

**THE EUROPEAN CONVENTION ON THE LEGAL STATUS OF
MIGRANT WORKERS (1977)**

An Analysis of its Scope and Benefits

March 1999

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1. INTRODUCTION

The purpose of this report is to look at European Convention on Migrant Workers which was first opened for signature in 1977 and reassess its value and importance in a Europe moving into the next millennium. The original decision to draw up the Convention arose at a time of substantial labour migration in Europe (1966). By the time it was opened for signature it had been overtaken by events which rendered its immediate value less clear, most importantly rising unemployment levels across Western Europe which had dramatically reduced the demand for migrant labour. However, Europe has, in the last ten years, gone through another enormous change: the dissolution of the communist block and the entry into the Council of Europe of new democracies as far afield as the Transcaucasus. In this new Europe to which we are only just beginning to adjust does the European Convention on the Legal Status of Migrant Workers provide a useful mechanism for dealing with some aspects of the new labour migration? This is the question which is addressed in this Report.

The decision to draw up a European Convention on the Legal Status of Migrant Workers was made at a time when the recruitment of foreign labour in Europe was commonplace. It was first included in the Work Programme of the Committee of Ministers of the Council of Europe in 1966. By the time it was opened for signature in 1977 the economic climate of Europe had changed dramatically, first and foremost as a result of the oil shocks of the early 1970s which jolted the economies of Western Europe and led to a rapid increase in unemployment. It contains many provisions relating to the collective recruitment of labour, which even by 1977, must have seemed untimely. However, it also contains substantial other provisions regarding the treatment of migrant workers.² In the second section of this Report, the aims and objectives of the Convention will be analysed.

The European Convention on the Legal Status on Migrant Workers constitutes one of the body of conventions drawn up in the context of the Council of Europe which relate to the treatment of aliens on the territory of the member states of the Council. In so far as it deals with social and economic rights of workers it compliments and gives specificity to some provisions of the European Social Charter (ESC). As regards the question of residence rights its other Council of Europe counterpart is the Convention on Establishment. The issue of social security rights of migrant workers is more specifically treated in the European Convention on Social Security.

Overarching, and applicable to all persons within the jurisdiction of the Council of Europe member states, is the European Convention on Human Rights (ECHR), a number of provisions of which are of relevance to migrant workers and the Fourth Protocol which deals specifically with protection of aliens from expulsion. The judgments of the European Court of Human Rights have been important in clarifying the duties of the member states as regards aliens with specific reference to the right to protection from interference with private and family life (Article 8 ECHR³) and the duty not to return aliens to a country where they would face a substantial risk of torture, inhuman or degrading treatment (Article 3 ECHR).

² The concept of migrant worker as used in the Convention is considered in depth below in Section 3. Of importance here is the question of whether and the extent to which migrants who have been authorised to work after their admission to the territory of a member state may be covered.

³ European Convention on Human Rights and Fundamental Freedoms 1950.

The European Convention on the Legal Status of Migrant Workers, therefore, fits within a system of Council of Europe treaties in which various rights are developed and expressed in different instruments with the purpose and intention of providing an interlocking and, in some cases overlapping, framework of human rights protection, *inter alia*, applicable to aliens. In accordance with its “sister” conventions, ie the Convention on Establishment and the Social Security Convention, the migrant workers convention is based on the principle of according rights to aliens who are nationals of other contracting parties. To this extent it differs from the ECHR which sets out fundamental human rights which must be protected irrespective of the nationality of the person concerned and some later conventions such as the European Convention on the participation of aliens in public life at local level.

The relationship of the migrant workers convention with the European Social Charter is somewhat more complicated. The two conventions cover similar territory, though the migrant workers convention is more limited in its scope. The European Social Charter which establishes the principle and contents of fundamental social and economic rights in Europe is properly the counterpart of the ECHR which contains the provisions for the protection of fundamental civil and political rights. However, the migrant workers convention which deals primarily with economic and social rights moves within the same domain as the European Social Charter. Further, the two conventions are based on the principle of according rights to nationals of other signatory states, though this principle in the European Social Charter only applies as regards some of the rights contained there in, others are of general application to all persons of whatever nationality. The third section of this report will outline the main features of the migrant workers convention with reference to other relevant Council of Europe conventions.

With the exception of the ECHR, the implementation of rights contained in the other Council of Europe conventions are supervised by Committees established under the conventions for this purpose. The special dispute resolution mechanism of the European Court of Human Rights is reserved exclusively for the ECHR indicating not only the importance of that convention as the foundation of the acceptable level of human rights protection in Europe, but also the individual nature of the civil and political rights contained in it. As regards the protection of social and economic rights the Council of Europe has favoured a more collective approach to supervision of implementation.

The European Convention on the Legal Status of Migrant Workers is subject to the supervision of the Consultative Committee established by Article 33 of the Convention. The Committee’s duties are to present opinions, recommendations and proposals designed to facilitate or improve the application of the Convention or aimed towards the Convention’s amendment. It is also charged with drawing up periodic reports containing information regarding the laws and regulations in force in its parties as regards matters provided for in the Convention. To date the Committee has published six such reports and commissioned, in 1992, an expert’s report on obstacles to the Convention’s ratification and extension of its scope. In the fourth section of this Report the contents of these periodic reports will be analysed.

To date, the convention has been signed by 12 member states and ratified by only 8.⁴ In order to determine the policy reasons and practical issues around signature and ratification

⁴ The Convention has been ratified by France, Italy, the Netherlands, Norway, Portugal, Spain, Sweden and Turkey. A further four member states have signed it but not yet ratified it: Belgium, Germany,

of the convention, we sent a questionnaire to the relevant government departments, non-governmental organisations and expert lawyers in all member states who have signed or ratified the convention as well as to such persons in a selection of member states who have neither signed nor ratified the convention including both new and old member states. The results of that questionnaire have been incorporated into the final section of this Report which sets out the legal and political considerations surrounding signature, ratification and application of the convention.

