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LOOKING AT THE INTERNATIONAL MEDICAL RECRUITMENT CODE FROM THE PERSPECTIVE OF RAWLSIAN THEORY OF JUSTICE

Teodora MANEA[1], Irina CEHAN[2], Liviu OPREA[3], Cristina GAVRILOVICI[4]

Abstract

The international recruitment of health personnel appears to be lately an usual practice for some countries to cover their needs in health care. That is possible due to income differences between countries that motivate physicians to migrate. Now this is an unavoidable fact, but the resulting ethical problems cannot be ignored, like the unbalance in the developing countries healthcare systems by losing physicians. The whole practice became morally questionable with international ongoing efforts to solve it one as the recruitments codes. We will to discuss the WHO Global Code of Practice on the International Recruitment of Health Personnel from an original perspective inspired from Rawls theory of justice. The rawlsian principles we will focus on are: a. *the veil of ignorance*, b. *the maximin strategy*. With this, we offer a better look inside the code and the practice it tries to regulate.

Keywords: recruitment codes; theory of justice; international recruitment of healthcare personnel.

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Introduction

The phenomenon of international migration of healthcare professionals has increased in the last decade and, although itself it is not a reason for the world crisis of labour in the healthcare field, it underlines this issue on the level of some countries (Dumont & Zurn, 2001). In 2006 the World Health Organization estimated a shortage of 4.2 million professionals. In this context, the international recruitment of healthcare professionals became an usual practice for many countries, as a solution to cover their lack of staff, but, at the same time, it became a problem for the developing countries. The acceleration of the recruitment from those countries destabilizes their health care systems, already in danger due to financial difficulties.

By contextualization, the problem of medical staff migration the ethical issue of responsibility moves from an individual level (in our case, the doctor who decides to emigrate) to the level of the rich countries that become morally accountable for the problems of social justice that may come up in the poor countries, such as impairment of the fundamental rights of individual to protect his health. The right to health is one of the fundamental human rights, recognized by national and international legislation. However, it not only involves a country's obligations towards its own citizens, but also the obligations of the recruiting states, claiming considerations of transnational justice (Connell & Buchan, 2011).

Starting with 1999, at the same time with an increase in the international migration of health care professionals and the consequences resulting from it, many countries have shown their concern about the shortage of staff, and the demand for policies on *ethical international recruitment* increased too (World Health Assembly, 2004). In response to that, codes of practice on international recruitment were adopted. In 2001 The National Health Service (NHS) in Great Britain developed the first code regarding the recruitment of healthcare professionals, based on the 1999's initial policy, which was revised in 2004. Beginning with that year several countries have adopted the Great Britain's model and developed codes of practice and memoranda of understanding meant to lead towards an ethical international recruitment. Later on, the first *regional* code adopted was the *Commonwealth Code of Practice* (2003) and subsequent codes were introduced in 2006 in Scotland, on a national level, and in 2007 appeared the *Pacific Code of Practice*, with regional applications. The regional codes of practice adopted until the Global Code had been written by various entities, usually governmental agencies or regional structures, such as the Commonwealth Secretariat and The Pacific Forum. The contents of the codes and memoranda of understanding were different in approach, terminology, subjects, sectors and areas covered, as well as in the implied expectations.

All the subsequent codes relied and built on the provisions of the prior codes, up to the 2010 *WHO Global Code of Practice*. Until the global code appeared, all the codes had been limited to a geographical area and had a high degree of generalization, excluding the application of the provisions to the private healthcare sector. All the recruitment codes adopted had three main objectives: protecting

the rights of emigrating healthcare professionals, ensuring that the emigrants are prepared and supported for their workplace, ensuring that the migratory flows don't stop securing healthcare services in the source countries (with implications of compensation and non-recruitment from these countries). In fact, these codes focused on the first two objectives, so they were more significant in the beneficiary countries. The third objective was given less practical importance, the rights of the emigrating personnel in the destination country having more significance than the right to health of the persons in the source countries (Plotnikova, 2011).

The Global Code of Practice on the International Recruitment of Health Personnel highlights the practice of bilateral agreements and memoranda of understanding for supporting ethical recruitment and that was the culmination of the code's development. The code serves as a *reference point* for the member states when they establish and improve the legal framework regarding the international recruitment and also acts like a *guide* for the implementation of international treaties and other legal instruments.

