

OHCHR MIGRATION PAPERS

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FAMILY REUNIFICATION

I. Introduction

Family reunification refers to the situation where family members join another member of the family who is already living and working in another country in a regular situation.

Since the 1980s, family reunification has become a major cause for legal immigration in a considerable number of countries, and particularly in Europe. The significance of this phenomenon has progressively led countries of employment of migrants to recognize – in the presence of specific circumstances – the legal possibility of family reunification for members of the families left behind¹. In fact, with the exception of the Gulf countries, most migrant-receiving countries have now some basic provisions for family reunification in their legislation².

However, while extensive protection is given *latu sensu* to families both in universal and in regional instruments³, the recognition of a specific right to family reunification seems to be in a sort of limbo between States' duty to recognize and respect the human rights of all individuals within their territory vis-à-vis States' right to freely determine –within certain limits - their immigration laws and border control policies.

The purpose of this paper is to analyze the legal framework regulating family reunification in the light of current international and regional human rights law and jurisprudence. This paper will not go into detail with respect to the concept and various definitions and interpretation of the term 'family' used in different

¹ 2002 International Migration Report of the UN Department of Economic and Social Affairs, chapter C "Immigration of family members", page 24: "The significance of immigration for family reunification has led several European countries to eventually recognize the right to reunification. Belgium, France, Germany, Italy, the Netherlands and Spain amended their legislation to this extent in the second half of the 1990s. The Council of Europe passed six recommendations and adopted two recommendations on the right to family reunification. Within the borders of the EU, the right to family reunification for European citizens has been in effect since 1998".

² 2002 International Migration Report of the UN Department of Economic and Social Affairs,, chapter C "Immigration of family members", page 24.

³ Article 16 (3) of the Universal Declaration of Human Rights states: "The Family is the natural and fundamental group unit of society and is entitled to protection by society and the State". The same clause is repeated in Article 23 of the International Covenant on Civil and Political Rights (ICCPR). The International Covenant on Economic, Social and Cultural Rights (ICESCR) goes even further than that in its Article 10(1), which declares that: "the widest possible protection and assistance should be accorded to family, which is the natural and fundamental group unit of the society, particularly for its establishment and while it is responsible for the care and education of dependent children". Other regional instruments, such as the American Convention on Human Rights (Article 17) and its Additional Protocol (Article 15(1)), the African Charter on Human and Peoples' Rights (Article 18) and the European Social Charter (Article 8(1)) contain provisions protecting the family as natural and fundamental base of the society.

instruments⁴ accepting for the purpose of this paper the definition of “members of the family” given in article 4 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁵ .

II. Legal Framework

i) International Human Rights Instruments

a) Convention on Migrant Workers

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families deals with the issue of family reunification in Part IV of the Convention, which is devoted to the “other rights of migrant workers and members of their families who are documented or in a regular situation”. Article 44 (1) reads:

“States parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state, shall take measures to ensure the protection of the unity of the families of migrant workers”.

In the context of this broad human rights approach, paragraph 2 provides an obligation to facilitate family reunification:

“States parties shall take all the measures they deem appropriate...to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children”.

In addition, paragraph 3 also provides that:

“states of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers”.

Article 44 was extensively debated during the drafting process of the Convention. Previous versions of the article actually contemplated a full-fledged right to family reunification for the spouse and the minor dependent children of the migrant workers.

⁴ DESA 2002 International Migration Report, page 24: “There are many variations in definitions of the family, criteria for eligibility and rights accorded to migrants entering a country under family reunification procedures. In all countries, family reunification provisions apply to spouses and unmarried, dependent, minor children. However, there is no consensus on the age of children. Polygamous unions are ruled out while un-married partners do qualify for reunification under certain conditions in an increasing number of countries. Australia and the Netherlands, and to some extent the United Kingdom, also recognize homosexual partners. In some countries, parents as well as brothers and sisters and other relatives may also qualify under conditions of dependency, age and sponsorship. Within the EU, more flexibility with regard to parents and grandparents is under discussion”.

⁵ Article 4: “For the purposes of the present Convention the term "members of the family" refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned”.

On the other hand, some opposition was also expressed to the inclusion of the word 'favourably' to be included in the text of paragraph 3. Finally agreement was reached -with some difficulties- on the current text as it is⁶.

The recently established Committee on Migrant Workers, which is the monitoring body of the UN 1990 Convention, still has to develop its own jurisprudence, since it will only start reviewing State party's reports at its 3rd session in December 2005.

b) Convention on the Rights of the Child

Article 10 (1) of the Convention on the Rights of the Child reads:

"In accordance with the obligation of States parties under article 9, paragraph 1⁷, applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner⁸. States parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family".

This provision concerns "family reunification" of children who are, or whose parents are, entering or leaving a country, and the families mainly affected by article 10 are so-called "economic migrants" and refugees. Article 10 does not expressly guarantee a 'right' to family reunification, and its careful wording reflects immigration control concerns raised by some countries during the negotiation process of the Convention⁹. In fact, due to increasingly stricter border controls of labour migration, family reunification has become the main legal entitlement for the settlement of migrants and increasingly restrictive conditions are being placed on family reunification (e.g. most countries today require applicants to demonstrate that they have sufficient resources, such as adequate housing, to support the immigrant's family members without recourse to public funds)¹⁰.