Greece and Luxembourg. The list of signatories and ratifications with their dates is contained at Appendix 2 to this Report.

2. THE AIMS AND OBJECTIVES OF THE CONVENTION

The starting point for considering the aims and objectives of any convention is with the preamble. The European Convention on the Legal Status of Migrant Workers contains four paragraphs to its preamble each of which provides an important insight into its purpose:

“Considering that the aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress while respecting human rights and fundamental freedoms”

The ideals and principles of the Council of Europe have not changed as a result of its dramatic enlargement over the past ten years. Its common heritage has, however, been extended by that increase. The role of labour migration as an element in facilitating economic and social progress within the Council of Europe has developed over the past ten years. Within the European Union, which now comprises 15 member states of the Council of Europe and through the European Economic Area Agreement a further two, labour migration among the parties is recognised as a fundamental right contributing to prosperity and the development of human capital. Its exercise is guaranteed in conditions of “freedom and dignity”.⁵

Within the European Union, notwithstanding the existence of a very strong right of free movement of labour accompanied by a right to non-discrimination in working conditions in comparison with own nationals, under 2% of nationals are actually using their right at the moment.⁶ However, within the territory of the 15 European Union Member States there are resident over 1,067,500 nationals of countries of Central and Eastern Europe, the former USSR and the Baltic states.⁷ These persons would be the immediate beneficiaries of an expansion of ratification of the migrant workers convention.

Figures for the current levels of labour migration in other Council of Europe member states are less easily accessible. It is difficult at this time to anticipate what the level of labour migration is likely to be over the next ten years. However, the adherence of more and more Council of Europe member states to the Fourth Protocol of the ECHR which provides a right to leave one’s country of nationality means that the potential for labour migration becomes greater as at least people have the chance to leave their country of nationality to take up employment elsewhere.

For those member states which have recently signed the Fourth Protocol of the ECHR it is important to supplement the right of their nationals to leave their state of nationality, *inter alia*, for the purpose of labour migration, with protection in the state where they then take up employment. The European Convention on the Status of Migrant Workers provides one mechanism for pursuing that aim: the economic and social progress not only of the member state but of its nationals.

⁵ Preamble to EC Regulation 1612/68.

⁶ Eurostat: Migration Statistics 1996 (covering the period 1994), Luxembourg 1997.

⁷ Eurostat: Migration Statistics 1996 (covering the period 1994), Luxembourg 1997.

Considering that the legal status of migrant workers who are nationals of Council of Europe member states should be regulated so as to ensure that as far as possible they are treated no less favourably than workers who are nationals of the receiving State in all aspects of living and working conditions;

The importance of the right to non-discrimination is rightly recognised as one of the most fundamental human rights. It holds a pivotal position in the constitutions of Council of Europe member states and is a lynch-pin of the European Community Treaty. However, all too often it is honoured more in the breach and the observance when it comes to migrant workers.

There has been renewed vigour given to the non-discrimination provision of the ECHR, Article 14, as regards migrant workers by the European Court of Human Rights in its 1996 judgment *Gaygusuz v Austria*. In that decision the Court found that discrimination on the basis of nationality against a migrant worker in the enjoyment of a social security right was contrary to the Convention. Important as this decision is, it must be remembered that the ECHR is not an instrument designed to regulate the position of migrant workers. It can only provide a tangential floor of minimum rights on the basis of civil and political human rights considerations for the treatment of migrant workers. Member states seeking to protect from discrimination in living and working conditions their nationals who are migrant workers in other Council of Europe states need to consider other instruments such as the European Convention on the Legal Status of Migrant Workers in order to achieve this.

Being resolved to facilitate the social advancement of migrant workers and members of their families;

The possibility of improving their economic and social position is of fundamental importance to migrant workers and their families. Realising this aspiration, however is more difficult. All too often obstacles are raised not just to family reunification, but in respect of family members already resident with the principal worker to their education, employment and access to other social benefits. One of the aims of this Convention is to address this disparity and provide a foundation for equal access to social, economic and education benefits for migrant workers and their family members. This is also an area which is not covered in the EC Association Agreements with the Central and Eastern European countries (CEECs). While a limited right of self employment is granted to nationals of some CEECs the position of family members is not covered.⁸

Affirming that the rights and privileges which they grant to each other's nationals are conceded by virtue of the close association uniting the member states of the Council of Europe by means of its Statute.

⁸ There is one exception as regards family members and access to social security benefits in those Agreements.

The extent of rights contained in the Convention is justified on the basis that they flow from the commonality of aims and purposes which characterised the member states of the Council of Europe. Although the Convention is not based on the principle of reciprocity it is limited to the treatment of nationals of contracting parties. Over the years since the Convention's first ratification a substantial number of the rights contained in it have been included in subsequent human rights conventions covering all migrant workers, most notably in the UN Convention on Migrant Workers which was adopted in 1990 but still has not received a sufficient number of ratifications to enter into force. Further, it has not been ratified by a single European state which is a Member State of the European Union. However, this essential feature of the Convention has remained stable.

Summary

What then can be discerned regarding the aims and objectives of the Convention from its preamble? The drafters intended its provisions to constitute a minimum level of acceptable treatment of migrant workers within the member states of the Council of Europe. The spirit underlying the Convention is the achievement of non-discrimination on the basis of nationality for migrant workers and their family members wherever resident within the territory of the Council of Europe. The material scope of the Convention focuses on the living and working conditions of migrant workers but is also intended to encompass the social advancement and well-being of migrant workers and members of their families.

3. SUMMARY OF THE MAIN FEATURES OF THE CONVENTION

The Convention consists of six chapters each covering a different aspect of the treatment of migrant workers. Each chapter will be considered in turn.

Chapter 1: the definition of a worker

This consists of one article: the definitions. The concept of a *migrant worker* for the purposes of the Convention is limited to a national of one contracting party who has been authorised by another contracting party to reside on its territory in order to take up paid employment. It is important to note that the purpose of the authorisation to reside is in order to take up paid employment. Without the later quality, a worker will not necessarily come within the scope of the Convention. For example, students who are permitted to work part time or full time through out their studies would not be covered by the Convention.

