensation) Convention 19 of 1925; the Maintenance of Migrants' Pension Rights Convention 48 of 1935; the Equality of Treatment (Social Security) Convention 118 of 1962; the Maintenance of Social Security Rights Convention 157 of 1982; the Social Security (Seafarers) Convention (Revised) 165 of 1987; the Equality of Treatment (Accident Compensation) Recommendation 25 of 1952; the Migration for Employment Convention 66 of 1966; the Migration for Employment Recommendation 1 of 1939; the Migration for Employment Convention (Revised) 97 of 1949; the Migration for Employment Recommendation (Revised) 86 of 1949; the Unemployment Convention 2 of 1919; the Unemployment Convention 44 of 1934; the Maternity Protection Convention 3 of 1919; and the Maternity Protection Convention 103 of 1952

- the prohibition of discrimination on the grounds of nationality in respect of rights and obligations under the legislation of each of the contracting parties;
- provisions to prevent a situation in which the migrant worker is not insured in either country's scheme and thus without any social protection, or to prevent him or her being insured in both;
- aggregation of periods of insurance spent in each of the countries when calculating entitlement to benefits;
- proratarisation – that each of the countries pays a proportion of the pension determined by the period of insurance spent in each; and
- export of benefits.<sup>109</sup>

While international agreements undoubtedly play a vital role in defining and strengthening the rights of migrant workers to social security, they are not without their shortcomings. In the first place, they only partially succeed in putting into practice the principles affirmed at multilateral level by the international Conventions.<sup>110</sup> The reasons lie in the reciprocity principle, which was formulated in a historical context when migration took place on a much smaller scale than is the case today. Immigrant workers originate from a much larger number of countries than in the past, and many of these countries either do not have any bilateral agreements or have insufficient bargaining power to conclude them or to negotiate more favourable terms. There is also an absence of reciprocity in migrant flows (meaning that the flow of migrants is often one-directional rather than multi-directional), and finally, there is asymmetry between the economic, political, institutional and administrative conditions regulating pension and other social security policies in the emigrant and immigrant countries respectively.<sup>111</sup>

In the second place, the protection provided by bilateral agreements is variable. While all provide for equal treatment, it is in some cases incomplete. For example, agreements entered into by Denmark include conditions requiring the satisfaction of past periods of residence or availability for work that does not apply to Danish nationals.<sup>112</sup> Most of the agreements provide for aggregation of periods of insurance. In many cases, this does not cause any difficulties. Where each country's social security system is based on contributions, aggregation of periods of insurance involves simply adding together paid contributions. However, not all social security schemes are contributory. Where one country's scheme is based on paid contributions and the other is based on periods of residence or employment, aggregation rules must obviously take that into account. As a rule, aggregation rules in these types of situations provide for the aggregation of different types of periods. For example, the agreement between Portugal and Australia aggregate Portuguese periods of insurance with Australian periods of residence.<sup>113</sup>

<sup>109</sup> See Roberts *Migration and Social Security* in Sigg & Behrendt *Social Security* 214

<sup>110</sup> See Paparella *Social Security Coverage* 12

<sup>111</sup> Paparella *Social Security Coverage* 8-12

<sup>112</sup> See Roberts *Migration and Social Security* 217

<sup>113</sup> Roberts *Migration and Social Security* 218

In the third place, bilateral agreements do not always provide for all contingencies. The benefits included are, in the main, insurance-based benefits. At the core of most agreements are arrangements for long-term benefits that provide for invalidity, retirement and widowhood. Periods of insurance for these benefits are aggregated and the principle of “proratisation” is utilised to distribute costs between the countries according to insurance. The benefits are also exportable. Less likely to be included are short-term benefits for maternity or sickness, and unemployment benefits are the least likely to make their way into these bilateral agreements.<sup>114</sup>

A final concern with international agreements is the fact that they seldom cover so-called “third-country nationals”.<sup>115</sup> Recent immigrants (or migrants) to Europe tend to come from countries outside the European Union,<sup>116</sup> meaning that they do not enjoy the benefit of bilateral social security agreements that member States concluded in the past with recruitment countries.<sup>117</sup> The latest figures indicate that less than 25 per cent of international migrants work in countries with bilateral or multilateral social security agreements.<sup>118</sup> These migrants are therefore dependent upon the treatment which is offered by the host State – treatment that varies from country to country and from benefit scheme to benefit scheme. Vonk<sup>119</sup> points out that

“in every case [these] national standards fall far below international standards [as contained in international agreements], particularly where they concern overcoming minimum insurance period requirements for entitlement to benefit, the possibility of exporting benefits abroad and claiming benefits for dependents who live outside the host-state”.

A recent report of the Global Commission on International Migration<sup>120</sup> highlights the negative consequences that flow from the non-exportability of pensions and social security entitlements – something that mainly affects migrants not covered by international agreements.

The reason for the dearth of bilateral agreements between developed countries and developing countries can be placed at the door of the reciprocity principle. As Roberts<sup>121</sup> points out, the important theoretical underpinning of the principle of reciprocity is that each party shares the costs and benefits on a

<sup>114</sup> Roberts *Migration and Social Security* 218

<sup>115</sup> Roberts *Migration and Social Security* 212

<sup>116</sup> Countries that do not have a bilateral agreement with any EU member country are mainly, but not exclusively, developing countries. These are primarily countries in Eastern Europe, Asia and Africa. In sub-Saharan Africa, eg, Senegal is the only country that has entered into a bilateral agreement with an EU country, namely with France – its ex-colonial ruler. There is only one agreement with the Indian subcontinent (between Denmark and Pakistan), and apart from the agreements between the Philippines and Italy and the Philippines and Spain, there are no agreements with any other Asian countries. Of the countries of Eastern Europe, only Poland (before joining the EU) had agreements with any of the EU member countries (with France, Germany, and Sweden). Of the Middle Eastern countries, only Egypt has an agreement with a member country, namely with Italy. See Roberts *Migration and Social Security* 216

<sup>117</sup> See Vonk 2002 *European Journal of Social Security* 325

<sup>118</sup> Global Commission on International Migration *Migration in an Interconnected World: New Directions for Action* (October 2005) 18

<sup>119</sup> 2002 *European Journal of Social Security* 325

<sup>120</sup> *Migration* 18. Even though this problem pertains mainly to migrants not covered by international agreements, it also affects those migrants covered by international agreements. This is because few agreements provide for exportability of all benefits, especially health care benefits