The WHO Code sets out a series of principles to sustain the ethical recruitment, a series of *responsibilities*, *rights* and *recruitment practices*, drawing attention to extremely important aspects. One of these refers to the recruiter's understanding of *the social responsibility* of the healthcare personnel towards the source country, as an equitable *contract* of services and, consequently, recruitment is best to be avoided. For the first time, this Global Code recommends that active recruitment from the developing countries, which have an acute shortage of personnel, should stop, except the cases where states have bilateral and multilateral agreements between governments. In this way the states have a reciprocity position and the recruitment process will take place as it was established, a practical control of the phenomenon being also possible.

The existence of practical codes on ethical international recruitment and particularly of the Global Code is a testimony of the need for such regulations to maintain a global balance of the healthcare workforce, in accordance with each country's needs, to ensure mutual benefits and to establish principles of ethical recruitment.

Objective: The perspective inside the codes inspired by Rawls theory of justice could lead to a better understanding of the provisions and the role of the international recruitment code. We hope that with the frame of Rawls theory of justice to go a little bit further in the objectified morality of codes. Because Rawls original position supposed multiple actors, we will discuss only the WHO Code, where our argument can be better exposed.

Why is this topic important?

The recruitment of the healthcare professionals became a usual practice to cover the lack of personnel in health systems of some countries. But the recruitment process must be seen not only at individual level, but as part of political strategies to cover a need. The policy of active recruitment from developing

countries having a poor healthcare system conducted to unbalance and harmful situation in those countries, claiming the responsibility at global level. All the decisions taken at state's level are reflected at individual level too. If from Rawls theory point of view we could replace states instead of individuals, then the message of Codes could become clearer. The need of fairness and sustainability of health system in developing countries lead states to create a contractual form of agreement concerning international recruitment (Cojocaru, Cace & Gavrilovici, 2013). It's a mutual attempt to protect an equitable sharing of goods and benefits, respecting in the same time the rights of individuals. This contract is claiming that states leaving beside their own best interest or financial advantages should act like objective actors concerning active harmful recruitment. The international context lead to recognizing the importance of stating principles for an ethical recruitment that could be agreed at state's level in order to sustain the justice as fairness, a balance of benefits and respect for individual rights.

The international recruitment of health personnel is not a traditional topic for the philosophical thinking, partially because this phenomenon is quite new and partially because the philosophical and ethical dimensions are very intricate. To analyse the recruitment codes within a theoretical frame work is not only a case of *applied* ethics, but a case of deep philosophical reflections, because it is very hard to find one theory able to cover such complexity of facts, intentions, human rights, policies, human behaviour, and market interests. So, we had to select and focus on some aspects of recruiting and migration of healthcare workforce. First we moved from the individual level to the state level and underline the role of countries on managing medical migration (MM). The reason for this is that the personal responsibility of physicians willing to migrate cannot be judged outer context. Ignoring the life style and life chances differences between poor and richer countries, the salaries and all the push factors of MM, the personal responsibility will be just a not (artificial) comprehensive approach to the complex morality of migration. The personal responsibility and the connected concept of individual freedom are, if we could call it so, *the last trigger* of migration. Isolating only these aspects will bring us to very shallow waters, where actually the moral conflict between the social responsibility and the liberty to migrate cannot be solved.

Our choice was to move from the individual to the state level and to see how the moral and philosophical problems are looking like from this perspective. Because the MM is mostly from poor to richer countries, one on the main issues is the imbalanced *power* of these countries considering the financial status and the healthcare personnel to cover the needs of a medical system So to encounter the topic of power we preferred to approach MM with Rawls theory of justice, but keeping in mind Foucault's reflections on power. How should we understand the birth of recruitments codes? First it was a practice of recruitment from poor to richer countries. Secondly there were voices claiming the morality of those practices (like Nelson Mandela condemning the recruitment of nurses from South Africa).because of the negative effects in source countries. In the third place, the morally responsible countries recognize their moral duty (under public pressure) concerning the active recruitment and decide to make the recruitment "ethical".