Excluded from the scope of the definition are frontier workers⁹, artists and entertainers including sportsmen engaged for short periods of time and members of a liberal profession; seamen; persons undergoing training¹⁰; seasonal workers¹¹; and workers carrying out specific work in another contracting state for an undertaking having its registered office outside the territory of that state.¹²

So, to which migrant workers is the Convention important? It protects migrants in classic employment situations who have moved from one contracting state to another and been authorised to work there and, accordingly, to reside there. These migrant workers will have the intention or at least the possibility of remaining long term on the territory of the host state and participating in the labour market of that state. These are the workers whose status is sufficiently stable and secure to be entitled to the best facilities for integration into the host state both for themselves and their families. Their contribution to the host state, through the work, taxes etc. entitle them to equality of treatment with nationals of the host state as regards social and economic rights. However, it is also fully capable of protecting migrant workers who arrived in a member state and were authorised to reside on some other ground at first and only subsequently were authorised to reside in order to take up paid employment.

The Consultative Committee has not clarified whether it considers that the scope of Article 1 includes, for instance, migrants who have been admitted for family reunification and been authorised to take up employment thereafter. It is by no means self evident that such persons should be excluded from the scope of the Convention's protection. Indeed, when

⁹ According to the Consultative Committee these are persons who retain their residence in one member state while working in another and normally return to their state of residence every day.

¹⁰ The Consultative Committee gave this a wide interpretation which not only covers vocational training but also persons who go to one member state from another to improve their command of its language, commercial or occupational practices and including au pairs.

¹¹ These are defined as persons whose employment in another contracting state is in an activity which is dependent on the rhythm of the seasons on the basis of a contract for a specific period or employment.

¹² These workers are carrying out services for a provider of services based outside the state and therefore, according to the approach adopted by the European Court of Justice with respect to the analogous provisions of Community law, at least, are not entering the labour market of the state in which the services are being carried out.

faced with a not dissimilar question regarding the scope of the subsidiary legislation of the EEC Turkey Association Agreement, the European Court of Justice held that such family members subsequently permitted to work were covered by the provisions of the Decision relating to migrant workers.¹³

Chapter 2: recruitment

This chapter consists of six articles, all of which appear fairly dated. They are designed to regulate the *recruitment of migrant workers* from their state of origin by a host state. This form of recruitment became rarer and rarer after 1972 and has virtually disappeared at the moment in Europe. Article 2 sets out the forms of recruitment and indicates the need for participation by official authorities or either the sending or receiving state. The cost of recruitment where carried out by an official body shall not be borne by the migrant worker.

Article 3 permits and regulates the use of *medical and vocational tests* of prospective migrant workers particularly as regards the purpose of the tests and to ensure that the costs do not fall on the worker.

Article 4 retains greater interest in today's Europe: it relates to the *right to leave the country of origin and enter the host state* once authorised to take up employment there. Once a migrant worker has obtained the necessary papers to take up employment he or she has a right to admission to the host state. In principle, although not specifically so stated in the Convention, these same rules should apply to re-admission after a short break outside the host state. Further, the papers which the worker requires should not only be issued as expeditiously as possible but also free of charge or at a cost not exceeding the administrative cost.

Articles 5 and 6 relate to *information* to be provided to the worker before he or she leaves the country of origin, including the right to a work contract and information on residence including the conditions and opportunities for family reunification. Article 7 sets out conditions relating to travel, the most important now being the duty of other contracting parties to facilitate transit for migrant workers between the host state and country of origin.

Chapter 3: social and economic rights including family reunification

This chapter includes the bulk of the economic and social rights which must be available to a migrant worker. It is, therefore perhaps the most important part of the Convention applicable today.

Articles 8 and 9 deal with the questions of *work and residence permits*. Where a migrant worker is admitted for employment the state must issue him or her a work permit which should be for a period not less than one year and should not bind the worker to one employer or locality for more than one year. Renewals should be for at least one year at a time. Residence permits should be issued for at least the length of the work permit and

¹³ C-237 *Kus* [1992] ECR I-6781

renewed accordingly. Its issue should be free of charge or at no more than the administrative cost. Both provisions are subject to conditions laid down in national legislation.¹⁴

Where *unemployed* on account of incapacity for work, illness, accident or otherwise involuntarily unemployed, the worker should be permitted to reside for at least five months¹⁵ on the territory of the state and receive assistance from the state towards re-employment. Article 25 requires the state to promote measures to ensure vocational retraining and occupational rehabilitation for such migrant workers provided they intend to continue to work in the state.

The *withdrawal of residence permits* is permitted on grounds of national security, public policy or morals, for health reasons subject to guarantees for the worker or on failure of the worker to fulfil a condition essential to issue or validity. However, the state must grant an effective right of appeal to a migrant worker against any decision to withdraw a residence permit.

Article 10 relates to *reception of migrant workers*, perhaps most importantly equal treatment with nationals of the state as regards assistance from the state's employment services. The right to *worship* in accordance with their faith is included here for migrant workers. Article 11 relates to maintenance obligations of migrant workers in their country of origin.

Special attention must be given to Article 12 which relates to *family reunification*. The circle of family members covered by the provision are: spouses and unmarried children who are minors according to the relevant law of the host state and dependent on the worker. The conditions which must be fulfilled are that the worker must be lawfully employed and have available for the family housing which is considered normal for national workers in the relevant region. The host state may apply a waiting period but that should not exceed 12 months. The conditions of admission of the family members should mirror those applicable to the worker. Only by special declaration may a host state make family reunification conditional also on a requirement of sufficient resources to cover the needs of the family. However, equally temporary derogation from this provision is also permitted.

Article 13 requires equal treatment with nationals of the state for migrant workers as regards *housing*. Provision is made for inspection of housing and requires states to protect migrant workers from exploitation as regards housing and rents.

