THE CONFLICT RULES ON THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS:
A PROPOSITION FOR INDONESIA AND ASEAN

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ISBN: 978-90-77096-25-3
NUR: 820

RIJKSUNIVERSITEIT GRONINGEN

The Conflict Rules on the Protection of the Rights of Migrant Workers: A Proposition for Indonesia and ASEAN

Proefschrift

ter verkrijging van het doctoraat in de
Rechtsgeleerdheid
aan de Rijksuniversiteit Groningen
op gezag van de
Rector Magnificus, dr. F. Zwarts,
in het openbaar te verdedigen op
donderdag 11 december 2008
om 14.45 uur

Ida Susanti
geboren op 27 augustus 1967
te Malang (Indonesië)

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ACKNOWLEDGMENT

The poor protection afforded to Indonesian migrant workers has bothered my conscience for a long time. At the same time, my passion for Private International Law does not allow me to stop thinking about this approach. This research really makes my dream come true. Finding conflict rules to protect the rights of migrant workers is a perfect combination between these two concerns. There are many existing imperfections in this dissertation, due to my limited knowledge and understanding of this topic. Nevertheless, I still hope it will introduce a fresh method to determine the level of legal protection of the rights of migrant workers in ASEAN territory.

This dissertation is the product of four years of research at the Ulrik Huber Institute for Private International Law at the University of Groningen, as well as some visiting researches at the International Labour Organization and the International Organization for Migration in Geneva; the Max Planck Institute for Comparative and Private International Law in Hamburg; and the Max Planck Institute for Foreign and International Social Law in Munich. I am, however, indebted for the support and friendship given to me during these years. I am delighted and grateful to have worked with Prof. dr. M.H. ten Wolde, LL.M. as my 1st promoter. I have learnt a lot from you. My appreciation also goes to Prof. dr. W.A. Zondag, LL.M. as my 2nd promoter. Your support and encouragement are meaningful to me. I am thankful to dr. H.H. Voogsgeerd, LL.M. as my peer and mentor. Your passion for International Labour Law is such an inspiration. My high appreciation goes to Prof. dr. C.J. Loonstra, LL.M., Prof. dr. F.J.M. de Ly, LL.M. and Prof. dr. Sunaryati Hartono, SH. MCL., as the members of the reading committee, who have given very critical remarks about this dissertation. I also would like to thank Mrs Paula Cunningham, who has edited the English of this dissertation; dr. J.G. Knot, LL.M. who has written the Dutch version of the abstract and part of the summary of this dissertation (together with Prof. dr. M.H. ten Wolde, LL.M.) and continuously has rechecked the final lay-out of this dissertation; Ms N.A. Baarsma, LL.M. who gave critical thought in the process to finalize this dissertation and Ms K.T. Galli, who arranged many administrative works during my study period. I would not have been able to finish this research without the support of the *Centrum voor Recht, Bestuur en Samenleving* (especially dr. J. Houtman), the Dutch Foundation *Stichting ter bevordering van het Internationaal Privaatrechtelijk Onderzoek*, the Rector of the Parahyangan Catholic University and the former and present Dean and Vices Dean of the Faculty of Law at the Parahyangan Catholic University in Indonesia.

My deepest appreciation goes to all colleagues and friends at the Private International Law Section: Every single one of you occupies a very important part in my heart. You were always there during the ups and downs of my life in the Netherlands. For me, doing the doctoral research was not only a matter of legal study, but also a matter of learning how to face the reality. You accompanied me throughout, friends. This section is such a family to me.

I would also like to extend my gratitude to the following individuals, who have supported me along the way: To Prof. dr. W.D. Verwey, LL.M. who always believes in me. You and Christa are such true friends; to the Kwik family, oom J.F. Kromme and Ms Mechteld Rouppe van der Voort, who always showed concern about my life and me; to Bude Nani and Manda, who always gave me a warm feeling. My life in the Netherlands would be very lonely without the crowds and communality of my Indonesian buddies: the Bear Family, Bima, Wisnu & Yuli, the Moel Family, Tita, Asaf & Tresna. Special thanks to Rina, who was always patient to accompany me during my treatment in the hospital.

The love and support of my absent friends is highly appreciated: Pak Bayu Seto, Mbak Ni and Mita, thank you for always being there for me; to Bu Elly Erawaty, I am touched by your incredible compassion and concern about me; to Tristam, thank you for sharing the anxieties of being a PhD student with me; to Prof. dr. B. Arief Sidharta, SH., dr. Herlien Budiono, SH. Notaris, Pak Agustinus Pohan, Mas Budi Prastowo &

Mbak Nur, my network of ex-Groningers: Ria Pertiwi and the family members, Fonita, Banar – Olin & Enya, Broerie, Hasna, Nathan, Mas Andreas & Mbak Cicil, Sari and the family members, thank you for your friendship. Special thanks to Sr. Angeline Machado in Geneva, your continuous prayers for me lead my way.

I could never have done this research and have survived in this very far-distanced country without the unconditional love of my family. For my mami and papi, my love and thanks to you both are more than words can say; for my De, ko Tjen, Reninta and Calvin, thank you for being my beloved family. I know that I owe each one of you an enormous debt of gratitude. A word of thanks goes to Ratna, my one and only beloved family in the Netherlands, who has supported and loved me along the way. Last but not least, special thanks to Sirius, you are always the brightest star in my sky.

I appreciate every single moment of my stay in the Netherlands. Finishing this dissertation is not the end of a chapter, but it is the beginning of a book that I am yet to scribe. God, give me grace to accept with serenity the things that cannot be changed, courage to change the things that should be changed, and the wisdom to distinguish the one from the other.

Groningen, 17 September 2008

Ida Susanti

LIST OF ABBREVIATIONS

ACFTA	ASEAN-China Free Trade Area
AEC	ASEAN Economic Community
AFAS	ASEAN Framework Agreement on Services
AFTA	ASEAN Free Trade Area
ASC	ASEAN Security Community
ASCC	ASEAN Socio-Cultural Community
ASEAN	Association of Southeast Asian Nations
ASLOM	ASEAN Senior Law Officials Meeting
CEACR	Committee of Expert on the Application of Conventions and Recommendation
CLA	Collective Labour Agreement
CRC	Convention on the Rights of Child
ECJ	European Court of Justice
EEC	European Economic Community
ETUC	European Trade Union Confederation
EU	European Union
Euratom	European Atomic Energy Community
GATS	General Agreement on Trade of Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTFU	International Confederation of Free Trade Union
ILL	International Labour Law
ILO	International Labour Organization
Jamsostek	Jaminan Sosial Tenaga Kerja (Workers' Social Security Programme)
MFN	Most Favoured Nation
MNE	Multi National Enterprises
MOU	Memorandum of Understanding
MRA	Mutual Recognition Agreement
NT	National Treatment
OECD	Organisation for Economic Cooperation and Development
OMC	Open Method Coordination
P4	Panitia Penyelesaian Perselisihan Perburuhan [Labour Dispute Settlement Committee]
P4D	Panitia Penyelesaian Perselisihan Perburuhan Daerah [Regional Labour Dispute Settlement Committee]
P4P	Panitia Penyelesaian Perselisihan Perburuhan Pusat [National Labour Dispute Settlement Committee]
PIL	Private International Law
PJTKI	Perusahaan Jasa Tenaga Kerja Indonesia [Indonesian Migrant Worker Supplier Agency]
PP	Peraturan Pemerintah (Government Regulation)
PT	Perseroan Terbatas (Limited Company)
SPPI	Serikat Pekerja Seluruh Indonesia [All-Indonesian Trade Unions]
THR	Tunjangan Hari Raya (Religious Holy Days Allowance)
TPRM	Trade Policy Review Mechanism
TRIP	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNHCR	The United Nations High Commissioner for Refugees
UU	Undang-Undang (Act)

USA	United States of America
VN	Verenigde Naties
WHO	Wereldhandelsorganisatie
WTO	World Trade Organization

TABLE OF CONTENTS

CHAPTER 2: THE EXISTENCE OF CONFLICT RULES CONCERNING THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS IN THE EUROPEAN UNION LEGAL INSTRUMENTS

CHAPTER 3: THE RECENT COOPERATION REGARDING PROTECTION OF THE RIGHTS OF MIGRANT WORKERS IN THE ASEAN REGION

CHAPTER 4: THE NATIONAL SUBSTANTIVE LAW OF INDONESIA REGARDING THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS

CHAPTER 5: THE NATIONAL CONFLICT OF LAWS RULES IN INDONESIA REGARDING THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS

CHAPTER 7: PRIVATE INTERNATIONAL LAW AND THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS – CONCLUSION

INTRODUCTION

1. Background Issue

Labour migration is one of the most intensive transnational activities in the Association of Southeast Asian Nations (ASEAN)[1] region. The employment of migrant workers is a significant and growing component of total employment in this region. Poverty, the high unemployment rate, and the lack of educational opportunities have driven Indonesian migrants abroad in search of work. This makes Indonesia one of the biggest sending countries in ASEAN. Every year, millions of Indonesian migrant workers travel to other countries, mostly to Malaysia and Saudi Arabia to work. Most of them earn money in other countries and transfer the money to their family in Indonesia. Their contribution to the accumulation of foreign revenue in Indonesia is significantly important.

Most Indonesian migrant workers are unskilled workers, largely working in informal sectors (such as domestic work); or performing low-skilled work (such as construction or plantation work). Many reports convey that they have been treated badly or have to work under bad terms and conditions. Many of them have signed an employment contract that has been drafted in a foreign language without an Indonesian translation. Some migrant workers reported that they had been raped or physically abused by their employer.[2] Research conducted in 2002 reported that 48% of Indonesian migrant workers were paid below the legal minimum wage, 90% did not receive their weekly rest days, and 24% had undergone physical abuse.[3] These data describe the extent to which Indonesian migrant workers are in need of legal protection. Indonesia should give priority to settling this problem immediately otherwise Indonesian workers will continue to be exploited.

Since these problems are not confined to Indonesia but are also evident in the countries to which Indonesian workers have migrated the revision of Indonesian law alone will not be sufficient to effectively ensure the protection of Indonesian migrant workers. The development of international relations regarding global economic and social issues has changed significantly since 1994, when the United Nations successfully concluded the *Final Act of the World Trade Organization (WTO) Establishment* and managed to implement it effectively on 1 January 1995. It is relevant to refer to the WTO here because it organizes the liberalization of trade in the services of natural persons in which migrant workers are one of the main actors.[4] They have to enter the international labour market in order to find a job opportunity, either as self-employed persons or as employees. In this situation, it is relevant to study the WTO in order to discover the role of the WTO in managing the liberalization of the trade in services provided by migrant workers.

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1 ASEAN is an intergovernmental organization established on 8 August 1967 in Bangkok by the five original Member Countries, namely, Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam joined on 8 January 1984, Vietnam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999. See: ASEAN, 'Overview: Association of Southeast Asian Nations'. <http://www.aseansec.org/64.htm>, accessed 10 November 2005.

2 United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 'Forced Labour and Exploitation of Indonesian Migrant Workers. Working Group on Contemporary Forms of Slavery, 28th Session'. Geneva 16 - 20 June 2003. <http://www.antislavery.org/archive/submission/submission2003-indonesia.htm>, accessed 12 November 2005.

3 See: Asian Migrant Centre & Coalition for Migrants Rights, 'Baseline Research on Racial Discrimination against Foreign Domestic Helpers'. Hong Kong, February 2002.

4 General Agreement of Trade on Services, which came into force in January 1995, is the first and only set of multilateral rules covering international trade in services. See: WTO, 'GATS: Fact and Fiction', p. 1. <http://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf>, accessed at 11 October 2005.

The main objective of the liberalization of trade in services is to allow natural persons who become service providers to supply their services in a territory of one Member States of the WTO without any restriction. This scheme recognized 'labour' as a factor integrated into the trade in services and the 'movement of natural persons', one of the four modes (Mode IV) of services defined by the *General Agreement on Trade of Services* (GATS). The Annex on the *Movement of Natural Persons Supplying Services* specifies that two categories of measures are covered: those affecting natural persons who are "service suppliers of a Member", i.e. self-employed suppliers who obtain their remuneration directly from customers; and those affecting natural persons of a Member who are "employed by a service supplier of a Member in respect of the supply of a service".[5] The latter condition is actually relevant to the employment of migrant workers. Trade liberalization on services requires the application of the principles of non-discrimination and the elimination of trade restrictions. These two principles support globalization on the labour market and promote the sustainability of the trade of services. On the other hand, in a welfare state and democratic society, the sustainable development of trade of services must support the fair employment and wellbeing of workers.

Since this dissertation will concentrate on the question how to cope with problems concerning the protection of the rights of transnational migrant workers, it is very important to consider the meaning and the context of globalization based on the concept of the International Labour Organization (ILO).[6] The ILO strives to realize a fair globalization for everybody, including workers. Therefore, in its study the ILO (especially by *the World Commission on the Social Dimension of Globalization*) established a concept of "social dimension of globalization". The meaning of "social dimension of globalization" is "the impact of globalization on the life and work of people, on their families and their societies".[7] Concerns and issues are often raised about the impact of globalization on employment, working conditions, income and social protection. Beyond the world of work, the social dimension encompasses security, culture and identity, inclusion or exclusion and the cohesiveness of families and communities. The most important idea included in this concept is that a balance must be maintained between "economic development" on the one hand and "human prosperity and dignity, especially the prosperity and dignity of workers" on the other hand.

This dissertation will describe and analyse how the formal institutions at the international, regional and national level have been involved in balancing 'the sustainable economic development' and 'the protection of the rights of migrant workers'. It will analyse the prospect of the ASEAN coordinating common level of protection in the ASEAN region. Furthermore, it also will describe how International Labour Law and PIL might harmoniously provide protection of the rights of migrant workers, especially for Indonesia as one of the countries supplying the most labour migration in the ASEAN territory.

The main approach used in this dissertation is the Private International Law (PIL) approach, especially as regards how the governing law of the protection of the rights of migrant workers must be determined. This approach will be important for ASEAN, because ASEAN needs a coordinative provision to provide a method to determine the *lex causae* of transnational employment relationships. This coordinative provision will help

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5 See: Antonia Carzaniga (Economic Affairs Officer, WTO Secretariat), 'GATS, Mode 4 and the Pattern of Commitments'. The paper had been presented in: Joint WTO-World Bank Symposium on Movement of Natural Persons (Mode 4) under the GATS. WTO, Geneva, 11-12 April 2002, p.3. <http://www.wto.org/english/tratop_e/serv_e/symp_mov_natur_perso_april02_e.htm>, accessed 11 October 2005. Cf: Dipankar Dey, 'Movement of Natural Persons (Mode-4) Under GATS: Advantage Developing Countries', (December 5, 2006). <http://ssrn.com/abstract=949435>, accessed 21 February 2007.

6 The ILO is the UN specialized agency, which seeks the promotion of social justice and internationally recognized human and labour rights. See: the ILO Constitution, especially article 10 of the Constitution and Philadelphia Declaration. <http://www.ilo.org/public/english/about/iloconst.htm#toc>, accessed 22 July 2005.

7 See: World Commission on the Social Dimension of Globalization, *loc.cit.*

the parties in the employment relationships to predict the applicable law of their relationships and to understand the legal consequences arisen from their relationships. The importance of these coordinative provisions is extremely high, because it is unrealistic to expect that within the next few years ASEAN will have its owned minimum standards of protection for migrant workers at the regional level. This legal void makes coordinative provisions to determine the applicable law (a harmonized PIL regulation) will be useful and significant to help the ASEAN migrant workers to settle their legal problems. A proper PIL regulation is expected to lead the migrant workers to a just and reasonable protection for their rights.

2. Main Objectives of the Research

A global phenomenon relating to the existence of transnational labour migration constitutes a vast area for scrutinizing the involvement of the PIL approach in determining the applicable law to protect the rights of migrant workers. In-depth study into this subject matter definitely requires profound examination of both Labour Law and PIL. In fact, literature on both fields of law has so far paid insufficient attention to conflictual issues arising from International Labour Law.[8] While the application of PIL in the settlement of transnational labour disputes has been practiced in some cases, this phenomenon is not often discussed in legal commentaries, especially in the ASEAN region. Therefore, a serious observation into this field is essential, particularly when we notice the growing quantity of transnational labour cases that has arisen recently. These problems are common in numerous countries, especially where regional free trade cooperation exists (such as in the European Union territory), or in a region that has a direct territorial border with other country(ies) (e.g. Malaysia is adjacent to Indonesia). In this situation, 'common' choice of laws rules will be useful for solving any legal problem arising from the transnational labour migration.

This dissertation is dedicated to creating a harmonized ASEAN PIL regulation, for protecting the rights of migrant workers; to developing a method for determining the applicable law of such protection in the ASEAN region in general; and particularly to developing a more modern Indonesian Labour Law, which does not only consider local factors, but also international factors in the protection of Indonesian migrant workers in foreign countries or foreign workers in Indonesia. Therefore, the main objectives of the research are:

- To provide an input for the improvement and development of PIL, especially for the purpose of protecting the rights of migrant workers and maintaining the balance between economic development and workers protection;
- To anticipate the necessity of establishing legal unification of the conflict rules of the protection of the rights of migrant workers in ASEAN, especially with regard to legal protection for the rights of migrant workers.

In order to accomplish those main objectives, this author will analyse the European PIL approach, which relies on the proximity approach; and the American PIL approach, which relies on the policy based approach. This analysis will cover observation concerning the law applicable to employment contracts, to basic rights and occupational rights of migrant workers, to triangular employment relationships and to social security of migrant workers. Problem regarding determination of the applicable law of the matters protected by mandatory rules or public policy of a certain country will also be discussed. Bearing in mind that ASEAN is a newborn 'people oriented' intergovernmental organization, assessment of the prospect of harmonisation of law on this topic at the ASEAN level and of whether it should be harmonization of conflict rules or harmonization of substantive law take a very important part in this dissertation. In the end of this dissertation, the author will propose a method to determine the applicable law to protect of the rights of migrant workers and necessary steps via bilateral and multilateral cooperation among the ASEAN Member States, for the purpose to achieve a better protection for the rights of ASEAN workers.

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[8] See: Istvàn Szàszy, *International Labour Law, A Comparative Survey of Conflict Rules affecting Labour Legislation and Regulations*. Leyden: A.W. Sijthoff, 1968, p. 69.

3. Problems Statement

Employment contracts involving migrant workers as employees have the potential of either discriminating against the migrant worker or abusing him or her on the one hand [9] or giving rise to the unequal treatment to the local employee on the other hand.[10] The meaning of discriminatory treatment based on the ILO Convention No. 111 concerning *Discrimination (Employment and Occupation)* 1958 has been described as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".[11] The discrimination of the migrant worker falls within the scope of this convention, i.e. "any distinction, exclusion or preference made on the basis of national extraction...". Therefore, a migrant worker who is treated unequally *vis-a-vis* local workers to his or her disadvantage is being discriminated against on the basis of national extraction.

There is also a contrary condition in – especially – developing/underdeveloped countries. In developing/underdeveloped countries, there is a stigma that migrant workers from developed countries (so called expatriates) are better qualified than local workers (even though they are posted at the same level and perform the same type of work, with the same experience and the same level of expertise). As a result of this stigma local workers generally have less favourable employment conditions, especially in the field of remuneration and social protection. In view of the differing impacts the presence of migrant workers has in the developed and developing/underdeveloped countries, it is also important that we determine the specific impacts of the presence of migrant workers in each region (especially in developed countries and underdeveloped or developing countries; or in sending countries and immigration countries). It is necessary to identify the most appropriate strategy for decreasing or eliminating any adverse effect on the rights of migrant workers.

The traditional PIL principles concerning the applicability of national labour law and legislation are usually based on an old principle, i.e. every national law should be applied in any labour relationship created within the territorial boundaries of the respective state (the *lex loci laboris* principle).[12] Since many rights and obligations dealt with by employment contracts are restrained by rules having public and mandatory characteristics,[13] usually these rights and obligations are also bound by the local law of the place in which the work is performed. Such strict application of this principle has various consequences. Bearing in mind the recent developments in work and employment relationships, especially in this era of globalisation the application of the territoriality principle may result in situations that are unreasonable or unfair or unjust.

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9 This is particularly the case in developed countries, in which the local workers are better educated or skilled workers, while migrant workers fill the 'three-D' jobs: dirty, dangerous and difficult. See: Patrick A. Taran, 'Migration and Labour Solidarity'. This can be found in Migrant Workers, (ILO Bureau for Workers' Activities) Labour Education 2002/4 No. 129, p. 26.

10 This is particularly the case in developing or underdeveloped countries, in which the migrant workers receive better treatment than local workers.

11 See: ILO Convention No.111 Discrimination (Employment and Occupation) Convention, 1958, article 1 (a).

12 See: István Szászy: *op.cit*, pp. 5-6. This principle has also been adopted by the Rome Convention 1980 on the Law Applicable to Contractual Obligation, article 6 paragraph 2 (a). Cf. Maurice V. Polak, '"Laborum Dulce Lenimen"? Jurisdiction and Choice of Law Aspects of Employment Contracts'. This article can be found in Johan Meeusen, Marta Pertegás and Gert Straetmans (Editors), *Enforcement of International Contract in the European Union, Convergence and Divergence between Brussels I and Rome I*. Antwerp, Oxford New York, Intersentia, 2004, pp. 326-328.

13 Some important matters governed by what are usually considered as mandatory rules are: minimum wage determination, maximum time of an employment contract within a fixed period, maximum period of probation, maximum working time, non-discrimination in wage determination, employee insurance, protection for the sick employee, right to strike, protection against collective dismissal, etc.

Such an unreasonable or unjust situation may be created by a contract under which workers are posted abroad If an employee is temporarily posted by the original employer to a new place of work where the number of fully paid day's holiday is shorter than in the original working place, if the holiday policy valid at this new place of work is applied (based on the *lex loci laboris* principle), the worker will have fewer rights to day's holiday then he or she had before the posting. In this case, the automatic application of the *lex loci laboris* principle can create adverse effects for the worker. Thus, other approaches to determining the applicable right regarding the period of fully paid leave that prevents the adverse effects for the right of the worker must be considered.

Based on these backgrounds, the main problem of this topic is 'How should the applicable law as regards the protection of the rights of migrant workers in the ASEAN region be determined?' This main problem will be elaborated upon to include the following legal questions, which will bring us to a conclusion regarding a proper method of determining the applicable law to protect the rights of migrant workers in the ASEAN region and to developing a PIL approach in Indonesian Labour Law on this matter. These legal questions are:

A. What is the role of international legal instruments (issued by the International Labour Organization, the United Nations and the World Trade Organization), regional law (such as the European Union community law) and national law in protecting of the rights of migrant workers? This will be examined in chapters 1 to 3.
B. Is it necessary to have a harmonized provision to protect migrant workers in the ASEAN region? This will be examined in chapters 3 and 6.
C. How should legal harmonization at the ASEAN level be realized? (Is it possible or necessary to establish regional law in the manner of regional law in the European Union? What would be the proper legal instrument for arranging legal protection for migrant workers?) This will be examined in chapters 3 and 6.
D. How should Indonesia as a sending country in ASEAN develop its Private International Law, in order to provide the best legal protection for migrant workers? This will be examined in chapters 4-6.
E. What is the best PIL principle that might provide suitable legal protection for migrant workers? This will be studied in chapter 6.
F. What should be the new legal sources of Private International Law, particularly in order to protect the rights of migrant workers? This will be studied in chapter 6.

4. The Scope of the Research

a. The meaning of migrant workers

The main subject of this research is the protection of the rights of migrant workers. There is more than one scheme for protecting the workers involved in the legal relationship; and the migration in this research always refers to "a transnational migration".[14] To avoid further confusion about the meaning of migrant workers we are including below an explanation of the terminology applied in this research and an interpretation of that terminology. Some of the ILO legal instruments we refer to use the term "migrant for employment". This term is defined as: "a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment".[15] Another ILO recommendation applies a similar term, "migrant worker". This term has

[14] Some countries interpret 'labour migration' as a transnational migration to a foreign country or as an internal migration within its territory. As examples, Namibia, China, Japan, Indonesia operate internal labour migrations, mostly from a rural area to an urban area. See also: Public Service Union, 'International Labour Migration, a UNISON Discussion Paper'. <http://www.unison.org.uk/file/a2444.pdf.pdf> accessed 21 July 2008.

[15] See: Recommendation I.1.(a) of ILO Recommendation No. 86 concerning *Migration for Employment Recommendation (Revised)*, 1949 and article 11 of ILO Convention No. 97 concerning *Migration for*

been defined as: "any worker participating in such migratory movements either within the countries and territories described in clause (a) of Paragraph 1 above[16] or from such countries and territories into or through the countries and territories described in clauses (b)[17] and (c)[18] of Paragraph 1 above, whether he has taken up employment, is moving in search of employment or is going to arranged employment, and irrespective of whether he has accepted an offer of employment or entered into a contract".[19]

Even though these two provisions use different terms, the meaning of "migrant for employment" and "migrant worker" is very similar. Nevertheless, the ILO Recommendation defines the term "migrant worker" more broadly, i.e. it does not cover only persons who are already in an employment relationship, but also covers persons who are in the process of entering an employment relationship, for example during the recruitment process.

Based on both the above definitions regarding migrant workers we can make some conclusions about the general meaning of migrant worker as defined in the ILO legal instruments:

1. The person is a worker (a natural person who presents himself/herself to provide work force);
2. There is a migration from one country to another country. Consequently, the employment must also be performed in another country (in a country foreign to the worker).
3. He/she is being employed by another party.

Therefore, if we refer to this limitation, some emphases must be clarified, to sharpen the scope of the term migrant worker in the ILO legal instruments:

1. It does not apply to a migrant worker who migrates within the territory of one country;
2. It is applied to either temporary work or for work performed for an indefinite period of time (or at least time limitation is beyond the context of this terminology);[20]
3. It is not applied to self-employed workers.

Nevertheless, in Indonesian Labour Law, article 56 paragraph 1 *Act on Placing and Protection of Indonesian Workers in Foreign Countries*[21] regulates that the maximum period of any employment contract to place an Indonesian worker in foreign countries is two years and it can be extended for another two-year period. Therefore, in Indonesian law, the employment of migrant workers should be performed under 'a temporary employment contract' and migrant workers are temporary workers.

Employment Convention (Revised), 1949. <http://www.ilo.org/ilolex/english/convdisp1.htm>, accessed 13 October 2006.

16 This refers to: countries and territories in which the evolution from a subsistence form of economy towards more advanced forms of economy, based on wage earning and entailing sporadic and scattered development of industrial and agricultural centres, brings with it appreciable migratory movements of workers and sometimes their families.

17 This refers to: countries and territories through which such migratory movements of workers pass on their outward and, where applicable, their return journeys, if existing arrangements in such countries and territories, taken as a whole, afford less protection to the persons concerned during their journeys than is laid down in this Recommendation.