⁶See travaux préparatoires of the Convention, UN Doc. A/C.3/37/7 and A/C.3/42/6.

⁷ Article 9 (1) : "States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence".

⁸ During the drafting of this article, some delegates expressed concern about the interpretation of the word 'positive' and suggested two alternatives, namely 'objective' and 'favourable'. However, the two alternatives were both rejected, since the former thought to be too ambiguous and the other too prejudgmental. The logic behind the word 'humane' is that it further qualifies and enforces the term 'positive'. For the word 'humane', the interpretation of the Committee on the Rights of the Child is that, besides the final decision, the entire procedure should be humane, e.g. respecting the dignity of the applicants, including the child's dignity. As far as the word 'expeditious' is concerned, it is interpreted that all judicial and administrative processes concerning children should be carried out as quickly as possible, taking into account that long procedures and uncertainty are deeply prejudicial for the development of children. See in this regard, UNICEF Implementation Handbook for the Convention on the Rights of the Child, page 147-150.

⁹ UNICEF Implementation Handbook for the Convention on the Rights of the Child, page 145.

¹⁰ According to the UNPFA 2002 report on International Migration, page 25: "in most countries, only nationals and holders of long-term residence permits—holding a residence permit for one year or longer, or permanent residence permit—may act as sponsor.... Most countries also require proof of the sponsor's ability to support incoming family members and to provide them with adequate

The Committee on the Rights of the Child, the monitoring body of the Convention, deals with the issue of family reunification quite regularly in its concluding observations, and increasingly so. Recently, considering the 2nd periodic report of *Philippines*, it recommended that the State party take all necessary measures to ensure that overseas Filipino workers, equally women and men, are able to meet their parental responsibilities, including through concluding bilateral agreements with the countries of destination, and to facilitate family reunification and stable family environment for the upbringing of children¹¹.

Considering the 2nd periodic report of *Norway*, the Committee was concerned that - despite the State party's very positive approach to family reunification of non-Norwegian children - the domestic measures providing for family reunification were not applied to their full extent. It urged the State party to establish a standard procedure through which children and other concerned persons were informed of the possibilities and procedures for family reunification and for these procedures to be implemented systematically¹². In the concluding observation on the 2nd periodic report on *Finland*, the Committee expressed concern about the length of the procedure for family reunification and the possible negative impact on the children involved, and encouraged the State party to examine the reasons for the delays in the procedures for processing asylum applications and for the settlement of children, with a view to shortening them¹³. Similar concerns have been expressed more recently in the consideration of the third periodic report of *Sweden*¹⁴ and *Luxembourg*¹⁵. The Committee did not limit its application of article 10 (1) of the Convention to developed states only. In fact, in the concluding observations on the initial report of *Mauritania*, the Committee noted (in the context of refugee children) that "there are no laws and practices guaranteeing the reunification of families" and recommended the State party to: "enact legislation, policies and programmes guaranteeing the reunification of families where this is possible"¹⁶. Likewise, in the consideration of the second periodic report of *Lebanon*, the Committee recommended the State party to: "facilitate family reunification and ensure the right to education for all refugee children"¹⁷.

In conclusion, it seems that while article 10 (1) of the Convention on the Rights of the Child does not expressly provide for a right to family reunification, the Committee on the Rights of the Child appears more and more willing to adopt an extensive interpretation of this provision in its concluding observations.

The Committee also addressed the issue recently in its General Comment number VI (2005) on "treatment of unaccompanied and separated children outside their country

accommodation. In a number of countries, assessing whether these conditions are met is left to local authorities, which results in a great deal of variability in the actual implementation of these provisions. In all countries, family members who are known to constitute a threat to public order or national security are not admitted through family reunification".

¹¹ § 45, CRC/C/15/Add.258, 03/06/2005

¹² § 32 and 33, CRC/C/15/Add.126, 28/06/2000

¹³ § 37 and 38, CRC/C/15/Add.132, 16/10/2000

¹⁴ § 41, CRC/C/15/Add. 248, 28/01/2005

¹⁵ § 53, CRC/C/15/Add. 250, 28/01/2005

¹⁶ § 47 and 48 CRC/C/15/Add.159, 6/11/2001

¹⁷ § 53, CRC/C/15/Add.169, 21 March 2002.

of origin”¹⁸. In section VII of the General Comment, devoted to “Family Reunification, Return and Other Forms of Durable Solutions”, the Committee considered that:

“Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country’s decisions on family reunification therein. In this context, States parties are particularly reminded that “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner” and “shall entail no adverse consequences for the applicants and for the members of their family” (art. 10(1)). Countries of origin must respect “the right of the child and his or her parents to leave any country, including their own, and to enter their own country” (art. 10(2))”¹⁹.