An entitlement on the same basis as national workers is extended to migrant workers under Article 14 as regards *general education, vocational training and retraining* and access to higher education in accordance with the generally applicable rules in the host state. The host state is also under a duty to facilitate language training both for migrant workers and their families. Although scholarships are left to the discretion of the host state, it is under a

¹⁴ This safeguards, for instance, the systems of some states where separate documents are not issued or where in certain categories of work one or other document is not required.

¹⁵ However, a state is not required to permit the continued residence of a migrant worker after the period of payment of unemployment allowance has been exceeded. This provision is designed to protect the social assistance provisions of the host state but may not be in accordance with the jurisprudence of the European Court of Human Rights, see above, or indeed consistent with Article 8 ILO Convention 97 on migrant workers.

duty to make efforts to treat the children of migrant workers equally in this regard as nationals. While reference is made to cross recognition of diplomas this is left to bilateral and multilateral agreements. The reverse duty as regards language training for the children of migrant workers in their parents' mother tongue is contained in Article 15 but goes no wider than a facilitation obligation.

Article 16 contains the very important right to equal treatment with the state's own nationals as regards *conditions of work*. The width of the concept of conditions of work is not spelled out however it seems likely that regard should be had to ILO guidelines on this issue. In the spirit of the Convention a wide concept of working conditions is appropriate to cover not just remuneration, hours, benefits and dismissal but all aspects integrally connected to the migrant's status as a worker.

The right to *transfer earnings and savings* is to be found in Article 17 which also requires states to permit the transfer of sums due to migrant workers after their departure from the host state.¹⁶ Article 18, on a related theme, requires equal treatment with nationals of the host state as regards social security subject always to national legislation, bilateral and multilateral agreements. There is only a duty to endeavour to secure for migrant workers conservation of rights in the course of acquisition and acquired rights and export of benefits through bilateral and multilateral agreements.¹⁷ Medical and social assistance is dealt with in Article 19 which requires the host state to grant migrant workers lawfully on its territory medical and social assistance on the basis of equal treatment with the states own nationals.¹⁸

Equal treatment for migrant workers and national workers as regards *prevention of industrial accidents, occupational diseases and industrial hygiene* is required by Article 20. Further migrant workers who are the victims of industrial accidents or occupational diseases must be entitled to benefit from the same occupational rehabilitation possibilities as national workers. Similarly, inspection of working conditions must be carried out by the host state on a non-discriminatory basis according to Article 21. In the event of death of a migrant worker as a result of an industrial accident the host state "shall take care" to provide help and assistance as regards repatriation of the body (Article 22).

Equal treatment as regards *taxation on earnings* is secured for migrant workers by Article 23, subject to double taxation agreements. Specific reference is made to the duty of the host state to ensure that migrant workers are not subject to duties, charges, taxes or contributions of any description which are higher or more burdensome than those applicable to the state's own nationals. Further, migrant workers must be entitled to deductions, or exemptions from taxes or charges and allowances including for dependants on the same basis as the host state's own nationals.

¹⁶ This reiterates the duty to be found at Article 19 of the ESC.

¹⁷ The framework nature of this provision on social security must be understood in the light of the other Council of Europe conventions on this issue: the European Convention on Social Security which entered into force in 1977. Here is to be found the detailed provisions relating to the protection of social security rights of migrant workers.

¹⁸ Specific reference is made to the European Convention on Social and Medical Assistance, 1953 but it does not add anything concrete: ratification of the Migrant Workers' Convention does not have consequences for the member state's position vis-a-vis the Social and Medical Assistance Convention.

In the field of expiry of work contracts and their cancellation or of *dismissal*, Article 24 requires equal treatment for migrant workers as is provided for national workers. Further in the event of job loss, where involuntary the host state must facilitate re-employment (Article 25).

Also in the field of *legal proceedings and judicial protection* of both person and property, rights and interests migrant workers are entitled to equal treatment as the host state's own nationals under Article 26. Specific reference is made to access to legal advice of their choice.

Finally in this chapter, equal treatment is required as regards: *access to employment services* not only for the worker but also for his or her family members who have been admitted to the state (Article 27); the *right to organise* (Article 28); and *participation in the affairs of the undertaking* for which the migrant works (Article 29).

Chapter IV: Return home

There is only one article to this chapter which places a duty on both the state of origin and the host state to ensure that the migrant worker is aware of the possibilities available to him or her in his or her country of origin before setting out to journey home (Article 30).

Chapter V: Relationship with bilateral and multilateral agreements

A reservation is made for more favourable treatment provided for under bilateral and multilateral agreements (Article 31) and in Article 32 this is reinforced. Article 33 provides for the establishment of the Consultative Committee (also known as the Joint Committee) to whose opinions the next chapter of this report will concentrate.

Chapter VI: Housekeeping

The final provisions of the Convention, as with all such international agreements are dedicated to the housekeeping: signature, ratification, entry into force, territorial scope, reservations, denunciations and notifications. Only nine reservations in total are permitted and no reservation may be made to Article 4 (the right of exit and admission); 8 (work permit); 9 (residence permit); 12 (family reunion); 16 conditions of work; 17 (transfer of savings); 20 (industrial accidents and occupational diseases); 25 re-employment); and 26 (access to courts etc).

Summary

The most important rights contained in the Convention which are relevant to Europe of the 1990s are those relating to the treatment of migrant workers established on the territory of contracting states. Of these, the right to family reunification deserves special note. Thereafter, the right to equal treatment in areas as diverse and important as conditions of work, housing, education and taxation are of critical importance to all migrant workers.

The Convention is by no means irrelevant to migrant workers where these important rights are engaged.