And so the first memoranda and codes, as instruments of making something doubtful to be "ethical", were born. The birth of codes statues at least two premises: the international recruitment is a *reality*, as the individual right of freedom of movement and working, which will persist long enough to motivate the whole efforts of making codes. Secondly: the use of a very important social resource, as the health personnel, formed in and planned for other countries, is morally acceptable. Somehow in this point we can feel a sort of moral discomfort associated with the question: would the recruiting countries believe that their moral duty to poor countries ends with the adoption of a recruitment code? No use in adopting a code without ways of implementing it or corrections if the provisions of the code will be violated. Lisa A. Eckenwiler speaks about "the crucial concern that the code seems to tiptoe around the role of neoliberal economic policies imposed by international lending bodies in facilitating migration" (Eckenwiler, 2009). Now, this level of the international corporate like World Bank and International Monetary Fund, can be seen as a possible third level of theorizing the morality of medical migration, further than the governments responsibilities. For methodological reason, we will remain at the second level. "Developing a policy response on ethical recruitment is extraordinarily complex…there is no obvious solution or quick fix' (McIntosh et al., 2007) and adopting and implementing a code of practice that states principles, responsibilities and rights concerning an ethical recruitment is not a guarantee for that, but because it appeared is a proven proof of a needed behaviour at international level in this direction.

Basic assumptions

In our argument we will assume that the *countries* can be regarded as *moral actors* and the code contains a set of rules that can be judged as just or unjust, regarding their effect in the practical application. If the parties – countries in our case – in the original position would adopt two such principles, this would then govern the assignment of rights and duties and regulate the distribution of social and economic advantages across countries. The difference principle permits inequalities in the distribution of goods only if those inequalities benefit the low income countries. Rawls believes that this principle would be a rational choice for the representatives in the original position for the following reason: Each country (or member country of an international treaty or agreement) has an equal claim on the international distribution of goods. Natural attributes should not affect this claim, so the basic right of any individual, before further considerations are taken into account, must be to an equal share in material wealth. What, then, could justify unequal distribution? Rawls argues that inequality is acceptable only if it is to the advantage of those who are worst-off.

In order to be coherent with Rawls theory, an objection could be raised: are the individuals/people replaceable with states/countries? In *The Law of the People* of Rawls, a chapter underlines this idea: *Why Peoples and not States*? "How far states differ from people rests how rationality, the concern with power, and state's basic interest are filled in. If *rationality* excludes the *reasonable* (that is, if a state

is moved by the aims it has and ignores the criterion of reciprocity in dealing with other societies); if a state's concern with power is predominant; and if its interests includes such things as converting other societies to the state's religion (…) – than the difference between states and peoples is enormous" (Rawls, 1999: 28).

The WHO is actually a community of states connected and working on the premises of *rationality* and *reasonable*. Rawls dictions make sense if we speak about war and individual state interests dominated by power. But the very essence of WHO, as a community of states, is to manage the right to health and health care at a global scale. Health is understood as a shared responsibility for the 194 states which are part of WHO. So, with this number of states and with the already accepted rules from the WHO Constitution, we believe to have good basis for our replacement of *individual* with *states* for the applied Rawls theory. The great number of member states is a guarantee for not neglecting their interests and the constitution sets a homogenous basis for rights and responsibilities, also the *rationality* and the *reasonable* Rawls was writing about. For example, the unequal development in different countries in the promotion of health is regarded in Constitution as a *common danger* for all states. We underline this just to make clear that the states are not alone and following their own power interests, but as parts of an international community with common goals and objectives.

Laying down such document as WHO Constitution is a kind of foundation act that state a particular kind of society. Maybe we need to extend or to rethink the sense of *society*. In a way the history of society starts with the Greek *polis* and expands to the present community of states. The common characteristic are designing a community of individuals, with their particular traces and interests, living together and agreeing upon a well ordered *cosmos* by the principles of justice and impartiality. Another argument for our understanding of WHO as a rawlsian society is based on fact that the members of such organization are free, equal, autonomous and the obligations that states signed for are self-imposed: "Yet a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize self-imposed." (Rawls, 1971: 17).