c) Convention on the Elimination of Racial Discrimination

The Convention on the Elimination of Racial Discrimination (ICERD) does not directly deal with family reunification. However, the Committee on the Elimination of Racial Discrimination (CERD), the monitoring body of ICERD, discussed the issue of family reunification when considering the situation of *Israel* under the early warning procedure in 2003. The Committee recalled that in one of its previous decisions, it called for the revocation of a particular legislation²⁰ which suspended, for a renewable one-year period, the possibility of family reunification, subject to limited and discretionary exceptions, in cases of marriage between an Israeli citizen and a person residing in the West Bank or Gaza²¹. CERD also has looked more recently into the issue of family reunification in its concluding observations. In the case of the consideration of the tenth and eleventh periodic reports submitted by *Portugal*²², for instance, the Committee recommended that the State party take measures to facilitate family reunification of immigrants in a regular situation.

d) International Covenant on Civil and Political Rights

Article 23 of the ICCPR provides that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”. That family reunification is an important principle under article 23 of the Covenant is recognized by the Human Rights Committee’s concluding observations on the initial report of *Switzerland* where the Committee noted that:

“family reunification is not authorized immediately for foreign workers who settle in Switzerland, but only after 18 months, which, in the Committee’s view, is a too long period for the foreign worker to be separated from his family”²³.

¹⁸ The General Comment applies to “all such children irrespective of their residence status and reasons for being abroad, and whether they are unaccompanied or separated” and therefore includes migrant children as well.

¹⁹ CRC GENERAL COMMENT No. 6 (2005), page 16.

²⁰ Israel’s Temporary Suspension Order of May 2002, enacted into law as the Nationality and Entry into Israel Law (Temporary Order) on 31 July 2003.

²¹ CERD Decision on Israel 2 (63), 22/08/2003

²² § 14, CERD/C/65/CO/6, 10/12/2004

²³ CCPR/C/79/Add.70, § 18.

Likewise, in the concluding observations on the second periodic report of *Israel*²⁴, the Committee – like CERD (see above) - expressed concern about a particular law, which suspended the possibility of family reunification for a renewable one-year period and recommended that Israel reconsider its policy with a view to facilitating family reunification of all citizens and permanent residents.

The Human Rights Committee also addressed indirectly the issue in its 1986 General Comment 15 on the “Position of Aliens under the Covenant” when at paragraph 5 it stated that:

“The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise”.

In addition, in its General Comment 19 of 1990 on “Protection of the family, the right to marriage and equality of the spouses”, the Committee argues in paragraph 5 that:

“the right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons”.

The Human Rights Committee –when dealing with individual complaints- has not looked specifically into the question of family reunification of the members of the families of a third country national living and working abroad. However, it has dealt with the protection of family unity in the quite similar case of feared or occurred deportation/expulsion of one of the family members from the place where the family lives²⁵.

For example, in the case *Winata vs. Australia*²⁶, the Committee recognized that:

“...Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances. In the present case, both authors have been in Australia for over fourteen years. The author’s son has grown in Australia from his birth 13 years ago, attending Australian schools as an ordinary child would and developing the social relationship inherent in that. In view of this duration of time, it is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a

²⁴ A/58/40 vol.I (2003) 64, § 85.

²⁵ We will see below in the paper that, when it comes to individual cases, also the European Court of Human Rights has less intervened in the issue of family reunification *stricto sensu*.

²⁶ The authors of the communication, dated 4 May 2000, were Hendrik Winata, and So Lan Li, both formerly Indonesian nationals but stateless at the time of the communication, also writing on behalf of their son Barry Winata, born on 2 June 1988 and an Australian national. The authors complained that the proposed removal of the parents from Australia to Indonesia would constitute a violation of articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant by the State party.

characterization of arbitrariness. **In the particular circumstances** (emphasis added), therefore, the Committee considers that the removal by the State party of the authors would constitute, if implemented, arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the alleged victims, and, additionally, a violation of article 24, paragraph 1, in relation to Barry Winata due to a failure to provide him with the necessary measures of protection as a minor”²⁷.

More recently, in *Madaferri vs. Australia*²⁸, the Committee found that:

“in the present case....a decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered “interference” with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case” and considered that : “the removal by the State party of Mr. Madaferri would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors”²⁹.

It appears from the cases mentioned above that the Committee preferred to consider this issue applying a ‘case by case’ approach rather than a general rule. Therefore, the ‘specific circumstances of the cases’ – e.g. the length of stay and the link of the family with the country where they live, the practicality of a return in the country of origin, the social relationship and working conditions of the members of the family in the host country etc., seem to play a fundamental role in the assessment of the Committee in determining whether in such cases a violation of the Covenant occurs³⁰.

e) International Covenant on Economic, Social and Cultural Rights

Article 10 of the ICESCR recognizes that: “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children...”. CESCR, the monitoring body of this Covenant, does not usually deal with family reunification, but has touched upon the issue a few times. In 1996, during the consideration of the third periodic report of the United Kingdom of Great Britain and Northern Ireland as applied in *Hong Kong*, the Committee reiterated “its deep concern over the growing numbers of split families in Hong Kong” and urged the Hong Kong government “to take every possible measure

²⁷ Winata vs. Australia, Communication N° 93/2000, 26 July 2001, § 7.3.

²⁸ The authors of the communication were Francesco Madaferri, an Italian national, born on 10 January 1961 and Anna Maria Madaferri, an Australian national, also writing on behalf of their children Giovanni Madaferri, born 4 June 1991, Julia Madaferri, born 26 May 1993, Giuseppina Madaferri, born 10 July 1996, and Antonio Madaferri, born 17 July 2001. All four children are Australian nationals. Francesco Madaferri was residing with his family in Melbourne, Victoria, Australia, at the time of the submission. The authors complained that the proposed deportation of Mr. Madaferri would constitute, *inter alia*, violation of article 17, 23 and 24.