4. SUMMARY OF THE REPORTS OF THE CONSULTATIVE COMMITTEE ON THE CONVENTION'S INTERPRETATION

The important function of reviewing implementation of the Convention and giving interpretation guidance on its provision is entrusted to the Consultative Committee established in 1984 in accordance with the Convention.¹⁹ Set up within the first year of entry into force of the Convention, it is composed of one representative from each contracting party to the Convention and meets at least once every two years. To date the Committee has published six reports, in July 1985, October 1986,²⁰ 1990,²¹ 1991,²² April 1994²³ and October 1995.²⁴ In respect of each periodic report, the Committee has requested information on implementation of the Convention of the contracting parties, analysed compliance in the light of the information received, and provided guidance on the Convention's meaning.

Each report specifies the Articles in respect of which the Committee seeks detailed information for the next report. The approach of the Committee in analysing the information received from the contracting parties is very much an investigative one. Where the information provided does not appear to provide a sufficient basis for a conclusion, the Committee seeks further information.

Only in respect of three provisions of the Convention has the Committee given specific guidance:

1. Article 4 (1): "the right of exit" as regards beneficiaries of the Convention refers to nationals of one contracting party; "the right of admission" concerns migrant workers of one contracting party admitted into the territory of another contracting party.²⁵
2. Article 4 (3): migrant workers of one contracting party admitted into another contracting party should be issued with the papers required free of charge or against payment of the administrative costs only. "Accordingly, to the meaning of this paragraph 'papers required' meant all the papers required by a contracting party for a migrant's entry into its territory."²⁶

¹⁹ Article 33.

²⁰ Covering the period 1.7.84-30.6.85.

²¹ Covering the period 1.7.85-31.12.88.

²² Covering the period 1.1.89-30.6.90.

²³ Covering the period 1.7.90-31.12.92.

²⁴ Covering the period 1.1.93-31.12.94.

²⁵ 2nd Periodic Report of the Committee of Ministers, T-MG(86) 8 final, 29 October 1986, Strasbourg, page 7.

²⁶ 2nd Periodic Report of the Committee of Ministers, T-MG(86) 8 final, 29 October 1986, Strasbourg, page 15.

3. Article 22: duties of the contracting parties in event of a migrant worker's death as a result of an industrial accident: "The Committee considered that this provision of the Convention obliges the contracting parties to meet the cost of transporting the body of the victim of an industrial accident to the country of origin".²⁷ This interpretative finding was picked up again in the 5th Report where the Committee advised of its intention to consider the question again in its next report.²⁸ In the 6th Report the Committee stated "The reports covering the Period from 1 January 1993 to 31 December 1994 show that none of the six contracting parties covers the cost of transport to a burial place in the country of origin".

The Committee has been circumspect about the use of its interpretative power and even more so as regards criticism of the contracting parties. It has adopted a gradual approach, choosing one provision of concern to it, first defining the duties imposed on the parties by the Convention, permitting a period of time for the contracting parties to bring their practices and legislation into accord with that interpretation and only then on examination of the state reports, reaching a negative conclusion on implementation of the obligation.

From the early Reports of the Committee it is not possible to draw conclusions as to the practices of the contracting parties which satisfied the Committee of state compliance as insufficient detail is provided as regards those practices. An analysis of the later Reports provides the following indications of practices which the Committee considered in keeping with the Convention:

1. *Article 2: forms of recruitment:* Norway signed and ratified the Convention during 1989 and its first national report was considered by the Committee in its 4th Report. The practice of Norway on recruitment of migrant labour was described as follows and in keeping with the Convention "Foreign workers must apply directly to the employers concerned in order to obtain a job. Work permit applications must go to the Norwegian embassies or consulates in the intending emigrants' countries of origin and must be addressed to the authorities responsible for the labour market which assess them. It is up to the immigration authorities to take a decision. The costs incurred are borne by the latter."²⁹ The primary concern of the Consultative Committee in this regard appears to be that the migrant worker should not be responsible for the administrative costs of recruitment.
2. *Article 8: work permits:* in the 2nd, 4th and 5th Reports the Committee found various practices as regards work permits in keeping with the Convention.

²⁷ 4th Report on the application of the European Convention on the Legal Status of Migrant Workers, T-MG(91) 2 final rev, 1991, Strasbourg, page 11.

²⁸ 5th Periodical Report on the Application of the Convention, T-MG(94) 1 rev, 1994, Strasbourg page 11.

²⁹ 4th Report on the application of the European Convention on the Legal Status of Migrant Workers, T-MG(91) final rev, 1991, Strasbourg page 3.

These include: the simultaneous issue of work and residence permits³⁰; the issue of a permit at the joint request of the worker and employer or a requirement for a signed work contract³¹; a requirement for issue of a work permit before arrival in the state³²; the combination of work and residence permissions in one document³³; the issue of first permits for a period of one year which bind the worker to a category of work but not an employer or for less than a year in which case the work is bound to a specific employer³⁴; a work permit which binds the worker to the same employer for its duration both initially and on renewal³⁵; endorsement of work permission on a residence permit within a short time period³⁶; a requirement that a worker who leaves his or her job within the first year of employment must fulfil all the initial conditions again for the issue of a second permit³⁷; the labour market situation as a ground for non-renewal of a work permit³⁸; a requirement that the worker has sufficient income and suitable housing and that there is no contrary indicator before a permit will be renewed.³⁹ The Committee appears to give a flexible interpretation to the ways in which work permits are issued and allows a margin of appreciation to the contracting parties regarding the initial restrictions, and indeed permits the continuation of restrictions as long as these are neither indefinite or excessive.

3. *Article 9: residence permits:* The Committee found the following practices compatible with the Convention: the extension of permission to reside notwithstanding unemployment for periods longer than stipulated in Article 9⁴⁰; provisions under which illness and unemployment do not affect the right of residence⁴¹; the application of a public order proviso on the issue of

³⁰ 2nd Periodic Report, *supra* as regards Spain, page 7.

³¹ 2nd Periodic Report, *supra* as regards the Netherlands, page 7 and 5th Periodic Report, *supra* as regards Portugal, page 4.

³² 2nd Periodic Report, *supra* as regards Sweden, page 7.