<sup>121</sup> *Migration and Social Security* 220

reasonably equal basis. That assumes that the benefit schemes in the respective two countries must be reasonably compatible. While this may be the case with the social security schemes of developed countries (even when the one scheme is a contributory Bismarckian scheme and the other a tax-financed, residence-based scheme), the schemes found in developing countries are often too different to allow for reciprocity.<sup>122</sup> There may be insurmountable technical difficulties to aggregating periods of insurance paid, or time spent, in the sending and receiving countries, and there may also be obstacles to exporting benefits that require administrative oversight, such as unemployment, sickness, and possibly incapacity benefits.<sup>123</sup>

However, there are no technical obstacles to extending equal treatment to migrants or to exporting retirement pensions. Roberts<sup>124</sup> argues that in these situations, one needs to move beyond the principle of reciprocity and “rethink the obligations of the receiving country”. In this regard, he proposes unilateral action on the part of the receiving country.<sup>125</sup> Along similar lines, Vonk<sup>126</sup> calls upon the EU to impose, at the very least, a number of minimum requirements which apply unilaterally to the treatment of third country migrants, such as equality of treatment on grounds of nationality, exportability of benefits and alleviation from minimum insurance periods for the right to benefit.

## 4 Discussion

### 4.1 Problems related to ratification and promotion of international agreements

The first decade after the adoption of the Convention was characterised by a lack of attention to its promotion – not only on the part of the UN itself – but also on the part of those governments which had played an active role in its preparation and design. As one commentator<sup>127</sup> noted:

“Until January 2001, there was not one person anywhere in the world, in any international organization, in any government, or any civil society group engaged with full-time responsibilities related to promoting this Convention. This contrasts sharply with the extensive numbers of staff, volunteers and collaborators mobilized by international secretariats that assured rapid entry into force of the Convention on the Rights of the Child, The Convention on Desertification and ... the Convention Against Anti-Personnel Landmines.”

While lack of promotion of the Convention is one problem, lack of ratification is another. It has already been noted that it took thirteen years for the UN Convention to garner enough ratifications to come into force.<sup>128</sup> Many obstacles to ratification can be identified. After its adoption, many UN member States have criticised the Convention as impracticable and unrealisable as

<sup>122</sup> Eg, some developing countries have provident funds that pay out a lump sum in the event of a contingency such as sickness or injury, and this may be incompatible with a scheme that pays out a continuing benefit See Roberts *Migration and Social Security* 220-221

<sup>123</sup> See Roberts *Migration and Social Security* 221

<sup>124</sup> *Migration and Social Security* 221

<sup>125</sup> *Migration and Social Security* 221

<sup>126</sup> 2002 *European Journal of Social Security* 332

<sup>127</sup> Taran 2000 *International Migration* 18

<sup>128</sup> See part 2 *supra*

an international standard in part because it is too ambitious and detailed, and because, in many cases, it departs from established human rights language.<sup>129</sup> The lack of publicity referred to above has also contributed to misconceptions about the purpose of the instrument. As Cholewinski<sup>130</sup> points out, many believe that an international convention that provides extensive human rights protection to migrant workers will only encourage more migration, especially irregular migration. This view persists despite the fact that one of the principal aims of the Convention is “to *reduce* irregular migration and its exploitation”.<sup>131</sup> In addition, extending rights explicitly to irregular migrants have also hindered ratification. During the drafting process, both Germany and the USA opposed granting rights to migrants in an irregular situation. However, such States are prevented by article 88 of the Convention from excluding this group of migrants on ratification and, as a result, are likely to decide not to ratify the Convention at all.<sup>132</sup> Finally, it has been pointed out that the international and political situation worldwide is not conducive to the protection of the rights of migrant workers, partly due to the

“continuing uncertainty in the global economy, the deepening gulf between poor and wealthy nations, and the growth of permanent migrant populations with different racial and cultural backgrounds”.<sup>133</sup>

This has resulted in less sympathy for the condition of migrant workers and their families resident in developed countries of employment, which accounts for the absence of ratification by any of the so-called “migrant receiving States”.

Nevertheless, despite the fact that none of the major “receiving States” have to date ratified the Convention, the ratification process has picked up some momentum since 2000 – so much so that by 2003, the Convention had received the 20 ratifications necessary in order for it to enter into force. In addition, and significantly, many States have utilised the provisions of the Convention as a guide in drafting its own national migration laws. One notable example is Italy, which based much of its comprehensive national migration law of 1998 on the provisions and standards of the Convention.<sup>134</sup>

Finally, another positive development is the fact that the UN has started to pay increased attention to the issue of migrancy during the last few years. In the first place, the UN Human Rights Commission appointed a Special Rapporteur on the human rights of migrants in 1999, tasked with

“examin[ing] ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, including obstacles and difficulties for the return of migrants who are undocumented or in an irregular situation”.<sup>135</sup>

<sup>129</sup> See Taran 2000 *International Migration* 19

<sup>130</sup> See Cholewinski *Migrant Workers* 202 (citing Hume *Equality of Treatment and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* in Cator & Niessen (eds) *The Use of International Conventions to Protect the Rights of Migrants and Ethnic Minorities* 82)

<sup>131</sup> Cholewinski *Migrant Workers* 202 (emphasis in original)

<sup>132</sup> Cholewinski *Migrant Workers* 202

<sup>133</sup> Cholewinski *Migrant Workers* 202

<sup>134</sup> Taran 2000 *International Migration* 18

<sup>135</sup> See Commission on Human Rights, Resolution 1999/44 (27 April 1999) The initial mandate of the Special Rapporteur was extended for a further three years in 2005: see Resolution 2005/47 (19 April 2005)

This was a critical step because, by mandating this Special Rapporteur, the UN acknowledged that violations of migrant human rights are as serious as “classic” human rights concerns such as torture, violence against women, racism and internally displaced persons, all areas for which Special Rapporteurs have been appointed.<sup>136</sup> Secondly, three recent UN initiatives place the focus directly on international migration issues, and entail the following:

- the establishment of an independent Global Commission on International Migration to study how to improve cooperation among UN and other international agencies;
- the holding by the General Assembly of a two-day high-level dialogue on international migration and development in September 2006,<sup>137</sup> and
- the establishment of the Global Migration Group by the International Organisation on Migration, bringing together the heads of several major UN agencies, including the ILO, the United Nations High Commissioner for Refugees (UNHCR), and the United Nations High Commissioner for Human Rights (UNHCHR).<sup>138</sup>

Whether this renewed focus on the issue of migration will bear any fruit is an open question, but it does represent a significant attempt on the part of the UN to address the general criticism that international efforts to defend human rights of migrants are “scattered”, “fragmented” and “limited in impact”.<sup>139</sup>