18 This refers to: countries and territories of destination of such migratory movements of workers, if existing arrangements in such countries and territories, taken as a whole, afford less protection to the persons concerned during their journeys or employment than is laid down in this Recommendation.

19 See: Paragraph I.2. of ILO Recommendation No. 100 concerning *Protection of Migrant Workers (Underdeveloped Countries)* Recommendation, 1955. <http://www.ilo.org/ilolex/english/convdisp1.htm>, accessed 11 August 2007.

20 Actually, the ILO Conventions arrange time limitation of an employment contract for migrant workers. Article 8 of the ILO Convention No. 97 concerning *Migration for Employment* admits permanent basis to employ migrant workers, while article 14 of the ILO Convention No. 143 concerning *Migrant Workers (Supplementary Provision)* arranges fixed term of employment of migrant workers.

21 In Indonesian, it is referred to as *Undang-Undang tentang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri*, Act. No. 39 year 2004.

b. Specific type of labour migration: posting of workers

This dissertation will also discuss provisions regarding the posting of workers. Within the context of transnational worker migration, the posting of temporary workers is one of the most important problems of European Union labour migration.[22] In the EU region, there are several countries located closely together with no physical national borders. This condition stimulates the temporary migration of people in these regions, including migration for employment. Additionally, two principles relevant to this are applied in this region: the principle of the free movement of persons and the principle of the freedom to establish. There are no restrictions for EU citizens to establish an enterprise (or its branch/representatives) in a country other than their country of origin (within the EU region). Therefore, it is very feasible that a foreign undertaking (originally from another EU member) may bring its own workers from the country of origin and post them in another country within the EU region. In comparison, such principles are not available within the ASEAN, another object of this research.

The most important regulation of migrant workers in this context is the *EU Posting of Workers Directive*.[23] This Directive will be extensively discussed in this dissertation, because it has a great relevance to the main topic of this dissertation and it will be very important as a comparison to the situation in ASEAN. If a worker is temporarily posted to a foreign country, the place of posting may apply different levels of protection as regards the rights of workers than that applied in the original country. This creates a potential problem regarding the determination of the applicable law to protect the rights of migrant workers, whether the law of the sending country (the place of origin) or the law of the host country (the place of work) should be applied. Monitoring the implementation of this directive is also very important in order to get a good picture of the PIL approach to the protection of the rights of migrant workers in the EU region.

c. Migrant workers in the formal sector

This dissertation will not study the protection of the rights of migrant workers who work in informal sectors because the scope of this sector is very broad, it varies from one country to another; and the legal status of migrant workers in these sectors is still unclear. Informal employment usually refers to those jobs in which either the employer or the worker, or both, do not have to comply with the existing labour regulations and tax laws. Thus, an informal worker might not receive some or all of the benefits established by law such as social security, over-time pay, or severance payments, and might not pay taxes on earnings.[24] The exact definition of formal and informal sectors is sometimes arbitrary and depends on the specific research objectives.[25] For the purposes of this research, the formal sector is described as a sector subject to

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22 It is obviously indicated by the existence of an EU Directive on the posting of temporary workers in European Union and at a national level almost all European Union members have a national act concerning this issue; because the Directive indicates that the implementation of this Directive must be done based on national law of the related country.

23 It is recognized as The Directive 96/71 of 16 December 1996 on the *Posting of Temporary Workers*.

24 See: Laura Juarez, 'Wage differentials between formal and informal salaried workers in Mexico'. The University of Texas at Austin Economics Department. <http://www.eco.utexas.edu/Graduate/Juarez/informaljuarez.pdf>, accessed 27 August 2006. This explanation is in accordance with the definition of informal employment, which "includes all remunerative work (i.e. both self-employment and wage employment), that is not registered, regulated or protected by existing legal or regulatory frameworks, as well as non-remunerative work undertaken in an income-producing enterprise. Informal workers do not have secure employment contracts, worker's benefits, social protection or workers' representation". See: The International Labour Organization, 'ILO Thesaurus 2005'. <http://www.ilo.org/public/libdoc/ILO-Thesaurus/english/ tr1746.htm>, 12 October 2006.

25 See: K. Hart, 'The Informal Economy'. [1985] Cambridge Anthropology, 10 no. 2, pp. 54-58.

regulation, wages are paid on a regular basis, taxes are levied and explicit contracts between employers and workers exist.[26]

The final objective of this research is to find the best way to provide legal protection for migrant workers working in formal sectors especially in Indonesia and generally in the ASEAN territory, particular focus is on determining a method for finding the applicable law which provides substantial justice for migrant workers.

Problems concerning how the production process should be accomplished without jeopardizing workers' welfare and how legal protection for workers should be established in order to assure decent working condition for workers without hampering global trade lead to very important issues. From the ASEAN perspective, for which the results of this research are expected to be useful, the high intensity of labour migration within the ASEAN countries on the one hand; and the great differences between the ASEAN Member States' legal systems on the other hand will result in different levels of protection for workers. Moreover, from the international perspective, the ILO has already established minimum standards of protection for workers. Therefore, problems concerning the applicable law for migrant workers appear on the surface.[27] In this situation, the applicable law will be chosen from some different conflict of laws contexts, i.e. conflict of laws in national laws; conflict of laws in international law (the ILO, UN and WTO regulations); conflict of laws in regional law.

d. Legal cooperation in ASEAN

In the ASEAN region, based on the *Ha Noi Plan of Action*, there is a strategic plan to accelerate the freer flow of skilled labour and professionals in the region.[28] ASEAN is motivated to revitalize and refocus cooperation on policy and strategic issues, such as the implications of economic integration and greater trade and the liberalization of services, including the impact of the GATS on social issues.[29] The priority of *the Ha Noi Plan of Action* on promoting regional mobility and the mutual recognition of technical and professional credentials and skills standards[30] still focuses on the co-operation to alleviate the flow of migrant workers in ASEAN territory. There are some other, more concrete, actions to manage labour migration development, al though these are still not as progressive as developments in the EU. The most recent cooperation regarding cooperation on the protection of migrant workers has been issued in the twelfth ASEAN Summit in Cebu on 13 January 2007, when the Heads of State/Government of the Member Countries of the ASEAN made a declaration regarding *the Protection and Promotion of the Rights of Migrant Workers*.[31] Therefore, evaluating the legal cooperation within ASEAN will give very important feedback for developing PIL principles regarding the protection of the rights of migrant workers in the ASEAN region. Studying such legislation and legal cooperation in the EU will be very useful to enrich the feedback, because the EU has more advance legislation and more solid cooperation on this field, particularly as the EU already has developed community law in this field.

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26 See: Menno Pradhan and Arthur van Soest, 'Formal and Informal Sector Employment in Urban Areas of Bolivia'. [1995] Labour Economics 2, p. 276.

27 This research will focus on the legal protection for "migrant workers", because this group of workers is very vulnerable to unequal treatment and outright discrimination: i.e. either being discriminated against in favour of local workers or in favour of permanent workers.

28 See: ASEAN, 'ASEAN Plan of Action for Cooperation on Immigration Matters'. <http://www.aseansec.org/16572.htm>, accessed 21 August 2006.

29 See: ASEAN, 'Social Development'. <http://www.aseansec.org/8558.htm>, accessed 22 August 2006.

30 It is mentioned in Joint Communiqué the Eighteenth ASEAN Labour Ministers Meeting, 13-14 May 2004, Bandar Seri Begawan, Brunei Darussalam. <http://www.aseansec.org/16111.htm>, accessed 22 August 2006.

31 See: the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. <http://www.aseansec.org/19264.htm>, accessed 27 August 2007.

e. PIL issue: the applicable law determination

This dissertation will analyse the role of PIL in protecting the rights of migrant workers. There are three main issues in PIL, i.e. the jurisdiction and competence of a court to hear and determine a case; the determination of the applicable law of a case; and recognition and enforcement of judgements decided by a foreign court or awards of foreign arbitrations. This dissertation will focus on the second issue only, i.e. discovering the proper way in which to determine the applicable law to protect the right of migrant workers, in cases where more than one legal system is relevant in transnational employment cases.

Since originally the main legal problem in this dissertation contains transnational characteristics, interfaces between more than one legal system are unavoidable. A legal interface must be described as 'collision between more than one legal system in a legal relationship'. It covers the interfaces between national law and regional law; or the interfaces between national law and international law; or the interfaces between regional law and international law. It is also referred to as "a juridical pluralism".[32] There is no hierarchy among those legal systems, but in some points, there are correlations or overlaps in their contents. It is important to understand this problem, in order to separate the jurisdiction of each law. As yet no legal system for ASEAN has become available, therefore studying the European Union experience in developing its conflict of laws system regarding the legal protection of the rights of migrant workers will be very useful for evaluating the needs of the future ASEAN legal system on this matter.

The dissertation observes many rights arising from employment relationships. Such observation is unavoidable because this dissertation will analyse the peculiar rights of workers and obligations of employers, these being considered as aspects forming the 'minimum protection' for migrant workers. It is necessary to describe the scope of the minimum protection at an international level, at a regional level and at a national level. From the PIL point of view, this observation is very important in order to find 'the applicable minimum protection for migrant workers', which provide the best protection for the rights of workers in transnational employment relationships.

In the effort to sharpen the main topic in which the PIL principles will be applied, the author will restrict the main question of this topic, i.e. the difficulty in determining when the law of immigration countries (host countries) must be applied or when the law of the countries of origin (home countries) of the employees must be applied, especially with a view to avoiding adverse effects on the protection of the rights of migrant workers, particularly with regard to unequal treatment between local and migrant workers.

5. Research Method

5.1. Legal Systematic Approach

The topic of this study suggests that the main approach appropriate for its research is a legal systematic approach. This approach involves converging approaches employed within the structure of PIL, International Labour Law and Labour Law. However, considering the subjects of observation i.e. comprehending laws and regulations and court judgments from the chosen regions, purposeful knowledge can only be obtained by employing a comparative legal approach. The results of such an approach would provide useful input for discussing every relevant problem and eventually for drawing conclusions in respect of each issue discussed. Nevertheless, the comparative process and analysis results of laws and regulations currently in

[32] See: Herman Voogsgeerd, 'The European Court of Justice and Legal Pluralism: the Case Law of the "Four Freedoms" and the Pluralist Construction of the Legal System of the European Community'. This paper is an integrated part of: Ige F. Dekker and Wouter G. Werner (editors), *Governance and International Legal Theory*. Martinus Nijhoff Publishers, Leiden/Boston, 2004, p. 285.

effect should be based on empirical assessment. Bearing in mind that the capacity of the author's background knowledge is mainly legal science, data that requires sociological or other methods of data collecting must be retrieved from at vast existing data banks that have been collected by previous researches and studies (such as by ILO, Asian Migrant Centre, etc.).

The main methodology to be employed in this research is "the legal systematic approach".[33] This approach systematically interprets an item of legislation in a one legal order and analyses a norm with respect to its position in the code's overall structure and 'interconnected meaning'.[34] Normally this approach is used to explore legal analysis within one legal order. However, because the content of this research has transnational characteristics, this approach will also be applied to study interfaces between legal orders (between international law and regional law; between international law and national law; between regional law and national law) and interfaces between substantive rules and conflict rules in order to protect the rights of migrant workers. The research will be developed based on these following steps:

- This dissertation will exploit primary legal resources (included: firstly legislation, i.e. ILO Conventions and Recommendations; UN Conventions; WTO General Agreement; EU Treaties, Directives and Regulations; ASEAN Charter and other legal instruments; and the national law of Indonesia; secondly court decisions in EU and in Indonesia; and thirdly existing statistical data reported by other researchers), especially as regards labour migration; human and fundamental rights of workers; employment contracts and the rights established by the employment contract; and conflict rules on these matters. Furthermore, it will also exploit secondary legal resources (including high quality publications relevant to those matters in books, journals, mass media reports, etc.).

- This dissertation will be systematically divided into four categories: a description of the topic at the international level; the regional level; the national level; and legal analysis that includes a proposal for Indonesia and the ASEAN. The choice of these categories has been determined by considering the characteristic of the protection of the rights of migrant workers, which is dominated by mandatory provisions. In this circumstance, there are mandatory rules at the international level that have direct binding effect and must be applied in both regional law and national law. Furthermore, mandatory rules in regional law (especially in European Law) also have binding effect on the national law of the Member States. The national law has a binding effect on the terms and conditions of any employment relationship in its territory. Therefore, these legal instruments create a web of minimum protection levels at the international, regional or national level, whereby the minimum level of protection under national law must be better or at least at the same as the minimum level of protection under regional law; and the minimum level of protection under regional law must be better or at least at the same as the minimum level of protection under international law. It is necessary to determine the stage of protection at each level based on these minimum protection layers, and to assess whether or not the application of the PIL approach for determining the applicable law for the protection of migrant workers will create adverse effects for the workers.

  Further explanation about the four categories is as follow:

  a. At the international level, we elaborate upon the legal protection for migrant workers provided for in international legal instruments issued by the ILO, the UN and the WTO and the existing conflict rules for determining the applicable law for the protection of the rights of migrant workers in these legal instruments. The legal instruments of the ILO have to be scrutinized,

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[33] A simple explanation regarding the legal systematic approach can be found in: John K. Hanft, 'A Model for Legal Research in the Electronic Age'. Witkin Legal Institute, Legal Reference Service Quarterly, Volume 17#3, 1999, pp. 77 *et seq.* <http://www.witkin.com/pages/eff_legal_research_pages/research_model_age.htm>, accessed 27 October 2005.

[34] See: Matthias Grabmair and Kevin D. Ashley, 'Towards Modelling Systematic Interpretation of Codified Law'. Jurix Conference, 2005. <www.starlab.vub.ac.be/.../presentations/JURIX%202005%20Presentation%20Grabmair%20&%20Ashley_wv.ppt>, accessed 12 August 2008.

since the ILO is the specialized UN agency seeking the promotion of social justice and internationally recognized human and labour rights. It also sets minimum standards for basic labour rights.[35] The UN legal instruments also come in for scrutiny because they set global minimum standards for human rights. The WTO manages the liberalization of international trade, including the liberalization of trade in services, whereby the freedom for natural person to provide services is also arranged in the GATS scheme. This relates to the obligation of the Member States not only to eliminate any restriction to trade in the services of natural persons, but also to protect the rights of workers. The ILO, the UN and the WTO have worked systematically to execute the application of international labour standards. The UN has established human rights regarding the protection of migrant workers and their family members; the ILO has established international labour standards for the protection for migrant workers and the WTO has promoted the trade of services, which comply with the internationally recognized core labour standards established by the ILO. Based on these backgrounds, the author believes that the three international organizations have an important role in protecting the rights of temporary migrant workers.

b. At the regional level, this dissertation will look at EU law and the existing legal cooperation in ASEAN concerning legal protection for migrant workers and the existing conflict rules for determining the applicable law for the protection of the rights of migrant workers in these legal instruments. This study also aims to assess the necessity to establish a harmonized PIL provision at ASEAN level. Understand the experience of other regional cooperation schemes in establishing their regional law is also very important. The author believes that the European Union has the most 'well established regional law' concerning this matter. Even though the EU law is not to be relied upon in the ASEAN region, understanding of the EU experience in developing its legal system will provide valuable food for thought for ASEAN's leaders and scholars. Since the EU has a number of specific provisions on the protection of the rights of migrant workers (including conflict of laws and rules related to that matter) and ASEAN does not have these as yet, it will be useful to analyse the way in which the EU developed its conflict rules as a basis for developing the "prospective conflict rules" for ASEAN region. At the regional level, there is no description as regards substantive law of the protection of the rights of migrant workers, because the purpose of this part is to propose the method for finding the proper applicable law for the protection of the rights of migrant workers for ASEAN, which is merely part of the conflict rules.

c. At the national level, in view of the fact that the objective of this research is to develop Indonesian PIL and Labour Law, this dissertation will describe Indonesian law regarding the topic thoroughly. It will explore the level of protection under Indonesian law and compare it with the relevant protection under international law. Comparison between Indonesian law and regional law will not be made here as ASEAN does not as yet have any regional law

d. In its legal analysis, this dissertation will indicate the intensity of the legal cooperation in ASEAN (in comparison with legal cooperation in the EU region) and the prospect of developing the ASEAN legal system. The possibility of ASEAN creating a unified legal system and legal harmonization regarding the protection of the rights of migrant workers will also be examined. Finally yet importantly, this dissertation will analyse the prospect of a PIL approach for ASEAN and Indonesia, which will provide legal certainty and substantial justice to protect the rights of migrant workers. Such matters are generally regulated in mandatory rules and can be found in substantive rules rather than in conflict rules. Therefore, it is unavoidable that this dissertation will also scrutinize substantive law regarding the legal protection of the rights of migrant workers.

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[35] See: International Labour Organization, 'ILO Mandate'. <http://www.ilo.org/public/english/about/mandate.htm>, accessed 23 October 2005.

5.2. Comparative Approach

A comparative approach is essential to this study and will therefore be applied in this research. In his writing, *Örücü* defined the term 'to compare' as being 'to observe and to explain similarities and differences, the emphasis can be sometimes in differences and at other times on similarities'.[36] In this dissertation, this comparative approach will be simply interpreted as "an intellectual activity with law as its object and comparison as its process".[37]

Once the differences, similarities, and commonalities among the compared subjects have been identified, a comprehensive analysis of these will be made, with particular focus on issues relevant to transnational labour problems, before the author finally proposes "common principles" of PIL for determining the applicable law for the protection of the rights of migrant workers at the ASEAN level as well under Indonesian law. Explanations in this study will provide a basis for predictions and may contribute to scientific knowledge, especially on PIL, International Labour Law and Labour Law. At the end of the comparative study, the author will propose a general theory regarding the determination of the applicable law for the protection of the rights of migrant workers, which in the long term might be useful for developing Indonesian PIL and the future ASEAN regional law.

The "common principle" of PIL will be proposed after the author compares some existing PIL approaches, especially the traditional PIL (which determines the applicable law by utilizing the most important connecting factors of the case) and the modern PIL (which determines the applicable law by considering the content of the relevant provisions). The main goals to be achieved by the author are to provide legal certainty and substantial justice for the protection of the rights of migrant workers.

The main objective of this study is to delineate the legal reasoning in legislations or court decisions. Therefore, this study will focus upon comparing the content of the relevant legislations and court decisions of each region. It will cover explanations about the differences and similarities of the UN, ILO and WTO in protecting the rights of migrant workers; the similarities and differences of EU and ASEAN in their legal cooperation; the similarities and differences of the conflict rules available in the UN, ILO, WTO, EU, ASEAN and Indonesian legal provisions. As regards interfaces between some legal orders, the main purpose of the comparative study is to find the similarities and differences in determining the *lex causae* for the protection of the rights of migrant workers at the international, regional and national level.

6. Writing Organization

This dissertation will be divided into eight chapters, which are more elaborately described, as follows:

- Chapter I: substantive rules in International Law.
  This chapter will describe legal protection for migrant workers under the substantive law in international laws established by the UN, the ILO and the WTO. It will include analysis of the contribution of those three international organizations in setting up international standards for the protection of the rights of migrant workers. The focus of this part is to discover international standards for the protection for migrant workers as these are arranged in the international legal instruments. It also will analyse how the balance of sustainable economic development and protection of the rights of migrant workers can be realized by international law.
- Chapter II: conflict rules in European law.

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[36] See: Esin Örücü, "Unde Venit, Quo Tendit Comparative Law?" This can be found in Andrew Harding and Esin Örücü, *Comparative Law in the 21st Century*, The Hague/London/Boston, Kluwer Academic Publishers, 2002, p. 8.

[37] See: K. Zweigert and H. Kötz, *An Introduction to Comparative Law, Third Edition*. Clarendon Press, Oxford, 1998, p. 2.

This chapter will describe the existing conflict rules in European law as regards the protection of the rights of migrant workers. It will analyse the use of the PIL method in European Law, in determining the applicable law for the protection of the rights of migrant workers, which is available in the EU Directives and Regulations, as well as decisions of the European Court of Justice.

- Chapter III: legal cooperation in ASEAN.
  This chapter will describe and analyse the existing legal cooperation in the ASEAN region, especially concerning the protection of the rights of migrant workers. It will describe the nature of legal cooperation in the ASEAN region, the intensity of the legal cooperation in ASEAN and will analyse the possibility of establishing legal harmonization regarding the protection of the rights of migrant workers in that region.
- Chapter IV: substantive rules in Indonesian law.
  This chapter will describe the legal protection for migrant workers under Indonesian national laws. It will describe the national minimum standard of protection for migrant workers under Indonesian law and analyse the legal problems in Indonesia that serve to aggravate the current crisis of workers' protection in Indonesia.
- Chapter V: conflict rules under Indonesian law.
  This chapter will examine the extent to which Indonesian law applies a conflict of laws approach in determining the applicable law for the protection of the rights of migrant workers in its territory. It will also describe the previous effort to develop Indonesian PIL in a codified legislation.
- Chapter VI: legal analysis and proposal.
  In general, this part will evaluate the future of the PIL approach in protecting migrant workers, especially in relation to the trend of legal harmonization concerning that problem at the international level. At the national level, this part will analyse the best alternative conflict rules to for correcting the adverse effect of the application of the *lex loci laboris* principle for the protection of migrant workers, especially within the context of developing the Indonesian PIL approach to protecting migrant workers. At the regional level, this part will analyse the possibility and necessity of developing a unified law for the legal protection of migrant workers; and of predicting the most suitable legal instrument to deal with the problems. It will also analyse the prospect of legal cooperation playing a role in the protection of the rights of migrant workers, by understanding the nature of loose regionalism[38] in the ASEAN region, and the need of ASEAN to develop a more settled institutional cooperation, especially to anticipate the trend of regionalism and globalization around the world. The final result of this part is a proposition regarding a harmonized protection of the rights of migrant workers by way of compulsory ratification of the ILO core conventions by the ASEAN Member States and harmonisation of conflict rules (PIL rules) as regards that matter; and a proposition regarding a unified PIL method for determining the applicable law in Indonesian PIL, for the purpose of providing a proper protection of the rights of migrant workers.
- Chapter VIII: Conclusion.
  The author will make brief conclusions covering all legal questions arising from this research.

[38] Based on the loose regionalism principle, ASEAN maintain 'a policy based' cooperation (instead of 'rule-based' cooperation), therefore, legal harmonization in the ASEAN region seems not suitable to the nature of the ASEAN regionalism. For further information, see: Bajuseto Hardjowahono, *The Unification of Private International Law on International Commercial Contracts within the Regional Legal System of ASEAN*. Ulrik Huber Institute for Private International Law, Groningen (the Netherlands), 2005, p. 148.

1 THE ROLE OF INTERNATIONAL ORGANIZATIONS IN THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS

This section will observe substantive law concerning the protection of the rights of migrant workers arranged by three international organizations, i.e. the International Labour Organization, the United Nations and the World Trade Organization. This observation is very important, especially in order to understand the human rights of migrant workers and their family members as well as the international minimum standards arranged by the ILO, which must be considered as an ideal minimal floor of rights. These international minimum standards of protection together with the human rights of migrant workers and the family members established by the UN play a very important role in the rules governing the international trade in services by natural persons as arranged by the WTO.

The organization of this dissertation is based on the sequence of involvement of the ILO, UN and WTO in dealing with the protection of the rights of migrant workers. Since the ILO started to manage the protection of the rights of migrant workers in 1939 by issuing the ILO Convention No. 66 concerning Migration for Employment, the author will discuss the work of the ILO first. The work of the UN towards establishing the human rights of migrant workers and their family members will then be analysed. This will be followed by the latest developments concerning the trade in services by natural persons and the efforts of the WTO to maintain the sustainable development of profitable migration for employment activities. This section will be concluded with a comparative study of the legal protection established by the ILO, the UN and the WTO and their involvement in the implementation of such protection at national level.

1.1. Introduction

The International Labour Organization is a United Nations specialized agency, which seeks the promotion of social justice and internationally recognized human and labour rights. The ILO's mandate includes the formulation of international labour standards in the form of Conventions and Recommendations,[39] the provision of technical assistance,[40] the improvement of independent employers' and workers' organizations and the provision of training and advisory services. Therefore, it is difficult to deal with international labour affairs without reviewing the work and contributions of the ILO in the development of labour matters.

To implement its mandate and to achieve its objectives, it is essential for this organization to anticipate and adjust its strategies to enable itself to adequately respond to the constantly growing challenges resulting from the inevitable globalization process that takes place in almost every aspect of human life. Being conscious of this changing world, ILO defines globalization as:

"a process of growing independence between all people within this planet. People are linked together economically and socially by trade, investment and governance. These links are spurred by market liberalization and information, communication and transportation technologies".[41]

From this definition, one may construe the typical borderless human living environment where people are more interdependent and closely knitted one to another in a single and intertwined global market. Although

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[39] These two ILO instruments are setting minimum standards of basic labour rights, especially on: freedom of association, the right to organize, collective bargaining, abolition of forced labour, abolition of child labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues. Those sectors are concluded in ILO Conventions and called as the 'fundamental ILO Conventions'. See: ILO International Training Centre, 'Fundamental ILO Conventions'. <http://www-old.itcilo.org/actrav/english/about/about_fundamentals.html>, accessed 11 February 2006.

[40] The technical assistances are primarily provided in the fields of: vocational training and vocational rehabilitation; employment policy; labour administration; labour law and industrial relations; working conditions; management development; cooperatives; social security; labour statistics and occupational safety and health. See: ILO, 'Fields of Action'. <http://www.ilo.org/public/english/about/index.htm>, accessed 11 February 2006.

[41] See: ILO Bureau for Worker Activities, 'Globalization'. <http://www.ilo.org/public/actrav-english/telearn/global/ilo/globe/new_page.htm>, accessed 11 February 2006.

not expressly stated in the above definition, it also signifies the implication that globalization will bring about more rigorous competition amongst individuals and legal entities in their effort to gain from their economic activities.

It is evident that globalization is, directly or indirectly, responsible for the growing intensity of the transnational movement of workers and emergent trends in international or national policies to deal with issues on migrant workers.[42] Since the establishment of the World Trade Organization in January 1995, due to its role as an organization for trade liberalization, a forum for governments to negotiate trade agreements, and also as a forum for governments to settle their international trade disputes, globalization has become an inevitable phenomenon. It operates a system of international trade rules.[43] From the international employment perspective, the essence of globalization probably relies a great deal on the need to provide good conditions for parties in employment relationships to enable them to maintain a balanced and fair relationship. The ILO established the *World Commission on the Social Dimension of Globalization*[44] that conducts studies into fair globalization, and also into recognizing the potentials of globalization process in fulfilling the needs of employees to have favourable working conditions within a global setting.