In order to avoid any confusion, we like to mention that in our paper the use of word countries and states is sometimes undifferentiated. The word *state* refers more to the political administration, to the political acting of a country. C*ountry* can have a more geographical nuance, but sometimes seems more natural to use this word, for example when we speak about health advantages, or the way a particular health policies is affecting the society as a whole.

The veil of ignorance

Are the code's principles chosen behind a *veil of ignorance*? That means blinding all facts about one country's interests that may interfere with a fair notion of justice. With this approach we try to find a method of analysing the morality of principles of medical recruitment based upon the following thought experiment, in Rawls interpreting tradition: countries or organizations (like WHO) to the original position know nothing about their particular needs, interests or facts within their own health care system or the international health care situation. The *veil of ignorance* blocks off this knowledge, such that one does not know what *burdens* and *benefits* of social or international cooperation could result once the veil is lifted.

With this knowledge blocked, parties to the original position must decide on principles for the distribution of rights, positions and resources in the international context. So, the main difficulty we have so far is to extend the veil of ignorance from the society level to the international or "multi-societal" level. But, if this principle is true, we can imagine to extent the national level of justice to an international one. If we have to reformulate Rawls original words, ("Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conception of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance") insisting on our particular topic it would look like this: ...no *state* (or country) knows its place in *international health market context*, its *development* position or *its international power*; nor does *it* know *its* fortune in the distribution of natural assets and abilities, *its resources of* intelligence and strength, and the like The principles of justice are chosen behind a veil of ignorance. For Rawls, this assumption should ensure that "no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances" (Rawls, 1971: 12). For us, the principles stipulated in the WHO Code should ensure that no country is advantaged or disadvantaged. The social circumstances regarding MM may change in the future for all countries, so that a *destination* country can change to a *source* country or vice versa. This possibility should not affect the "choice of principles" for the WHO Code.

The maximin strategy

The maximin strategy should be adopted in order to maximize the prospects of the least well-off. For our case this can be reformulated like: the principles of the international medical recruitment codes should follow the maximin strategy to maximize the prospects of the low income countries. Again, reformulating Rawls words „They are the principles that rational and free persons concerned to further their own interests would accept in an initial position of equality as defining the

fundamentals of the terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established (Gavrilovici, Cojocaru & Astarastoae, 2012). This way of regarding the principles of justice I shall call justice as fairness" will sound like: They are the principles that *democratic* and free *countries* concerned to further their own interests would accept in an initial position of equality as defining the fundamentals of the terms of their association. We changed *persons* to *countries* and this lead us to change *rational* to *democratic*. It is still to be discussed if the mark of *rationality* applied to the concept of country could be approximate as *democratic*, but, because for our time the best functioning institutions seems to be the democratic one, as well as the best status of an individual, regarding his decisions and moral judgments seems to be the rational one we allowed ourselves to make this *mutatis mutandis* from person to country and from rational to democratic.

Premises

Our argument is based on the follow two *premises*: (1) Rawls Theory of justice is a good theory to understand justice as fairness or to solve ethical problems or to give an ethical background to a given situation/contract; (2) The two principles of original position are still valid if we change individuals with states (or countries). The only ethical approach to the codes was regarding them through an utilitarian point of view. Well, are them instruments to frame an ethical recruitment of healthcare personnel, and the basis behind an instrument should be utilitarian? An instrument can be built on libertarian, deontological, utilitarian etc. ethical basis. Here we have to apply Rawls to WHO Global Code and to make it plausible that states could replace individuals in his theory.

Discussions on premises

Rawls Theory of justice is a good theory to understand justice as fairness or to solve ethical problems or to give an ethical background to a given situation/contract. International medical recruitment became in the last years a field of possible misunderstandings/conflicts between powerful states and developing ones, each one trying to protect and develop its own health system. In this context a clear framework for recruitment was needed as a point of reference to be agreed at international level. States intended to clear off, from the beginning, any possible discussion of morality of recruitment by establishing the principles for an ethical recruitment. Doing so it was agreed to give up interests that may harm de worse-off, and the whole behaviour deducted by adopting the Code could be best shown up through Rawls theory and its principles invoked before. In fact, the context of international medical recruitment, and most of all, the solution to possible negative effects could have only be framed by WHO CODE, through the eye of Rawls

principles: veil of ignorance and maximin strategy sustaining in the same time international justice on this matter.