This view was adopted with a dissenting opinion of Ms. Wedgwood.

²⁹ CCPR/C/81/D/1001/2, Madaferri vs. Australia, 26 August 2004, § 9.8.

³⁰ However, in an inadmissibility decision, the Human Rights Committee stated *inter alia* that “article 23 of the Covenant guarantees the protection of family life **including the interest in family reunification** (emphasis added)”, Ngambi and Nébol v. France, Communication N° 1179/2003, 9 July 2004, § 6.4.

to develop a fair and open one-way permit approval mechanism in order to facilitate rapid family reunification”³¹. When considering the second periodic report of *Israel* in 2003 on the same issue that was considered by CERD and the Human Rights Committee (see above), the Committee expressed its concern about the “...practice of restrictive family reunification with regard to Palestinians, which has been adopted for reasons of national security” and recommended the State party “to undertake a review of its re-entry and family reunification policies for Palestinians”³². More recently, during the consideration of the fourth periodic report of *Norway*, the Committee expressed concern that “ the subsistence requirement imposes an undue constraint on the ability of some foreigners, including those who have been granted a residence permit on humanitarian grounds, to be reunited with their closest family members” and encouraged the State party “to consider easing restrictions on family reunification in order to ensure the widest possible protection of, and assistance to, the family”³³.

f) Convention on the Elimination of Discrimination Against Women

CEDAW, the monitoring body of the Convention on the Elimination of Discrimination Against Women, touched upon the issue of family reunification in its General Recommendation 21 on “Equality in marriage and family relations”. When commenting on article 15 (4) of the Convention according to which “States parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile”, the Committee argued that “migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them”³⁴.

Furthermore, while considering the 2nd periodic report of *Denmark*, the Committee regretted “the introduction in new legislation of an increase in the age limit for spousal reunification from 18 years to 24 years of age in order to combat forced marriage” and urged the State party “to consider revoking the increase in the age limit for family reunification with spouses, and to explore other ways of combating forced marriages”³⁵.

ii) UN extra-conventional mechanisms

The General Assembly, during its 59th session, adopted a specific resolution³⁶ on “Respect for the right to universal freedom of travel and the vital importance of family reunification”³⁷. The General Assembly considered that:
“family reunification of documented migrants is an important factor in international migration and that remittances by documented migrants to their countries of origin often

³¹ E/C.12/1/Add.10, 6 December 1996, § 26 and 34.

³² E/2004/22 (2003) 42, § 261 and 277.

³³ E/C.12/1/Add.109, 13 May 2005, § 16 and 35.

³⁴ CEDAW, General Recommendation No. 21 (13th session, 1994)

³⁵ A/57/38 (part 2, paras. 311-355), § 345-346.

³⁶ The resolution was adopted with 122 votes in favour, 3 votes against and 61 abstentions. Israel, Palau and the United States of America voted against. Among the 61 abstentions, there are most country of employment of migrants and the whole European Union.

³⁷ GA Resolution A/RES/59/203, 20 December 2004.

constitute a very important source of foreign exchange and are instrumental in improving the well-being of relatives left behind”. Furthermore, the General Assembly reaffirmed that: “all Governments, in particular those of receiving countries, must recognize the vital importance of family reunification and promote its incorporation into national legislation in order to ensure protection of the unity of families of documented migrants” and called upon all States: “to refrain from enacting, and to repeal if it already exists, legislation intended as a coercive measure that discriminates against individuals or groups of legal migrants by adversely affecting family reunification and the right to send financial remittances to relatives in the country of origin”.

In addition, the Commission on Human Rights, in its yearly resolution on the human rights of migrants³⁸, welcomed immigration programmes adopted by some countries that allow migrants to integrate fully into the host countries, facilitate family reunification and promote a harmonious and tolerant environment, and encouraged States to consider the possibility of adopting these types of programmes. The Commission also called upon States to facilitate family reunification in an expeditious and effective manner, with due regard to applicable laws, as such reunification has a positive effect on the integration of migrants³⁹.

The Special Rapporteur of the Commission on Human Rights on the human rights of migrants discussed the issue of family reunification especially in relation to unaccompanied minors. In her report to the General Assembly in 2002 she noted “a reluctance on the part of States to consider the best interests of the child. In the three years since she became Rapporteur, the Special Rapporteur has noted that the vast majority of unaccompanied minors who migrate do so for the purpose of family reunification”⁴⁰.

In her report following a visit to *Spain* in 2004, the Special Rapporteur also argued that “the strengthening of control systems should be proportionate to solutions comprising family reunification and integration of migrants who have already been in Spain for several years”⁴¹.

iii) Other Instruments

During the 59th session of the International Labour Organization, the issue of family reunification was described in a preliminary report entitled “Migrant Workers” as follows:

“Uniting migrant workers with their families living in the countries of origin is recognized to be essential for the migrants’ well being and their social adaptation to the receiving country. Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevents them from leading a normal life. The large numbers of migrant workers cut off from social relations and living on the fringe of the

³⁸Resolution 2005/47 of 19 April 2005. Adopted without a vote. See chap. XIV, E/CN.4/2005/L.10/Add.14.