The movement of persons across state borders to work on foreign soil is as old as the notion of the state itself, especially in countries with adjacent borders to each other (such as the Netherlands, which is directly adjacent to Germany and Belgium). In recent times, progressive developments in the transportation system and the tight competition amongst transportation companies even enables people to move much more easily and farther across the globe. Labour migration has become the major source of support for poor families in developing countries.[45] The Global Commission on International Migration observed that: "international migration contributes to the development of countries of destination by filling gaps in the labour market, by providing essential skills and by bringing social, cultural and intellectual dynamism to the societies that migrants have joined".[46] Therefore, one of the most remarkable phenomena of the human

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[42] If one looks at the main principles on globalization, i.e.: the most favoured nation principle and the national treatment principle, it is obvious that both principles would improve the progress of global trading (including trade of services by migrant worker). One of the impacts of this globalization is the effort to establish labour markets integration (see: article V bis General Agreement on Trade in Services. <http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#article%20Vbis>, accessed 11 February 2006. According to the official comment to this article, such integration provides citizens of the parties concerned with *a right of free entry to the employment markets* of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits. Although no valid data concerning the causal relationship between increasing worker mobility and globalization is yet available, the most important effect of globalization on worker mobilization is that it provides greater opportunity for worker to find a job in a foreign country.

[43] See: The WTO, 'What is the World Trade Organization?' <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm>, accessed 11 February 2006.

[44] The main aim of ILO is promoting decent work for all. Therefore, ILO must be very careful in anticipating the impact of globalization on employment relationships, because based on trade liberalization, unskilled and uneducated employees would undoubtedly become the sufferers. *The World Commission on the Social Dimension of Globalization* arranged two important studies concerning globalization: *A Fair Globalization, The Role of the ILO* and *A Fair Globalization: Creating Opportunity for All.* These studies premeditated all conditions in globalization era that must be satisfied to create decent work and fairness for all stakeholders in employment relation.

[45] See: Judith van Doorn, 'Migration, Remittances and Development'. This paper can be found in International Labour Organization, *Migrant Workers* (Labour Education 2002/4 No. 129). Geneva, 2002, p. 48.

[46] See: Ryszard Cholewinski, 'Protection of the Rights of Migrant Worker and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment'. <http://www.ohchr.org/english/bodies/cmw/docs/cholewinski.doc>, accessed 22 January 2007.

resources development in the past two decades is the significant increase of migrant workers around the world.[47] To illustrate this phenomenon, the following TABLE I describes the job market statistics in some leading "exporting" countries in Asia.

TABLE I

Average Annual Number of Workers Originating in Labour Sending Countries of Asia in 1980-1999[48]

Sending country/Receiving region	1980-84	1985-89	1990-94	1995-99
South Asia				
Bangladesh Number of clearances (land)	53,000	78,000	174,100	262,000 (95-98)
India Number of clearances	223,500	139,800	297,225	400,275 (95-98)
Pakistan Number of clearances	124,500	76,800	143,000	127,075 (95-98)
Sri Lanka Number of clearances	31,300	18,900	52,300	164,312
Nepal	—	—	—	—
South-East Asia				
Indonesia Number of clearances	24,400	63,500	118,000	321,300
Philippines Number of clearances	274,000	353,900	471,000	562,000
Thailand Number of clearances	60,100	89,600	86,800	193,100
Vietnam	—	—	—	—
East Asia				
China Number of clearances	37,600	61,100	135,000	275,000

If we refer to the TABLE I above, it is obvious that growth in the annual average labour migration has more than doubled within only two decades, with the exception of that in Pakistan. The number of migrant workers in Pakistan in 1995-1998 had decreased slightly more than the annual average for 1990-1994. There is no specific explanatory analysis accompanying the above table to explain the cause of this decreased migration. However, there are some possibilities that may have influenced this situation, such as tougher competition between the Pakistani workers and foreign workers coming from other sending countries, the increasing number of the job opportunities in the local job market, the internal policy of the government by applying certain quotas on the maximum number of migrant workers, etc.

1.2. Scope and Definition

The meaning of "migration"[49] was described as the "movement (of people or animals) from one country or region to another". Within the context of this study, such movements will only focus on the transnational

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[47] In 2002, 175 million people lived outside their country of origin, 100 million of whom were migrant workers. See: Samuel Simőn Velasco (Director ILO Bureau for Workers' Activities), 'Editorial'. This paper can be found in International Labour Organization, *Migrant Workers* (Labour Education 2002/4 No. 129). Geneva, 2002, p. vi.

[48] See: International Organization for Migration, *Labour Migration in Asia: Trends, Challenges and Policy Responses in Countries of Origin*. Geneva, 2003, p. 16.

movement of people, more specifically, the inter-country passage or cross-border movement of workers. Therefore, the meaning of "transnational migration" will be described here as: "the movement of persons from one country to another country".

It is quite interesting to realize that the ILO does not provide a general definition of workers, because in the ILO legal instruments the definition of workers is always interpreted in a certain context (such as part-time workers, older workers, seafarers, frontier workers, seasonal workers, etc.). Therefore, the author uses the definition in a secondary legal resource, i.e. in a legal dictionary. The meaning of a worker[50] can be described as: 1. One who labours to attain an end; especially a person employed to do work for another. 2. A person who offers to perform services for compensation in the employ of another, whether or not the person is so employed at a given time. Based on these descriptions, there are some essential characteristics of a worker:

- He/she must work for somebody else as an employee;[51]
- Even though the work is permanent work, there is a certain time at which the work will be terminated (as an example when the worker reaches his/her pensionable age);
- He/she must be entitled to receive a salary or other means of remuneration as compensation for the work or services that he or she provides.

If we refer to the ILO legal instruments, one may find a term somewhat similar to the term migrant worker, i.e. "migrant for employment". This term is described as: "a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment".[52] While in other ILO Recommendations, the term migrant worker is actually used to mean: "any worker participating in such migratory movements either within the countries and territories described in clause (a) of Paragraph 1 above[53] or from such countries and territories into or

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[49] See: Bryan A. Garner, Black's Law Dictionary, 8th edition. West Publisher, 2004. <https://international.westlaw.com/>, accessed 10 August 2006.

[50] See: Ibid.

[51] He/she is specifically working under an employment contract, not any other kind of contract (such as construction working agreement, contract of internship, etc.). The main essence of this type of contract is the common fact that relationship between worker and employer is not footed on an entirely equal basis. Even in cases where a skilled worker might work on the basis of his/her expertise in certain area of work, the fact remains that he/she has to work under working condition usually predetermined by employers. It is not uncommon for an employer to offer terms regarding the working conditions before the contract is agreed and signed by the parties. But if we look at the conclusion of transnational employment contracts, especially where employees are recruited through a temporary agency, it is not usual for the parties to meet to each other *interpraesentes*. Negotiations concerning working conditions are therefore very limited, and mostly in the area of salaries and working time. Afterwards, these employees have to perform their work under the pre-existing working condition according to the company regulation. This is one of the reasons to assume that the position of the parties in an employment contract is not as equal as parties in many other contracts of services, especially in the field of business and commercial contracts. Cf: Joyce P. Jacobsen and Gilbert L. Skillman, *Labour Markets and Employment Relationship, a Comprehensive Approach*. Malden, Oxford, Carlton: Blackwell Publishing, 2004, p. 252. Employees are indeed placed in a subordinated binding relationship with the employer. See: Marie Agnes Sabirau Perez, 'Changes to the Law Applicable to an International Contract of Employment'. [2000] International Labour Review Volume 139, Issue 3.

[52] See: Recommendation I.1.(a) of ILO Recommendation No. 86 concerning Migration for Employment Recommendation (Revised), 1949 and article 11 of ILO Convention No. 97 concerning Migration for Employment Convention (Revised), 1949. The full text can be found at http://www.ilo.org/ilolex/english/convdisp1.htm.

[53] This refers to countries and territories in which the development from a subsistence form of economy towards more advanced forms of economy, based on wage earning and entailing sporadic and scattered development of industrial and agricultural centres, brings with it appreciable migratory movements of workers and sometimes their families.

through the countries and territories described in clauses (b)[54] and (c)[55] of Paragraph 1 above, whether he has taken up employment, is moving in search of employment or is going to arrange employment, and irrespective of whether he has accepted an offer of employment or entered into a contract."[56]

Based on these descriptions of migrant workers, some important elements can be identified regarding the scope of migrant worker according to the relevant ILO legal instruments:

1. The person is a worker (a natural person who avail him/herself to work);
2. It involves a typical migration of that person from one country to another;
3. The worker is being employed by another party;
4. The employment is performed in a country other than the worker's country of origin.

When put into the perspective of the main subject of this study, the concept of worker will be described here as:

"A natural person who works for another party, whereby the work is performed in a country other than his/her country of origin, and in return for which he/she would be entitled to financial remuneration, social protection and other rights at work".[57]

1.3. Protection of the Rights of Migrant Workers by the International Labour Organization

The ILO has a mandate to protect and regulate employment conditions around the world. It has regulated some Conventions and issued some Recommendations concerning the protection of migrant workers. The most important recent ILO instruments (relevant to the topic of this dissertation) to be discussed are: Convention No. 97 (1949) concerning *Migration for Employment*, Convention No. 143 (1975) concerning *Migration in Abusive Condition and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, Recommendation No. 86 (1949) concerning *Migration for Employment*, Recommendation No. 100 (1955) concerning *the Protection of Migrant Workers in Underdeveloped Countries and Territories*, and Recommendation No. 151 (1975) concerning *Migrant Workers*.

There are two important ILO legal instruments related to arrangements for migrant workers, i.e. ILO Conventions and ILO Recommendations. ILO Conventions are binding legal instruments, only if a country

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54 This refers to countries and territories through which such migratory movements of workers pass on their outward and, where applicable, their return journeys, if existing arrangements in such countries and territories, taken as a whole, afford less protection to the persons concerned during their journeys than is laid down in this Recommendation.

55 This refers to countries and territories of destination of such migratory movements of workers, if existing arrangements in such countries and territories, taken as a whole, afford less protection to the persons concerned during their journeys or employment than is laid down in this Recommendation.

56 See: Recommendation I.2. of ILO Recommendation No. 100 concerning Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955.
<http://www.ilo.org/ilolex/english/recdisp1.htm>, accessed 12 August 2006.

57 If one refers to the rights at work stipulated in the Declaration on Fundamental Principles and Rights at Work initiated by the ILO and reaffirmed by all 181 ILO's member States, the rights at the workplace include 4 categories:
- Freedom of association and the right to collective bargaining;
- Freedom from forced labour;
- Freedom from child labour; and
- Freedom from discrimination in respect of employment and occupation.

The declaration is expected to provide a "social floor" for the global economy. See: International Labour Office: "Understanding Rights at Work: ILO Declaration on Fundamental Principles and Rights at Work', p.1. The full text can be found at:
<http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=4751> accessed 12 August 2006.

ratifies them. Yet there is an exception for the core ILO Conventions,[58] which constitute the core ILO minimum standards of protection. These Conventions are legally binding and Members are obliged to implement these conventions on the basis of their ILO membership, and not on the basis of the ratification thereof.[59] This obligation is established by the *Declaration of Fundamental Rights and Principles at Work*, which was adopted by the 86th session of the International Labour Conference in June 1998.[60] Meanwhile, ILO Recommendations are intended as guidelines for national legislation and policies of the Members. They are not subject to ratification; thus, they are not directly binding legal instruments and there is no legal obligation for a State to implement them.[61] Even though ILO Recommendations do not have direct binding effect, the Members should refer to these legal instruments in their policy making; because it is expressly stated that the Members shall report to the Director General of the International Labour Office on the position of the law and the practice in their country regarding the matters dealt with in the ILO Recommendations.[62]

The ILO has been involved in the protection of migrant workers since 1939, when it issued ILO Convention 66 (1939) concerning the *Recruitment, Placing and Conditions of Labour of Migrants for Employment.* The focus of this Convention is actually about the recruiting, placing and employment conditions (equality of treatment) of migrant workers. It was revised in 1949 by Convention No. 97 concerning *Migration for Employment.* Following the coming into force of the latter Convention, Convention No. 66 is no longer open to ratification. Hence, Convention No. 66 never came into force, because it was withdrawn by the ILO Conference on 30 May 2000. Moreover, in fact most of the scope of regulation in Convention No. 66 is covered by the Convention No. 86 and its annexes; therefore, there is no necessity to apply both Conventions at the same time. Later on, Convention No. 143 (1975) concerning *Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* was regulated providing supplementary provisions, especially provisions concerning the trafficking of clandestine, irregular or illegal workers and measures to eliminate such practice.

1.3.1. Convention 097 concerning Migration for Employment (Revised 1949)[63]

This Convention defines the notion of migrant worker as mentioned in the previous part of this dissertation, but than it excludes frontier workers, short-term entry of members of the liberal professions and artists, and seamen from the scope of migrant worker.[64] This means that these three groups are not protected by this Convention, while nobody can dispute that in reality we find a lot of problems arising in connection with these types of workers.

This Convention established some rights and obligations for the ratifying Member States:

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58 The core ILO Conventions consist of 8 fundamental ILO Conventions, i.e. two pivotal Freedom of Association Conventions (Nos 87 and 98), Equal Remuneration Convention (No. 100), Forced Labour Convention (Nos 29 and 105), the Discrimination (Employment and Occupation) Convention (No. 111), Minimum Age Convention (No. 138), the Worst Forms of Child Labour Convention (No. 182).

59 See: Breen Creighton, 'The Future of Labour Law: Is There a Role for International Labour Standard?' This paper can be found in: Catherine Barnard, Simon Deakin and Gillian S. Morris (editors), *The Future of Labour Law : Liber Amoricum Bob Hepple QC.* Oxford: Hart, 2004, p. 267.

60 See: Lee Swepston, 'International Labour Conference: ILO Declaration on Fundamental Principles and Rights at Work and Annex, Introductory Note'. International Legal Materials, Vol. 37, 1998, p. 1233.

61 See: Lee Sweepton, 'Human Rights Complaint Procedures of the International Labour Organization'. This paper can be found in: H. Hannum (editor), *Guide to International Human Rights Practices, 3rd Edition.* Ardsley, New York: Transnational Publisher Inc, 2004, p. 86.

62 See: article 19 paragraph 6 (d) of the ILO Constitution.

63 Date of coming into force: 22 January 1952.

64 See: article 11 paragraph 2 of Convention No. 97.

1. Transparency

Each Member State has to make available on request to the International Labour Office and to other Members any information on: national policies, laws and regulations relating to emigration and immigration; special provisions concerning migration for employment and the conditions of work and livelihood of migrants for employment; and general agreements and special arrangements on these questions concluded by the Member. They also have to maintain an adequate and free service to assist migrant workers, and in particular to provide them with accurate information.[65]

Access to information is very important for every stakeholder (such as: prospective migrant workers, migrant workers, employers, employment agencies, etc.) as well as other Member States. Such information will provide legal certainty and increase the predictability of the rights and obligations of the parties arising from their employment relationship. It provides a description of the level of protection provided by a specific Member State to migrant workers. It also gives more opportunities for the Member States to know the trend of other countries regulations, for the purpose of developing their own regulation.

2. Specific Measure Against Misleading Propaganda

This Convention commands the Member States to take appropriate measures to combat any misleading propaganda relating to immigration and emigration, by issuing a new regulation prohibiting such activities or by carrying out particular operative actions (alone or in cooperation with neighbouring countries).[66] This article establishes a lot of obligations for the government, because in order to implement this provision, a lot of measures relating to inter-sector coordination must to be introduced (such as coordination between labour inspectors and immigration officials; coordination between labour inspectors and related embassies; coordination between labour inspectors and registered working agencies, etc.); it requires intensive inspections of all practices or activities related to labour migration, rules and procedure to administer any violation related to misleading propaganda, and measures to punish such violation.

3. Facilitation and Protection

This Convention establishes obligations for the Member States to facilitate the departure, journey and reception of labour migration within their jurisdiction.[67] It means that the governments of countries of origin as well as countries of destination have to facilitate the process of migration of workers and members of their families from their departure until their arrival back to the countries of origin. Furthermore, during their journey and their working time in the countries of destination, those countries also have to provide certain protections for migrant workers by:

- Maintaining medical services for the purpose of guaranteeing migrant workers and members of their families reasonable health and ensuring that they enjoy adequate medical attention and good hygienic conditions;[68]
- Applying equal treatment and non discrimination principles (between migrant workers & members of their families and nationals of the states) in respect of nationality, race, religion or sex, to immigrants lawfully within its territory,[69] especially concerning remuneration and other components relevant to the value of remuneration; membership of trade union and enjoyment of collective bargaining; accommodation; social security; employment taxes; and legal proceedings relating to the matters referred to in this Convention;

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65 See: article 1 and 2 of Convention No. 97.
66 See: article 3 and Annex I article 8 of Convention No. 97.
67 See: article 4 of Convention No. 97.
68 See: article 5 of Convention No. 97.
69 See: article 6 of Convention No. 97.

- Undertaking services related to employment and migration, and coordinate such services with the corresponding services of other Members;[70]
- Protecting migrant workers (in permanent employment) and members of their families from expulsion to the country of origin by reason of failure to follow his or her occupation due to illness or injury subsequent to entry. Such protection will be effective only within a reasonable period, which must not exceed 5 years from the date of admission;[71]
- Protecting the savings of the migrant workers and allowing them to export and import currency;[72]
- Regulating matters of common concern arising in connection with the application of the provisions of this Convention with other countries, in case the number of migration is sufficiently large.[73] This article actually tries to protect migrant workers from uncertainty regarding their residency. If they have come to a foreign country then they have to go back to their country of origin due to sickness or injury, they will have a very hard time and their life will become very vulnerable. Therefore, the country of destination pays more attention to the recruitment of migrant workers on a permanent basis, especially as regards the implementation of this provision. Subsequently the question is: what is the meaning of 'reasonable time' to keep the effect of this provision? Even if the parties are bound by contracts which have 'probation' clause: this means that if within the probation periods the migrant workers have not performed any work for the employer, the employers will be entitled to terminate the contract of employment. Nevertheless, it does not mean that the countries of destination will automatically be entitled to return migrant workers directly after termination of the contracts, especially if the migrant workers still have valid resident permits. Therefore, if a country expects its right to return terminated migrant workers to their countries of origin, the country has to provide clear and measurable provisions concerning this matter (as an example, the validation of resident permit is linked to the existence of a lawful occupation in that country, the legitimate grounds to terminate transnational employment contract and its impact on the validity of the resident permit, the reasonable period for migrant worker to stay after the termination of employment contracts, etc.);
- Permitting non-government institutions to become involved in recruitment and in the placing of migrant workers in foreign job opportunities and regulating such operations.[74] The idea of common regulation is very important to relieve the problems associated with labour migration, especially amongst adjacent countries, in which the flows of migration are usually very high. As an example, everyday many Indonesian workers go to or come back from Malaysia. These intensive flows also trigger the traffics of Indonesian illegal workers, those with no valid working permit for Malaysia. Due to the number of problems caused by this illegal employment in Malaysia, in 2004 Malaysia decided to deport illegal workers back to their countries of origin, some of whom were Indonesian. Indonesia aims to protect its migrant workers everywhere and Malaysia aims to eliminate problems connected with migrant workers in its territory. Therefore, these two countries cooperated in finding a solution to the problems by drafting a Memorandum of Understanding on the placement of Indonesian migrant workers engaged in the informal sector. This consent is subject to restrictions, especially in respect of for public employment offices or other public bodies in the territory in which the operations take place; public bodies in a territory other than that in which the operations take

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70 In case the services are rendered by its public employment service, it must be free of charge. See: article 7 of Convention No. 97.

71 See: article 8 of Convention No. 97.

72 See: article 9 of Convention No. 97.

73 See: article 10 of Convention No. 97. See also: Antara (the Indonesian News Agency), 'Indonesia to Contact Malaysia over Illegal Worker Deportations'. (Jakarta: July 15, 2004). <http://au.news.yahoo.com/040715/3/p/pwxr.html>, accessed 13 August 2006. The MOU is available on-line <http://www.caramasia.org/docs/MoU%20My-Idonesia%202006.pdf>, accessed 13 August 2006.

74 See: Annex I article 3 of Convention No. 97.

place which are authorised to operate in that territory by agreement between the Governments concerned; any body established in accordance with the terms of an international instrument;
- Ensuring that the services rendered by its public employment service in connection with the recruitment, introduction or placing of migrants for employment are rendered free;[75]
- Maintaining a system of supervision of contracts of employment between an employer (or a person acting on his behalf) and a migrant worker, by obliging the employer to deliver a copy of the contract of employment to the admitted worker before his departure, or if the Governments concerned so agree, in a reception centre on arrival in the territory of immigration;[76] that the contract shall contain provisions to indicate the conditions of work and particularly the remuneration offered to the migrant; that the migrant shall receive in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, information concerning the general conditions of life and work applicable to him in the territory of immigration;[77]
- Providing any necessary assistance during an initial period in the settlement and safeguarding of the wellbeing, during the journey and in particular on board ship, of the migrants and members of their families authorised to accompany or join them;[78]
- Establishing penalties in respect of violations to the system of supervision.

4. Recruitment other than under Government-Sponsored Arrangements for Group Transfer

Recruitment in Member States can be arranged under government-sponsored arrangements or outside government-sponsored arrangements (under private arrangements). Recruitment, introduction and placing processes are intended for individuals as well as for groups transfer. The Annex I of Convention No. 97 focuses on non-government sponsored recruitment arrangements (private institutions) for group transfer. The scope of recruitment covers the engagement of a person in one territory on behalf of an employer in another territory, or the giving of an undertaking to a person in one territory to provide him with employment in another territory; together with the making of any arrangements in connection with these activities, including the seeking for and selection of emigrants and the preparations for departure of the emigrants.[79] It means that the non-government institutions become the matchmaker between job opportunities and human resource availabilities, whereby they are located in different countries. The non-government institutions

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[75] See: Annex I article 4 of Convention No. 97.

[76] The author believes that the conclusion of a contract should be completed prior to the departure of migrant workers. It is important to eliminate the risk of disagreement between the parties concerning the content of the contract when the migrant workers are already in the country of destination. If that happens, migrant workers will be in a very difficult situation. If they refuse to sign the contract, they will lose their jobs while they are already in the country of destination whereas if they do sign the contract their interest will not be satisfied. Even though article 5 paragraph 2 entitles the workers to know the occupational category in which he is engaged and other conditions of work, in particular the minimum wage which is guaranteed to him; this paragraph is very vague and open to interpretation:
   - This does not elaborate who has the obligation to deliver the copy of the contracts to migrant workers, whether it is non-governmental institutions who sponsored the migration or the prospective employees;
   - This does not describe clearly what the meaning of "the occupational category in which he is engaged and other conditions of work" is. Even though the occupational category and the minimum wage of that occupation are described clearly, there are still a lot of matters in these contracts that are open to disagreement, including what the applicable law is to determine the standard of protection for migrant workers.

   The established system of supervision of each Member must prevent a worst condition for the workers caused by lack of information concerning the whole working term and condition.

[77] See: Annex I, article 5 of Convention No. 97.

[78] See: Annex I, article 6 (c) and (d) of Convention No. 97.

[79] See: Annex I, article 2 (a) of Convention No. 97.

referred to here could be the prospective employer or a person in his service acting on his behalf or private agencies.[80]

These institutions have to be involved in the whole process of recruitment, introducing and placing, including comparing the candidate employees' qualifications (skills, experience and educations) with the job requirements); testing the candidate employees and to deciding whether they can be admitted to work in the offered position; explaining the term and conditions of the employment contract to the admitted candidates; assisting the parties in the conclusion of the employment contract; assisting in the departure of the migrant workers; assisting in the arrival of the migrant workers or in the admission of the migrant workers to the place of at which they are to perform the work; introducing migrant workers to their employers; facilitating the employment relationship between the parties. To interpret and to implement this article, the author believes that the bottom line of the involvement of such institutions should include some measures of protection for migrant workers (when they are performing their work in a foreign country):

- They help migrant workers who have a dispute with their employers;
- They facilitate the parties to find the proper way to settle the dispute;
- They facilitate migrant workers to access legal aid, in case they have to proceed the dispute in a legal proceeding;
- They submit a report about the dispute to the government of the country of origin;
- If necessary, they request the government to provide legal advice, to protect citizens from its country.

The most important function of the private employment agencies is to protect migrant workers from unnecessary, unfortunate or unfair conditions in a foreign country. Therefore, private employment agencies are responsible for guaranteeing that the working conditions and employment terms of the employment contract are identical to or better than those explained to the migrant workers upon which the migrant workers based their decision to enter into the employment contract. Based on further analyses to the Annex I, the author favours including these protective measures for migrant workers in the supervisory system of each Member, as is obligatory under article 5 Annex I and as in the elaboration of article 6 (b) Annex I of this Convention.

In cases where the number of migrants for employment going from the territory of one Member to that of another is sufficiently large, it is important that the competent authorities of the territories concerned enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of this Annex, and in particular that they provide for a system of supervision over contracts of employment in the form of an operative and enforceable regulation.[81] The introduction of a common system of supervision as well as other labour migration procedures will prevent problems arising in these countries in the future. Furthermore, it will create more uniform regulations between (or amongst) those countries.

The author also believes that it is important for Member States to establish 'a system of registration' for each labour migration: either labour migration from their territory to another country or from another country into their territory. It is a kind of double registration for related countries, to make it easier for each country to monitor the number of migrant workers in a working place within their territory; as well as to monitor the number of citizens migrating from their country, the country of destination and their occupation. This is not

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[80] See: Annex I, article 3.3 of Convention No. 97. The private agency must had been given prior authorisation so to do by the competent authority of the territory where the said operations are to take place, in such cases and under such conditions as may be prescribed by the laws and regulations of that territory, or agreement between the competent authority of the territory of emigration or any body established in accordance with the terms of an international instrument and the competent authority of the territory of immigration.

[81] See: Annex I article 7 of Convention No. 97.

mandatory under the Convention and its Annex but it might provide useful support to the implementation of the system of supervision.

5. Recruitment, Placing and Conditions of Labour of Migrants for Employment Recruited under Government-Sponsored Arrangements for Group Transfer

In comparison with the Annex I, the Annex II establishes broader obligations for governments to arrange some additional forms of protection for the migrant workers, such as:

- Before authorising the introduction of migrants for employment, the competent authority of the territory of immigration shall ascertain whether there is not a sufficient number of persons already available that is capable of doing the work in question.[82] It is very important to monitor the proportion between the number of job opportunities in certain sectors and the number of local workers available to perform these jobs as well as the involvement of migrant workers in the performance of these jobs. It would be useful to prevent a surplus of human resources in that sector in that territory. The impact of such a control would be to prevent unemployment in that country (directly in certain sectors of work, indirectly in that country as a whole).