Similar difficulties that beset the UN Convention also plague the ILO Conventions. During the last fifteen years there has been neither active promotion nor any significant new ratification of the two ILO Conventions related to migrant workers’ rights.<sup>140</sup> Ratification of the two ILO Conventions related to migrant workers’ rights has slowed to a trickle in the last decade. For example, Convention 97 has been ratified by only five countries since 1996, and Convention 143 by only two, bringing the total number of ratifications for the two conventions to a disappointing 45 and nineteen respectively (out of a possible 178).<sup>141</sup> In a survey done in 2003, only twelve member countries indicated that they intend to ratify Convention 97, and only ten indicated that they intend to ratify Convention 143. By contrast, 34 member countries indicated that they do *not* intend to ratify Convention 97, and 40 member countries gave the same response in respect of Convention 143.<sup>142</sup> Obstacles to ratification of

<sup>136</sup> However, as Taran 2000 *International Migration* 33 notes, the Rapporteur on the Human Rights of Migrants (as do other Special Rapporteurs on thematic human rights issues) suffers from a significant lack of resources. The Rapporteur has only one half-time assistant, travel allocations for only one mission per year, and is offered no compensation other than coverage of travel expenses and *per diem* while on an official mission – a situation Taran 2000 *International Migration* 33 calls “a sad commentary on the funding priorities of many UN member governments”

<sup>137</sup> For a summary of the discussions, see <http://www.un.org/esa/population/migration/hld/index.html> (last accessed on 9 February 2007)

<sup>138</sup> See [http://www.un-ngls.org/international\\_migration.htm](http://www.un-ngls.org/international_migration.htm) (last accessed on 9 February 2007). See also <http://www.un.int/iom/GMG.html>

<sup>139</sup> See, eg, Taran 2000 *International Migration* 12

<sup>140</sup> See Taran 2000 *International Migration* 18

<sup>141</sup> See <http://www.ilo.org/ilolex/cgi-lex/ratifice.pl?C097> and <http://www.ilo.org/ilolex/cgi-lex/ratifice.pl?C143> (last accessed on 26 February 2007)

<sup>142</sup> ILO *Fair Deal for Migrant Workers* 160

Convention 97 listed by member countries included article 2 (concerning free service to assist migrants for employment) and article 6 (equality of treatment between foreign workers and national workers). In respect of Convention 143, article 10 (equality of opportunity and treatment) and article 14 (the right of migrant workers to geographical mobility) were most frequently cited as preventing ratification.<sup>143</sup> The most common general objection to ratification was that the Conventions are not in line with current national laws and practice. Another general objection was that the Conventions are inflexible with respect to national systems and procedures, especially the social security system – in particular provisions that grant migrants and their families the same conditions as nationals, those that offer the same rights for irregular migrants, and those with respect to family reunification.<sup>144</sup> However, despite the low level of ratification, and the unlikelihood that this will increase significantly in the immediate future, it would seem that on the whole the ILO instruments have played a vital role in orienting national laws and regulations. Many countries indicated that they have either used the Convention as a model for national laws and regulations, or intend to do so.<sup>145</sup>

Taran<sup>146</sup> reports that since the early 1990s, proposals have been made in various international fora for elaboration of guidelines or minimum standards explicitly less strict and specific than those of the 1990 UN Migrants Convention. Such minimum standards or guidelines would substitute the Convention's explicit standards with general, vague and non-enforceable "principles" instead of detailed and explicit standards backed up with monitoring and enforcement mechanisms.<sup>147</sup> In addition, a 2003 survey indicated that there was little support amongst member countries for a new ILO Convention on the rights of migrant workers.<sup>148</sup> As a result, in November 2005, a Tripartite Committee of Experts of the ILO adopted the *ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-based Approach to Labour Migration*.<sup>149</sup> As the title indicates, the *Framework* comprises non-binding principles and guidelines for labour migration, and the various role players (governments, employers' and workers' organisations, as well as relevant international organisations) are encouraged "to promote and respect its contents". It is meant to supplement and not replace any of the existing ILO instruments.<sup>150</sup> Despite its non-binding nature, one notable feature of the *Framework* is that it explicitly recognises the rights of migrant workers in an irregular situation. It encourages States parties to enter into bilateral, regional or multilateral agreements to provide social security coverage and benefits, as

<sup>143</sup> ILO *Fair Deal for Migrant Workers* 160-161

<sup>144</sup> ILO *Fair Deal for Migrant Workers* 161

<sup>145</sup> ILO *Fair Deal for Migrant Workers* 161 This is also a conclusion reached by the ILO during a 1999 survey of the relevant Conventions dealing with migrants See ILO *Fair Deal for Migrant Workers* 240

<sup>146</sup> 2000 *International Migration* 19

<sup>147</sup> Taran 2000 *International Migration* 19

<sup>148</sup> ILO *Fair Deal for Migrant Workers* 163

<sup>149</sup> See <http://www.ilo.org/public/english/standards/realm/gb/docs/gb295/pdf/tmmf1m-1.pdf> (last accessed on 26 February 2007)

<sup>150</sup> Introduction par 4

well as portability of social security entitlements, to regular migrant workers and, “as appropriate, to migrant workers in an irregular situation”.<sup>151</sup>

## 4 2 Supervision and enforcement

It is generally accepted that one of the major shortcomings of the UN system in general, and the ILO in particular, is the failure to enforce the standards contained in its instruments effectively. The individual migrant whose rights have been violated faces an uphill battle to have those rights enforced through the bodies established by the international instruments for exactly that purpose. This also holds true for any State party who alleges that another State party has failed to meet its obligations under any of the international instruments.

### 4 2 1 *The UN and the enforcement of the Migrants Convention*

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, consisting of ten experts serving in their personal capacity, has been established in terms of the Migrants Convention to monitor compliance with the terms of the Convention.<sup>152</sup> The supervisory functions of the Committee are threefold:

- to examine reports on the application of the Convention submitted by State parties;<sup>153</sup>
- to receive and consider communications from a State party alleging that another State party is not fulfilling its obligations under the Convention;<sup>154</sup> and
- to receive and consider communications from or on behalf of individuals within a State party who claim that their rights under the Convention have been violated.<sup>155</sup>

As far as the first function is concerned, States parties are under an obligation in terms of article 73 to submit reports on the “legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the Convention”. Initially these reports must be submitted one year after the entry into force of the Convention<sup>156</sup> and thereafter every five years and whenever the Committee so requests. Article 74 directs the Committee to examine these reports and transmit appropriate comments to the State party concerned. The Committee may also request supplementary information when considering the reports and receive observations from States parties on any comments made.