³⁹ CHR resolution 2005/47 of 19 April 2005, § 9 and 10.

⁴⁰ A/57/292, 9 August 2002, § 43.

⁴¹ E/CN.4/2004/76/Add.2, Report submitted by Ms. Gabriela Rodríguez Pizarro, Special Rapporteur, in conformity with resolution 2003/46 of the Commission on Human Rights 1, Addendum, Visit to Spain. 14 January 2004, para. 79

receiving community create many well known social and psychological problems that, in turn, largely determine community attitudes towards migrant workers”⁴².

A similar point was made again more recently by the ILO when the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration adopted in 1997 guidelines which stated that:

"prolonged separation and isolation of family members lead to hardships and stress affecting both the migrants and the dependants left behind, which may give rise to social, psychological and health problems, and even affect workers' productivity. Therefore, family reunification should be facilitated".

However, despite the recognition of the enormous social importance of reunification of families, ILO instruments do not contain a clear obligation upon States in this respect⁴³. Thus, Convention N° 97 (1949) “Migration for Employment” Convention is somehow limited in scope and obviously does not respond to the modern modalities of migration anymore. Likewise, Recommendation 86 (1949) “Migration for Employment”, subordinates family reunification to the agreement of the States concerned by saying: “Provision should be made by agreement for authorization to be granted for a migrant for employment introduced on a permanent basis to be accompanied or joined by the members of his family”⁴⁴.

Article 13(1) of Convention N° 143 (1975) “Migrant Workers Convention”, goes a bit further by stipulating that "a Member may take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory".

Migrant Workers Recommendation N° 151 (1975) uses a stronger language in its paragraph 13 (1) which reads: “All possible measures should be taken both by countries of employment and by countries of origin to facilitate the reunification of families of migrant workers as rapidly as possible....”.

At the 2004 ILO Conference, ILO and its constituents agreed on the desirability of a rights-based approach to migration, and on the development of a non-binding framework for migrant workers in a global economy. This framework will comprise international guidelines on best practices on various areas, including family reunification possibilities⁴⁵.

In general, the notion of family reunification has caused a certain amount of friction within the ILO forum between countries of origin and employment of migrants, in particular in relation to temporary or time-bound migration and to the possible reunification of short-term migrant workers with their families.

⁴² International Labour Conference, 59th session, 1974, Report VII (I), Migrant Workers, 1973, 27.

⁴³ See also R. Cholewinsky, *Migrant Workers in International Human Rights Law*, 1997, Oxford Clarendon Press, page 118.

⁴⁴ Recommendation 86 (1949), § 15 (1).

⁴⁵ ILO Conference 92nd session, Report of the Committee on Migrant Workers, § 24 of the conclusions.

iv) European Instruments:

- European Convention on Migrant Workers of 1977

The European Convention on Migrant Workers (which only applies to migrants coming from member states of the Council of Europe which are party to the Convention) specifically deals with family reunification in its article 12⁴⁶ which reads in its paragraph 1:

“The spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker, are authorized on conditions analogous to those which this Convention applies to the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements to join the migrant worker in the territory of a Contracting Party”.

However, this ‘entitlement’ is subject, under the Convention, to some important conditions; thus, the migrant worker should have “available for the family housing considered as normal for national workers in the region where the migrant worker is employed” (art.12 (1)), and the receiving country may render the authorization of family reunification conditional upon a waiting period which shall not exceed twelve months.

Furthermore, any State may make the family reunion “further conditional upon the migrant worker having steady resources sufficient to meet the needs of his family” (art. 12(2)) and even temporarily derogate from the obligation of family reunification “for one or more parts of its territory” (art. 12 (3)).

⁴⁶ The entire text of article 12 is:

“The spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker, are authorised on conditions analogous to those which this Convention applies to the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements to join the migrant worker in the territory of a Contracting Party, provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed. Each Contracting Party may make the giving of authorisation conditional upon a waiting period which shall not exceed twelve months.

Any State may, at any time, by declaration addressed to the Secretary General of the Council of Europe, which shall take effect one month after the date of receipt, make the family reunion referred to in paragraph 1 above further conditional upon the migrant worker having steady resources sufficient to meet the needs of his family.

Any State may, at any time, by declaration addressed to the Secretary General of the Council of Europe, which shall take effect one month after the date of its receipt, derogate temporarily from the obligation to give the authorisation provided for in paragraph 1 above, for one or more parts of its territory which it shall designate in its declaration, on the condition that these measures do not conflict with obligations under other international instruments. The declarations shall state the special reasons justifying the derogation with regard to receiving capacity.

Any State availing itself of this possibility of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and shall ensure that these measures are published as soon as possible. It shall also inform the Secretary General of the Council of Europe when such measures cease to operate and the provisions of the Convention are again being fully executed.

The derogation shall not, as a general rule, affect requests for family reunion submitted to the competent authorities, before the declaration is addressed to the Secretary General, by migrant workers already established in the part of the territory concerned.