- Where the "collective transport of migrants" from one country to another necessitates passage in transit through that country[83] the competent authority of the territory of transit shall take measures to expediate the passage of the migrant workers, to avoid delays and administrative difficulties. This provision is very important as it guarantees the migrant workers a smooth journey without undue delay. This means they do not have to spend too much time merely travelling. It saves a lot of cost and energy for them and moreover they will be able to reach the country of destination without trouble.
- Each Member State (for which this Annex is in force) shall provide permission for the liquidation and transfer of the property of migrants for employment admitted on a permanent basis.[84] Actually more general provisions concerning permission to transfer part of the earnings and savings of migrant workers had been regulated in article 9 of this Convention. Additional emphasis in this Annex II gives rise to questions, because such emphasis is not provided in Annex I of this Convention. The difference between article 9 of this Convention and article 7 paragraph 1 (e) Annex II of this Convention is: in the Annex II, the permission to liquidate or transfer can be given on a permanent basis. Therefore, it could be concluded that permission to liquidate or transfer the earnings or savings on a regular/permanent basis is merely provided for migrant workers who migrate under government-sponsored arrangements, even though article 9 of this Convention has guaranteed migrant workers that they will be able to send their savings and earnings "as they desire". These words are very vague allowing each country to interpret the implementation of this provision in a different way. Hence the possibility that a country attempting to decelerate the flow of cash out of its territory may negate permanent transfer by migrant workers, allowing migrant workers to transfer their earnings or savings but not on a permanent basis. In other words, there is no guarantee for migrant workers who migrate under non government-sponsored arrangements that they will be permitted to transfer their earnings or savings on a regular/permanent basis. Furthermore, a question arises: should these different kinds of labour supply systems (supply by government-sponsored and non government-sponsored arrangements) create a different protection for migrant workers?

  The author does not see any differences between earnings and savings earned or saved by migrant workers under government-sponsored arrangements and earnings and savings belonging to migrant workers under non government-sponsored arrangements, neither does she see any danger in giving permission for migrant workers to liquidate or transfer their savings on a permanent basis. Moreover,

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82 See: Annex II article 3 paragraph 6 of the Convention No. 97.
83 See: Annex II article 5 of the Convention No. 97.
84 See: Annex II article 7 paragraph 1 (e) of the Convention No. 97.

the author believes that every migrant worker has a right to do so, and that this forms part of the human rights of migrant workers. Therefore, the author proposes that article 9 of this Convention be revised and that it obliges the Members States to give permission for migrant workers to liquidate or transfer their savings on a permanent basis. If this provision had been concluded in article 9 of this Convention, then article 7 paragraph 1 (e) could be eliminated.

- Member States shall take appropriate measures to assist migrant workers during an initial period with regard to matters concerning their conditions of employment.[85] Such an assistance in an initial period is very important to help migrant workers to comprehend the terms and conditions of work of their employment contract, and as a result they will know their rights and obligations under this contract. This is useful as a means of preventing unnecessary disputes between them and their employers.

  Such assistance is not established in Annex I of this Convention, and it could be concluded that: migrant workers, who are supplied through non government- sponsored arrangement, will not be entitled to obtain it. It is another complication, which discriminates between migrant workers who are supplied under government-sponsored arrangements and those supplied under non government-sponsored arrangements. The author believes that such discrimination must be eliminated. For the purpose of protecting migrant workers a whole, assistance during an initial period must be provided for all migrant workers without differentiating according to who has sponsored their migration for working.

- If migrant workers fail to secure the employment for which they have been recruited (because the job is restricted for them, as regulated in article 3 of this Convention) or to find other suitable employment for a reason for which they are not responsible, the cost of their return and the return of the members of their family who have been authorised to accompany or join them (including administrative fees, transport and maintenance charges to the final destination, and charges for the transport of household belongings) shall not fall upon the migrant workers.[86] This is another right for migrant workers who are sent through government-sponsored arrangements, which is not enjoyed by migrant workers who are sent through non government-sponsored arrangements.

  It is very important that migrant workers be protected from having to pay all the costs of migration, especially not the recruitment fails because of a reason for which they are not responsible. Nobody shall be responsible for something that is beyond or outside his or her control. This protection must be available to all migrant workers, not only to those recruited via government-sponsored arrangements. Therefore, this protection should also be added to the Annex I of this Convention.

- Still in connection with previous paragraphs, the competent authority of the territory of immigration shall take appropriate measures to assist migrants in finding suitable employment which does not prejudice national workers; and it shall take such steps as will ensure their maintenance pending placing in such employment, or their return to the area of recruitment if the migrants are willing or if they agreed to such a return at the time of their recruitment, or their resettlement elsewhere[87]. Again, this is another right for migrant workers who are sent through government-sponsored arrangements, which is not enjoyed by migrant workers who are sent through non government-sponsored arrangements.
  This part is very important for preventing migrant workers from being neglected and from becoming unemployed in the country of destination, when they are not deemed to be responsible for the loss of suitable work. Again, nobody shall be responsible for something that is beyond or outside their control. It must be applied to all migrant workers, not only to those who are recruited via government-sponsored arrangements. Therefore, this protection must also be added to the Annex I of this Convention.

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85 See: Annex II article 8 Convention No. 97.
86 See: Annex II article 9 Convention No. 97.
87 See: Annex II article 10 Convention No. 97.

- This part is still related to the previous four paragraphs, with additional emphasis to the status of migrant workers who are refugees or displaced persons. For them the competent authority of that territory shall use its best endeavours to enable them to obtain suitable employment, which does not prejudice national workers, and shall take such steps as will ensure their maintenance pending placing in suitable employment or their resettlement elsewhere.[88]

  This provision is, again, very important for preventing migrant workers who are refugees or displaced persons from being neglected and from becoming unemployed in the country of destination, when they are not deemed to be responsible for the lost of suitable work. And again, nobody shall be responsible for something that is beyond or outside their control. Therefore, every migrant worker who is a refugee or displaced person must obtain this protection, without considering whether he is recruited via government-sponsored arrangements or non-government sponsored arrangements. Therefore, this protection must be also be added to the Annex I of this Convention.

- On the basis of article 12 of Annex II of this Convention, a system of supervision over the contract of employment is not compulsory. Nevertheless, if a Member State maintains such a system, it shall indicate the methods by which the contractual obligations of the employer shall be enforced, the terms of international instruments that are involved and the competent authority of the territory of immigration that must control the activities in order to provide the assistance to migrants during an initial period and especially with regard to the migrants' their understanding of the employment conditions applicable to them.

  Actually, this article 12 is a further implementation of article 8 of this Annex. Because article 8 of this Annex is applied only for migrant workers who are recruited via government-sponsored arrangements, therefore, article 12 is also applied solely in respect of. The author believes that this provision is also important to protect every migrant worker, not only the one who is recruited via government-sponsored arrangements. For a government, it will be easier to control the recruitment process via the government-sponsored arrangements than via non government-sponsored arrangements. Therefore, in fact the position of migrant workers recruited by non government-sponsored arrangements is more vulnerable than migrant workers recruited by government-sponsored arrangements. Furthermore, it is important that the level of their protection is better than or at least the same as that provided in respect of migrant workers recruited by government-sponsored arrangements. Based on this conclusion, again the author suggests applying this arrangement to Annex II as well.

6. Importation of the Personal Effects, Tools and Equipment belonging Migrants for Employment

Personal effects belonging to recruited migrant workers and members of their families who have been authorised to accompany or join them "shall be exempt from customs duties on arrival in the country of destination". This includes portable hand-tools and portable equipment of the kind normally owned by workers for the performance of their particular trades, provided such tools and equipment can be shown at the time of importation to be in their actual ownership or possession, to have been in their possession and to have been used for an appreciable time, and to be intended to be used by them in the course of their occupation.[89] The same treatment is applied when migrant workers and the members of their families go back to their countries of origins, as long as they still retain the nationality of that country at the time of their return there and provided such tools and equipment can be shown at the time of importation to be in their

[88] See: Annex II article 11 Convention No. 97.
[89] See: Annex III article 1 of Convention No 97

actual ownership or possession, to have been in their possession and use for an appreciable time, and to be intended to be used by them in the course of their occupation.[90]

These provisions are very important for shielding migrant workers and members of their families from the necessity of paying custom duties for their used personal belongings, tools and equipment. Temporary migrant workers in particular would be charged double or more custom duties were this exemption not established. It would be very expensive and unfair for them if they had to pay custom duties every time migrant workers crossed the border of one territory into another, all the more so when they need the belongings for performing their work.

7. Final Remarks to ILO Convention No. 97

The author considers that the most controversial organization of the regulation in this Convention is in Annex I and Annex II of this Convention. Those annexes separate the type of migrant workers into two parts: migrant workers recruited by government-sponsored arrangements and those recruited by non government-sponsored arrangements. The protection for them is also different (it has been analysed in the previous two points). Based on those analyses, the author believes that it is not appropriate to differentiate between these migrant workers on the basis of their manner of recruitment. It can potentially create discriminatory treatment between two groups if a country applies both Annexes in its territory.

An illustrative case will be provided here to describe how such discrimination could happen: there are two migrant workers who work in the same working place and the same position. They come from different countries. One of them (so called A) had been recruited via a non government-sponsored arrangement, while another one (B) had been recruited via a government-sponsored arrangement. In some matters, they will be treated differently. B gets a guarantee that he will be able to transfer his savings on a permanent basis, while there is no such guarantee for A. Furthermore, if on arriving in the country of destination B finds that he can not be placed in the agreed position due to reasons outside his control he will be guaranteed placement in another working place or he will be returned to the country of origin at no cost to himself (administrative fees, transport and maintenance charges to the final destination, and charges for the transport of household belongings etc will not be charged to him). If that happens to A, this guaranty is not applicable. Another unequal treatment concerns the assistance regarding conditions of employment during an initial period. A will not get that assistance while B will be entitled to get it.

The illustrative case above describes how Annex I and Annex II of this Convention can establish discrimination amongst migrant workers who are placed in the same position and the same working place. Therefore, those different treatments based on the method of recruitment (via government-sponsored arrangements or non government-sponsored arrangements) must be re-evaluated.

The author predicts that actually differentiation between migrant workers recruited by government-sponsored arrangements and non government-sponsored arrangements will encourage potential migrant workers to use government-sponsored arrangements to enter other labour markets. If such a system is available in a country, it may be an ideal way of recruiting migrant workers because the management and operation of such a system is easily supervised by all persons/institutions involved.[91] But in reality there are a lot of countries which do not yet organize government-sponsored arrangements for these activities. In this situation, migrant workers do not have any option but to be recruited and placed by non government-sponsored arrangements. As a consequence, based on the Annex I and Annex II of this Convention, they

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[90] See: Annex III article 2 of Convention No 97

[91] Usually if the system is arranged by government-sponsored institution, it will be regulated in a public regulation and therefore this system becomes more transparent and controllable. It creates a more secure position for migrant worker.

will get different protection than migrant workers who are recruited by government-sponsored arrangements; and as it has been mentioned before, in certain conditions they will be in a more vulnerable position.

Amending a Convention is very complex and time consuming. Nonetheless, if the problem is caused by a fundamental reason such as the potential emergence of discriminatory treatment pursuant to this Convention, it is very reasonable to recommend amendment of this Convention. Another important matter to be covered in the amendment is to make the system of supervision compulsory for every ratifying State. During the amendment process, the ILO should establish a code of conduct regarding the system of supervision for every country, in which every country shall maintain equal treatment between migrant workers recruited by government-sponsored arrangements and non government-sponsored arrangements. As a note, if the code of conduct were to be applied and respected by all countries, then the priority to amend this Convention would become less immediate.

1.3.2. Convention 143 Migration in Abusive Conditions and Promotion of Opportunity and Treatment of Migrant Workers (Supplementary Provisions) Convention, 1975[92]

This Convention defines the meaning of migrant worker in the same definition as it is in the ILO Convention 97, but the scope of protection is a little bit broader with regard to when a person becomes a worker, i.e. "not only protect persons who migrate for work, but also to protect persons who have migrated from one country to another with a view to being employed".[93] As a result of this provision even persons arriving with no employment contract are protected by this Convention. The problem is: the term "with a view to being employed" is very vague and there is no criterion for explaining what the meaning of it is. Some conditions can arise and create grey areas concerning whether the person must be protected by this Convention, such as:

- A person who has migrated to a country to participate in job recruitment, but then fails to pass the job requirements. He/she arrived in the country for the purpose of finding work and being employed in certain position in that country. The question that then arises is whether this situation constitutes migration "with a view to being employed";
- A person who has migrated to a country has an employment contract that commences several months after his/her arrival. Then the question is whether his/her presence before the employment period is also protected by this Convention, etc.

While in general, the scope of the types of worker who will be protected by this Convention is still narrower than the scope of the ILO Convention 97. The ILO Convention 143 excludes frontier workers, the short-term entry of members of the liberal professions and artistes and seamen from its protection. Moreover it also excludes "persons coming specifically for purposes of training or education; 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" (this group is not excluded by the ILO Convention 97).

The author is concerned about the exclusion of "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"[94] from the scope of this Convention. Based on this exclusion, it is likely that the ILO considers this problem to be protected by a

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92 Date of coming into force: 9 December 1978.
93 See: article 11 paragraph 1 of this Convention.
94 See: article 11 paragraph 2 (e) of this Convention.

national law, even though it does not provide any indication about which national law might be applied as the proper law of this problem.

In the legal concept, this kind of employment is defined as "posting of workers". It seems that this Convention does not consider posted workers to fall within the criteria of migrant workers. Actually, this legal relationship is very problematic. If we look to the status of the worker and the relationship between the worker and his employer, there is no change in their legal relationship following the posting to the foreign country, even though in fact there is a change of working place; and that it is possible that the change of working place will influence many aspects in the implementation of the employment contract (such as lower health and safety protection, etc.). The author believes that the posting of workers should not result is a lower level of protection for the workers nor should it result in poorer working conditions than in their previous post. Therefore, if the posting of workers creates adverse effect for the posted workers, then national or international law shall interfere in this legal relationship. It also corresponds to the task of the ILO to protect the interests of workers when they are employed in countries other than their own.[95] This problem will be analysed in more detail in the subsequent part of this dissertation.[96]

The author also gives special attention to the nature of protection provided by this Convention. Actually, this Convention is mainly used to protect "temporary" migrant workers. This matter is expressively arranged in article 14 point (a), which regulates that a State (in which this Convention is in force):
'may make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract'.
It is obvious that this Convention encourages States to arrange working admissions for migrant workers in their country in a specific period, and the maximum is two years. This article is very important, because it answers some legal problems that are the frequent subject of discussion:

- This article can be used to determine whether an employment relationship is lawful or illegal. The basic rule that must be applied is: if the migrant worker resides illegally in the host country the employment relationship is also illegal;
- The general period of labour migration is two years. The determination of two years maximum working period for migrant workers is very sensible, in the sense that it is in harmony with other Conventions.[97] It is very important to maintain consistencies amongst regulations at the international level as well as at the national level. Moreover, most employment contracts for migrant workers have a maximum duration of two years.[98] The twice yearly renewal of the resident permit is also a useful control mechanism. If a migrant worker has to renew his/her resident permit every two years, this procedure can control the

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95 See: the first Consideration of this Convention.

96 See: chapter 7, *infra*.

97 As an example, article 52 paragraph 3 (a) of the *UN Convention on Migrant Workers*.

98 As examples, under the legalization programme for irregular migrant workers, any irregular migrant who had resided in Korea for less than three years as of March 31, 2003, was permitted to work in the industry designated by the Ministry of Labour for a maximum period of two years, if they voluntarily reported to the relevant authorities and went through a specified procedure. See: Amnesty International USA, 'Republic of Korea (South Korea): 'Migrant workers are also human beings". <http://www.amnestyusa.org/news/document.do?id=ENGASA250072006>, accessed 18 August 2006; Malaysia also applies the standard two years contract for migrant workers employment. See: Human Rights Watch, 'Malaysia: Migrant Workers Fall Prey to Abuse, Mass Expulsions Ensnare Refugees; Migrant Women Lack Legal Protections'. <http://hrw.org/english/docs/2005/05/17/malays10959.htm>, accessed 18 August 2006. In Ireland, the working permits as well as green cards will be granted initially for a period of 2 years. See: The Department of Enterprise, Trade and Employment of the Republic of Irelands, 'Minister Martin outlines details of New Employment Permits Policy for Migrant Workers'. <http://www.entemp.ie/press/2005/20051012a.htm>, accessed 18 August 2006.

presence of that person in the country and also detect his/her employment status.[99] This is another measure that is very important in the fight against illegal employment. If this system is applied together with the immigration system that controls the inflow and outflow of migrant workers this combination will be very functional for reducing the number of illegal residents in a country. It must be kept in mind that this Convention does not prohibit any country from granting resident permits longer than two years period, even though it is not recommended. Therefore, it can be concluded that this Convention gives States the right to arrange more specific provisions concerning working permits and resident permits for migrant workers, to make such that provisions are suitable to the practice and the condition of the States.

Actually the main objective of this Convention – besides the completion of legal protection for migrant workers as regulated in the ILO Convention 97 – is also to prevent abusive conditions of migrant workers in implementing their employment relationships, as well as to promote higher opportunities for migrant workers to compete in a foreign labour market and to be treated in the same way as local workers. Therefore, this Convention is actually supplementary to the ILO Convention 97.

Some rights and obligations that have been established by this Convention can be classified as follows:

1. Protection of the basic human rights of all migrant workers

Any state for which this Convention is in force has an obligation to respect the basic human rights of all migrant workers in its territory.[100] To enforce this article and to implement the international standards of protection arranged by the ILO in its fundamental ILO Conventions,[101] a country also has to refer to the UN Convention on *Migrant Workers*.[102] Furthermore, the workers or their family members shall not be responsible for paying any financial costs arising as a result of any changes in circumstances or new arrangement (especially with regard to adjusting their situation to the governing law), that may affect them..[103]

2. Combating the illegal employment of migrant workers

Any state for which this Convention is in force has an obligation to combat the existence of illegal workers in its territory.[104] The state shall systematically seek to determine whether there are illegally employed migrant workers on its territory and whether any movement of migrants for employment departs from, passes through or arrives in its territory in which the migrants are subjected (during their journey, on arrival or during their period of residence and employment) to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations. It is very clear that the application of this article is supposed to be supported by a good labour administration,[105] labour inspection[106] and immigration system.[107]

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99 In general, a resident permit will be issued by a country if the applicant has sufficient income or there is a guarantee that he/she will be able to afford his/her life in that country. The applicant can only register his/her income from a lawful employment, because if he/she reports his/her income from illegal employment as well, their status as illegal worker will be exposed.

100 See: article 1 of this Convention.

101 The scope of the Fundamental ILO Conventions has been explained in the previous chapter.

102 The binding power of this article is decreased if the country does not ratify one or some Fundamental ILO Conventions, or does not ratify the UN Convention of Migrant Worker.

103 As an example, based on article 9 paragraph 3 of this Convention, in case of expulsion of the worker or his family, the cost shall not be borne by them.

104 See: article 2 paragraph 1, article 3 (a) of this Convention.

105 For a more comprehensive idea about the scope of labour administration, see: the ILO Convention No. 150, 1978.

As regards this problem, the purpose of labour administration is to provide a good database of the inflow and outflow of migrant workers, to check the completion of any labour migration requirements before the prospective migrant workers depart to the country of destination, to register employment agreements between the migrant workers and their employer, etc. Through the arrangement of such databases, it will be easier for the authority to monitor the expiration of the period of migration of each migrant worker and to control whether he/she has already renewed the employment contract, in situations where the employment contract has expired and the migrant worker is still in the country of destination.

Labour inspection has a very important role in combating illegal labour migration. The labour inspector has access to check the factual employment relationship in all working places, especially related to the condition of work and protection of workers while engaged in their work. It means that labour inspectors are entitled to control the status of workers in any working place to identify whether workers have appropriate protection and fair working conditions. Indirectly, this function gives the labour inspectors access to identify whether a worker is employed legally. In practice, it is not easy to discover whether an employer employs illegal workers, because by employing illegal workers he/she usually derives a benefit from cheap worker, while on the other hand illegal workers are given an opportunity to work in the country of destination, even though they can not fulfil the administrative requirement to work in such a country. Both parties derive the benefit from the illegal employment relationship, and therefore, in general they do not want to announce the existence of this relationship and seek to conceal this activity. It is a kind of systematic underground movement that is very difficult to discover. As an example, there were tremendous rallies by illegal migrant workers throughout the USA between April – May 2006, calling for illegal immigrant rights. The author does not want to discuss the possibility to issue such rights, but is concerned about the huge number of protesters (hundreds of thousands people) and the area of protests (in small towns and big cities across the United States). [108]

The immigration system plays a key role in controlling illegal migration. Immigration officers are the first gate to face any inflow or outflow of persons to / from a country. Therefore, it is very important that a system of cooperation and coordination between labour inspectorates and immigration offices is created in order to bring about more accurately controls of the required documents relating to labour migration as migrants enter a country of destination,[109] and it is necessary as well to make the database of inflow and outflow of migrants[110] accessible for labour administrators. By using this database, it will be easier for the labour

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106 For a more comprehensive idea about the scope of labour inspection, see: the ILO Convention No. 81, 1947 (for industrial and commercial sectors). This also relates to the ILO Convention No. 85, 1947 (labour inspection in non-metropolitan territories) and the ILO Convention No. 129, 1969 (labour inspection in agricultural sector).

107 This refers to the immigration law and provisions of each country.

108 See: CNN International, 'Rallies Across US Call for Illegal Immigrant Rights'. <http://www.CNN.com/2006/POLITICS/04/10/immigration/index.html>, accessed 11 October 2006. Before these rallies, no one realized how big the number of illegal workers in the USA was, because in general it is impossible to census them, since in practice clandestine illegal migrant employment is very latent.

109 Still this kind of system does not guarantee the successful elimination of illegal workers, because there are many migrant workers who crossed the border using (valid) tourist visa, but after the expiration of their tourist visa they do not leave the country of destination. This phenomenon is very hard to trace by any immigration system, especially if the person visits the country of destination without any personal guarantee from the inhabitants of that country. Even if the immigration offices can detect any expired tourist visa [the author believes that if there is a need to create this kind of system, it is not impossible]; tracing the presence of these persons is quite troublesome and overwhelming.

110 The author is not certain if this kind of data is existent in all countries in the world (except the data of inflow of migrants who need a visa to enter a country, this can be traced from the data of visa application in any embassies of that country), since in practice there is no notification system to the data of persons who enter a country. This is a very sensitive issue, because if such a notification system

administrators to detect whether a migrant worker who has an expired employment period and does not have a new employment contract, is still in that country or has already departed. It will be a very important indication to detect the existence of illegal employment relationships.

In comparison with the way in which the ILO Convention 97 combats illegal workers, the approach of this Convention is more rigorous and addresses the problem more directly, since this Convention does not fight merely against misleading propaganda related to immigration and emigration, but it directly orders any States for which this Convention is in force to collaborate with other States against the organisers of illicit or clandestine movements of migrants for employment departing from, passing through or arriving in its territory, and against those who employ workers who have immigrated in illegal conditions.[111] It is a very sensible approach, because if the organisers of these illegal activities are diminished, it will be difficult for the intending migrant worker to enter any black labour market. Gradually this effort will eliminate the practice of illegal worker employments, and indirectly it prevents any worker from being involved in any abusive working relationship. Alas the drafting of article 3 (b) of this Convention has a very weak enforcement effect, because it uses very ambiguous terminology to eliminate any practice of illegal migrant employment, i.e. shall take necessary and appropriate measures against the organisers of illicit or clandestine movements. This term is very subjective and very open for interpretation. What the meaning of 'necessary and appropriate measures' is, is not very clear and it can be implemented by the State for which this Convention is in force in very various ways and at various levels of intensities.

Moreover, this Convention also orders the ILO Member States to take the necessary measures for systematic contact and exchange of information on the subject with other States at the national and the international level, in consultation with representative organisations of employers and workers.[112] This exchange of information, especially between some countries that are located adjacent to one to another, is very important. The information relevant to this problem is especially related to the database of inflow and outflow of migrant workers in those countries and the database of the registration of transnational employment contracts. From these databases, those countries will be able to get descriptions of the place of employment, the working condition and the working period of every single worker. It will make it easier for labour administrators of each country to indicate the existence of migrant worker employments within their territories.

Another important provision relating to illegal / irregular migrant workers can be found in article 9 paragraph 4,[113] in which is imposed the right of a country to legalize the status of illegal/irregular migrant workers, by granting the right to stay and to enter legal employment. It is another way of reducing illegal/irregular employment, but this method must be adopted very carefully by a country, since it can also create unemployment and social problems in that country. This problem can be explained as follows: in the case of a migrant worker who becomes an illegal or irregular migrant worker because of his/her invalid status as a resident; if the host country creates opportunities for irregular/illegal migrants to change their status into legal residents, this would also present the migrant worker with the opportunity to change his/her illegal/irregular employment into legal employment. If the number of the new legal migrant workers is plentiful (because of the change of status) while the number of local workers is equal to the number of job opportunities in that country, the chances of local workers finding employment are less because the jobs will

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is applied, aside from the fact that it would be very impractical, there is also a big question as to whether this system does not infringe the privacy and freedom to move of a person (vide article 12 and 13 of the Universal Declaration of Human Rights).

111 See: article 3 (b) of this Convention.

112 See: article 4 of this Convention.

113 The content of this paragraph is as follows: Nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment.

also be taken by migrant workers. In this case, unemployment rates in that country can increase. The author believes that if a country authorizes legalization of the status of illegal workers, it must be done based on strict criteria, requirements and procedure. They must be useful as a filter to prevent a surplus supply of human resources in certain sectors in that country.

Nevertheless, it is actually not always easy for an illegal migrant to find a lawful job, since a lot of illegal migrant workers have been intentionally employed by employers under bad working conditions and standards of protection. It needs hard efforts for illegal migrant workers to change their illegal employment relationship into lawful employment relationships. Their search for new lawful jobs is not always successful, especially for unskilled migrant workers. Where previously their employers had admitted them to work because they were willing to work under poor working conditions and low levels of working protection, under a lawful employment contract, the employers are obliged to provide a certain standard of protection, which is enforced by the country via national laws. As regards unskilled migrant workers, it makes sense that employers are reluctant to hire unskilled migrant workers under the same standard of protection as local workers. Therefore, if these persons have been admitted as legal residents, but are unable to obtain a lawful job, the situation will be divided: either the unskilled migrant workers will be unable to obtain a lawful job and they will become unemployed in the host country; or they will continue their illegal employment (with the result that the provision has no effect in combating the problem of illegal employment). Indeed a very careful planning must be designed before a country implements article 9 paragraph 4 of this Convention.

3. Consultation in the Law Making Process

This Convention obliges the lawmakers to consult to the representative organizations of employers and workers as regards the issuance of laws and regulations and other measures provided for and designed to prevent and eliminate the abuses related to manpower trafficking; illegal employment of migrant workers; employment of illegal workers; illicit and clandestine movements of migrant workers; and other violations to the problems arranged by this Conventions and the possibility of their taking initiatives for this purpose shall be recognised.[114] This Convention respects the involvement of the representatives of workers and employers, two parties in employment relationships, but does not mention the representative of the government. It seems this article assumes the scope of 'lawmakers' already includes government [in the sense of executive power]. This assumption is actually inaccurate if we apply this provision to a legal instrument, which is issued by legislative power (i.e. Act/Law). If the arrangement concerning migrant worker protection is issued at the level of Act/Law, there is no involvement of the executive power in this issuance. Therefore, consultation with the relevant government authorities becomes as important as the consultation with the representative organizations of employers and workers in order to discover the real problems in the field, the best way to resolve these problems and the contents of the law that properly regulate these problems.