<sup>151</sup> Par 9 9

<sup>152</sup> Art 72 The number of experts will increase to 14 once 41 States have ratified the Convention (see <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/B87E9E85C7147498C1256CEF00385E50?opendocument> (last accessed on 26 February 2007))

<sup>153</sup> Art 73

<sup>154</sup> Art 76

<sup>155</sup> Art 77

<sup>156</sup> The Convention came into force on 1 July 2003



The latter two procedures, namely to receive and consider State and individual complaints, are in effect the only formal enforcement mechanisms contained in the Convention. However, both procedures require ten declarations by States parties to enter into force, two of which must include the two States involved in the inter-State complaint.<sup>157</sup> To date, no State party has made the necessary declaration. During drafting, those State delegations favouring the optional procedure prevailed over those favouring a mandatory inter-State complaints mechanism. The former argued that a mandatory procedure would be inappropriate because of the complexity of the Convention and also because it would discourage potential States parties from ratifying it.<sup>158</sup> Those in favour argued that only through such a procedure would the Convention's effective implementation be ensured.<sup>159</sup> The decision was also taken during drafting to make the individual complaints mechanism optional rather than mandatory. Those in favour of a mandatory mechanism pointed to the relative efficiency of the individual complaints mechanism under other international human rights instruments, in contrast with the inter-State grievance machinery which was rarely, if ever, used.<sup>160</sup>

The Convention contains no formal enforcement mechanisms beyond the inter-State and individual complaint procedures. Even if a State party is found to have infringed the Convention, there are no binding sanctions available to the Committee to enforce against that State party, which is a general feature of UN human rights Conventions.<sup>161</sup> Instead, the Convention shifts the responsibility for enforcement to States parties themselves. Article 83 of the Convention obliges States parties to ensure the following:

- that any person whose rights have been violated has an effective remedy;
- that the person seeking a remedy is entitled to a review of his or her claim and to a decision by competent judicial, administrative, or legislative authorities; and
- that remedies, when granted, be enforced by the competent authorities.

Article 84 obliges States parties to adopt the legislative and other measures necessary to implement the provisions of the Convention. Apart from these rather weak guarantees, those wishing to “enforce” the Convention will have to rely on informal mechanisms, which are essentially limited to publicity and action by NGOs.<sup>162</sup>

#### 4 2 2 *The ILO and the enforcement of Conventions*

In general, the ILO relies on what has been termed “sunshine, carrots, and sticks” to enforce its standards and norms.<sup>163</sup> The ILO has relied primarily on

<sup>157</sup> See Cholewinski *Migrant Workers* 194

<sup>158</sup> Cholewinski *Migrant Workers* 194

<sup>159</sup> Cholewinski *Migrant Workers* 194

<sup>160</sup> Cholewinski *Migrant Workers* 195

<sup>161</sup> Cholewinski *Migrant Workers* 197

<sup>162</sup> Cholewinski *Migrant Workers* 197

<sup>163</sup> See Elliott “The ILO and Enforcement of Core Labor Standards” 2000 *International Economics Policy Briefs* 2

the first (through its elaborate supervisory mechanisms) and the second (in the form of technical assistance). Only once, in the so-called Burma forced-labour case, has the ILO made use of the third. Until then, the use of sticks was limited primarily to peer pressure.<sup>164</sup> Each of these mechanisms will now be discussed briefly.

#### 4 2 2 1 “Sunshine”: supervision of the application of Conventions

Supervision of the application of the Conventions of the ILO can take two main forms: a routine reporting-and-review process and ad hoc procedures for handling complaints by worker or employer groups or governments regarding another member’s compliance.<sup>165</sup> In respect of the first, article 22 of the ILO Constitution requires member governments to report routinely on conventions they have ratified, while article 19 may be invoked to request periodic reports from members explaining why they have not ratified a particular convention and describing what they are doing under their national laws to achieve the goals of the Convention. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) reviews both types of reports each year and prepares its own report, noting instances of progress as well as problems in implementation.<sup>166</sup> The CEACR may also choose to address a potential problem by submitting a “direct request” for additional information to a member government. Another layer of supervision and potential peer pressure is added at the annual International Labour Conference when the Conference Committee on the Application of Conventions and Recommendations meets to review the CEACR report. In addition to a general discussion, the Conference Committee discusses individual cases and invites governments to explain problems in applying ratified Conventions. Its report may include references to cases of special concern, including “continued failure to implement”.<sup>167</sup> The approach of the CEACR has been characterised as “conservative”, not only with regard to the action that can be taken, but also with regard to the language used.<sup>168</sup> Questions addressed to national governments are “inevitably” couched in extremely courteous diplomatic language – so much so that “it is doubtful whether junior clerks in labour ministries understand easily what is being asked”.<sup>169</sup> In respect of the second form of supervision, namely *ad hoc* procedures for handling complaints, article 24 of the ILO Constitution entitles any worker or employer organisation, not just those formally appointed as delegates to the ILO, to make representations when they are of the opinion that a member government is not complying with a convention it has ratified.

<sup>164</sup> Elliott 2000 *International Economics Policy Briefs* 2

<sup>165</sup> See Elliott 2000 *International Economics Policy Briefs* 2

<sup>166</sup> Elliott 2000 *International Economics Policy Briefs* 2

<sup>167</sup> Leary *International Labour Conventions and National Law* (1982) 19

<sup>168</sup> Leary *International Labour Conventions* 153

<sup>169</sup> Leary *International Labour Conventions* 153 Nevertheless, Leary *International Labour* 153-154 credits the CEACR with “persistence and patience in the pursuit of the elimination of discrepancies between national law and the provisions of ratified conventions” She writes that “[t]he supervisory Committees have not always been successful in persuading governments to their point of view but their diplomatic persistence has been successful on many occasions”

These procedures highlight the importance of “ratification”. Except for the article 19 procedure discussed above, no action can be taken against a member government that has not ratified a Convention. This shortcoming was partially addressed in 1998 with the adoption of the Declaration on Fundamental Principles and Rights at Work. The Declaration requires *all* member countries that have not ratified one or more of the eight Conventions<sup>170</sup> associated with these rights to report annually on what they are doing to promote the principles involved, though not the more detailed legal obligations in the Conventions.