The two principles of original position are still valid if we change individuals with states (or countries). The state of health system in each country depends on the responsibility of governments and also individuals, so it's a double responsibility. This is also reflected and underlined by article 3.1 from the Code „The health of all people is fundamental to the attainment of peace and security and is dependent upon the *fullest cooperation of individuals and states*. Governments have a responsibility for the health of their people, which can be fulfilled only by the provision of adequate health and social measures". The context of international medical recruitment comes out of the national borders, so we can not only talk about individuals and the relation person-his state no more. So this relationship is at least doubled by state to state agreements. In this position, by adopting the CODE states have agreed to negotiate positions and establish a truce between them concerning active recruitment, and that only had been possible if states were the actors when here applying Rawls theory. So however we could see this international phenomenon, if we change individuals with states, the two Rawls principles shown before remain valid, and sustain the best possibility of such an agreement.

Analysing the WHO Code

The first Article of the WHO Global Code of Practice on the International Recruitment of Health Personnel is presenting the Objectives: to establish and promote voluntary principles and practices for the ethical international recruitment (EIR), to serve as a reference for Member States, to provide guidance and to facilitate and promote international discussion and advance cooperation on matters related to EIR. The Nature and Scope of Code, stipulated in the second article announce the voluntary nature of the code, and its global extent as scope. The Article 2.3 is respecting the *maximin* because speaks about strengthen of the prospects of the least well-off: "The Codes provides ethical principles applicable to the international recruitment of health personnel in a manner that strengthens the health systems of *developing* countries, countries with economies in *transitions* and *small island* states."

Results: Summarizing, we will show which articles could be subscribed under the veil of ignorance, respective under the maximin strategy.

The veil of ignorance: A possible veil of ignorance is present there where is mentioned that international recruitment of health personnel should be conducted in accordance with the *principles of transparency, fairness and promotion of sustainability of health systems in developing countries*. The underlined ethical values show that the member States were concerned and try to *promote* and respect *fair labour practices for all health personnel*. All aspects of the employment and treatment of migrant health personnel should be *without unlawful distinction* of any kind. (WHO Code, 3.5.) The member States are in different

economic development stages. By establishing this general rules, we think that no advantages for well developed countries in need of health care personnel will be considered. The veil of ignorance guarantees that the particular interests of those countries will be ignored.

(3.8.) Member States should facilitate circular migration of health personnel, so that skills and knowledge can be achieved to the *benefit of both source and destination countries.*

(5.1.) Destination countries are *encouraged to collaborate* with source countries *to sustain and* promote health human resource development and training as appropriate.

(10.3.) Member States either on their own or via their engagement with national and regional organizations, donor organizations and other relevant bodies should be encouraged *to provide technical assistance and financial support to developing countries or countries with economies in transition*, aiming at *strengthening health systems capacity*, including health personnel development in those countries.

The maximin strategy

(2.3.) The Code provides ethical principles applicable to the international recruitment of health personnel in a manner that *strengthens* the health systems of *developing countries*, *countries with economies in transition and small island states*.

(3.2.) ... voluntary international principles and the coordination of national policies on international health personnel recruitment are desirable in order to advance frameworks to *equitably strengthen health systems worldwide*, to mitigate the negative effects of health personnel migration on the health systems of developing countries.

(3.3.) The *specific needs* and special circumstances of countries, especially those *developing countries and countries with economies in transition* that are particularly *vulnerable* to health workforce shortages and/or have limited capacity to implement the recommendations of this Code, *should be considered*. Developed countries should, to the extent possible, provide *technical and financial assistance to developing countries* and countries with economies in transition aimed at strengthening health systems, including health personnel development.

(3.4.) Member States should *take into account the right to the highest attainable standard of health of the populations of source countries....* in order to mitigate the negative effects and *maximize the positive effects of migration on the health systems of the source countries.*

(3.8.) Member States should facilitate circular migration of health personnel, so that skills and knowledge can be achieved to the *benefit of both source and destination countries*.