4. Providing Equal Opportunity and Treatment for Migrant Workers

A legal migrant worker shall enjoy equality of treatment with nationals in respect of particular of guarantees of employment security, the provision of alternative employment, relief work and retraining.[115] This provision

[114] See: article 7 of this Convention.

[115] See: article 8 paragraph 2. Additionally, paragraph 1 of this article provides that if a migrant worker has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit. This paragraph gives an opportunity for a migrant worker who is unemployed due to the lapse of his employment contract to seek a new job and he must be considered as a legal migrant worker, until the expiration of his residence permit or other administrative requirements related to this situation. The loss of job is not the only measure to determine the legal status of a migrant worker.

prevents discrimination between migrant workers and local workers, within the scope of job seeking opportunities,[116] job certainty and job continuity,[117] training to improve his/her knowledge and/or skill related to his/her job,[118] and to enjoy their rights arising out of past employment as regards remuneration, social security and other benefits, in case their employment relationship cannot be regularised by the laws and regulations of a country of working admission.[119] This protection is very important to guarantee fair treatment for migrant workers who work in a foreign country, since their status as a foreigner is very vulnerable and in practice often results in an unfavourable employment contract for the migrant worker.[120] Therefore, a formal protection of non-discriminative treatment against local workers via a formal regulation either at the international level or at the national level is very important to protect migrant workers.

The main provisions concerning equality of opportunity and treatment for migrant workers[121] are arranged in Part II (article 10 and articles 11-14) of this Convention. The backbone of this equality principle lies in article 10 of this Convention, which covers the obligation of a State (in which the Convention is in force) to regulate in its national policy provisions concerning:

'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', and article 12 point (g), which obliges States to guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment.'

Based on these articles, States have an obligation to apply the equality principle in their national law only to protect lawful migrant workers and members of their family. This principle must be applied to the most basic rights, and some of them belong to the fundamental human rights of workers, i.e. equality of opportunity and treatment in respect of employment, occupation and trade union participation. These matters are also protected in the UN Convention on *Migrant Workers.*[122] For implementing this article, the States are obliged to do these following activities:[123]

- To seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of the operational policy;
- to enact such legislation and promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

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116 If a migrant worker has a lapsed employment contract while he has a valid permit to live in a country, that country has to give him or her the opportunity to seek a new job within its territory.

117 If a migrant worker has concluded an employment contract with an employer, in a general situation, he/she has a right to keep the continuity of the contract and the employer cannot unilaterally terminate the contract.

118 Any migrant worker is entitled to improve his or her work skills in the same way as the comparable local worker (if any). His/her opportunity to receive training cannot be reduced merely by the fact that he/she is a migrant worker.

119 See: article 9 paragraph 1. An irregular migrant worker shall enjoy their rights as the result of the irregular employment relationship. Even though he/she is an irregular worker, if he/she has already fulfilled his/her obligation in the employment relationship, the fact that the employment relationship is irregular does not erase his/her right to receive compensation and any rights arisen from the employment relationship. This protection is not only important for the migrant worker himself/herself, but it also important for ensuring sufficient income to support for his/her family members.

120 This situation especially applies to unskilled migrant workers situations, because usually their bargaining position is very low and they do not have any option to improve their own employment condition.

121 Since this Convention regulates the equal opportunity and equal treatment of migrant workers, then the focus of non-discrimination and equal treatment is on the scope of comparison between migrant workers and nationals (local workers).

122 Cf: article 13 paragraph 2 and 26 of the UN Convention.

123 See: article 12 of this Convention.

- to take measures, encourage educational programmes and develop other activities aimed at acquainting migrant workers as fully as possible with the policy, with their rights and obligations and with activities designed to give effective assistance to migrant workers in the exercise of their rights and for their protection;
- to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- in consultation with representative organisations of employers and workers, to formulate and to apply a social policy appropriate to national conditions and practice which enables migrant workers and their families to share in advantages enjoyed by its nationals while taking account, without adversely affecting the principle of equality of opportunity and treatment, of such special needs as they may have until they are adapted to the society of the country of employment;
- to take all steps to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue;
- to guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment.

There are two main strategies implied in this article, i.e. strategy at the level of policy making, and strategy at the level of policy implementation.

At the level of policy making in the national law, this Convention obliges States to consult and to cooperate with representatives of workers and employers, in the effort to draft a new policy, to evaluate the implementation of the policy and to amend any operative provision or code of conduct, which is inconsistent with the policy. This method is very important, for the purpose of finding the ideal policy for arranging labour migration in practice.[124]

At the level of policy implementation, this Convention is aimed at assuring the enforceability of this Convention by way of obliging States to promote the policy; to take measures to implement this policy; to encourage educational programmes; to develop other activities to understand their rights and for their protection; to provide assistance and encouragement for migrant worker and their family members for implementing their rights under this Convention, as well as to preserve their nationality, ethnic identity and cultural ties with their country of origin. This Convention aims to protect migrant workers and their family members[125] not only in relation to their rights connected to the employment contract, but also in relation to their nature as a foreigner and human being. Therefore, reunification of the family members of the migrant workers becomes one arrangement in this Convention.[126]

5. Recognition of Occupational Qualifications of Other Countries

The States for which this Convention is in force are obliged to make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas, after appropriate consultation with the representative organisations of employers and workers.[127] To interpret the meaning of this article, the author would like to refer as well to article VI of the GATS. This article provides Governments the right to retain their right to set qualification requirements for certain professions (such as lawyers, doctors, accountants, etc.) and to set standards to ensure consumer health and safety. As long as the same regulations are applied to foreign service suppliers as to local service suppliers, it does not violate the

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[124] The author's note in the previous part of this dissertation concerning the absence of the government representative also applies to this part.

[125] The members of the family of the migrant worker, as stated in article 13 paragraph 2 of this Convention, are the spouse and dependent children, father and mother.

[126] See: article 13 paragraph 2 of this Convention.

[127] See: article 14 point (b) of this Convention.

national treatment principle. Article 14 point (b) of the ILO Convention No. 143 and article VI of the GATS recall Governments to set occupational qualification requirements: on the one hand article VI of the GATS acknowledges the sovereignty of a State to regulate such occupational qualifications and apply them within its territory to everybody who seek or are employed in those occupations (without considering whether he/she is a local worker or a migrant worker); on the other hand article 14 point (b) of the ILO Convention No. 143 is similar to article VII of the GATS. They oblige States to recognize the occupational qualifications of foreign countries acquired by anyone seeking any job within their territory (without considering whether he/she is a local worker or a migrant worker). It is evidence that both ILO Conventions No. 143 and GATS apply the non-discrimination principle as the basic principle of their provisions.

Based on these provisions, it can be concluded that if a person has completed education or occupational training in a certain country, the diploma, certificate or other credentials obtained must be recognized by other countries. The place, in which the occupational training or education was undertaken, is entitled to set the level of that education/training. On the other hand, if a person uses that certificate/diploma to apply for a job vacancy in a certain country, then the country, in which the recruitment is undertaken, is entitled to set the occupational qualification requirements to measure whether a candidate qualifies for that job vacancy.[128] Any certificate / diploma / other credentials obtained in other countries must be recognized in order for it to be used as one component for measuring whether the occupational requirements of that job vacancy have been fulfilled. This way of application implies a mutual reciprocity recognition of each country's standards of requirements or qualification standards.

This regulation can be applied ideally when the standards of occupational training or education are equal in each country. However, if the gap between the standards in the developed and developing or under developed countries is very big, the application of this arrangement can create problems. As an illustration: a person has completed an occupational training or educational programme in a developing country, which has a low quality of occupational training or education. Afterwards that person successfully applies for a job vacancy in a developed country. In such a situation it is not impossible that his work will fall below the quality of that expected from a worker in that job in that particular country. Therefore, a preliminary test before somebody is recruited to work in a foreign country plays a very important role in decreasing the problem of inequality. This preliminary test reflects the quality, knowledge and skill of the person better than merely the certificate or diploma.

Still in relation to the recognition of occupational qualifications in other countries, even though a migrant worker has the relevant qualifications for a certain position, the government is entitled to restrict access to limited categories of employment or functions where this is necessary in the interests of the State.[129] The meaning of limited categories of employment or functions where this is necessary in the interests of the State is not elaborated upon. Understand how a country is supposed to interpret the meaning of this article is much easier when the country is a member of the WTO because it then has to register such restrictions in its Schedule of Commitments to the WTO. Therefore, by referring to the Schedule of Commitments of one country we will be able to identify what are inaccessible occupations for migrant workers. On the other hand, if a country is not a member of the WTO, usually it will be acceptable if the reason to limit the accessibility of some occupations is determined by some specific situations such as: any job related to national security, public interest, and governmental services.

6. Multilateral and Bilateral Agreements

[128] These requirements must be general requirements, which are applied to all applicants, either foreigners or nationals of that country.

[129] See: article 14 point (c) of this Convention.

In the application of this Convention, it is not impossible problems will arise amongst countries cooperating intensively in the field of labour migration.[130] To settle the problems between/amongst countries arising from the implementation of this Convention, this Convention encourages the States to conclude multilateral or bilateral agreements.[131] Actually, cooperation and coordination between/amongst countries via multilateral/bilateral agreements can play a very important role in settling any problem in a certain region; because before they conclude the agreement, they can analyse the concrete problems in their regions, design specific solutions for these problems, arrange these into policies and draft them within the scope of multilateral/bilateral agreements. This arrangement is very practical in preventing more problems in the future and it can be used as a guidance to settle any dispute concerning labour migration.

7. Effect of Ratification

Either Part I (Migrations in Abusive Conditions) or Part II (Equality of Opportunity and Treatment) of this Convention can be excluded from the acceptance of any Member that ratifies it, by a declaration appended to its ratification.[132] This system makes this Convention become more adaptable and applicable in its region. Therefore, if there is a change of situation in a country, it may also at any time cancel that declaration (of exclusion of the applicability of certain parts of this Convention) by a subsequent declaration.[133] On exclusion matter, this Convention impliedly applies the "sunset principle". It means that exclusion of certain part of this Convention does not apply forever. As soon as the condition of a country, which declares exclusion, is getting better and it is ready to implement the whole part of this Convention, it must cancel its exclusion. There is a report procedure concerning the application of this Convention;[134] and a certain country might maintain its exclusion as long as there are specific reasons to persist with that exclusion, and the position of its law and practice in regard to the provisions of the Part excluded from its acceptance.[135] The Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.[136]

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130 Usually these countries are adjacent one to another, or have a long history of labour migration. As examples, the USA is located adjacent to Mexico, and it is not surprising that there are many Mexican migrant workers in the USA. Nevertheless, in other parts of the world there are two countries that are located in different regions, but have a very intensive labour migration, such as between Indonesia and Saudi Arabia. Saudi Arabia's labour market absorbs a lot of Indonesian migrant workers, even though these countries are not adjacent one to another. This is the result of a long history of Islamic connection between Indonesia and Saudi Arabia. One of the five pillars of Islam is the Hajj Pilgrimage. This is a compulsory pilgrimage to Mecca in Saudi Arabia (at least once in a lifetime) for Moslems. Indonesia has the biggest Islamic population in the world. Therefore, many Indonesians visit Saudi Arabia every year. A lot of Indonesians became more familiar with that country and enter into a lot of transactions and business cooperation with Arabic people, also in the labour sector. At first Indonesian labour migration in Saudi Arabia was largely related to the yearly exodus of Indonesians on Hajj pilgrimage. Later, because there are a lot of job opportunities in Saudi Arabia (mostly for un-skilled workers), the outflow of Indonesian migrant workers to Saudi Arabia gradually increased. Recently, together with Malaysia it has become the main destination of Indonesian migrant workers. Useful information concerning the status of ratification of Saudi Arabia to the ILO core conventions is available in the Annex III of this dissertation.

131 See: article 15 of this Convention.

132 See: article 16 paragraph 1 of this Convention.

133 See: article 16 paragraph 2 of this Convention

134 Every Member has to report the application of the ILO Conventions and Recommendations in its territory to the ILO's Committee of Experts on the Application of Conventions and Recommendations. Every year this committee will arrange a meeting to analyze the report of certain countries and propose recommendations for each country to improve the application of those Conventions in those countries.

135 See: article 16 paragraph 3 of this Convention.

136 See: article 22 of this Convention.

Actually, the country reports can be used as the reference of this examination, because these reports will describe the actual situation of the application of this Convention, including problems of implementation. If there are similar problems of implementation amongst countries, they reflect the flaw of this Convention. It means that this part must be amended, to improve the applicability of this Convention. If the Conference adopts a new Convention to revise this Convention wholly or partially, the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the period of denunciation as arranged in article 19, if and when the new revising Convention shall have come into force. As from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members. If a State had ratified this Convention but it does not ratify the new Convention, this Convention shall in any case remain in force in its actual form and content for those Members.[137] This arrangement is quite problematic, since new ratification of the revised Convention for the State that has already ratified this Convention is not compulsory and also there is no obligation for that state to evaluate its ratification to this Convention (after the new revised Convention comes into force). If a country preserves its ratification to this Convention and does not want to ratify the new revised Convention, it means there are two different provisions that apply to the same matters (migration in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers); and it means the ILO applies dual standards of protection. Therefore, if there is revision to this Convention, it is better to provide for a certain arrangement whereby the new revised Convention is gradually implemented in all the States that have ratified the Conventions (either this Convention or the new revised Convention), to avoid dual standards of protection.

8. Final Remarks to ILO Convention No. 143

The author considers this Convention very comprehensive for combating illegal labour relationships as well as for protecting the rights of (lawful) migrant workers and the members of their families. Special attention by the author is given to article 11 paragraph 2 (e) of this Convention, in which an employee, who is posted temporarily to a foreign country for the purpose of completing his/her duties or assignments, is excluded from the protection of this Convention. In the global legal practice of employment relationships, the transnational posting of workers is becoming very popular and is practiced worldwide. In practice, it is difficult to determine whether there is a change in the applicable law governing that kind of relationship, and there are many debates concerning whether the posted workers must be protected by the law of the foreign country (host country) or the law of the original country (home country). To prevent posted workers from being adversely affected by the transnational posting it is very important that international standards of protection are provide to simplify the determination of the applicable law (especially if the related countries apply very different levels of protection), to guarantee the posted workers that they will not receive lower standard of protection than the standard of protection in the original country, or that they will be treated equally to local workers (of the host country). Consequently, applying this Convention to a transnational posting of workers is very useful for providing legal certainty for a posted worker. Based on this argumentation, the author concludes that article 11 paragraph 2 (e) of this Convention should be changed and the scope of this Convention should comprise transnational posted workers and other types of temporary migrant workers.

It is comprehensible that one of the main aims of this Convention is to combat the practice of illegal employment as mentioned in article 3 of this Convention. The Migrants Rights International[138] argues that

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[137] See: article 23 of this Convention.

[138] Migrants Rights International is a non-governmental organization and federation of migrant organizations and non-governmental organizations promoting the human rights of migrants. Its purposes are: to promote recognition and respect for the rights of all migrants; to advocate for ratification of the 1990 International Convention on the Protection of the Rights of All Migrant

the methods by which States carry out their obligation, i.e. "to suppress clandestine movements of migrants for employment and illegal employment of migrants", may in some circumstances constitute violations of the fundamental human rights of workers.[139] There is no elaboration of this argument, but the author envisages that based on the previous trend in the international mobility of workers, which is increasingly in the hands of private fee-charging intermediary agencies, it has negative aspects, since workers are vulnerable to malpractices. If there is a malpractice in the labour recruitment, introducing or placing that makes the status of migrant workers that of an illegal migrant worker, the situation is very unfortunate for these migrant workers because on the one hand illegal migrant workers are the victims of the illegal practices of their private agencies and on the other hand they will neither be protected by this Convention nor be entitled to receive any of the rights exercised by lawful migrant workers, since article 3 refers to the illegal employment of migrants in general and does not take into account the background to this illegal employment. In this situation, the human rights of the innocent illegal migrant workers should be protected. Yet there is no exception in this Convention, which creates a protection for these illegal migrant workers. Solving this problem is not easy because if the Convention were to create some exceptions to protect some specific cases of illegal labour migration, this would make the Convention too detailed, rigid, complicated and difficult to implement; on the other hand, it fails to provide protection for victims of illegal labour recruitment (caused by malpractice of private agencies work).[140] This Convention does not treat this type of illegal migrant worker any differently than other types of illegal migrant workers, and for some scholars it therefore violates the human rights of this specific type of illegal migrant worker. Therefore, to correct the flaw in article 3 of this Convention, the author recommends that every ratifying country supports this article with national measures to assist this specific kind of illegal migrant worker constituting either returning the worker to the country of origin or providing certain measures to refurbish his or her status as well as to punish the agencies who perform the malpractice.

Another comment can be made regarding the characteristics of the ILO Convention. The ILO has a tripartite structure, in which the representatives of government, employer and worker are involved in the process of drafting a Convention and negotiating the content of this Convention. Adoption of a Convention will happen after those representatives reach agreement. In this procedure, each delegate is being entitled to vote individually. Therefore, ratification of an ILO Convention cannot be made subject to reservation.[141] A ratification to an ILO Convention may exclude a (some) part(s) of that Convention, as long as the exclusion is in the scheme which is arranged in that Convention itself. If we refer to the article 16 of this Convention, it entitles a country to exclude either Part I or Part II of this Convention from its acceptance, as long as the country submits a subsequent declaration to the Director General of the ILO. This means that a country cannot exclude only some articles of this Convention, but it has to exclude one block of this article. Based on this arrangement, there are three ways in which this Convention can be applied:

- A country implements only Part I (Migration in Abusive Conditions);
- A country implements only Part II (Equality of Opportunity and Treatment);

Workers and Members of their Families; to facilitate the efforts of migrant associations and other non-governmental organizations in advocating for migrants rights; and to monitor trends and developments in the situation of migrants' rights and welfare. MRI is a non-governmental association in special consultative status with the United Nations Economic and Social Council.

139 See: Migrant Rights Bulletin, 'Feature Report: ILO Reviews Instruments on Protection of Migrant Workers Rights, Supplement to Pilot Issue of Migrants Rights Bulletin, October-November 99'. <http://www.migrantsrights.org/ILO_report101199.htm>, accessed 12 November 2006.

140 It seems this Convention implicitly put the obligation to do due diligence with regard to the integrity of each party in the employment recruitment to the parties themselves. In case there is a risk in relation with the bona fide of one party, the counterpart has to take the risk because of his/her own failure to accomplish the preliminary due diligent, before he/she enters the legal relationship.

141 See: Nicolas Valticos and Geraldo W. von Potobsky, *International Labour Law*. Kluwer Law and Taxations Publishers, Deventer, 1995, p. 50.

- And a country implements Part I as well as Part II of this Convention (in this case that country does not make any exclusion to this Convention).

Ideally, the whole of this Convention should be implemented because the first part of this article is very important to be applied for combating illegal migrant employment; while the second part of this Convention guarantees lawful migrant workers (and the members of their families) equal treatment and equal opportunity to that enjoyed by local workers. By applying this Convention as a whole, a country will be able to protect migrant workers as well as to prevent the existence of illegal migrant workers in its territory. Therefore, if a country has the political will to arrange labour migration in its territory comprehensively, the author recommends it ratify the whole part of this Convention without any exclusion.

From the PIL point of view, this Convention does not provide a lot of conflict of laws rules, because actually the aim of this Convention is to establish international standards of protection for migrant workers. Nevertheless, in some articles related to the application of national law to implement this Convention, it applies the "territoriality principle", since this Convention allows each ratifying country to adopt necessary and appropriate measures in order to protect migrant workers or to eliminate the illegal employment of migrants and to apply these measures within its jurisdiction.

1.3.3. The Core International Labour Standards

It is undeniable that conditions of labour often involve injustice, hardship and vulnerability to workers. To avoid the worst condition at work and in order to ensure that globalization offers a fair chance at prosperity for everyone, the ILO established a system of international labour standards drawn up by representatives of governments, employers and workers from around the world covering the most basic rights related to work, namely the core international labour standards. It falls into four categories:[142]

- Freedom of association and the effective recognition of the right to collective bargaining;
- The elimination of all forms of forced compulsory labour;
- The effective abolition of child labour;
- The elimination of discrimination in respect of employment and occupation.

In relation to the main topic of this dissertation, problems concerning child labour usually do not affect migrant workers, because most migrant workers are adults employed on the basis of an employment contract. In a transnational context, child labour is usually practiced as the result of child trafficking or the illegal employment of migrant workers. Nevertheless, issues regarding freedom of association, the right to collective bargaining, forced labour and non-discrimination in respect of employment and occupation become sensitive issues to migrant workers; because those issues are very essential and connected to the protection of the rights of migrant workers.

Freedom of association and the right to collective bargaining are recognized as two of the most basic rights of workers by the ILO; and they cover the right to organize and the right to strike.[143] The application of these

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[142] See also previous explanation in the footnote Nos 57 and 58, *supra*.

[143] With regard to the right to strike, neither the ILO Convention No. 87 nor No. 98 explicitly regulates the right to strike. It is only recognized in the ILO Recommendation 1951 No. 92 concerning *Voluntary Conciliation and Arbitration*, which mentions in paragraph 7 that 'No provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike'. Nevertheless, the general principle was recognized very early by the ILO's Supervisory Bodies, in spite of the absence of an explicit provision in the Convention. As early as its second meeting in 1952, the Committee on Freedom of Association affirmed the principle of the right to strike, stating that it is one of the "essential elements of trade union rights". See: Committee on Freedom of Association, 'Second Report (1952), Case No. 28 (Jamaica)'. It is an integrated part of *Sixth Report of the International Labour Organisation to the United Nations*. Geneva, Appendix 5, p. 210, para. 68. See also: Lee Swepston, 'Human Rights Law and Freedom of Association: Development through ILO

rights requires negative (limitation) and positive (protection) dimensions. It means that a government, on the one hand, negatively is entitled to establish any constraint or restriction as regards the application of these rights; on the other hand, positively they must safeguard the rights by creating a system for complaints about violations, adjudication, remedies, and punishment. The government must not only control or confine workers who organize unions but also effectively protect and enforce mechanisms that prevent employers from acting against workers who try to organize unions.

Every country is obliged to suppress and to eliminate every practice to employ any person in work or services that are exacted upon him under the menace of any penalty and for which the said person has not offered himself voluntarily.[144] Any forced-labour practice must be penalized based on the national law of the country. Normally, migrant workers will not be involved in this work, because usually before the departure they must have signed an employment contract, which states the terms and conditions of the employment. Nevertheless, in fact there are many violations by the employers, especially cases involving migrant workers who work in an informal sector or who perform low-skilled work (such as in the domestic work) have been reported and prosecuted.[145] Many migrant workers get virtually no days off and no specific working and resting hours. In many cases, the employers hold their passport and their salary. It is not a new phenomenon that many migrants get severe ill-treatment, physical abuse, and even homicide. This condition is very similar to slavery.[146] Since they belong to the fundamental rights of workers that must be protected by every ILO Member State, it becomes their concern to combat any kind of slavery and forced labour in their territory.

Non-discriminatory treatment and equal treatment are other fundamental rights of (migrant) workers. There are seven prohibited grounds for discrimination (any distinction, exclusion or preference in law or in practice, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation), i.e. race, colour, sex, religion, political opinion, national extraction and social origin.[147] Furthermore, the principle of equal remuneration for men and women workers for work of equal value shall also be applied by the ILO Member States via their national laws or regulations, legally established or recognised machinery for wage determination, collective agreements between employers and workers or a combination of these various means.[148] These provisions are also applicable to migrant workers.

A final definitional issue looks upon potential new prohibited grounds for discrimination. Convention 111 leaves it to national governments to determine distinctions or preferences on grounds other than those listed above that may require attention. If sufficient consensus emerges, additional grounds might be added to ILO jurisdiction in the future such as age, sexual orientation, disability, and other health conditions, most notably

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Supervision'. [1998] International Labour Review, vol 137 No. 2, p. 187. This right has been established from the interpretation. However, the ILO endorses governments everywhere to establish conditions that limit or constrain the right to strike in the national law.

144 See: article 2 paragraph 1 of the ILO Convention 1930 No. 29 concerning *Forced Labour*.

145 Further information regarding forced labour practices in different countries has been reported in: International Labour Conference 93rd Session 2005, 'A Global Alliance against Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005, Report 1B'. International Labour Office, Geneva, pp. 46-62. <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5059>, accessed 15 October 2006.

146 A very serious ill treatment and 'short of' slavery to Indonesian migrant workers has been reported by the Anti-Slavery International, the Indonesian Migrant Workers' Union and the Asian Migrant Centre. See: footnote No. 2, *supra*.

147 See: article 1 paragraph 1 of the ILO Convention 1958 No. 111 concerning *Discrimination (Employment and Occupation)*.

148 See: article 2 of the ILO Convention 1951 No. 100 concerning *Equal Remuneration*.

HIV/AIDS.[149] The government's authority to extend the prohibited grounds for discrimination means that the scope of non-discriminatory treatment differs from one country to another. This difference may create different levels of protection from one country to another. In the PIL point of few, it is very important to apply a PIL principle to determine the applicable law, which will not lead migrant workers to a disadvantageous position.

1.3.4. The ILO Recommendation concerning Migration for Employment (Revised), (Recommendation No. 86, 1949)

One of the most important objectives of this ILO Recommendation is to promote the general policy of the ILO Members "to develop and utilize all possibilities of employment and for this purpose to facilitate the international distribution of manpower and in particular the movement of manpower from countries which have a surplus of manpower to those countries that have a deficiency".[150] This objective is very helpful in combating unemployment and to make effective use of manpower in a global perspective. It makes the international labour market more efficient. If a lot of Members adopt the policies and measures necessary to establish a global network to simplify the operational order and satisfy the demand for manpower this will help to combat global unemployment and manpower shortage around the world.

This Recommendation also promotes "free services" to assist migrants and their families and in particular to provide them with accurate information related to their migration; certain restriction on emigration and other provisions related to emigration; employment and living conditions, including health conditions in the place of destination, return to the country of origin or of emigration, and anything related to the interest to maintain their capacity as migrants; any facilities granted to migrants and measures to facilitate their adaptation to the economic and social organization of the country of immigration, to facilitate such relevant measures to ensure that: migrants for employment receive adequate accommodation, food and clothing; vocational training to enable them to acquire the required qualification, assistance to access recreation, welfare facilities and medical assistance.[151] These recommendations are ideal for protecting migrant workers and their family members. Yet implementing such policies is very expensive because it involves a lot of authorities and related institutions, either at a local level or at an international level and it assists a lot of people without obligation to pay. Therefore, it can be predicted that such recommendation will not be suitable for countries that have economic difficulties. It is necessary to provide special provisions for these countries, which can keep the balance between the right to information of migrant workers and the sustainable economic development in those countries.