In addition to the weak nature of “peer pressure”, another problem with the supervisory system is the sheer volume of information that the organisation has to deal with annually. As more countries have joined, and more Conventions have been adopted, the total number of routine reports required has risen from an annual average of just over 600 in the 1930s to 2036 in 1998.<sup>171</sup> Of these, the proportion submitted in timely fashion averages 71 percent. The high number of reports inevitably means that the CEACR is overburdened, leading to a situation in which few of the adopted instruments can be carefully examined with sufficient regularity. This has resulted in the CEACR constantly having to adjust the reporting periods, meaning that instead of examining compliance on an annual basis (as provided for in article 22), in practice it takes place every three, four or even five years.<sup>172</sup>

#### 4 2 2 2 “Carrots”: identifying priorities for technical assistance

Another objective of the Declaration on Fundamental Principles and Rights at Work is to identify priorities for technical assistance. It is accepted that the

“most effective and sustainable means of improving implementation of core labor standards is to provide technical and financial assistance to countries that want to improve enforcement but lack the resources to do it”.<sup>173</sup>

The Declaration has already attracted increased financial contributions from developed country members who are interested in ensuring its effectiveness. Unfortunately, however, this “carrot” is limited to the eight core Conventions associated with the Declaration, none of which pertain directly to migrant workers.

#### 4 2 2 3 “Sticks”: more than peer pressure?

The ILO Constitution makes provision for a complaints procedure that potentially extends the power of the ILO beyond that of mere peer pressure. Article 26 of the Constitution is the provision reserved for the most serious cases and complaints. It provides that a State<sup>174</sup> which has ratified a particular Convention may

<sup>170</sup> These are the Conventions associated with the four core principles of freedom of association and the right to collective bargaining, freedom from forced labour, abolition of child labour, and non-discrimination in employment

<sup>171</sup> See Elliott 2000 *International Economics Policy Briefs* 2

<sup>172</sup> See Penning & Schulte *International Social Security Standards: An Overview* in Penning (ed) *Between Soft and Hard Law* (2006) 18

<sup>173</sup> Elliott 2000 *International Economics Policy Briefs* 4

<sup>174</sup> Unlike art 24 representations, art 26 representations may only be made by official ILO delegates

file a complaint that another ratifying State is not effectively observing the provisions of the Convention. After a complaint is made, the ILO governing body tries to resolve it by seeking the member's permission to send a Direct Contacts Mission to discuss the problem with the government in question. If the Governing Body does not deem it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time, it may appoint a Commission of Inquiry to investigate the charges.<sup>175</sup> The Commission will report its findings and, if appropriate, make recommendations as to how the member can make its laws and practices consistent with the relevant Convention. The member can take the Commission's findings on appeal to the International Court of Justice. If the Commission's findings are not appealed or if they are appealed and upheld, the country will be asked to report on what it has done to implement the Commission's recommendations.<sup>176</sup> Significantly, article 33 provides that if satisfactory compliance is not forthcoming, "the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith". While it is not clear what precise action the governing body (through the member States) may be able to take, it is generally accepted that it may take the form of economic or other sanctions.<sup>177</sup>

The article 26 procedure has hardly ever been invoked. Indeed, between 1919 and 1960, there was only one complaint and in the following 40 years an average of only six complaints per decade were received.<sup>178</sup> In all, only six Commissions of Inquiry have been appointed and none of these Commission reports were appealed to the International Court of Justice. The application of the potentially powerful article 33 was not raised until 2000, when the governing body invoked it for the first time in the ILO's history and recommended action against Burma (or Myanmar, as it is also known) in respect of the practice of forced labour.<sup>179</sup> The action recommended, although vaguely worded, is far-reaching. It does not directly impose sanctions against Burma, but calls on member governments, employers and workers, as well as other international organisations, including the United Nations, to "take appropriate measures" and to "reconsider ... any cooperation they may be engaged in with [Burma]".<sup>180</sup> As a result, some coun-

<sup>175</sup> Art 26(3)

<sup>176</sup> See Elliott 2000 *International Economics Policy Briefs* 5

<sup>177</sup> See International Labour Office *Reports I and II and Constitutional Questions*, 29th Session of the International Labour Conference (1946) referred to by Elliott 2000 *International Economics Policy Briefs* 5

<sup>178</sup> See Elliott 2000 *International Economics Policy Briefs* 5

<sup>179</sup> Elliott 2000 *International Economics Policy Briefs* 5 In 1996, a number of worker delegates filed an art 26 complaint regarding forced labour in Burma. A Commission of Inquiry was appointed in 1997, and in 1998 it called on the government of Burma to bring its laws and practices in compliance with the Forced Labor Convention (No 29) by May 1999. In the absence of a constructive response from the regime in Burma, art 33 was invoked in March 2000. The governing body recommended a variety of actions, including calling upon member States "to review their relationship with the Government of Myanmar [Burma] and to take appropriate measures to ensure that Myanmar 'cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labor...'" See Elliott *International Economics Policy Briefs* 6. The situation is to date still unresolved, with Burma recently threatening to withdraw its membership from the ILO in response to a recent report by the ILO that Burma has still not fully complied with its recommendations (see in this regard *Report of the Director-General: Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)* Governing Body doc. GB 291/5/2, 291st Session, Geneva (Nov 2004) par 11 and 12)

<sup>180</sup> See Resolution adopted by the 88th Session of the International Labour Conference (June 2000)

tries imposed economic and trade sanctions against Burma. However, despite these actions, many argue that the resolution underscores the weakness of the ILO because it cannot directly take action against a member country, but has to call on other actors to do so.<sup>181</sup> In addition, the Burma case makes it clear that successful resolution also requires the cooperation of the “offending” government. This was acknowledged by the ILO itself:

“The Myanmar case thus demonstrates that it is impossible to make effective progress against forced labour when there is a climate of impunity and repression against persons who denounce forced labour abuses, in the absence of the political will to clamp down on the military and local authorities who are themselves deriving economic advantage from forced labour practices.”<sup>182</sup>

However, the case of Burma is nevertheless encouraging for a variety of reasons. It represents the first instance where the ILO has used its constitutional authority to respond to egregious violations, thereby setting a potential precedent for future similar action. Secondly, it shows that the ILO is not entirely “without teeth” when it comes to violations of international labour standards. Even though the case has yet to be resolved after nearly ten years of activity, it has placed the issue of forced labour in Burma under the international spotlight, thereby forcing a recalcitrant government to take actions it may otherwise not have done. On the other hand, it must be noted that the case of Burma was a relatively “easy case” for the ILO. As one commentator<sup>183</sup> has noted, Burma is “a small, poor, relatively isolated country and the violations were both egregious and well documented”. It is clear that the real test of ILO credibility will come when it is forced to confront larger and more powerful members.

#### 4 2 3 *Incorporation of norms in national law – a better solution?*

Although international treaties such as ILO Conventions are couched in terms of obligations for the ratifying State, the ultimate intended beneficiaries are individuals within the State.<sup>184</sup> As Leary<sup>185</sup> argues,

“[i]n the absence of a supra-national legal system, the effective incorporation of the norms of these treaties in national law is of crucial importance if they are to accomplish their purpose”.