- European Convention on Human Rights and the jurisprudence of the European Court

The European Convention on Human Rights provides for the protection of family life in its Article 8 entitled ‘Right to respect for private and family life’ which reads:

“Everyone has the right to respect for his private and family life, his home and his correspondence” and “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

The European Court on Human Rights has a quite consistent jurisprudence on article 8 with respect to family reunification and has established precise requirements. These include, in particular, effective and strong links between the family members concerned and the host country, actual existence of ‘family life’, [im]possibility to reunite the family elsewhere.

It is important to distinguish two types of situations which apply to article 8 of ECHR, and which the Court seems to consider with a slightly different approach. The first situation –which is the main topic of this paper - concerns family members wanting to join for the purpose of family reunification another member of the family abroad, usually the breadwinner. The second scenario applies when a member of the family is expelled or threatened with expulsion (often as a result of sanctions resulting from criminal proceedings) from the country where he/she and the family live.

In *Gül vs. Switzerland*, the Court – in a case which concerned the refusal of Swiss authorities to allow a 12-year-old Turkish boy to join his parents who were living in Switzerland – found no violation of article 8 (by 7 votes to 2):

“In view of the length of time Mr and Mrs Gül have lived in Switzerland, it would admittedly not be easy for them to return to Turkey, but there are, strictly speaking, no obstacles preventing them from developing family life in Turkey. That possibility is all the more real because Ersin (the boy⁴⁷) has always lived there and has therefore grown up in the cultural and linguistic environment of his country”⁴⁸.

It is interesting to notice that somehow the Court differentiated between the strict legal reasoning and the moral consideration, by saying that:

“Having regard to all these considerations, and while acknowledging that the Gul family's situation is very difficult from the human point of view, the Court finds that Switzerland has not failed to fulfill the obligations arising under Article 8 para. 1, and there has therefore been no interference in the applicant's family life within the meaning of that Article”⁴⁹.

The dissenting opinion of Judge Martens also signed by Judge Russo argued *inter alia* that:

“In cases where a father and mother have achieved settled status in a country and want to be reunited with their child which for the time being they have left behind in their country of

⁴⁷ Note of the author.

⁴⁸ *Gül vs. Switzerland*, 53/1995/559/645, § 42.

⁴⁹ *Gül vs. Switzerland*, 53/1995/559/645, § 44.

origin, it is per se unreasonable, if not inhumane, to give them the choice between giving up the position which they have acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other's company which constitutes a fundamental element of family life”.

They also pointed out, however, that: “It remains, of course, to be considered whether the latter principle applies in the present case, where the applicant has not "achieved settled status" in Switzerland, in so far as he and his wife have not been granted a "settlement permit", but have to base their right of residence on a permit which has, in principle, a temporary character and, consequently, a lower legal status than a settlement permit”.

In another controversial case, *Ahmut and Ahmut vs. the Netherlands*, the Court found –by 5 votes to 4 -that the decisions of the Dutch authorities to refuse to admit Souffiane Ahmut- a 9-year-old child who lost his mother in Morocco - to live with his father - a well-established immigrant who at the time of application had acquired Netherlands nationality - did not constitute a violation of article 8 of the Convention.

In fact the Court argued that:

“the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest”⁵⁰ and “where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory” and that “it may well be that Salah Ahmut would prefer to maintain and intensify his family links with Souffiane in the Netherlands. However.....Article 8 does not guarantee a right to choose the most suitable place to develop family life”⁵¹.

Very strong arguments against this position of the Court were advanced in the dissenting opinion of the four judges voting against this decision.

In particular, Judge Martens joined by Judge Lohmus was very critical and argued that:

“I am worried that, although this case could have easily been distinguished from that of *Gul v. Switzerland*⁵², a Chamber composed for the most part of different members has chosen to follow that unfortunate precedent. In this context, I refer to what I have said in paragraph 15 of my dissenting opinion in the latter case. **I fear that the present decision marks a growing tendency to relax control, if not an increasing preparedness to condone harsh decisions, in the field of immigration** (emphasis added)⁵³”.

⁵⁰ *Ahmut and. Ahmut vs. the Netherlands* 21702/93, 17 May 1995, § 67(a).

⁵¹ *Ibid*, § 67 (c) and 71.

⁵² Court's judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I, p. 159.

⁵³ Other dissenting opinions were formulated by Judge Valticos and Morenilla:

Judge Valticos considered that:

“Alongside these fundamental factors, the arguments in support of the Netherlands authorities' decision to separate the son from his father (arguments such as the actual length of the son's visits to his father) do not weigh very heavily and even reflect a restrictive spirit incompatible with the very meaning of the Convention and the concept of human rights”. He also went even further arguing that: “The father had acquired Netherlands nationality, and in any country, a national is entitled to have his son join him, even if the son does not have the same nationality. How does it come about that in the present case this right was refused him? I cannot think that it is because the Dutch father was called "Ahmut". **However, the suspicion of discrimination must inevitably lurk in people's minds**” (emphasis added)”.

Judge Morenilla was of the opinion that:

“In view of these circumstances, the measures adopted by the Netherlands authorities **do not appear to be either necessary or proportionate** (emphasis added) to the legitimate aims that Article 8 para. 2 foresees, and therefore not justified under this provision. To deny a father and son their right to be

A similar approach was taken by the Court in the case of *Abdulaziz, Cabales and Balkandali vs. United Kingdom*, where the Court concluded that:

“the duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country. In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them”⁵⁴.