Paragraph 13 of this Recommendation advises Members to require any intermediary who undertakes the recruitment, introduction or placing of migrants for employment on behalf of an employer to obtain a "written warrant" from the employer, or some other document proving that it is acting on the employer's behalf. This document should be drawn up in, or translated into, the official language of the country of emigration and should set forth all necessary particulars concerning the employer, concerning the nature and scope of the recruitment, the introduction or placing which the intermediary is to undertake, and concerning the employment offered, including the remuneration. This recommendation is very important for protecting the legal certainty of the rights and obligations of migrant workers under the employment contract concluded between migrant workers and their employers. These documents must state the term and conditions of the

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[149] Further information regarding the scope of non-discrimination and equal treatment in different countries has been reported in: International Labour Conference 95th Session 2007, 'Equality at Work: Tackling the Challenges, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report 1B'. International Labour Office, Geneva, p.9. The document is available on-line at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082607.pdf.

[150] See: paragraph 4 of this Recommendation.

[151] This is summarized from paragraph 5-12 of this Recommendation.

employment contract, and all the rights and obligations of each party under the employment contract. From the point of view of contract law, it is necessary that these documents be provided before work seekers agree to the employment contract because a contract constitutes the entire agreement between the parties with respect to the subject matter thereof and merges all prior and contemporaneous communications only if the terms and conditions of the contract were known to the parties before they agree to sign the contract. This requirement is very important for preventing migrant workers from unnecessarily obtaining a job under terms and conditions below his/her expectations. Furthermore, the author considers that it is necessary to ensure that an intending migrant worker will certainly get a proper job, before he/she departs to the country of destination.

This Recommendation also advises the Members "to complete all technical, occupational and medical selection", before the departure of the intending migrant to the immigration country. This process should be under the responsibility of official bodies or competent authorities in that country.[152] This recommendation is also very important for protecting an intending migrant from the unnecessary risk of being denied employment because he/she cannot fulfil the requirements of the offered job after he/she arrives in the country of immigration. Completing all recruitment processes in the country of origin can prevent this kind of situation.

The right of migrant workers to be accompanied or joined by the members of their families is also emphasised in this Recommendation.[153] Either the country of emigration as well as the country of immigration should facilitate the unification of migrant workers and their family members. Furthermore, they should be authorised to reside in the country of immigration and to be treated in the same way as nationals.[154] This recommendation is very important for protecting the migrant workers from discriminatory treatment during their stay in the country of immigration.

Special attention has been given to countries in which the number of migrants for employment is sufficiently large. This Recommendation recommends that these countries supervise the conditions of employment of such workers, either by a special inspection service or by labour inspectors or other officials specialising in this work.[155] This recommendation is very important for controlling the practice of international labour migration in these countries, especially if a number of violations have been reported in any one country, either violation of the rights of migrant workers under their employment contract or violation of the human rights of migrant workers.

This Recommendation also recommends that Members issue a guarantee to any regularly admitted migrant worker, insofar as is possible, that he or she will not to be removed from the territory of the Member State his or her lack of means or the state of the employment market, unless an agreement to this effect has been concluded between the competent authorities of the emigration and immigration territories concerned.[156] Contents of such agreement should provide:

a) that the length of time the said migrant has been in the territory of immigration shall be taken into account;[157]

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152 See: paragraph 14 of this Recommendation.

153 See: paragraph 15 of this Recommendation.

154 See: paragraph 16 of this Recommendation.

155 See: paragraph 17 of this Recommendation.

156 See: paragraph 18 of this Recommendation.

157 This recommendation is very important, since in general the ILO recommends that to support the right to geographical mobility migrant workers can reside lawfully for a prescribed period not exceeding two years (see article 14 (a) of the ILO Convention No. 143), and that in principle no migrant shall be removed who has been there for more than five years. This is a warranty for migrant workers that they cannot be removed from the said country merely because the length of their stay has exceeded five years period.

b) that the migrant must have exhausted his rights to unemployment insurance benefit;[158]
c) that the migrant must have been given reasonable notice so as to give him time, more particularly to dispose of his property;
d) that suitable arrangements shall have been made for his transport and that of the members of his family;
e) that the necessary arrangements shall have been made to ensure that he and the members of his family are treated in a humane manner; and
f) that the costs of the return of the migrant and the members of his family and of the transport of their household belongings to their final destination shall not fall on him.

This Recommendation is a little bit too optimistic, because it starts from the assumption that every country has already maintained all abovementioned measures. Point b) of this paragraph cannot be applied in the territory of all Members, because if a country does not have a social benefit system yet, this requirement cannot be used to measure whether a migrant worker can be removed from the said country. Point d) and f) must also be elaborated in the said agreement, by determining a specific party who has to pay the cost of transportation. The author believes that employers have to pay this cost of transportation, because the presence of migrant workers in the country of immigration is to implement their employment contracts with their employers.

The jurisdiction of the authorities of the territories to control the operations of recruitment, introduction and placing of migrants for employment has been emphasized in this Recommendation.[159] Continual monitoring of the practice of labour migration in a country is very important, especially to ensure that all processes of recruitment, introduction and placing have been done lawfully; furthermore to control whether the implementation of employment contracts between migrant workers and their employers are also performed without any infringement of the national law as well as international law related to labour migration and protection for migrant workers. Such control also has its uses in reducing the incidence of malpractice with regard to the employment contracts of migrant workers.

This Recommendation also recommends bilateral agreements between countries to specify the methods of applying the principles set forth in the Convention and Recommendation concerning Migration for Employment, furthermore this Recommendation provides a Model Agreement, to assist countries desiring to draw up such an agreement with its drafting.[160] Furthermore, this Recommendation will have a very important role in establishing more harmonized agreements amongst countries, because if each country applies this model agreement to arrange its cooperation with other countries the content of each agreement will be more or less similar one to another. In a way, it is a good practice to establish standards of protection of the rights of migrant workers. It also has a good impact on the harmonization of the content of an employment contract that involves migrant workers.

Provisions concerning agreement between the parties to provide dispute settlement machinery in the Model Agreement[161]is very important for the protection of migrant workers, especially because migrant workers live in a foreign country, which applies different laws to those in his or her country of origin. It is very important for migrant workers and their family members to have access to the appropriate courts or to otherwise obtain redress for their grievances, in accordance with the laws and regulations of the territory of immigration.

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158 It must be noted that there are many countries that do not have any unemployment insurance benefit. As an example, Indonesia does not have unemployment social benefit system; because its two National Acts related social benefit or social insurance, i.e. *Worker Social Insurance Act No 3, 1992* and *National Social Insurance Act No. 40, 2004* do not cover the unemployment social benefit.

159 See: paragraph 19 of this Recommendation.

160 See: paragraph 21 of this Recommendation.

161 See: article 16 of this Model Agreement.

This provision is very important from the PIL point of view, because if the parties determine an appropriate procedure to settle the disputes as well as the competent forum that has jurisdiction to settle any disputes related to the employment relationship with the migrant worker; it will help the parties to the employment contract to settle any disputes between them by having the case heard in the appointed forum. Usually the countries will provide two options to be chosen by the disputing parties, i.e. via compulsory proceedings (such as litigation or compulsory arbitration), or via voluntary proceedings (such as voluntary arbitration, mediation, etc.). From the PIL point of view, the most important agreement concerning the settlement of disputes is that determining the forum and country authorised to hear the dispute will be heard (either the country of emigration or the country of immigration). It will answer the problem of jurisdiction in this transnational employment relationship.

Alas, this part does not regulate any problem related to choice of law rule or any method to determine the applicable law of the dispute, even though it is another difficult problem on transnational legal relationship. There are at least two different applicable laws we have to deal with; i.e. the applicable law of the legal proceedings of the court, tribunal, arbitration or other competent bodies; and the applicable law to settle the dispute.

- On the one hand, the applicable law of the legal proceedings of the court, tribunal, arbitration or other competent bodies is usually based on the national law of the place of the legal proceeding because it is part of the procedural law of the country. Procedural matters such as rules of evidence and court procedure are governed by the *lex fori*.[162]
- On the other hand, the determination of the applicable law to settle the dispute is more complicated, because there is no single/dominant conflict of law rule (like in the procedural law) to determine the applicable law of the dispute. The author suggests the parties (States involved in the bilateral agreement) agree that migrant workers and their employers have to agree a choice of law rule in their employment contract as this will ease the process of the dispute settlement, should such a dispute occur. If there is a choice of law rule in the employment contract, as long as the express statement by the parties of their intention to select the law of the contract is *bona fide* and lawful, there is no reason to dismiss the chosen law on the ground of public policy.[163]

In some respects, the content of the ILO Recommendation No. 86 is very similar to the content of ILO Convention No. 97 (such as the application of equal treatment and non-discrimination principles in respect of nationality, race, religion or sex; and the effort to combat misleading propaganda relating to immigration and emigration). This overlap is necessary to cover the different nature of ILO Conventions and ILO Recommendations. ILO Conventions are applied to the Members based on ratification;[164] therefore, they only have direct legal binding effect for the ratifying countries. If a country does not ratify the ILO Convention No. 97, it does not have any legal obligation to implement any provision within the scope of this Convention. Nevertheless, if similar provisions are arranged in the ILO Recommendation No. 86, non-ratifying countries do not have the legal obligation to implement this Recommendation, but they are obliged to report the position of the law and practice in their country as regards the matters dealt with in this Recommendation. Therefore, this Recommendation is smoothing the progress of non-ratifying countries to conform their law and practice of labour migration and migrant workers protection in correspondence to the provisions applied by the ILO.

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162 See: C.M.V. Clarkson and Jonathan Hill, *Jaffey of the Conflict of Laws, Second Edition.* Butterworths, 2002, p. 12.

163 See: the statement of Lord Wright in *Vita Food Product Inc. v Unus Shipping Co.* [1939] A.C. 277. More information can be seen in David McClean, *Morris: The Conflict of Laws, Fifth Edition.* Sweet & Maxwell Ltd, London, 2000, p. 322.

164 Except the application of the Fundamental ILO Conventions (this matter has been elaborated in previous past of this chapter), which are directly applicable to States because of their ILO Membership.

Moreover, the existence of a Model Agreement in this ILO Recommendation is also important to provide exemplary provisions and to create a similar pattern of arrangements between countries regarding bilateral or multilateral agreements on labour migration and migrant workers protection. This strategy facilitates the process of establishing international standards of protection on this specific matter.

Nonetheless, this recommendation deals with Private International problems, i.e. concerning disputes settlement mechanisms. Alas, this part only arranges the agreement between countries (via bilateral agreement) and it does not deal the problem of determining the applicable law. Therefore, the author suggests that bilateral agreement between two parties should arrange the method to determine the applicable law of the disputes. Even if both parties have ratified the ILO *Migrant Worker Convention* and are legally obliged to enforce that Convention, since the ILO Convention provides only "a minimal floor of rights",[165] there is still a potential conflict of laws between the two national labour laws. If one country applies higher standards of protection than the minimal floor of rights established by the ILO, while another country applies only the minimum standards, then the problem of conflict of laws becomes relevant and it must be determined which national law should be applied to protect the migrant workers. Therefore, the author considers that a clear arrangement concerning the method to determine the applicable law of employment contracts must be arranged within the scope of bilateral agreement between countries.

1.3.5. The ILO Recommendation concerning Migrant Workers (Recommendation No. 151, 1975)

This Recommendation was concluded to support the application of any rights and obligations of the ILO Members established by *the ILO Convention 143 on Abusive Conditions and Promotion of Opportunity and Treatment of Migrant Workers (Supplementary Provisions) 1975*. In fact, this Recommendation is actually a very important instrument to support the ILO Convention 143, in view of the fact that until now the ratification of this convention by the Members has progressed very slowly. The obligation of the Member States to report the status of legal practices and national law concerning the subject matters covered by this Recommendation will encourage them to achieve the level of protection for migrant workers stipulated in this Recommendation. The main objective of this Recommendation is the same as the main objective of the ILO Convention No. 143, i.e. to establish further desirable standards as regards three aspects, i.e. equality of opportunity and treatment; social policy with regard to migrants; and employment and residence.[166] Based on paragraph 1 of this Recommendation, these standards should be applied within the framework of a coherent policy on international migration for employment, and be based on the economic and social needs of both countries of origin and countries of employment. It should take not only short-term manpower needs and resources into account, but also the long-term social and economic consequences of migration for migrants as well as for the communities concerned. Since migration for employment is a transnational activity, it would be ideal to regulate it in bilateral or multilateral agreements between countries, with the main purposes creating harmonized arrangements and the sustainable development of profitable migration for employment activities.

The most important principle in this Recommendation is the effective equality of opportunity and treatment (between migrant workers and their family members and nationals of the Member States) in respect of access to vocational guidance and placement services; access to vocational training and employment of their own choice on the basis of individual suitability for such training or employment, account being taken of qualifications acquired outside the territory of those obtained in the country of employment; advancement in accordance with their individual characteristic, experience, ability and diligence; security of employment, the provision of alternative employment, relief work and retraining; remuneration for work of equal value; conditions of work, including hours of work, rest periods, annual holidays with pay, occupational safety and

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[165] See: Simon Deakin and Frank Wilkinson, 'Rights vs. Efficiency? The Economic Case for Transnational Labour Standard'. [1994] Industrial Law Journal, Vol. 23, No. 4, p. 301.

[166] See: recitals of this Recommendation.

occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment; membership of trade unions, exercise of trade union rights and eligibility for office in trade unions and in labour-management relations bodies, including bodies representing workers in undertakings; rights of full membership in any form of co-operative; conditions of life, including housing and the benefits of social services and educational and health facilities.[167]

These provisions are directly related to the most important protection for the migrants as workers and as human beings. It offers the basic preconditions for migrant workers to be able to perform well in their work, because without these forms of protection, in particular with regard to their occupational health and safety, their ability to provide the best performance due to lack of skill or knowledge, their stability of life in the immigration countries, etc.; as well as being unfairly treated *vis-a-vis* nationals, migrant workers will feel insecure in performing their work,. In view of the importance of these types of protection, this Recommendation also advises the Members to provide a competent public authority to control and observe the practice of these equalities.

This Recommendation also advises Members to assure the rights of migrant workers to geographical mobility while it also recognizes the free choice of employment, subject to the conditions that the migrant workers have resided lawfully in a Member's territory for the purpose of employment for a prescribed period not exceeding two years or, if a Member's laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract; to make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas; and to restrict access to limited categories of employment or functions where this is necessary in the interests of the State. These provisions absorb article 14 of the ILO Convention No. 143, therefore, to avoid any repetition, the author will not discuss this problem in this part.

In order to enable migrant workers and their families to take full advantage of their rights and opportunities in employment and occupation, this Recommendation advises Members to take measures to inform them, as far as possible in their mother tongue or, if that is not possible, in a language with which they are familiar, of their rights under national law and practice as regards the matters related to vocational training, security of employment, remuneration, condition of work and other rights related to their position as migrant workers,[168] to advance their knowledge of the language or languages of the country of employment, as far as possible during paid time; to promote their adaptation to the society of the country of employment and to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue. Moreover, in case of collective recruitment, this Recommendation suggests the Members take the measures necessary to introduce migrants to the language of the country of employment and to its economic, social and cultural environment before the migrants' departure from their country of origin. These provisions are very important for preparing migrant workers and their family members to adapt and to live properly in immigration countries.

Reunification of the migrant workers with their family members is regulated in this Recommendation. It advises Member States to take all possible measures under national laws or regulations, bilateral/multilateral arrangements and other relevant measures to facilitate the reunification of families of migrant workers as rapidly as possible. To implement this reunification, the workers should have appropriate accommodation for them and their family members, which meets the standards normally applicable to nationals of the country of employment.

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167 See: paragraphs 2 and 3 of this Recommendation.

168 See: paragraph 7 of this Recommendation. To determine the right of migrant workers here mentioned, reference is made to paragraph 2 of this Recommendation.

For the purposes of this Recommendation the term family members of migrant workers includes the spouse and dependent children, father and mother[169]. This scope is broader than the scope in article 44 paragraph (2) UN Convention on Migrant Workers, in which it includes only spouse and dependent children. It is clear that this Recommendation wants to create a higher level of protection for the family members, because it takes the cultural backgrounds in all countries into account. Many countries consider that independent children should take care of their parents. The author sees this different scope as being the result of the tripartite mechanism, in which the worker representatives have successfully advocated the interests of migrant workers. Nevertheless, the adverse effect of this provision is that the burden of providing living expenses for the migrant workers will be higher. It may potentially decline the quality of life of migrant workers and their family members. To anticipate this problem, the author argues that every country has to make a link between a migrant worker's salary and the number of family member who may accompany migrant workers in the immigration countries. Therefore, provision concerning the right of migrant workers to visit the country of residence of their family members (without having their employment terminated or their right to residence in the country of employment withdrawn during that period); or the right to be visited by their family members at least during the annual holiday with pay (when at least for one year they cannot bring their family members into the immigration countries) is very important to maintain the unity of migrant workers with the family members.

Every country should take appropriate measures to prevent any special health risk or occupational accident, to which migrant workers may be exposed, including training, instruction or other special measures to enlighten them regarding occupational safety and hygiene at work.[170] It also should take any measure to ensure that migrant workers fully understand instructions, symbols and other signs relating to safety and health hazards at work, in view of migrant workers' lack of familiarity with processes, their language difficulties and other reasons. Moreover, this Recommendation recommends that national law imposes administrative, civil and penal sanctions on employers or other responsible persons or organisations who fail to implement any regulation concerning health and safety protection for migrant workers. Indeed this provision is very important for securing migrant workers from any risk concerning any adverse effect to their health and safety at work, especially for preventing any occupational disease or accident. If every country comprises that kind of provision in its national law, it will be a guarantee that every migrant worker will be properly protected as regards health and safety, since the failure to implement this matter will be subject to civil or penal sanctions.

This Recommendation advises countries to refrain from removing migrant workers regularly admitted in their territory. The fact of these migrant workers losing their employment should not in itself imply the withdrawal of their authorisation of residence.[171] They should be allowed sufficient time to find alternative employment, at least for a period corresponding to that during which they may be entitled to unemployment benefit; and the authorisation of residence should be extended accordingly (as an example, if they a migrant worker has lodged an appeal against the termination of his or her employment, he or she should be allowed to reside pending the final decision). It is undeniable that the residence permit must be considered as a requirement for the continuity of a migrant worker's employment contract. If a migrant worker has his or her permit to reside in the country of employment (immigration country) for any reason other than their employment contract, his or her employment contract must be terminated and the migrant will have to depart from the immigration country.

Furthermore, if the employment contract is terminated unjustly, migrant workers are entitled to claim reinstatement, compensation for loss of wages or other payment which results from unjustified termination, or access to a new job with a right to indemnification; or the migrants worker should be allowed sufficient

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169 See: paragraph 15 of this Recommendation.
170 See: paragraphs 20-22 of this Recommendation.
171 See: paragraphs 30-34 of this Recommendation.

time to find alternative employment. In some ways, the termination of the employment contract is the worst situation for migrant workers, because they loose their job, they do not earn salary, and if they do not immediately find a new job, they will no longer be able to live in the foreign country. Therefore, any termination of a migrant worker's employment contract should be the result of a reasonable and fair decision taken on lawful grounds. It must apply the procedure and formality as regulated in the national law in the country of employment. The migrant worker should be entitled to any outstanding remuneration from the performed work, including severance payments normally due; to benefits which may be due in respect of any employment injury suffered; 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 international arrangements. Since migrant workers (either lawful or illegal) have worked for their employers, it is reasonable that they receive their rights established by their previous work.

Regarding migrant workers who are the object of expulsion orders or who are claiming their rights under their employment contract, they should have a right of appeal before an administrative or judicial instance and the right to get legal and language interpreter assistance, according to conditions laid down in national laws or regulations. This provision is the implementation of the due process of law principle and the doctrine on treatment of aliens and access to the courts, which is considered as part of customary law in international legal practices.[172]

Any illegal employment of migrant workers must be heard under relevant international or national law, and if there is a ground to do so, the party involved can be prosecuted based on the penal sanction.[173] Therefore, providing the rights arisen from an employment relationship to illegal migrant workers does not legitimate such an illegal employment relationship.

The newest ILO Recommendation related to migrant workers is very comprehensive and detailed. It also focuses on many fundamental matters in detail. Provisions concerning equal opportunity and treatment are not only presented as principles but they have been elaborated into specific aspects in more operational provisions such as vocational training, employment conditions, etc. This Recommendation is very useful for smoothing the progress of the national law of each country so that it corresponds with the standards established by the ILO, even though the country does not ratify any ILO Convention concerning migrant workers. This Recommendation also concerns the function of social services to enable migrant workers and their family members to adapt to the situation in the immigration country. In general, this Recommendation proposes many suggestions to the Member States to take measures to protect migrant workers and to facilitate them to live properly in the immigration country and to perform well in their working place.

1.4. Protection of the Rights of Migrant Workers by the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, adopted by United Nations General Assembly Resolution 45/158 of 18 December 1990[174]

1.4.1. Introduction

Based on the Preamble of this Convention, basically the main objective of this Convention is to reaffirm standards and principles that had been established by some international Convention issued by the United

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[172] Based on these doctrines, aliens must have access to national legal remedies. They are entitled to bring an action, and avail themselves of the usual means of defence. See: Pieter Boeles, *Fair Immigration Proceedings in Europe*. Martinus Nijhoff Publishers, the Hague/Boston/London, 1997, p. 32.

[173] In the previous part of this dissertation has been explained that national law should impose civil or penal sanctions on those who are responsible for organizing and operating illegal employment of migrant workers as well as employers of illegal migrant workers. This provision can be found in article 68 *UN Convention on Migrant Worker* as well as article 6 of the ILO Convention No. 143.

[174] Date of entry into force: 1 July 2003.

Nation itself and the ILO, to recognize the important work of some UN's specialized agencies in connection with migrant workers and members of their families, to establish norms which may contribute to the harmonization of the attitudes of States through the acceptance of basic principles concerning the treatment of migrant workers and members of their families, and to bring about the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive Convention which could be applied universally. Therefore, this Convention more or less compiles the rights and protections for migrant workers and members of their families in one wide-ranging Convention, while the content of this Convention can be found as well in other Conventions. This Convention is helpful to find easily a comprehensive legal source concerning the rights and protections for migrant workers and their family members. The coverage of protection in this Convention is more comprehensive than any other international Conventions related to migrant worker protections, because the approach of this Convention is more multi-dimensional, i.e. to protect the migrant workers from some different characteristics of protection, such as from a contract law aspect, immigration law aspect and human rights aspect.

1.4.2. Subject of Protection

The term "migrant worker" has been defined by article 2, paragraph 1 of the *Migrant Workers Convention* as: 'a person who is to be engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'. Therefore, it is obvious that this Convention is meant to regulate the legal protection of "transnational" labour migrations. Furthermore the Convention introduces a new scope of protection, i.e. to apply this convention to many categories of migrant workers and their families,[175] including: frontier workers who reside in a neighbouring State to which they return daily or at least once a week; seasonal workers; seafarers employed on vessels registered in a State other than their own; workers on offshore installations which are under the jurisdiction of a State other than their own; itinerant workers; migrants employed for a specific project; self-employed workers.[176] These types of workers are not covered by the ILO Conventions 97 and 143.

Some limitations of the coverage of this Convention have been regulated in article 3 of this Convention. This convention does not protect:

- persons sent or employed by international organizations and agencies;
- persons sent or employed by a State outside its territory (to perform official functions, who participate in development programs and other co-operation programs);
- foreign investors;
- refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;
- students and trainees; and
- seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

It is undeniable that those people migrate to a country other than their country of origin. They are excluded from the scope of protection of this Convention due to some reasons:

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175 See: United Nations Press Release, 'Convention on Protection of Rights of Migrant Workers to Enter Into Force Next July'. 19 March 2003. <http://www.unhchr.ch/huricane/huricane.nsf/view01/B87E9E85C7147498C1256CEF00385E50?opendocument>, accessed 13 November 2006.

176 This broad classification of migrant workers is quite innovative and important, because it improves the recognition of the rights and protection for the migrant workers and their families to a wider extent than the similar protection established in the ILO Conventions (No. 97 and 143) and Recommendation (No. 86) and the effect of protection from this Convention will cover more groups of migrant workers than the scope of protection of any ILO legal instruments.

- These people (such as: a diplomatic staff of a country or a staff of the UN and its specialized agencies, diplomats, etc.) work under a special regulation applicable to them.
- The main reason of their migration to another country (such as: foreign investors, refugees, students and trainees) is not to enter into an employment contract. Even though in the end, as for example refugees, enter an employment contract, but they are bound by special regulations, which link to their status as refugees and not as migrant workers. Some countries like Canada,[177] United Kingdom,[178] and Greece[179] have a special program to give an opportunity for the refugees to work, either as migrant workers or as self-employed worker.

1.4.3. Scope of Protection

The Convention plays a role in preventing and eliminating the exploitation of all migrant workers and members of their families throughout the entire migration process.[180] It covers the preparation of migration, the adjustment and settlement in the immigration country and the return to the home country.

Migrant workers and members of their families who have the proper documentation are entitled to be informed before their departure, or at the latest at the time of their admission to the State of employment, of all conditions applicable to their admission, as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.[181] This protection is very important to ensure the rights and obligations of migrant workers and their families. In the implementation, before the departure to the state of employment, migrant workers and their families must be familiar with all the working condition and terms of employment. This provides the migrant workers and their families with legal certainty. Furthermore, it also establishes a guarantee for the workers that in the country of destination they will embark upon a job with specific standards of protection. Based on the prerequisite of contract validity, this provision is also important to fulfil the contemporaneousness of the exchange of the rights and obligation of the parties to the employment contract, in order to create binding premises for the parties.[182]

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177 See: Legal Line Canada, 'Can a refugee work in Canada?' <http://www.legalline.ca>, accessed 14 November 2006. In Canada, after a refugee claimant files an application for refugee status, he/she will be notified by Immigration Canada as to when he/she can apply for an Employment Authorization. It usually takes between three and four months from the time that a refugee claimant enters Canada until the time that the claimant will receive an Employment Authorization and be allowed to start working.

178 See: The National Health Service of the UK, 'Work Permits, Visas, Refugee Doctors & Induction Courses (Overseas Doctors)'. <http://www.nhscareers.nhs.uk/nhs-knowledge_base/data/5401.html>, accessed 15 November 2006. In the UK, there is special training available for refugees who are qualified doctors, to help them prepare for registration with the General Medical Council, and for applying for jobs in the National Health Service. Refugee doctors should be encouraged to contact Isabel Fish at the British Medical Association (0207 383 6231), and register on the BMA's refugee doctor database, they will then receive a monthly newsletter about services available for them.

179 See: Dr.Elizabeth Mestheneos, 'EU Care: Refugee Entrepreneurs in Greece' (National Contribution to the EU funded programme for the European Commission Directorate General Justice and Home Affairs, under the budget line B3- 4113, integration of refugees; Unit A/2 "Immigration and Asylum"). <http://www.sextant.gr/refugee.html>, accessed 17 November 2006.