States have adopted different methods of incorporating treaties in national law. Some States employ the method of “legislative incorporation”, meaning that the norms of treaties become national law by this method only when enacted through the normal legislative process.<sup>186</sup> Other States have adopted the method of “automatic incorporation”, whereby treaties become binding

<sup>181</sup> See Elliott *International Economics Policy Briefs* 6

<sup>182</sup> 93rd Session of the International Labour Conference *Report of the Director General (Report 1(B)): A Global Alliance against Forced Labour* (2005) 26 par 109

<sup>183</sup> See Elliott *International Economics Policy Briefs* 7

<sup>184</sup> See Leary *International Labour* 1

<sup>185</sup> *International Labour* 1

<sup>186</sup> Leary *International Labour* 2. South Africa falls into this group of countries. S 231(4) of the Constitution, 1996, provides that “[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation”. However, the same subsection provides that “a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”. Whether the provisions of a treaty are self-executing or not are not always easy to determine. See Dugard “International Law and the South African Constitution” 1997 *European Journal of International Law* 77 and Leary *International Labour* 38 *et seq*

law immediately upon ratification (plus publication or proclamation in some countries).<sup>187</sup> For a variety of reasons, including the lack of legal certainty that characterises the system of automatic incorporation, ILO supervisory organs have frequently insisted on the adoption of legislation specifically implementing ILO Conventions rather than on automatic incorporation.<sup>188</sup> In any case, the special nature of fundamental social rights as a rule requires their specific implementation by the lawmaker; their mere ratification normally does not create an enforceable legal position for the individual.<sup>189</sup> Under the Migrants Convention, States parties are specifically obliged to undertake to adopt the legislative and other measures necessary to implement the provisions of the Convention, which includes the introduction of effective remedies and enforcement mechanisms.<sup>190</sup> Against the background of the weak (and to date non-existent) enforcement mechanisms contained in the UN Convention, action at national level becomes of paramount importance in order to ensure the Convention's efficacy.<sup>191</sup> The incorporation of treaty norms in national law should go a long way towards providing more effective relief to individuals aggrieved by the failure of a country to adhere to or to implement the provisions of an international treaty.

#### 4 3 The UN Migrant Workers Convention – effective protection of undocumented migrants?

The extension of protection to undocumented migrants by the UN Migrant Workers Convention represents a watershed or, as one commentator<sup>192</sup> has argued, “a political and jurisprudential achievement”. With few exceptions,<sup>193</sup> all other instruments regarding migrant workers have provided protection to documented or regular migrants only. The question that remains is to what extent the incorporation of undocumented migrants have been successful, especially when viewed from the perspective of the human rights of the undocumented migrant.

<sup>187</sup> Leary *International Labour* 2

<sup>188</sup> For additional reasons, see Leary *International Labour* 155-156

<sup>189</sup> Report of the XV World Congress of Labour Law and Social Security 22-26 Nov 1997 *Human Rights and Social Security* Blanpain (ed) (1998) 21

<sup>190</sup> Arts 83 and 84

<sup>191</sup> See Cholewinski *Migrant Workers* 201

<sup>192</sup> See Bosniak 1991 *International Migration Review* 758

<sup>193</sup> Unlike Convention 97, which confines protection to any person “regularly admitted as a migrant for employment”, art 9(1) of Convention 143 does extend rights “arising out of past employment as regards remuneration, social security and other benefits” to undocumented or irregular migrants. The objective of this part of the Convention is to extend to undocumented migrant workers some rights that derive from their having been employed. Eg, the fact that an undocumented migrant does not have a work permit should not deprive him or her from receiving remuneration for work that he or she has performed. Par 34 of Recommendation 151 elaborates further on this right, and provides that “a migrant worker who leaves the country of employment, irrespective of the legality of his stay therein to any remuneration for work performed, including severance payments normally due; to benefits which may be due in respect of any employment injury suffered; and in accordance with national practice to compensation in lieu of any holiday entitlement acquired but not used; (and) to reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international agreements” (own emphasis). While it is clear that only social security benefits that derive from past employment are covered, it is equally clear that these benefits are extended to both documented and undocumented migrants

On the face of it, the Convention extends significant rights to undocumented migrant workers and family members. Apart from the right to social security, it also includes the right to due process, equal protection, access to the courts, rights to free expression, and so forth. This in itself is significant, and if properly enforced, could improve the status and situation of these workers considerably. On the other hand, the Convention does allow States to afford lesser protections to undocumented migrant workers than to documented migrants, confirming the view that the extension of benefits to irregular migrants is done "in the context of an overall disapproval of the phenomenon of irregular migration".<sup>194</sup> For example, under the terms of the Convention, the undocumented migrants do not have guaranteed rights to family unity, certain trade union freedoms, liberty of movement, participation in the public affairs in the State of employment, equality of treatment with nationals with regard to certain government benefit programs including housing, educational and health-related services, and further employment protections.<sup>195</sup>

However, as Bosniak<sup>196</sup> points out, the real problem with the Convention, and one which will seriously limit its efficacy as a human rights instrument for undocumented migrants, is that its provisions protecting States' sovereign prerogatives to control immigration will often effectively undermine or defeat the rights it provides to those migrants. As a practical matter, efforts to exercise the rights prescribed in the Convention may well expose the migrants to expulsion and punishment for immigration-related violations. This continued vulnerability to prosecution for immigration violations will not only limit their ability but also their willingness to exercise the rights guaranteed to them under Part III of the agreement. For example, upon applying for social security benefits or upon presenting themselves for emergency medical care, undocumented migrants would almost certainly be required to display identification, or in some other way reveal the particulars of their status, "which could lead to questions and to unwanted contact with immigration officials".<sup>197</sup> There is nothing in the Convention that would protect an undocumented migrant who finds him- or herself in such a situation. Article 79 expressly provides that

"[n]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and their families".

In addition, the powers of States to enforce their immigration policies may undermine one of the most significant rights extended to undocumented migrants, namely the right to enforce their rights against an employer irrespec-

<sup>194</sup> Pieters & Schoukens *Exploratory Report* 8

<sup>195</sup> Convention Part IV See also Bosniak 1991 *International Migration Review* 741

<sup>196</sup> 1991 *International Migration Review* 759

<sup>197</sup> Bosniak 1991 *International Migration Review* 760 This is not mere speculation In Denmark, eg, entitlement to social assistance is reserved for people who have lived in the country for the previous three years Social assistance for people who have lived in Denmark for a shorter period of time is decided by local authorities acting under guidance laid down by the Ministry of Social Affairs However, if a claim for social assistance is made by a person who has lived in Denmark for less than three years, he or she may be deported See Roberts *Migration and Social Security* 211

tive of their unauthorised status.<sup>198</sup> As Bosniak<sup>199</sup> argues, even if an employer has violated this right by contacting immigration officials and notifying them of the migrants' undocumented status,

“a State is unlikely to forego prosecuting an immigrant for violations of its immigration laws simply because his or her employer will also be subject to prosecution”.