The Court seems more inclined to protect the unity of a family group whose members are already living and working in a foreign country, when deportation and/or expulsion of one of the members - usually as a supplementary sanction resulting from a criminal activity - potentially threaten the unity of the family⁵⁵.

together when the son is at an age at which he needs his father's care and guidance, particularly since his mother has died, and to deny a national of the Netherlands the right to have his son begin an education in the adopted country of which he is a national according to the law, **is in my opinion contrary not only to the European Convention of Human Rights but also to "cogent reasons of a humanitarian nature" as set forth in the national legislation** (emphasis added)”.

⁵⁴ *Abdulaziz, Cabales and Balkandali vs. United Kingdom*, 15/1983/71/107-109, § 68.

⁵⁵ In these cases, the Court looks at the proportionality of the measure, the level of family ties and, most recently, at the gravity of the criminal activity for which the measure of deportation/expulsion is applied.

In *Mehemi vs. France*, 85/1996/704/896, the Court had to consider the case of an Algerian citizen born and living in France (and whose family was also residing in France) who was expelled as a supplementary sanctions for drug trafficking involvement. The Court found that (§ 37):

“in view of the applicant's lack of links with Algeria, the strength of his links with France and above all the fact that the order for his permanent exclusion from French territory separated him from his minor children and his wife”, the measure in question was disproportionate to the aims pursued.

The Court held a similar approach in the case of *Moustaquim vs. Belgium*, 26/1989/186/246 where the claimant was deported as a consequence of its continuous involvement in criminal activities. However, once again the Court insisted on the criterion of the existence of strong family ties and of the proportionality of the measure. It stated, *inter alia* that: “Having regard to these various circumstances, it appears that, as far as respect for the applicant's family life is concerned, a proper balance was not achieved between the interests involved, and that the means employed was therefore disproportionate to the legitimate aim pursued. Accordingly, there was a violation of Article 8” (§46).

Likewise in the case of *Nasri vs. France*, 18/1994/465/546, the claimant - an Algerian national, who was born in Algeria deaf and dumb in June 1960, and went to France with his family in February 1965 - was threatened with deportation following conviction from criminal activity. The Court, as in the previous cases:

“..... takes the view that the execution of the impugned measure would amount to an interference with the exercise by the applicant of his right to respect for his family life” and that “It accordingly falls to determine whether the deportation in question would satisfy the conditions laid down in paragraph 2 (of article 8), namely whether it would be "in accordance with the law", whether it would pursue one or more of the legitimate aims listed in that provision and whether it would be "necessary in a democratic society" to attain the said aim or aims” (§ 34 and 35).

Recently, the Court has shown that to determine whether article 8 of the Convention has been violated, due weight should be given to the type of the criminal activity for which the claimant has been convicted. This is clear in the case of *Radovanovic vs. Austria*, 42703/98, where the Court found that (§ 34):

“.....the present case needs to be distinguished from a number of cases concerning the expulsion of second generation immigrants, in which the Court found no violation of Article 8 of the Convention (see *Boujlifa v. France*, judgment of 21 October 1997, Reports 1997-VI, p. 2264, § 42; *Bouchelkia v. France*, judgment of 29 January 1997, Reports 1997-I, p. 65, §§ 50-51; *El Boujaïdi v. France*, judgment

- European Social Charter

Article 19 of the European Social Charter regulates the right of migrant workers and their families to protection and assistance. In particular, it is provided that with a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake “*to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory*” (article 19(6)). The Committee of Independent Experts has interpreted Article 19 (6) extensively, frequently interpreting the duty to facilitate as a positive obligation to assist migrant workers and their families to create the conditions which make family reunification possible⁵⁶. Obviously, this provision has to be read in conjunction with article 16 of the same Charter, which safeguards the right of the family to social, legal and economic protection⁵⁷.

- Committee of Ministers of the Council of Europe

The Council of Europe dealt with the issue of family reunification in the recommendation Rec (2002) 4 of the Committee of Ministers “on the legal status of persons admitted for family reunification”⁵⁸. The Committee’s recommendation, recognizing that the residence status and other rights granted to the admitted family members are important elements assisting the integration of new migrants in the host society, regulates the situation once family members join the migrant worker in a foreign country.

- Council Directive 2003/86/EC⁵⁹

of 26 September 1997, Reports 1997-I, p. 63, §§ 40-41; and Dalia, p. 92, §§ 53-54). These cases all involved second generation immigrants who arrived in the host country at an early age and were convicted of serious offences with lengthy terms of unconditional imprisonment. Furthermore, they concerned drug offences, the kind of offence, for which the Court has shown understanding of domestic authorities’ firmness with regard to those who actively contribute to its spread. In the present case, despite the shorter duration of the applicant’s stay in Austria the Court attaches considerable weight to the fact that although the applicant was convicted of aggravated robbery, he was only sentenced to a six-month unconditional term of imprisonment, whereas twenty-four months were suspended on probation”. Accordingly, the Court found a violation of article 8 in this case.

⁵⁶ See Cholewinski, op.cit., page 344, footnote 292.