180 See: Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'Frequently Asked Question'. <http://www.unhchr.ch/html/menu2/6/cmw/faqs.htm#1>, accessed 18 November 2006.

181 See: article 37 of this Convention.

182 See: N. Stephan Kinsella, 'A Libertarian Theory of Contract: Title Transfer, Binding Promises, And Inalienability'. Journal of Libertarian Studies Volume 17, no. 2. Ludwig von Mises Institute, Spring 2003, pp. 11–37. <https://www.mises.org/journals/jls/17_2/17_2_2.pdf>, accessed 1 December 2006.

The principle of not being treated less favourably is one of the most important principles in this Convention.[183] This principle is applicable in respect of remuneration and other conditions of work and terms of employment. Some other very important principles guarantee regular or documented migrants the rights to liberty of movement, to form associations and trade unions, and to participate in public affairs. This Convention protects the right of the migrant workers and their family members to be treated equally even though they have a different background of race and culture. Furthermore, it is very prudent for the migrant workers and their family members to be integrated into the community in the state of employment, but there is no single reason for the authority in neither the state of employment, nor the employer to cut their links off to their own culture.

This following Table will describe briefly the most important protection of the rights of migrant workers and their family members:

TABLE II
HIGHLIGHTS OF THIS CONVENTION

Rights of and Protection for Migrant Workers and their family members	Rights of and Protection for Illegal Migrant Workers and their family members	Rights and Duty of All State Parties	Rights and Duty of Sending Countries	Rights and Duty of State of Employment
Basic freedoms: - freedom to enter and leave the state of origin (1); - Freedom to life without cruel, inhuman or degrading treatment of punishment; outside slavery or servitude and forced or compulsory labour (9-11); - freedom of thought, conscience and religion and the right to hold and express opinions (12-14).	Human Rights: Rights to obtain fundamental human rights (preamble).	Non discrimination with respect to rights: to enable migrant workers and members of their families without any discrimination to enjoy the rights set forth in the Convention (7).	Emigration of workers : Persons seeking employment abroad should be allowed to leave and enter the country of origin (8).	Emigration of workers : Persons seeking employment abroad should be allowed to leave and enter the country of origin (8).
Due Process of law: - Investigations, arrests and detentions: based on established procedures, in equality with nationals of the	Obtaining equality with nationals of the state of employment: to have access to emergency medical care (28), education,	Promotion of sound equitable, humane and lawful conditions: Consultation and collaboration to ensure better living and working conditions, including social economic,	Pre-departure information: Before the departure of workers and members of their families to the States of employment, they must be fully informed of all	Particular Protection: -Protection of liberty and security of workers and members of their families (16-17); -Protection from property confiscation (15);

[183] See: article 25 of this Convention.

State (16-20); - a fair and public hearing by a competent, independent and impartial tribunal established by law (18.1); - No arbitrary expulsion (22 and 56).	including preschool education (30).	cultural and other needs as well as impact of migration on the communities concerned (64).	conditions applicable to their admission, stay and employment as well as other requirements (37).	-Protection from their personal documents confiscation (24).
Basic Rights: - Right to life (9); - Right to privacy on communication (14); - Right of having property (15). - Right of equal treatment with the nationals of the host country: in relation with their work (25), social security benefit & emergency medical care (27-28), in access to educational, vocational and social services (43-45), protection against unemployment, dismissal, unemployment benefits, (54), in the exercise of remunerated activity (55); - Right to transfer their earning, saving and belonging (32); - Right to information their rights & obligation (33); - Right to liberty to move in the country of employment (39).	Contractual rights: Rights to get their rights without being discriminated due to their illegal status (25.3).	Appropriate service: concerning: -Information dissemination about the rights of migrant workers from this Convention (33, 37); -Institutions establishment to address the needs of migrant workers (41). -Granting remittances, and tax and customs duty exemptions (46,48); -permission and facilitation the transfer of the migrant workers' earnings and savings to their States of origin (47); -Formulation, implementation and enforcement migration policy (64-66); -Consultation and collaboration in preventing and eliminating illegal and clandestine movements of labour by taking appropriate measure and imposing sanction (68).	Exercise of political rights of migrants: facilitate the exercise of the right of migrant workers and members of their families to participate in public affairs, vote and be elected in elections in their home countries. (41).	Equal treatment with nationals: -Provide equality with nationals before the courts of law and tribunals (18); -Provide equality with nationals to remuneration, conditions of work, e.g. overtime, hours of work, weekly rest, holidays with pay, safety, termination of contract, etc. (25); -Provide equality with nationals to access to education, vocational training, guidance and placement, housing including social housing schemes, social and health services (43) and social security (27); -Provide equality with nationals in gaining access to education, including preschool education (30).
Contractual	Rights to return	Reporting:	Provision of	Keeping with the

protection: Protection against employment contract violation (54(d)).	and reintegration to the home country: Obtain assistance to make an orderly return to their home countries, economic resettlement, and social & cultural reintegration (67).	legislative, judicial, administrative and other measures they have taken to implement the provisions of the Convention (one year after the Convention enters into force and thereafter, every five years or whenever Committee on the Protection of the Rights of Migrant Workers and Members of Their Families requests it (73).	adequate consular services: provide adequate consular and other services required to meet the social economic, cultural and other needs of their migrant workers and members of their families (65.2).	standards of fitness, safety, health and principles of human dignity: Working and living conditions of migrant workers (70).
Other rights: - Right to be informed about all conditions applicable to their admission (concerning their stay and remunerated activity and its requirements) (37); - Right to be temporarily absent (38); - Right to liberty to move and reside (39);		Protection to the rights arising from this Convention: -No compulsion on migrant workers to renounce their rights (82); -To ensure the recognition of the rights, and to provide effective remedies for violations of such rights (83).	Regulation of recruitment: Recruitment of workers for overseas employment should be regulated by restricting it to public services or bodies of the sending State. Recruitment by agencies, employers and their agents should be subject to authorization, approval and supervision (66).	Giving permission to participate in a trade union: to join or form trade unions and associations for the protection of economic, social, cultural and other rights (26).
- Right to form trade union (40); - Right to participate in public affair (41); - Political rights (42 par 3); - Right to enjoy export-import duties and taxes (46); - Right to transfer their earning and saving (47); - Right to stay until a reasonable period, in case of death of migrant worker or		Taking appropriate actions: -against the dissemination of misleading information relating to emigration and immigration; -to detect and eradicate illegal or clandestine movements of migrant workers; -to impose sanctions on those who are responsible for organizing and operating such movements as well	Resettlement of migrant workers: Migrant workers and members of their families, including illegal migrants, must be assisted to make an orderly return to their home countries. The States of origin must take appropriate measures to promote adequate economic conditions for their resettlement, and social and cultural reintegration (67).	Enabling the unity of the family: By allowing the members of the family to join the migrant worker (44).

dissolution of marriage (50); - Right to freely choose their remunerated activity (53).		as employers of illegal migrant workers (68).		

This Convention regulates the rights of and protection for migrant workers in general, and does not aim to establish specific rights and protection for temporary migrant workers. In fact, temporary migrant workers are more vulnerable than the regular migrant workers, because their short period of work in a foreign country in practice diminishes the urgency to find the proper law governing their protection in that foreign country. The different levels of protection between the state of employment and the state of origin potentially create a dispute. This Convention arranges some particular categories of migrant workers; which also belong to the scope of temporary migrant workers, i.e. seasonal workers, itinerant workers, project-tied workers and specified employment workers.[184] This Convention gives a solution as regards the social security protection for them. They will be protected by the social security protection of the country of origin. Further provisions in this Convention do not deal with the way to determine the applicable protection for migrant workers and their family members if more than one regime is involved in a transnational employment relationship.

1.5. Protection of the Rights of Migrant Workers by the World Trade Organization

This study presupposes that trade globalization should be beneficial to all stakeholders in global trade activities, including the employees. The UNDP Human Development Report 1997 concluded a challenging thought that "globalization offers great opportunities, but only if it is managed more carefully and with more concern for global equity".[185] Furthermore, six years later, the UNDP Human Development Report 2003 concluded that "but just as globalization has systematically benefited some of the world's regions, it has bypassed others as well as many groups within countries".[186] It happens because in fact, deep-rooted human development inequality is at the heart of the problem.[187]

1.5.1. Globalization and the General Agreement on Trade in Services

It has been clearly stated that the goal of the WTO is to improve the welfare of the peoples of the member countries.[188] Every international organization involved in the arrangement of the trade globalization stated its honourable aims and purposes with regard to trade globalization, but on the other hand, it is questionable still whether such goals are realistic, achievable and more than just sloganistic language. Therefore,

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184 See: article 59-62 of this Convention.

185 See: Friedl Weiss and Paul de Waart, 'International Economic Law with a Human Face: an Introduction View'. This article can be found in Friedl Weiss, Erik Denters and Paul de Waart (ed), *International Economic Law with a Human Face: an Introduction View*. The Hague, Dordrecht, London, Kluwer Law International, 1998, p. 10. See also: The UNDP Human Development Report 1997, 'Human Development to Eradicate Poverty'. Oxford University Press, 1997, pp. 17-23. <http://hdr.undp.org/en/media/hdr_1997_en.pdf>, accessed 1 December 2006.

186 Further explanation about which region and which group has been bypassed by the globalization, see: The UNDP Human Development Report 2003, 'Millennium Development Goals: A compact among nations to end human poverty'. Oxford University Press, 2003, p. 16. <http://hdr.undp.org/en/media/hdr03_complete.pdf>, accessed 2 December 2006.

187 See: The UNDP Human Development Report 2005, 'International Cooperation at a Crossroad: Aid, trade and security in an unequal world'. Hoechstetter Printing Co, 2005, p.4. <http://hdr.undp.org/en/media/hdr05_complete.pdf>, accessed 2 December 2006.

188 See: WTO, 'The WTO ... in Brief'. <http://www.wto.org/english/res_e/doload_e/inbr_e.pdf>, accessed 2 December 2006.

reassurance is ultimately necessary on whether principles and rules directed to and applicable in global trade activities are indeed aimed at and designed for the benefit of the least developed countries and the welfare of the under-privileged portion of the world community. The most important format used as instruments by the WTO to arrange trade liberalization is Multilateral Trade Agreements (MTA), and for that matter, the most relevant MTA related to the mobilization of transnational worker is the General Agreement on Trade in Services (GATS), the one and only set to date containing multilateral rules governing international trade in services.

Article 1 of the GATS determines the scope of this Agreement to affect trade in services of the WTO Member States. Based on the definition of trade in services provided by article 1 paragraph 2.d of this Agreement, it is interpreted as 'the supply of a service by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member'. Based on this scope, the presence of migrant workers as natural persons-service suppliers is covered by this Agreement. The following paragraphs will elaborate some important arrangements within the GATS scheme relevant to the trade in services of natural persons (Model IV of the trade in services). It covers the activities of migrant workers who provide their services (in the form of their work energy, skills, and knowledge to perform certain jobs) in another country, either on behalf of their employers or as self-employed persons. Although GATS does not define the skill level of the services to which Mode IV applies, hardly any states have made GATS commitments for low-skilled workers. Nevertheless, as multinational companies benefit from moving both low-skilled and high-skilled jobs around the world through GATS Mode III (investment-related) provisions, it seems legitimate to ask whether it is justifiable to limit the capacity of workers to seek employment in the countries where jobs are available based on Mode IV.[189] Furthermore, in the process of negotiation of this Agreement, the USA and EU argued that one reason GATS Mode IV is unworkable, particularly for semi-skilled and unskilled service providers, is because source countries cannot guarantee the return (and hence the 'temporariness') of their service providers working abroad. Failure to return makes GATS Mode IV a migration issue rather than a trade issue, and thus a politically unpalatable topic to discuss in many developed countries.[190] Therefore, the issue here was concerning whether the work is 'permanent or temporary' rather than whether the workers are 'high-skilled or low-skilled workers'. In practice, agreements between certain developed and developing countries that have enabled workers from the developing countries to enter the developed countries on a temporary basis indicate that the GATS Mode IV process may be feasible for all parties,[191] without considering the skill level of the migrant workers. A previous study by Walmsley and Winters illustrated that unskilled workers took a big part in service liberalization under the scheme of Model IV GATS, such as in agriculture and construction sectors in Germany and the UK, which mostly were occupied by Polish and Czech migrant workers.[192] Nevertheless, the mechanism to effectively apply the scheme of Model IV GATS to the low-skilled migrant workers is still debated. Until recently, no binding legal instrument about this matter has been passed by the WTO. Therefore, it still takes long process to implement the liberalization of unskilled service providers in the international trade in services.

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189 See: Caroline Dommen, 'Migrants' Human Rights: Could GATS Help?' [2005] Migration Policy Institute, Migration Information Sources. <http://www.migrationinformation.org/feature/display.cfm?id=290> accessed on 28 October 2008.

190 See: Uri Friedman and David Zafar Ahmed, 'Ensuring Temporariness: Mechanisms to Incentivise Return Migration in the Context of GATS Mode 4 and Least Developed Country Interests'. [2008] Quaker United Nations Office, Geneva, p. 1. <http://www.quno.org/geneva/pdf/economic/Issues/EnsuringTemporariness-English.pdf> accessed on 28 October 2008.

191 See: *ibid.*

192 See: T. L. Walmsley, and L. A. Winters, 'An Analysis of the Removal of Restrictions on the Temporary Movement of Natural Persons', [2002] CEPR Discussion Paper No. 3719, pp. 38-42.

Movement of natural persons supplying services (Mode IV)[193] deals with negotiations on the labour movements and rights of individuals for temporary stay in a foreign country with the purpose to provide services. It allows parties to negotiate on specific commitments applied to the movement of persons to provide services under the agreement. It requires, however, that people working abroad under a specific commitment scheme shall be allowed to provide the service in accordance with the terms of the commitment. It specifies that the agreement does not apply for people seeking permanent employment or in the process of complying conditions to obtain citizenship, permanent residence or permanent employment.

As regards the employment relationship, there are some basic principles involved furnishing the general values concerning liberalization on trade in services by migrant workers. There are two principles of non-discrimination, which are fundamental to the GATT, namely "the most-favoured-nation principle" and "the national treatment principle". Being the foundation of the WTO system,[194] these principles of non-discrimination are fundamental not only to the GATT, but to all WTO Agreements (that are also incorporated in the *General Agreement on Trade and Services* as well as in the *Agreement on Trade-related Aspects of Intellectual Property Rights*).

The non-discrimination principle shall be applied to establish an economic integration,[195] by way of allowing Members to enter any agreement to liberalize trade in services, in which they commit themselves to eliminate the existing discrimination through the elimination of any discriminatory measures and/or the prohibition of a new or a more discriminatory measure.

In relation to trade in services, the Most-Favoured-Nation (MFN) principle[196] suggests that each Member must grant to every other Member the most favourable treatment that it grants to any country with respect to trade in services. It means that a Member must treat every produced service or service-supplier from other Members equally (with some exceptions, such as to give advantages treatment to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed).[197] In general, if a Member grants a concession to another Member, such concession must be considered applicable to other members. The MFN principle is, nonetheless, subject to some important exceptions under the GATS, and the measure for which the exemptions have been taken is described in the MFN Exemption List of the Member, indicating to which Members the more favourable treatment is applicable, and specifying the duration of the exemptions. In principle, these exemptions should not last for more than ten years. As mandated by GATS, all these exemptions are currently being reviewed in order to determine whether the conditions that originally generated the need for these exemptions still exist. In any case, these exemptions are part of the current services negotiations.

If we apply this principle to worker mobility, it is possible to infer that a migrant worker (from a Member) – who either directly provides services to a service receiver or who works for a service provider – has an opportunity to provide his services under the same conditions as other migrant workers from any Member.

The National Treatment (NT) principle set out in Part III Article XVII of the GATS addresses another form of discrimination, namely that between imported and locally produced services and between foreign service suppliers and local service suppliers. This article requires that not only imported and locally produced services, but also foreign service suppliers and local service suppliers are to be treated equally, with respect

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193 See: article 1 paragraph 2.d of the GATS and article XXIX, *Annex on Movement of Natural Persons Supplying Services under the Agreement (GATS).*

194 See: Asian Development Bank, 'World Trade Organization Toolkit'. <http://www.adb.org/Documents/Others/OGC-Toolkits/WTO/wto0100.asp>, >, accessed 2 December 2006.

195 This is explicitly stipulated in article V para 1 (b) of the GATS.

196 This principle can be found in Part II article II of the GATS and exemptions to this principle are provided for in articles XIII and XIV e of the GATS and Annex Exemption of the GATS.

197 See: Article II para 3 of the GATS.

to all laws, regulations and requirements affecting their internal sale. In other words, Members are prevented from adopting internal or domestic policies designed to favour their domestic service providers *vis-à-vis* foreign service providers of a given service, even though the latter may all be treated in a uniform way.

The application of the MFN and NT principles in the trade in services is rather different one to another. On a one hand, the MFN principle is part of the general obligation of the Member States. Consequently, the Member States automatically oblige to implement this principle in their legislations or in any related measure affecting trade in services in their territory. On the other hand, the NT principle establishes obligations to the Member States to open their market access to foreign service suppliers only in the specific sectors of services, as it is agreed in the specific commitments of those Member States.[198] Consequently, other sectors, which are not expressly listed in the specific commitment, are not complied with the NT principle. Furthermore, in order to implement the NT principle to the sector listed in its specific commitment, a Member State is entitled to determine the terms, limitations and conditions in the market access, as long as it has been agreed in the negotiation and it is specified in its Schedule of Specific Commitments.[199]This mechanism leads to a conclusion that the implementation of the NT principle provides a space for the Member States to exclude some service sectors from the trade liberalisation.

The idea is that barriers to trade may exist not only as a result of practices at borders, but also as a result of internal measures, which discriminate between domestic and imported services. The specific application of the NT principle to given situations has been the source of a number of important GATS and WTO disputes, particularly to facts that domestic laws, regulations or administrative policies which may be neutral on the face, nevertheless have either the intent or effect of imposing differential burdens on foreign exporters. Formally identical or formally different treatments shall be considered as less favourable if they affect the conditions for competition in favour of domestic services or service suppliers of a Member compared to the like services or service suppliers of any other Member.[200] The GATS non-discrimination and NT rules may also be interpreted so that national laws and regulations may be considered discriminatory if they have a disproportionate effect on foreign firms - even if they apply equally for national and foreign firms. To make this problem more practical, *Robert Weissman* gave an interesting illustration:[201]

'A foreign advertising company that specializes in making television advertisements for tobacco companies might argue that an advertising ban unfairly discriminates against foreign advertising agencies. This argument would be strengthened if the advertisement company were complaining about a television-advertising ban that did not extend to other media, and if foreign companies had a disproportionately larger share of the television advertising market. The challenging company might claim that it was not receiving equally favourable treatment as domestic advertising companies, even though the advertising restrictions applied equally to foreign and domestic firms'.

Based on this illustration, it can be concluded that if a regulation in its application creates a disproportionate/unequal effect on foreign legal subjects, even though it is applied equally to nationals and foreign legal subjects, it may be considered discriminatory.

In specific circumstances however, WTO Members are allowed to derogate from the NT principle. One important exception that may be brought to the NT principle is included in Article XIII and XIVd of the GATS, which allows Members to adopt measures inconsistent with the GATS, including the NT requirement provided that these measures are intended to protect legitimate interests as laid down in Article XIV of the

198 See: article XVI of the GATS.

199 See: articles XX paragraph 1 and XVI paragraph 2 of the GATS.

200 See: article XVII para 3 of the GATS.

201 See: Robert Weissman: 'International Trade Agreements and Tobacco Control: Threats to Public Health and the Case for Excluding Tobacco from Trade Agreements'. Essential Action, Washington, November 2003, v 2.0, p. 16. <http://www.essentialaction.org/tobacco/trade/tobacco.trade.v02.backgrd.pdf>, accessed 17 January 2007.

GATS,[202] such as health; and that the said measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the countries where the same conditions prevail or constitute a disguised restriction on international trade in services.

The main principles of trade liberalization are the twin liberal principles: freedom and legal equality,[203] as they have been deliberated in the MFN principle and the National Treatment principle. Both principles facilitate every trade actor to enter and compete in local, regional or international trade. These principles will be ideally applied only if the preconditions are satisfied, i.e. every involved country has equal capability, equal knowledge, equal assets and capital, equal technology, etc, and hence they are in general able to compete equally. In fact, as long as this precondition is not yet satisfied, application of these principles may create an unjust and unequal competition between the countries in international trades. Corrective measures to the unequal effect of the principle of freedom and principle of legal equality are therefore, necessary to create a more justifiable competition. In respond to this problem, the WTO provides a principle to increase participation of developing countries in trade in services,[204] namely 'special and differential treatment provisions or the principle of preferential treatment for developing and under-developed countries'.

This principle increases the ability of the developing/under-developed country members to participate in the global competition of international trade, by way of:

- To negotiate special commitments related to trade in services, aiming at the strengthening of domestic services capacity and efficiency and competitiveness of the developing/under developed country members through access to technology on commercial basis; to improve their access to global distribution channels and information networks; and to liberalize the market access in sectors and modes of supply of export interest from developed country members to developing/under-developed country members.
- To provide information concerning the developed country members respective markets with regards to commercial and technical aspects of the supply of services; registration, recognition and obtaining of professional qualifications; and the availability of services technology. Furthermore, the least-developed country Members put a special priority to submit their specific commitments to cope with their serious difficult conditions in their development, trade and financial needs.

Technical and operative instruments concerning special treatment for least developed countries have also been established during *the Special Session of the Council for Trade in Services* on 3 September 2003, in the form of *Modalities for the Special Treatment for Least-developed Countries in the Negotiations on Trade in Services.*[205] In these modalities, the least developed countries have the opportunity to take their basic condition to achieve social and development objectives; to use it as a means of addressing poverty, upgrading welfare, improving universal availability and access to basic services; to ensure sustainable

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202 Therefore, similar with the provision in the GATT, the National Treatment principle may be exempted on questions concerning emergency safeguard measures, particularly in efforts to cope with existing pressures on the balance of payments, for maintenance of a level of adequate financial reserves and for solving some problems under the umbrella of General Exception. The General Exception in the GATS is also usually linked to public order, public security, public health and public procurement. Of these specific reasons, the public procurement is the reason that is commonly used to exempt the application of the national treatment principle. Cf. Elizabeth Drake, 'The General Agreement on Trade in Services: How Will It Impact Workers?'. American Federation of Labour – Congress of Industrial Relation. <http://www.aft.org/topics/immig-healthcare/GATS.pdf>, accessed 30 July 2008.

203 See: Wil D. Verwey, 'The Principle of Preferential Treatment for Developing Countries'. [1983] The Indian Journal of International Law, Vol. 23, Nos 3 & 4, p.343.

204 See: article IV of the GATS.

205 See: WTO, 'WTO Members agree on ways to boost LDC participation in services negotiations'. <http://www.wto.org/english/news_e/pres03_e/pr351_e.htm>, accessed 23 January 2006.

development and to include their social dimensions in the negotiations and submissions of their schedule of specific commitments.

Another important principle in the trade liberalization is the non-reciprocity principle. While the principles of reciprocity and MFN are the pillars upon which the WTO system is established, it is also notable that the Members agree that in some WTO provisions important exceptions to the MFN should be granted especially for least/under-developed countries and developing countries. In the relation between developed countries with developing or least/under developed countries, non-reciprocal trade preference could also be perceived as one kind of special/preferential treatment for developing or least/under developed countries. Based on this non-reciprocity principle, no reciprocal obligations exist for the developing or under/least developed countries, and they are bound only to apply the most-favoured nation clause and not to discriminate between the WTO members. The objective of this principle is somewhat similar to the special and preferential treatment for developing countries or under/least-developed countries principles, i.e. to increase developing or under/least-developed countries' export income, promote the industrialisation of these countries and accelerate their economic growth.

The application of the preferential treatment for least/under-developed countries and developing countries as well as the non-reciprocity principle in the relationship between developed countries and least/under-developed countries or developing countries is restricted by "the sunset principle". Under this principle: a statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed.[206] In relation to the WTO provisions, this organization sets a specific period for developing or least/under-developed countries to deregulate their regulations based on all WTO principles, or to terminate any trade restriction or any exception to the WTO principles, that is currently applied in their international trade regulations or practices. The principle is supposed to provide a transitional period for Members to adjust their internal conditions and to improve their competency to involve in international trade practices.

Some important applications of the sunset principle applications could be seen in the following matters:

- To limit the period of exception of non-discrimination treatment for emergency safeguard measures, i.e. on a date not later than three years from the date of entry into force of the WTO Agreement;[207]
- To limit the period of exemption to the MFN principle by a member, i.e. on the date provided for in the exemption, and it should not exceed a period of 10 years;[208]
- To limit the period of modification of specific commitments schedule, i.e. at any time after three years have elapsed from the date on which that commitment entered into force;[209] etc.

To put these matters within the context of the protection of the rights of migrant workers, since migrant workers employment (especially regarding temporary posting of workers in a foreign country by their employers) can be within the scope of the GATS, we may also deduce that all the GATS principles are applicable to them. It also means that Member States must reassess their legislations on the trade in services related to the specific sectors, which are listed at their schedule of specific commitments (and must take reasonable measures as may be available). It covers the assessment of the legislation issued by the central, regional or local government; other authorities and non-governmental bodies in the exercise of power delegated by the governments or authorities. The scope of assessment will include trade practices concerning the accessibility of the job market for (unskilled or skilled) foreign workers, the transparency of

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206 See: Bryan A. Garner, *Black's Law Dictionary, 8th edition.* West Publisher, 2004. This principle can be found under the word sunset law.

207 See: Article X para 1 of the GATS.

208 See: Article XXIX, Annex on Article II Exemptions of the GATS.

209 See: Article XXI para 1. (a) of the GATS.

their regulations, the necessary legal protection for migrant workers and other related issues in those specific sectors of services (listed in the schedule of specific commitments).

The main aim of this evaluation is to look ahead to the creation of a more favourable environment for workers to obtain truly essential benefits from the global trade, and to avoid or even eliminate bad working relationships that would treat migrant workers as commodities valued only to the benefit of their employers.[210] At this point, the author believes that some valuable efforts can be carried out through the WTO mechanism, especially concerning a process for creating international agreements and developing dialogue between countries of origin and destination on issues of common interest on a bilateral, multilateral, regional or global basis.[211]

1.5.2. The Role of the WTO to Improve the Protection of Migrant Workers

The World Commission on the Social Dimension of Globalization[212] of the ILO has a forum, the so called *the Ideas Bank*. It contains policy briefs on a wide range of proposals relating to the social dimension of globalization. The policy briefs summarize the main idea behind a particular proposal recommended by the World Commission.[213] From its summary, there are some important aspects related to worker protection, in which WTO would have an important role to work in.