³³ 2nd Periodic Report, *supra* as regards France, page 7.

³⁴ 2nd Periodic Report, *supra*, as regards Sweden, page 7.

³⁵ 4th Report, *supra*, as regards Norway, page 4, 5th Periodic Report, *supra*, as regards Sweden, page 5.

³⁶ 4th Report, *supra*, as regards Turkey, page 4.

³⁷ 4th Report, *supra*, as regards Norway, page 4.

³⁸ 2nd Periodic Report, *supra*, as regards France, the Netherlands and Spain, page 7.

³⁹ 4th Report, *supra*, as regards Norway, page 4.

⁴⁰ 2nd Periodic Report, *supra*, as regards France and the Netherlands, page 8 and 5th Periodical Report, *supra*, as regards Portugal, page 7.

⁴¹ 3rd Report, *supra*, as regards the Netherlands, Portugal, Spain and Sweden, page 7.

permits⁴²; the issue of permanent residence permits⁴³; the issue of permits valid for ten years and renewable by right⁴⁴; the issue of permits limited to the duration of a work permit⁴⁵; dispensing with the requirement of a residence permit where the worker has a work permit⁴⁶; the application of small charges for the issue and renewal of permits⁴⁷; revocation of a permit only on the advice of a Aliens' Residence Board⁴⁸; withdrawal of a permit on grounds of fraud and deception⁴⁹; withdrawal on grounds of activities contrary to public order, national security, or state interests which are likely to damage state relations with other countries, conviction of crimes carrying a sentence in excess of one year's imprisonment and engaging in illegal activity⁵⁰; the presence of a right of appeal against withdrawal or revocation of a permit.⁵¹ Here the Committee was primarily faced with considering whether more generous provisions relating to the issue of residence permits were compatible with the Convention. In all cases they so found. However, also in this category the Committee had to consider various member state practices in limiting residence permits, mainly on national policy/criminal activity/fraud grounds. Again, in all cases the Committee found the practices in accordance with the Convention.

4. *Article 12: Family Reunification:* The Committee considered and approved the following national measures: the issue of residence permits to spouses and under-age children subject to a means requirement and in the absence of other reasons for refusing the permits⁵²; the waiving of the housing requirement⁵³; refusal of family reunification where the worker has been resident for less than one year; where the worker does not have adequate resources or accommodation or where the family members constitute a threat to public order or health⁵⁴; the waiving of the waiting period and the raising of the

⁴² 5th Periodical Report, *supra*, as regards France, page 5.

⁴³ 5th Periodical Report, *supra*, as regards Portugal and Sweden, page 5.

⁴⁴ 5th Periodical Report, *supra*, as regards France, page 5.

⁴⁵ 5th Periodical Report, *supra*, as regards the Netherlands, page 6.

⁴⁶ 5th Periodical Report, *supra*, as regards Norway, page 6.

⁴⁷ 5th Periodical Report, *supra*, as regards Spain and Portugal, page 6.

⁴⁸ 5th Periodical Report, *supra*, as regards France, page 7.

⁴⁹ 5th Periodical Report, *supra*, as regards Norway, page 7.

⁵⁰ 5th Periodical Report, *supra*, as regards Portugal and Spain, page 7.

⁵¹ 5th Periodical Report, *supra*, as regards France, Norway, the Netherlands, Sweden, Portugal and Spain, page 7.

⁵² 4th Report, *supra*, as regards Norway, page 4.

⁵³ 4th Report, *supra*, as regards Norway, page 4.

⁵⁴ 5th Periodical Report, *supra*, as regards France, page 8.

maximum age for admission of children.⁵⁵ Again, provisions which are more generous to the worker than those required by the Convention are always found compatible with it.

5. *Article 14: Pretraining, Schooling, Linguistic training, Vocational training and retraining:* The Committee accepted the following measures: equal access as national workers to general, technical or vocational training⁵⁶; special programmes financed by the state for language training for new arrivals⁵⁷; equal access to education grants to children of migrant workers.⁵⁸ This area of training is of special importance to the integration of migrant workers and their chances and those of their family members, especially their children, to improve their working and living conditions in the host state.
6. *Article 25: Re-employment:* The Committee considered acceptable the following measures: the targeting of vocational training to migrant groups where over represented as a percentage of the unemployed⁵⁹; programmes to prevent unemployment among migrant workers⁶⁰; programmes to identify training gaps and provide extra assistance for migrant workers.⁶¹

On a more general note, the Committee on a number of occasions has considered the relationship of the Convention with the European Community.⁶² It noted with approval the European Commission's Communication of 7 March 1985 on Guidelines for a Community Policy on Migration where the Commission states "Ratification by member states of the European Convention on the Legal Status of Migrant Workers...would constitute an important step towards providing better safeguards for migrant workers' rights..."⁶³

The question of the relationship between the Convention as the Council of Europe's instrument on regulation and protection of migrant workers and European Community law on free movement of workers was considered in some depth by the eminent consultant whom the Committee appointed to report to it on the status of the

⁵⁵ 5th Periodical Report, *supra*, as regards the Netherlands, Norway and Sweden, page 8.

⁵⁶ 5th Periodical Report, *supra*, as regards France, the Netherlands, Norway, Portugal, Spain and Sweden, page 9.

⁵⁷ 5th Periodical Report, *supra*, as regards France, the Netherlands, Norway, Portugal, Spain and Sweden, page 9.

⁵⁸ 5th Periodical Report, *supra*, as regards France, the Netherlands, Norway, Portugal, Spain and Sweden, page 9.

⁵⁹ 4th Report, *supra*, as regards France, page 5.

⁶⁰ 4th Report, *supra*, as regards the Netherlands, page 5.

⁶¹ 4th Report, *supra*, as regards Sweden, page 5.

⁶² 1st Periodic Report, *supra*, page 3; 3rd Report, *supra* pages 14/15.