(5.3.) Member States in both source and destination countries should encourage and support health personnel to utilize work experience gained abroad for the *benefit of their home country.*

(10.3.) Member States either on their own or via their engagement with national and regional organizations, donor organizations and other relevant bodies should be encouraged *to provide technical assistance and financial support to developing countries* or countries with economies in transition, aiming at strengthening health systems capacity, including health personnel development in those countries.

Discussions

So far we showed how the articles of the WHO Code can be assessed through Rawls theory of justice. We can say that the Code respects the two principles of Rawls' original position, therefore the Code is just. Or better formulated, the WHO Code, as an international instrument thought to be used to improve the ethical recruitment on global level, respects the moral value of *justice*. If its implementation will be achieved by all states implied in medical recruitment, either source, or destination countries, the code could show its utility as well. But the moral *basis* of this code is not utilitarian, what we could think is good from an ethical perspective. The WHO Code is supposed to be an ethical instrument working on a very high level, so its generality can also have good or bad aspects. The good one is because it can encompass a very bright spectrum of application and beneficiaries. The bad thing is that its generality seems to be not so efficient to rules regulating out moral behaviour, although it recalls a specific standard. The general moral principles (Plato-Kant canon in Rorty's formulation) can be too abstract to be applied in concrete cases. So the code should be seen and interpreted as a very good moral basis on the management of international recruitment. As Lisa Eckenwiler said "we have only just began".

Limitations

First possible objection: justice versus utility (utility versus liberty?): A first possible objection will be: why to choose the moral theory based on *justice* to analyze the code, instead of a *utilitarian* basis? In the end the WHO code should serve like an instrument to regulate medical recruitment. So, if we conceived the code like an instrument we have to discuss its utility, his ability to solve some practical problems. But if we do so it does not mean that the instrument should not also be just; if it really is just, then its utility has a fair and equitable background. If not, for example, its utility would have been then limited to a low number of beneficiaries and then would not promote an equitable balance. What would be useful for an individual/country may be not so far the other party/s, and then the justice as fairness is needed. WHO Global Code is a legal instrument that implies parties to adopt it and also mutual benefits, so the utility without justice would not

sustain an agreeable contract that in fact is also voluntary. Utilitarian conception of justice: maximizing benefits and minimizing harm, promoting "an equitable balance of interests among health workers, source countries and destination countries" (Eckenwiler, 2009).

Second possible objection: hypothetical and unhistorical original position: Another possible objection concerns some theoretical aspects connected with Rawls original position. The original position is *hypothetical*: principles to be derived are what the parties *would agree to*, not what they have agreed to. Another important aspect of Rawls original position is the *ahistorical* character, which is that the agreement has never be entered into as a matter of fact. But even when rawlsian principles for the original position are hypothetical and ahistorical, it does not mean that they have less moral value or weight. How should we understand the hypothetical and unhistorical character of the original position? Our interpretation and answer to this objection will be that these two characteristics have to be considered on a metaethical level. They are assuring the condition of possibility, phenomenologically speaking, of applying Rawls theory to concrete, historical events. If people wouldn't have this ingrowing possibility inside them, then their moral behaviour and standards would never come up to light in order to become true and practical. Any legal instrument at international level once adopted between countries follow to establish the best situation agreeable that in practice is targeted for better results and mutual benefits.

Conclusions

Analysing Code's articles following Rawls principles we can see that *the maximin strategy principle* is a central point of the states' „contract". So his theory can contribute to understanding and also framing what *ethical recruitment* would mean, respecting in the same time the idea of *fairness* in sharing goods for the benefit of all. As long as „there is *no agreed definition of ethical international recruitment*, and no consensus on the significance and location of harmful recruitment practices" (Connell, Buchan, 2011) there is a continuous need for establishing an ethic frame for the international practices of recruitment of health care personnel.

The veil of ignorance is reflected in state's efforts to collaborate in a manner „that strengthens the health systems of developing countries, countries with economies in transition and small island states" (art. 2.3. Code), abdicating interests of active recruitment for their own purposes. Rawls theory followed as background when analysing the Code, besides the fact that offers a deeper inside of its provisions, it also gives consistency to this legal framework and inspires states to implement it on national legislation too and respect a fair agreement of medical recruitment.

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