What is the role of WTO in improving the protection of migrant workers in the territory of the Members? The WTO has the "Trade Policy Review Mechanism" (TPRM), which has an important role to play in evaluating the trade policies of the members. The TPRM was introduced into GATT in 1989 following the Mid-Term Review of the Uruguay Round. The TPRM is a formal process by which trade policies of each WTO Member are periodically reviewed. Its objective is to review "trade policies/practices and their impact on the functioning of the multilateral trading system". It is specifically stated that the mechanism is designed only to increase transparency and understanding and is not intended to "impose new policy commitments on Members". The review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the

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210 In other words, the WTO is bound to observe the fundamental principle established by the ILO to protect workers in the Philadelphia Declaration 1944, part I: "labour is not a commodity". <http://www.ilo.org/public/english/about/iloconst.htm#annex>, accessed 17 March 2005.

211 As an example, there is a multilateral agreement amongst the seven Members of the League of Arab States concerning *Model of Bilateral Agreement on the Movement of Labour*, in which the involvement of the authorities in the state of origin and the state of immigration has been provided for (See: the Appendix of *the Pact of the League of Arab State*, 22 March 1945). Another example *the North American Agreement on Labour Cooperation* has been supplemented to the North American Free Trade Agreement. It endeavours to create a foundation for cooperation among the Member States for the resolution of labor problems, as well as to promote greater cooperation among trade unions and social organizations in order to fight for improved labor conditions. Within this agreement, the USA and Canada as the countries of destination and Mexico as the sending country have tried to manage the flow of migrant workers in their region. In ASEAN region, labour cooperation at the ministerial level have been undertaken between ASEAN on the one side and Japan, China and Republic of Korea on the other side.

212 The World Commission on the Social Dimension of Globalization was established by the International Labour Organization (ILO) in February 2002. The Commission is an independent body. It was initiated to respond to the needs of people as they cope with the unprecedented changes that globalization has brought to their lives, their families, and the societies in which they live. The official website of this commission is: < http://www.ilo.org/public/english/wcsdg/index1.htm>, accessed 11 January 2006.

213 The website of this forum is: <http://www.ilo.org/dyn/idea/ideasheet.home>, accessed 15 April 2008.

multilateral trading system.[214] The mechanism was confirmed as an integral part of the WTO in Annex 3 of the *Marrakesh Agreement establishing the World Trade Organization.*

Before 1995, trade policy reviews were restricted to trade in goods. In conformity with WTO rules, since 1 January 1995 such reviews also covered new areas of trade, including trade in services.[215] In 1996, the *Economic and Social Council* of France[216] proposed the application of that broader sector of review (including labour rights record of the Members). Furthermore, during the 1st Ministerial Conference of WTO in Singapore (1996), it was agreed to review the labour rights records of the Members. Since 1997, the *International Confederation of Free Trade Union* (ICTFU)[217] has been independently producing reports on the labour practices of countries under TPRM review and making them publicly available through its website, but then in 1999 the ICFTU suggested that its reports be replaced by similar ones from the ILO. The commitment to review labour rights records of the Members was also reaffirmed by the European Parliament through its *Resolution for the 5th Ministerial Conference of the WTO* in Cancun,[218] and furthermore the European Parliament encouraged the WTO Commission to design a further progress in labour rights protection through reviewing the accomplishment of each Member's national policies in fulfilling the core labour standard.[219]

Regardless of some obvious weaknesses that persist in this mechanism,[220] such reviews are indeed valuable and play a significant role in encouraging improvements within the national laws of the Members, especially in relation to the elimination of any restriction on the trade in services with regard to labour participation as individual service providers. These review schemes will develop the policies of the Members

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214 It is mentioned in the objectives of the TPRM. See: World Commission on the Social Dimension of Globalization, 'Reviewing Labour Rights through the Trade Policy Review Mechanism'. <http://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm>, accessed 12 January 2006.

215 See: WTO, 'Trade Policy Review Mechanism'. <http://www.wto.org/english/tratop_e/tpr_e/tprm_e.htm>, accessed 15 January 2006.

216 *The Economic and Social Council* of France is a consultative assembly. It does not play a role in the adoption of statutes and regulations, but advises the lawmaking bodies on questions of social and economic policies. The executive may refer any question or proposal of social or economic importance to it. It publishes reports in the Journal Official, which are sent to the Prime Minister, the National Assembly, and the Senate.

217 This is a confederation of national trade union centres, each of which links together the trade unions of that particular country. It was set up in 1949 and has 241 affiliated organisations in 156 countries and territories on all five continents, with a membership of 145 million, 40% of who are women. It has three major regional organisations, APRO for Asia and the Pacific, AFRO for Africa, and ORIT for the Americas. It also maintains close links with the *European Trade Union Confederation (ETUC)* (which includes all ICFTU European affiliates) and *Global Union Federations*, which link together national unions from a particular trade or industry at international level. See: ICFTU, ICFTU: What is It, What It Does...' <http://www.icftu.org/displaydocument.asp?DocType=Overview&Index=990916422&Language=E> accessed 31 July 2008.

218 See: European Parliament, 'P5_TA-PROV(2003)0336 Preparation for the WTO Ministerial Conference: European Parliament resolution on preparations for the 5th World Trade Organization Ministerial Conference (Cancun, Mexico, 10-14 September 2003)'. <www.union-network.org/UNIsite/In_Depth/Interna_Relations/GATS/2003PDF/Cancun%20-%20EP%20Resolution%20June.pdf> accessed 19 July 2006.

219 The meaning of 'core labour standard' is not explicitly defined by the Ministers. Nonetheless, as far as the author understands, this term should be interpreted as the minimum standard of labour protection imposed by the core ILO conventions (so called fundamental ILO Conventions). This subject will be dealt with further in another part of this study.

220 One should always bear in mind that the TPRB has no particular competence in relation to labour issues, other than within the context of trade in services. Therefore, the scope of the policy review is not broad and comprehensive covering all labour policy sectors.

in accordance to the WTO rules, without ignoring the actual domestic conditions and inputs from other Members.

In 1996, the *Economic and Social Council* of France proposed to broaden these review activities to include appraisals on the functioning and regulation of a country's labour market, with a view to reaching better understanding on the mutual interaction of trade and labour policies. [221] It means that TPRM will also evaluate whether labour policies of a member caused adverse effects to trade in services. As an example, a review under the TPRM procedure has been undertaken to reply to questions filed by India to the EU, as regards the involvement of three companies from the EU involved in employing child workers in India within the context of multinational outsourcing, for the supply of cotton seeds to these companies. The main question regards the attitude and the effort of the European Commission to force the European companies to implement the fundamental labour rights treaties that have been agreed upon in the ILO. This review has encouraged the European Commission together with the Indian government to establish a Join Action Plan. It includes strengthening of the policy dialogue and cooperation in a number of areas, including employment and social policy. [222] Therefore, the mechanism of this review will gradually set each member in motion to integrate its future labour policies in harmony with all provisions on trade in services under the WTO scheme, or to revise those policies, which are inconsistent with those provisions in order to promote unrestricted movement of services as well as in order to protect migrant workers. There are many opinions arguing the presence of potential benefit from trade liberalization [in this context: GATS] for employees especially for those coming from the developing countries. They seem to be concerned about not being able to compete with employees from developed countries due to their lack of education, skill, experience, etc. It is undoubtedly true that under the ambiance of globalization, their position becomes more vulnerable. This is also behind the rise of movements against globalization in various places in the world. Nevertheless, since 1995 the wave of globalization has become an undeniable phenomenon bound to happen, and now it has already become an undeniable fact. Consequently, it is now rather futile to struggle against the process. Workers are preferably conceiving a strategic plan to survive and to reap the benefits from this global trade and global market, instead of wasting too much time and energy fighting it. Thus, focusing on efforts to correct the unequal bargaining position with employers is more useful. Action plans for increasing the workers' bargaining power must be converged with the needs of job markets for a certain quality level of education, skill, and experience. Labour unions might be able to benefit from the WTO, i.e. under the scheme of GATS and coordination of their governments to invite training or technical assistance from developed countries. [223]

There is an actual necessity to regulate the flows of migrant workers through the establishment of bilateral or regional agreements aimed at avoiding unnecessary legal conflicts, such as legal conflicts arising from the different standards of protection of the rights of migrant workers. Bilateral and regional inter-governmental agreements between developed and a developing countries are supposed to endow the participating countries with some benefits,[224] such as the benefit of allowing authorities in developed countries to communicate directly with the government of developing countries that is intended to export high-skilled workers on temporary basis. In this case, labour migration is put within the context of government cooperation. It is supposed to be the simplest way to prevent the traffic of illegal migrant

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[221] See: World Commission on the Social Dimension of Globalization, 'Promoting Policy Integration through the Trade Policy Review Mechanism'. <http://www.ilo.org/dyn/idea/ideasheet.display?p_idea_id=55> accessed 20 July 2006.

[222] Further information is available in: Spidla, 'Multinational companies foster child slavery'. Answers of Mr. Spidla on behalf of the European Commission, to questions of Max van den Berg (PvdA/PSE) (28 November 2005). <http://www.indianet.nl/a060131e.html>, accessed 30 July 2008.

[223] See: T. L. Walmsley, and L. A. Winters, footnote no. 192, *ibid.*

[224] See: World Commission on the Social Dimension of Globalization, 'Agreements to Harmonize Policies on International Migration'. <http://www.ilo.org/dyn/idea/ideasheet.display?p_idea_id=17>, accessed 14 July 2006.

workers. However, in order to maximize the beneficial fruits of such arrangements, standardization of admission permits and credential requirements are necessary, and might improve the transparency factor if these requirements are openly published.

Bilateral agreements may also stipulate that foreign worker training programs to improve skills properly suited to the needs of the developing countries be part of such an integrated program.[225] They could also make some concrete efforts to harmonize specific immigration rules and regulations of the involved parties. Providing a "GATS code of conduct" on the employment of foreign workers might be helpful as well.[226] Such a code should, however, be drafted for all GATS signatories with regard to fair wages for migrant workers, prohibitions on types of dangerous work, prohibition on confiscation of travel documents, rules for treatment of workers following contract termination etc. In other words, provision in such codes of conduct might be perceived as the minimum standards of protection of migrant workers, while additional/better protection could be arranged by the governments via their national laws. The author tends to object to the idea of creating a code of conduct solely by the WTO due to the limited authority of its trade in services area. The authority to regulate labour protection should remain with the ILO. Therefore, if the code of conduct were to comprehensively include the standards of labour protection, it should be arranged in coordination with the ILO, to prevent any substantial contradiction. As long as the better protection is applied to all migrant workers without any favoured treatment for migrant workers from certain countries, this national law is lawful under the GATS scheme.

A very interesting idea to facilitate the temporary cross-border movement of labour has been proposed by the Indian delegation, by way of the issuance of the GATS visa.[227] It had been proposed in the statement made by India in the General Council of the WTO in November 1998. The idea of the GATS Visa is a special category of visas for professionals, which would make it possible for skilled workers to obtain their travel documents without any unnecessary bureaucracy. If this new device is in place, countries would have to assemble a proper system that would deal with professionals differently from ordinary tourists or immigrants, and such issuance should apply uniform requirements and procedures established by the WTO. Whether the idea of GATS visas should be based on automatic entry or single or multiple entry of long duration demands further study by the Members, although to minimize the risk of visa abuse, the WTO may restrict the use of such visas so that they are not used for the purpose of attaining a permanent status.[228]

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225 This can be arranged under the context of special and preferential treatment for developing/least developed countries under article 4 of the GATS.

226 The idea of GATS code of conduct has been proposed by Briant Lindsay Lowell and Allan M. Findlay. See: Briant Lindsay Lowell and Allan M. Findlay, 'Migration of Highly Skilled Persons from Developing Countries: Impact and Policy Prescription'. [2002] International Migration Papers 44, ILO.

227 See: World Commission on the Social Dimension of Globalization, 'GATS Visa to Facilitate the Temporary Cross-Border Movement of Labour'. <http://www.ilo.org/dyn/idea/ideasheet.display?p_idea_id=54>, accessed 18 July 2006. The concept of India concerning trade in services via Model 4 of GATS can be found in: Ajay Srivastava: 'GATS – The Indian Scenario'. This scenario had been introduced in the forum: "Business for Development" Challenges and Options for Government and Business after the Adoption of the WTO "July Package". Manila, Philippines, 21-22 October 2004. Another article similar to this one is: *Services Negotiations: Issues and India's Concerns*. [1999] India and The WTO (a monthly Newsletter of the Indian Ministry of Commerce), Vol. 1 No. 6. Both articles mentioned the importance of GATS visa issuance, to avoid the complicated working visa regime in many countries. This situation in a certain way can establish an administrative restriction for skilled workers (Model 4 GATS).

228 The application of this visa must correspond with the scope of the GATS, i.e. its provisions are applied only in respect of temporary work performed by an individual worker, and not in respect of a worker who wants a position as a permanent worker. Therefore, the GATS visa will not be misused as the means for foreign workers to obtain a permanent residence permit. Such a strict restriction must be effectively enforced to prevent immigration matters and trade in services matters from becoming mixed up.

The application of the GATS visa is expected to solve the immigration problem on trade in services, and therefore it should not generate other administrative restrictions. Legal certainty of the requirements and transparency in the procedure of issuance must be preserved. Since the GATS visa issuance for a temporary natural service provider is still under discussion, there is no available provision concerning the procedure and requirement to apply that visa yet.[229] The author believes that if the GATS visa is going to be realized, it may encourage the mobility of professionals and skilled workers.

1.6. A Comparative Study on the Role of the ILO, the UN and the WTO to Protect the Rights of Migrant Workers

After the description of the protection of migrant workers under the UN, the ILO and the WTO systems, hereby the author will make a comparative study of the legal instruments issued by the three international organizations. There are some factors in respect of which such legal instruments can be compared, i.e. the basic rights of migrant workers; the rights related to the implementation of the employment contract; and the scope of non-discrimination principles for the protection of migrant workers. The author has chosen these factors, because migrant workers are involved, and because these factors have been arranged in these legal instruments, but in different ways and with different levels of protection.

1.6.1. The Basic Rights of Migrant Workers

The similar scope of basic rights provided by the UN, the ILO and the WTO is "the right to provide services in other countries". Every person is allowed to provide his/her service in other countries without any restriction, especially without being discriminated against in respect of nationals of the country of destination or migrants from other countries.

a. Provisions in the UN Convention and the ILO Conventions and Recommendations with regard to Migrant Worker Protection

The basic rights of migrant workers are protected within the scope of the UN Convention and the ILO Conventions and Recommendations. These include specific rights, i.e. the right of freedom to stay in or to leave from any State as well as the right at any time to enter and remain in their State of origin; the right to life; the rights of no forced labour, slavery or servitude and hard labour or prison labour; the right of freedom of thought, conscience and religion; the right to hold opinions without interference; the right of privacy; the right to have and the freedom to use property; the right to liberty and security of person; the right to equality before the law and the courts or tribunals; the right of no collective expulsion; the right to get compensation of work; the right of social security protection; the right of access to medical care; the basic right of access to education of the children; the right to maintain cultural links with their State of origin; the right to transfer their earnings and savings; the right of information concerning their rights or obligations arising from international law, national law or the employment contract with their employer. These rights are protected by the UN Conventions as well as the ILO Conventions and Recommendations. These rights may also be considered to be human rights.

Nevertheless, in certain cases the UN Convention and the ILO Conventions and Recommendations have a different intensity. As examples, the ILO Conventions and Recommendations regulate the right to life in general, while in the UN Convention it is arranged in more detail, that migrant workers have the rights to life

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[229] To get a more comprehensive feature of the prospect of the GATS visa arrangement, see: Richard Self and B. K. Zutshi, 'Temporary Entry Of Natural Persons As Service Providers: Issues and Challenges in Further Liberalization under the Current GATS Negotiations'. Joint WTO-World Bank Symposium on Movement of Natural Persons (Mode 4) under the GATS. WTO, Geneva, 11-12 April 2002, Pp. 24-27. <http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_zutshi_self_e.doc> accessed 25 July 2006.

without torture / cruel / inhuman / degrading treatment or punishment. The right to liberty in the UN Convention is regulated in more detail as well, in which migrant workers and their family members have the rights to liberty and to be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

Another right is regulated by the UN Convention but is not regulated by the ILO Conventions and Recommendations, i.e. the right to a name, to registration of birth and to a nationality of the children. Since this right is more general in relation to migrant workers as residents (instead of migrant workers as employees), it should be arranged at the level of UN Convention instead of the ILO.

b. Provisions in the GATS with regard to Migrant Worker Protection

The GATS has more general provisions to protect migrant workers, explicitly to promote the global trade practices of WTO Members under the context of labour standards. This commitment had been declared in the first WTO Ministerial Conference in Singapore in December 1996. Since taking office in September 1999 until the expiration of his directorship in 2005, the former WTO Director-General *Mike Moore*, has met twice with the ILO Director-General *Juan Somavia. Mike Moore* has said he looks forward to co-operating with Mr Somavia and other officials from the ILO. He has also been clear that the WTO will be guided by Ministers on the issue of trade and core labour standards.[230] The labour standards issue must be taken up by the WTO in some form if public confidence in the WTO and the global trading system is to be strengthened. Actually, that commitment is the subject of political debate in the ministerial conference of the WTO, and it has not yet been regulated under the WTO's binding legal instruments. Nevertheless, the context of labour standards referred to by the WTO is the international labour standards as established by the ILO.[231] It is a very good coordination and cooperation between two specialized agencies. Without neglecting the protection of the rights of migrant workers, the WTO maintains its focus in the field of trade in services on natural persons, by applying the international labour standards as established by the ILO in the GATS system rather than by establishing its own new standards.

1.6.2. The Rights related to the Implementation of an Employment Contract of Migrant Workers

The three international organizations have the same grounds for the protection of the rights of migrant workers under their employment contracts, i.e. "no less favourable treatment" for migrant workers. That principle is applied by each international organization even though it is used in different contexts, in order to make this principle pertinent to its mandate. Nevertheless, in many occupational rights, the ILO has more detailed provisions than the WTO and the UN. Furthermore, the application of such rights by the ILO is facilitated by a system of supervision of contracts of employment, in which the supervision system involves many administrative requirements and needs agreements to indicate the methods by which the contractual obligations of the employers shall be enforced.

a. The Rights related to the Implementation of an Employment Contract in the UN Convention on Migrant Workers

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[230] See: The WTO, 'Trade and Labour Standards: Subject of Intense Debate'. <http://www.wto.org/english/thewto_e/minist_e/min99_e/english/book_e/18lab_e.htm>, accessed 14 November 2006. Some member governments argue that the rights such as: the freedom to bargain collectively, freedom of association, elimination of discrimination in the workplace and the elimination workplace abuse (including forced labour and certain types of child labour), are matters for consideration in the WTO.

[231] See also: Phillip L. Martin, *GATS, Migration, and Labour Standards.* International Institute for Labour Studies, Geneva. Decent Work Research Programme, DP/165/2006, p. v.

The UN Convention on Migrant Workers arranges some conditions related to he protection of the rights of migrant worker under their employment contract, i.e. no migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfil a contractual obligation; the right to receive wages and other entitlements due to him or her; treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration, other conditions of work and other conditions of employment; the rights to participate in activities of trade unions and of any other associations. The recognition of these rights is considered to be very important for migrant workers to guarantee them a proper employment relationship, which enables them to receive a proper compensation, proper working conditions, proper terms of work and proper standards of life.

b. The Rights related to the Implementation of an Employment Contract in the ILO Conventions and Recommendations

The rights provided by the UN are actually also provided for by the ILO, except for the prohibition to imprison migrant workers who fail to fulfil his/her contractual obligation. In relation to the employment contract, the ILO balances the interest of migrant workers against the dominant position of their employer, by way of establishing minimum levels of protection for migrant workers. That effort is supported by some relevant mechanisms such as: the proposal to establish a supervisory system for each country; requirements to include some minimum content in an employment contract; the rights to information before the departure of migrant workers, especially concerning conditions of work. Moreover, the ILO Convention No. 97 has two annexes, which are related to the recruitment, placing and conditions of work of migrant workers. Those annexes organize the detailed process of examination, admission, journey and placing of migrant workers as well as their rights under the employment contract. Therefore, to be compared with the UN Convention on Migrant Workers, the ILO legal instruments are more technical and operational.

c. The Rights related to the Implementation of an Employment Contract in the GATS

Since one of the main objectives of the WTO is to facilitate the implementation, administration, operation and further objectives of international trade liberalization, it is logical that this organization gives attention mostly to the trade aspect of the supply of services by natural persons. Therefore, it is not surprising that this organization does not provide any specific protection of the rights of migrant workers under the employment contract. This problem is beyond the mandate of the WTO.

1.6.3. The Scope of Non-Discrimination Treatment

The non-discrimination treatment in the UN Convention on Migrant Workers has narrower coverage than the scope of non-discrimination treatment in the ILO legal instruments and the GATS. The UN Convention on Migrant Workers applies non-discrimination treatment with respect to rights, while the ILO legal instruments and the GATS apply non-discrimination treatment with respect to rights and opportunities.

a. The Scope of Non-Discrimination Treatment in the UN Convention on Migrant Workers

Part II of this Convention limits the scope of non-discrimination only to respect for rights. Therefore, Part III and Part IV of this Convention may be applied merely to the rights of migrant workers and the members of their families (part III concerns human rights, while part IV concerns other rights). By excluding opportunity from the coverage of non-discrimination treatment, it seems this Convention does not protect intending migrant workers who want to work in a foreign country, nor does it provide any facilitation system to help

migrant workers whose employment contract has terminated to find new work in the immigration countries.[232]

b. The Scope of Non-Discrimination Treatment in the ILO Conventions and Recommendations

The ILO Convention No. 143 and Recommendation Nos. 100 and 151 provide not only equal treatment but also equal opportunity for migrant workers, in respect of employment and occupation; social security; trade union; cultural rights; and individual / collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory, at least as equal as that of nationals. Meanwhile the ILO Convention No. 97 and Recommendation No. 86 do not provide protection for equal opportunity of migrant workers. These two ILO legal instruments were issued more than two decades earlier than the ILO Convention No. 143 and Recommendation Nos. 100 and 151. It is not surprising if the standards of protection in the later legal instruments are higher than the standards in the previous legal instrument, since the ILO is becoming increasingly persistent in its efforts to improve the minimum level of protection for workers.

c. The Scope of Non-Discrimination Treatment in the GATS

The GATS does not explicitly clarify the scope of MFN and national treatment principles, whether it covers only equal treatment or equal opportunity as well. Nevertheless, in practice no service providers may be treated differently, both in their effort to sell their services and in the process of performing their services. Therefore, if a national law of a certain country establishes unequal treatment of or unequal opportunity for a natural person who wants to provide any service in its territory (if the service sectors have been listed in the schedule of specific commitments by that country), this can be considered as a violation of the GATS. It indicates that the GATS has a broad spectrum of application,[233] it covers both equal treatment and equal opportunity.

1.7. Concluding Remarks

In the effort to enable itself to adequately respond to the global movement of migrant workers and to protect their rights, the ILO, the UN and the WTO have their own function indicated in their mandates. The UN deliberates the focal points to protect the human rights of migrant workers and their family members; while the ILO does not stop at the human rights issues, but goes further to regulate many issues related to the employment relationship and the impact of this relationship on migrant workers. The WTO does not deal directly with the problem of the protection of migrant workers; but it assures the right of migrant workers to be treated equally *vis-a-vis* nationals of the immigration country as well as nationals of other countries, in trading their services as natural persons. This web of protection is quite comprehensive and if countries apply all the measures established by these three international organizations, the rights of migrant workers will indeed be protected thoroughly and systematically.

To realise the objective of protecting the rights of migrant workers, the three international organizations have to cooperate and establish a mechanism of coordination, especially at the policy making level. If the three international organizations successfully coordinate comprehensive and systematic legal instruments

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[232] This Convention covers provisions related to a transition period of the unemployed migrant worker as provided for in articles 50 and 54 of this Convention, concerning the right to unemployment benefit. Migrant workers are entitled to this benefit if they have been in employment and their employment contract is being terminated and they will gain no advantage from having their opportunity to find a new job increased. Therefore, this provision is not part of the equal opportunity arrangement.

[233] It has been declared explicitly that the MFN principle guarantees equal opportunities for suppliers from all WTO Members. See: WTO, 'GATS: Fact and Fiction'. <http://www.wto.org/english/tratop_e/serv_e/gats_factfiction4_e.htm>, accessed 26 November 2006.

regarding this matter, migrant workers will be better protected. Since the main objective of the ILO is to promote social justice and it establishes internationally recognized labour rights around the world, it is reasonable for the ILO to become the main organization to manage the improvement of the protection of the rights of migrant workers, and it must work actively with the UN and other relevant specialized agencies to develop policies and programmes that support the creation of decent work and decent protection for the rights of migrant workers.[234]

In fact, many people assume that labour protection and international trade are opposed to each other. In international practices, on the one hand many producers overlook labour protection in their attempt to obtain an efficient production cost. On the other hand, sometimes labour unions demand higher rights for workers, which is beyond the capacity of the employer to fulfil. The ILO and the WTO must deal with these two extreme positions, in order to accelerate production processes without hampering the welfare of the workers. The ILO and the WTO may cooperate to achieve their goals to protect migrant workers on the one hand and to accelerate free trade on services without any restriction on the other hand. To achieve this target, the ILO introduced the *World Commission on the Social Dimension of Globalization* to study fair globalization and to formulate a mechanism by which globalization will create opportunity for all. This reaffirmed the need to realize "universally shared values and principles" to execute any transaction in this globalization era, to make every party involved enjoy the benefit of globalization. The universally shared values and principles above mentions are as follows:

- Respect for human rights and human dignity, including gender equality. This lies at the heart of commitments already undertaken by the international community.
- Respect for diversity of culture, religion, political and social opinion, while fully respecting universal principles.
- Fairness. Fairness is a notion which is deeply felt and clearly recognized by people in every country. It is a standard of justice which many use to judge globalization and the equitable distribution of its benefits.
- Solidarity is the awareness of a common humanity and global citizenship and the voluntary acceptance of the responsibilities which go with it. It is the conscious commitment to redress inequalities both within and between countries. It is based on recognition that in an interdependent world, poverty or oppression anywhere is a threat to prosperity and stability everywhere.
- Respect for nature requires globalization to be ecologically sustainable, respecting the natural diversity of life on earth and the viability of the planet's ecosystem, as well as ensuring equity between present and future generations.[235]

It needs indeed global cooperation and common political will to achieve such a mechanism. Furthermore, the persistent application of international minimum standards of protection established by the ILO, together with non-discrimination principles in the international trade in services, will be very useful for maintaining a sustainable economic development with high respect for human rights and human dignity.

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[234] See also: International Labour Office, 'The ILO at a Glance'. <http://www.ilo.org/public/english/download/glance.pdf>, accessed 16 November 2006.

[235] See: World Commission on the Social Dimension of Globalization: 'A Fair Globalization: Creating Opportunity for All'. Geneva, 2004, p.8. <http://www.ilo.org/public/english/wcsdg/docs/report.pdf> accessed 20 November 2006.