⁶³ COM (85) 48 fin

Convention in 1991.⁶⁴ This report drew attention to the important link which the Convention could provide between the more liberal rules of the European Community which only extend protection to nationals of the Community's Member States, and the need for effective equal treatment rules for workers from member states of the Council of Europe outside the European Community. In this regard, the Convention may be seen as an important tool to reducing differential and discriminatory treatment of workers from Council of Europe countries when they are resident and working lawfully within the Member States of the European Community. However, effectively to fulfil this role, the Convention needs to be signed and ratified by more Member States of the European Community, which, is an objective of the Community's institutions, and by the new member states of the Council of Europe.

The issues surrounding signature, ratification and application of the Convention will be considered in further detail in the next section.

⁶⁴ The European Convention on the Legal Status of Migrant Workers: obstacles to its ratification, extension of its scope, Report prepared by Henry de Lary de Latour, Consultant, T-MG(91) 1 final, 1991 Strasbourg.

5. LEGAL AND POLITICAL CONSIDERATIONS SURROUNDING SIGNATURE, RATIFICATION AND APPLICATION OF THE CONVENTION

The Council of Europe's Convention on the Legal Status of Migrant Workers has so far only been ratified by eight member states and signed by a further four. Why has there be such limited interest in the Convention? The answer to this question is divided into two parts: first the political and legal developments outside the Council of Europe, specifically within the European Union over the period, secondly the national perspectives of the member states of the Council of Europe and of experts and NGOs at national level.

The Convention was opened for signature at a time when the European host states for migrant workers over the preceding decade had closed substantially the opportunities for labour migration. Nonetheless, most of the states which have signed the Convention did so on the day on which it was opened for signature: 24.11.77: Germany, Greece, Luxembourg, the Netherlands, Portugal, Spain, Sweden and Turkey. France signed the Convention in 1982 and Italy in 1983. Norway is the most recent signatory in 1989. For those states which went on to ratify the Convention, this normally occurred within a couple of years of signature. Italy, the Netherlands Spain and Turkey took a little longer.

The whole field of international regulation of labour migration ceased to be of pressing interest for Europe in the 1970s. The ILO conventions on this issue, Numbers 97 and 143 have not enjoyed substantial ratification from European states since the 1970s. The UN Convention on Migrant Workers which was opened for signature in 1990 has not been signed by a single European state. Further the role of the state in labour migration has changed. International labour migration is no longer directed by Governments in Europe. It is left to international corporations, private employment agencies and indeed, some might add smugglers, to identify demand for and supply of migrant labour which is then subject to approval or rejection by the state. With this changing role, however, comes the need for commitment to the protection of the individual worker. The excuse of high unemployment levels in the state or the tiresome fact that national legislation might have to be amended are not compatible with the reality that states have withdrawn from an active role in labour migration and receded into a passive role of approval or rejection of what is often a fait accompli. The state then owes a duty to migrant workers to offer an acceptable level of protection from discrimination and exploitation. Where the state exercises a decreasing degree control over the selection of migrant workers and the contents of their labour contracts it must compensate by giving them the right to equal treatment and protection from arbitrary action by their employers.

The Convention is designed to afford rights to migrant workers and to protect their position within their host state. It is not the only source of such protection. All but one of the other contracting parties of the Convention have bound themselves to a substantially higher level of protection for their migrant workers in the territory of one another through the European Community Treaty, or in respect of Norway through the European Economic Area Agreement which gives equivalent rights to migrant workers to those contained in the EC Treaty. From the perspective of 1998, one contracting party stands out: Turkey. At this point in time, it is the only contracting

party which is not also a Member State of the European Union. However, Turkish workers within the territory of the Union do enjoy substantial rights of continued employment and equal treatment through the subsidiary legislation of the EEC Turkey Association Agreement and Protocol.

For the other Member States of the European Union which have either not signed or failed to ratify the Convention what incentive is there to doing so now? Competence for regulating residence of third country nationals within the territory of the Union's Member States has, with the Amsterdam Treaty, been transferred to the Community. This means that rules on residence will be drafted in the Community institutions and adopted in accordance with the EC Treaty provisions. As has been mentioned in the introduction, the Commission has already indicated the commitment of the Community to ratification of the European Convention on the Legal Status of Migrant Workers. The largest single national group of migrant workers in the European Union, Turkish workers, are already protected to a substantial degree in Community law through the EEC Turkey Association Agreement and Protocol. Therefore, extending that protection through the Convention to migrant workers from other Council of Europe states should not be seen as a dramatic step. Instead it should be welcomed as an opportunity to consolidate the position of third country national migrant workers within the Union and provide a basis for future Community measures on the treatment of all such migrant workers. Early ratification of the Convention could simplify and provide a sound foundation for the required Community measures under the Amsterdam Treaty.

Of course the membership of the Council of Europe and that of the European Union do not coincide and are unlikely ever to do so. However, a number of the Council of Europe's member states in Central and Eastern Europe and the Baltics in particular aspire to membership at an early date. What value then does the Convention have for them? In this context, it may be seen as a stepping stone towards the kind of regulation of the status of migrant workers which will apply after accession to the Union. The important principle of the Convention of non-discrimination in working conditions is also fundamental to Community law, which of course also adds the right of free movement across borders for migrant workers who hold the nationality of one of the Member States. The Convention prepares the legal framework of a country for the next commitment of Community law. Further, as the Community adopts measures on third country national migrant workers, an existing commitment under the Council of Europe Convention will assist these potential new Member States in their adjustment to the new legal regime. It should not be forgotten that during the transitional period, the protection which the Convention may afford to nationals of these aspiring Community Member States may be important to their integration into the Union.

Finally, what about those Council of Europe member states which do not aspire to membership of the European Union, where is their interest in signing and ratifying the Convention? Those member states which were part of the former USSR were subject to uniform rules on labour migration within that territory. Independence has brought to right to regulate this area nationally but has not provided an international structure within which to do so. One of the important benefits of the Convention is that it provides such a framework within a controlled environment: rights only as regards other contracting parties. There needs to be a floor of rights which is common among

the Council of Europe member states on the treatment of migrant workers. In times of uncertainty it is not clear whether it will be the nationals of one state or another who will necessarily be the “winners” from such a regime. However, consistent rules and proper regulation always mean that participants in the system are winners. States and their officials have clarity as regards their obligations and the security of knowing that the rules which they apply are internationally acceptable.