Finally in this regard, the protection afforded to undocumented migrants may be limited in another respect. Even though a State cannot ratify the Convention while at the same time excluding the application of any part of the Convention, it may ratify with reservations as to specific articles.<sup>200</sup> It is therefore possible that many States will ratify the Convention, if at all, with a variety of reservations as to specific articles which benefit undocumented migrants.

#### 4 4 Social insurance and social assistance – equal treatment?

A typical characteristic of the right to social security is its universality.<sup>201</sup> The right presupposes that persons who are in a vulnerable position should be protected not because of their status as workers, or because of their nationality, but by virtue of their membership of society.<sup>202</sup> However, in the case of migrants, the universal character of the right to social security has been considerably undermined. Access to social assistance for migrants has always been more problematic than access to social insurance. Because social insurance schemes have to a large extent always presupposed a contract of service with the employer, nationality has not really been an issue, at least where coverage of migrants is concerned.<sup>203</sup> For migrants, the absence of a nationality condition implies that migrants can be integrated into the social insurance schemes of the host-State. However, migrants nevertheless experience disadvantages in claiming social insurance benefits – disadvantages resulting from the specific legal requirements which may exist in national legislation.<sup>204</sup> These include reduced pension rights as a result of broken insurance records, problems in accessing benefits abroad, and many others. The solution to these problems can be alleviated by national legislative efforts, but in the end the realisation of effective solutions requires the linking together of national social security

<sup>198</sup> Art 25(3)

<sup>199</sup> 1991 *International Migration Review* 761 In terms of art 68(2), States must impose sanctions against employers who employ irregular migrants in order to “eliminate the employment in their territory of migrant workers in an irregular situation”

<sup>200</sup> Art 88 In drafting this provision, State representatives deliberately capitalised the “p” in “Part” to clarify its reference to entire sections of the Convention rather than to individual provisions See Nafziger & Bartel 1991 *International Migration Review* 785

<sup>201</sup> See Vonk 2002 *European Journal of Social Security* 318 Eg, the Universal Declaration on Human Rights formulates the right to social security for everyone as a member of society Similarly, the International Covenant on Economic, Social and Cultural Rights expresses the right of everyone to social security

<sup>202</sup> Vonk 2002 *European Journal of Social Security* 318

<sup>203</sup> Vonk 2002 *European Journal of Social Security* 319 In a recent study of selected European countries, it was noted that where social security benefits are based on contributory payments, equal treatment between nationals and migrants is normally ensured See Cholewinski *The Legal Status of Migrants Admitted for Employment* (2004) 84

<sup>204</sup> Vonk 2002 *European Journal of Social Security* 319



schemes on the basis of international agreements.<sup>205</sup> The point is, however, that in principle, nationality has not been a barrier to the extension of social insurance rights to migrants.<sup>206</sup>

Extending social assistance to migrants, however, has been less straightforward. The reason is not difficult to discern: while the origins of social insurance schemes are based upon a reciprocal insurance relation between an insured person and a social insurance institution, the origins of social assistance schemes are based upon the notion of unilateral charitable obligation. In this regard, the prevailing opinion is that “it [is] not the host-state but the state of origin which [is] responsible for offering support to the needy”.<sup>207</sup> Nationality has gradually been replaced by the condition of territoriality in social security law. However, in social assistance this principle has never been fully accepted. The two principles are rather intertwined (at least in almost all European countries) where there are links between social assistance and the legality of residence.<sup>208</sup> This means that, in practice, only those with permanent residence status usually qualify for social assistance.<sup>209</sup> While some countries simply deny access to social assistance to undocumented migrants, other countries only recognise entitlement to certain forms of minimal aid.<sup>210</sup> However, most countries follow an “in between approach” in which some (but not all) social assistance benefits are granted to irregular migrants.<sup>211</sup> These benefits usually include non pecuniary services such as food, clothing, housing as well as assistance benefits for children and minors.<sup>212</sup> International law does little to improve the position of undocumented or irregular migrants in these instances, and social assistance is also largely excluded from international coordination treaties. For instance, Convention 97 specifically allows countries, in their national laws or regulations, to prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds.<sup>213</sup>

<sup>205</sup> Vonk 2002 *European Journal of Social Security* 319 For a discussion of the important role of international agreements, see part 3 *supra*

<sup>206</sup> This even holds true for irregular migrants Art 68(2) of the Migrants Convention guarantees the “rights of migrant workers *vis-à-vis* their employer arising from employment” However, during the drafting of the Convention, it was emphasised that the rights protected were only those that had “already accrued at the point the employment was terminated owing to its illegality” See Cholewinski *Migrant Workers* 189

<sup>207</sup> Vonk 2002 *European Journal of Social Security* 320

<sup>208</sup> As Vonk 2002 *European Journal of Social Security* 321 points out, most States require legal residence for the right to social assistance, while immigration law may make the legality of residence dependent upon the condition that the foreigner does not rely upon public funds

<sup>209</sup> Eg, in Germany, the child benefit and the payment for raising children are only available to migrants in possession of a residence permit, but not those holding a temporary residence title In the United Kingdom, Immigration Rules prevent migrant workers from accessing non-contributory or means-tested benefits (eg, income-based job seeker’s allowance and income support, housing benefit and council tax benefit, family credit, child benefit, and disability allowances) See Cholewinski *Legal Status* 26 39

<sup>210</sup> See Vonk 2002 *European Journal of Social Security* 329

<sup>211</sup> One example is that of the Netherlands where, in terms of the so-called “Linking Act” (*Koppelingswet*), irregular migrants have since 1998 been fully excluded from all public services (secondary or higher education, housing, rent subsidy, facilities for handicapped persons, health care and all social security benefits, including national assistance) However, legal aid, emergency health care and education for children to the age of eighteen years remain accessible to all migrants, including irregular ones See Minderhoud “The Dutch Linking Act and the Violation of Various International Non-Discrimination Clauses” 2000 *European Journal of Migration and the Law* 186-187

<sup>212</sup> See Pieters & Schoukens *Exploratory Report* 11-12

<sup>213</sup> Art 6 1(b)(ii)