⁵⁷ “With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means”.

⁵⁸ The recommendation was adopted at the 790th meeting of the Ministers’ Deputies on 26 March 2002.

⁵⁹ On 3 October 2005, the EU Commission has announced that, whereas the deadline for national implementation of the Directive 2003/86/EC, setting out the rules by which third-country nationals legally residing in one of the Member States may apply for their family members to join them in the Member State of their residence expired, only six Member States (Belgium, Estonia, Latvia, Lithuania, Poland and Slovenia) have notified their implementing measures. With the exception of Denmark, Ireland and United Kingdom who are not bound by the Directive provisions, the other 16 Member States have not notified any implementing measures. In consequences, the Commission has announced that it will take appropriate procedural steps according to the power conferred by Article 226 of TEC (Treaty establishing the European Community).

One of the most important documents on family reunification recently adopted within the European Union framework is Council Directive 2003/86/EC of 22 September 2003 “on the right to family reunification”.

The purpose of the Directive is to determine the conditions for the exercise of the right to family reunification of third-country nationals, who reside lawfully in the territory of a European Union Member State. The Directive lists a certain number of conditions to be fulfilled, prescribes also procedural rules concerning the treatment of applications for family reunifications and specifies the rights of family members once the application is accepted. Member States are allowed to grant family reunification under more favourable provisions compatible with the Directive but they cannot grant this right under more restrictive conditions than those provided for by the Directive.

The directive expressly uses the term ‘right’ when referring to family reunification. In the preamble family reunification is defined as “a necessary way of making family life possible” since it creates socio-cultural stability facilitating the integration of third country nationals in the Member State. The Directive seeks to protect the family and establish or preserve family life and provides that the material conditions for exercising the right to family reunification should be determined on the basis of common criteria.

In the directive, the right to family reunification is limited to nuclear family members. This includes the sponsor's spouse; the minor and unmarried children (including adopted children) of the sponsor and the spouse; and the minor, unmarried and dependent children (including adopted children) within the custody of the sponsor or the sponsor's spouse (Art. 4(1)). Member States may also authorise the reunification of an unmarried partner, and of the unmarried minor children (including adopted children) and dependent unmarried adult of such persons (Art. 4(3)).

The Directive only applies where the sponsor holds a residence permit issued by a Member State for a period of validity of one year or more and has reasonable prospects of obtaining the right of permanent residence (Art. 3(1)).

v) Inter-American instruments

Article 17 (1) of the American Convention on Human Rights provides that: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state”. Article 27 of the same Convention provides that article 17 is a non-derogable one.

Article V of the American Declaration of the Rights and Duties of Man establishes that “Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life”. Article VI of the same document provides that every person has the right to establish a family, the basic element of society, and to receive protection therefor.

See http://europa.eu.int/comm/justice_home/news/intro/news_intro_en.htm

So far, the jurisprudence of the Inter-American system has not been particularly rich as to family reunification and/or protection of the family.

On May 30, 2000, in the “Case of Haitians and Dominicans of Haitian origin in the Dominican Republic vs. Dominican Republic”, the Commission asked the Inter-American Court of Human Rights to adopt provisional measures to stop the Dominican Republic from engaging in the massive expulsion of Haitians and Dominicans of Haitian origin, since, based on the information contained in the petition, this action was endangering the lives and physical integrity of the deportees. Furthermore, on many occasions, families had been separated and minor children abandoned.

On August 18, 2000, a public hearing was held and the Court granted the provisional measures with respect to the persons identified by the Commission. In that decision, the Court required of the Dominican state, *inter alia*,: “that it abstain from deporting or expelling Benito Tide Méndez and Antonio Sension” and that “it allow as soon as possible the family reunification of Antonio Sension and Andrea Alezy with their younger children in the Dominican Republic”⁶⁰;

III. Conclusion

Family reunification is very important for migrant workers. A solitary existence handicaps the development of contacts with the community in which the migrant workers live and affects their well-being. Family reunification allows them to consistently improve their living conditions, to deal with the problem of social adjustment in a smoother way and to better integrate in the host society. In addition, family reunification has also positive effects on the working capacity of the migrant workers.

However, as illustrated throughout the paper, family reunification is often limited in practice, within the conflict between the human rights of the individual and the security and economic needs of the State. Although the importance and value of family reunification is universally acknowledged, it is not yet recognized as a full-fledged right and it is usually to a great degree left to states’ discretion and granted only under strict requirements and on a case by case basis. When granted, it often finds its legal justification upon the broader right to protection of family life.

The most recent jurisprudence of the UN treaty bodies and some other new developments at regional level, such as the adoption of Council Directive 2003/86/EC, represent slow steps forward towards a more ample recognition of a right to family reunification. Potentially, the recently established Committee on Migrant Workers - being the monitoring body of a UN Convention on the very subject of migrants’ rights - is the most authoritative panel in determining the extent and the significance of the rights of migrant workers and members of their families, including family reunification. However, so far the Committee has not yet had an opportunity to apply the Convention in practice. Once the Committee starts examining States parties’ reports, it will be in a position to interpret the provisions in the Convention in the context of concrete country situations.

⁶⁰ Inter-American Commission 2001 annual report, chapter V, § 85-97.