APPENDIX 1: REPLIES TO QUESTIONNAIRES

The methodology used to seek to discover the national perspective of member states of the Council of Europe towards the Convention was through the submission of a questionnaire to the relevant national ministries, appropriate NGOs and expert lawyers in three categories of states: those which have signed and ratified the Convention, those which have only signed the Convention and a selection of those which have neither signed nor ratified the Convention. The results were as follows:

1. Countries which have signed and ratified the Convention: France, Italy, the Netherlands, Norway, Portugal, Spain, Sweden and Turkey.⁶⁵ We received no effective reply from Norway, Portugal or Spain.

Government	NGO/Expert	Reason	Application in national law	Comments
Sweden		International solidarity	Already incorporated but without specific reference	No jurisprudence
	France	n/a	No specific reference but rights incorporated	No jurisprudence
Netherlands	Netherlands	International solidarity and to conform with the European Social Charter	One reference to Convention in national law; but numerous changes to legislation to bring it into compliance	Three court decisions making reference to Convention
	Turkey	To protection Turkish workers in Europe	No specific reference	No jurisprudence

⁶⁵

Many thanks to: G Lindqvist, Ministry of the Interior, Sweden, C Rodier, GISTI, France, Prof P Boeles, Everaert Advokaten, Netherlands, J Van Blankenstein, Ministry of Social Affairs, Netherlands, Prof T Centel, Turkey.

2. Countries which have signed but not ratified the Convention: Belgium, Germany, Greece and Luxembourg.⁶⁶ We received no effective reply from Belgium or Greece.

Government	NGO/Expert	Reasons	Comments
Belgium		not given	The authorities consider Belgian law to comply with the Convention. Its provision have not been referred to by national courts.
Germany		Continuing high levels of unemployment; existing similar duties under ESC	The most detailed response including copies of correspondence on the question.
	Germany	Unknown	The Convention is virtually unknown and its provisions are not even used by lawyers as persuasive points to courts.
	Luxembourg	Unknown	The Convention is virtually unknown and its provisions are not pleaded before the courts.

⁶⁶ Many thanks to: H Vercruysse, Ministry of the Interior, Belgium, Dr F Hempel, Bundesministerium fur Arbeit und Sozialordnung, Germany, R Hofmann, Hofmann & Kese, Germany, M Elvinger, Luxembourg, Caritas, Luxembourg.

3. Countries which have neither signed nor ratified the Convention: Austria, Czech Republic, Estonia, Finland, Hungary, Romania, Slovakia and the UK.⁶⁷ No effective reply was received from Finland, Hungary or Romania.

Government	NGO/Expert	Reasons	Comment
Austria		National law makes adequate provision for the legal status of migrant workers.	There is no intention to reconsider the position.
Czech Republic		The Republic would wish to make reservations inter alia on Articles 9 (residence permits); 12 (family) and 25 (re-employment) which is not permitted under the Convention.	Substantial consideration has gone into the question. A decision against signature was adopted in 1998 but the question could be reopened.
	Estonia	No decision has been taken on whether or not to sign the Convention.	The position of the Russian minority makes it very unlikely the Convention will be signed soon.
Poland		No decision has been taken but, similarly to the German reply, the existence of other conventions, particularly the ESC makes it unlikely.	Those countries which have ratified the Convention are not the most important for Poland as regards reciprocal rights.
	Poland	The question of ratification will be considered over the next few years; the main problem is concern about migrant workers in Poland.	The European Social Charter was signed in 1997 which may increase the likelihood of ratification of the convention.
UK		A negative decision has been reached on the ground that ratification would require changes to domestic law.	The interests of the resident and European Economic Area labour force were cited as a reason.

⁶⁷

Many thanks to: H Kutrowatz, Ministry of Employment, Health and Social Affairs, Austria, M Fuchs, Ministry of Social Affairs and Labour, Czech Republic, M Haruoja, Estonian Institute for Human Rights, P Musialkowski, Ministry of Labour and Social Policy, Poland, L Stowomir, Helsinki Fundacja Praw Człowieka, Poland, G Hopkins, Immigration and Nationality Directorate, UK, E Bye, Joint Council for the Welfare of Immigrants, UK.

APPENDIX 2:

**LIST OF COUNTRIES WHICH HAVE SIGNED AND RATIFIED
THE EUROPEAN CONVENTION ON THE LEGAL STATUS
OF MIGRANT WORKERS**

Member States / Etats membres	Date of/de signature	Date of/de Ratification Or/ou Accession/ adhésion	Date of entry into force/ Date d'entrée en vigueur	R : Reservations/ Réserves D : Déclarations T : Territorial Decl./ Décl. Territoriale
BELGIUM/ BELGIQUE	09/02/78			
FRANCE	29/04/82	22/09/83	01/12/83	R/D
GERMANY/ ALLEMAGNE	24/11/77			D
GREECE/ GRÈCE	24/11/77			
ITALY/ ITALIE	11/01/83	27/02/95	01/05/95	
LUXEMBOURG	24/11/77			
NETHERLANDS/ PAYS-BAS	24/11/77	01/02/83	01/05/83	R/D/T
NORWAY/ NORVEGE	03/02/89	03/02/89	01/05/89	R/D
PORTUGAL	24/11/77	15/03/79	01/05/83	
SPAIN/ ESPAGNE	24/11/77	06/05/80	01/05/83	
SWEDEN/ SUEDE	24/11/77	05/06/78	01/05/83	
TURKEY/ TURQUIE	24/11/77	19/05/81	01/05/83	

Last up-date/dernière mise à jour : 28/10/1998

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