It is clear that migrants pay taxes, including indirect taxes, from the moment of arrival in the host country, thereby contributing to the financing of the social security system. It is hard to make a fair case for allowing migrants to contribute economically, but then refuse to share the economic benefits and risks.<sup>214</sup> Even so, undocumented migrants (with the exception of access to certain forms of minimal aid) are in most countries excluded from social assistance benefits. It may be necessary to amend the relevant international instruments to expressly provide for the extension of certain minimum standards of protection to all migrant workers, especially those in an irregular situation.<sup>215</sup>

## 5 Concluding remarks

Migration and, by implication, migrant workers, are predominant features of the contemporary age of globalisation. Migration worldwide has shown a constant upward trajectory, with one in every 50 human beings worldwide living outside their country of origin.<sup>216</sup> However, an equally defining feature of the globalised world is the generalised, widespread and commonplace violation of migrants' human rights.<sup>217</sup> The plethora of international standards concerned with migrant workers and their families, many of which were examined in this article, certainly gives the impression that international human rights law has given adequate attention to the protection of the rights of this group. While the reach of the UN and ILO instruments is extensive, many problems remain. These relate to both the content and enforcement of the international standards. In respect of content, one of the most glaring shortcomings is the exclusion of irregular migrants from the reach of the instruments. Even when they are included, as is the case under the UN Convention, their protection is limited and in many cases inadequate. It was pointed out that efforts to exercise the rights prescribed in the Convention may well expose the migrants to expulsion and punishment for immigration-related violations. In respect of enforcement, it was pointed out that both the UN and ILO systems of supervision and enforcement are inadequate and ineffectual. Lack of interest on the part of member States is also a defining feature of these instruments, with no significant ratification of any of the ILO instruments occurring during the last decade, and the UN Convention requiring thirteen years to garner enough signatures to come into force eventually.

However, it appears that both the UN and the ILO have in recent years begun to pay renewed attention to the issue of migrancy. Two examples of this renewed interest is the appointment of the Special Rapporteur on the Human Rights of Migrants in 1999, and the adoption in 2005 of the ILO Multilateral Framework on Labour Migration. In addition, it is important to note that inter-

<sup>214</sup> See Roberts *Migration and Social Security* 222

<sup>215</sup> Vonk 2002 *European Journal of Social Security* 331 proposes this in the context of the European Union (EU). He suggests that with the introduction of common immigration measures, the EU should consider adopting minimum standards of social protection for both asylum seekers and "illegal" immigrants

<sup>216</sup> See Taran 2000 *International Migration* 9

<sup>217</sup> Taran 2000 *International Migration* 9

national instruments have played a significant role as blueprints for reform of national legal standards.

In respect of social security specifically, the role of bilateral and multilateral agreements cannot be overstated. These agreements have the advantage of flexibility by ensuring precise application of international principles and solving unique problems that may be experienced by the countries or regions concerned. However, despite the positive role that these agreements play, their overall reach is limited, covering less than a quarter of all international migrants. Particularly affected are migrant workers from the developing world, who are seldom covered by international agreements. Social security systems found in the developing world are often significantly different from and therefore incompatible with the systems in the developed world, which makes the conclusion of international agreements very difficult, if not impossible. The suggestion made in this paper is that, under these circumstances, the reciprocity principle may need to be jettisoned in favour of unilateral action on the part of the receiving, developed State. In the absence of international agreements, granting equal treatment to migrants and exporting pensions unilaterally to migrants from the developing world will not only present few technical obstacles, but, more importantly, endorse important standards of economic justice.

Finally, it has been pointed out that extending social assistance to migrant workers has been less straightforward than the extension of social insurance benefits. In most cases, migrant workers are excluded from benefits paid wholly or partly out of public funds, with those in an irregular situation bearing the brunt of this policy decision. While few would deny a country the right to establish a minimum period of residence as a precondition for the receipt of social assistance benefits, it must be acknowledged that migrants pay taxes from the moment of their arrival in the host country, thereby contributing to the financing of the social security system. As the ILO notes, account should be taken of the fact that “the effective participation of migrant workers in the financing of national social security programmes is not limited to those contributions which may be deducted from wages”.<sup>218</sup> Excluding migrant workers entirely from all tax-funded benefits is a refutation of this contribution, and violates principles of social justice and fairness. Many countries acknowledge this contribution by extending some social assistance benefits to both regular and irregular migrants. However, this is done haphazardly, and, being dependent on national law, inevitably differs from country to country. In the absence of international guidelines, this will continue to be the case. The time may be ripe to consider including the guarantee of some form of minimal social assistance to migrant workers in the relevant international instruments.

### OPSOMMING

Migrasie toon wêreldwyd 'n stygende tendens. Daar word bereken dat een uit elke vyftig mense buite hul land van oorsprong woon. Wat egter ook 'n stygende tendens toon is die algemene en wydverspreide miskennening van die menseregte van trekarbeiders, m a w persone wat buite hulle landsgrense werk. Hierdie artikel ondersoek die rol wat internasionale instrumente (soos uitgereik en aangeneem deur die Ver-

<sup>218</sup> ILO *Introduction to Social Security* (1989) 159

enigde Nasies en die Internasionale Arbeidsorganisasie) asook internasionale ooreenkomste (bilateraal en multilateral) speel om die regte van trekarbeiders te beskerm. Veral die beskerming van trekarbeiders se reg op sosiale sekerheid (wat beide sosiale versekering en sosiale bystand insluit) kom onder die loep. Alhoewel daar onlangs positiewe ontwikkelinge op internasionale vlak plaasgevind het, en die rol wat bilaterale en multilaterale ooreenkomste speel bemoedigend is, dui die artikel daarop dat daar baie ruimte vir verbetering is. Tekortkominge word uitgewys en spesifieke voorstelle vir verbeteringe word gemaak. Laastens word die kwessie van die verlening van sosiale bystand aan trekarbeiders bestudeer. Daar word bevind dat meeste lande weier om voordele wat in die geheel of gedeeltelik vanuit staatsfondse gefinansier word aan trekarbeiders te verleen. Hierdie stand van sake word gekritiseer op die basis dat dit neerkom op 'n miskenning van die bydrae wat trekarbeiders tot die staatskas maak deur middel van (direkte en/of indirekte) belastingbydraes, asook as 'n miskenning van die beginsels van sosiale geregtigheid en billikheid. Die tyd is ryp dat daar oorweging geskenk moet word aan die insluiting van 'n bepaling in die relevante internasionale instrumente wat 'n minimum vlak van sosiale bystand aan trekarbeiders waarborg.