Chapter 3: The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Key questions

- What rights are protected under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families?
- Does the Convention make a distinction between the rights of documented and undocumented migrant workers?
- What obligations does the Convention place on States? How is compliance with the Convention monitored?

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1 Introduction

This chapter introduces and describes the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("the Convention on Migrant Workers") and the obligations it imposes on States that have ratified it.

By ratifying core human rights treaties and ILO conventions, States agree to uphold a range of obligations in relation to the treatment of migrant workers in their territory.

In addition, all States have, by virtue of their obligations under the UN Charter and the ILO Constitution, accepted accountability to the international community in relation to the implementation and realization of human rights, including the human rights of migrant workers and members of their families.

The Convention on Migrant Workers is therefore not the only human rights treaty that protects the rights of migrant workers; however, it is the most comprehensive and detailed. It sets a worldwide standard in terms of migrants‟ access to fundamental rights, whether in the labour market, in the education and health systems or in the courts.[1] It is the first universal codification of the rights of migrant workers *and members of their family* in a single instrument.[2]

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[1] "Introduction, The UN Convention on Migrant Workers‟ Rights"; Paul de Guchteneire and Antoine Pécoud; in *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights;* Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009.

[2] "The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation"; Juhani Lönnroth; *International Migration Review*; vol. 25; no. 4 (Winter 1991).

However, the relatively low level of ratification of the Convention[3] highlights the importance of drawing on the commitments made by States through their ratification of other human rights treaties and ILO conventions.

It should also be noted that migrant workers are not a homogenous group and many can face situations of cumulative vulnerability. For example, female migrant workers can experience “multiple discrimination” – or “intersectional discrimination” – on the basis of their sex and gender, their nationality and their status as migrant workers.

As such, a comprehensive and coordinated approach, grounded in a range of international legal standards, is required to address the complex human rights issues facing many migrant workers.

2. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The Convention on Migrant Workers was adopted in 1990 and came into force in July 2003. It reinforces and complements the other core human rights treaties of the UN. It also responds to the specific circumstances and vulnerabilities of migrant workers and members of their families, similar to other human rights treaties which address the vulnerabilities of women, children and, more recently, persons with disabilities.[4]
The Convention, which establishes minimum standards that all States parties are obliged to respect, protect and fulfil, is directly relevant to documented and undocumented migrant workers and members of their families.

Indeed, the Preamble to the Convention recognizes that “the human problems involved in migration are even more serious in the case of irregular migration” and highlights the need to encourage appropriate action “to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental rights”.

The Convention on Migrant Workers consists of six substantive parts:

- Part I: Scope and definitions
- Part II: Non-discrimination with respect to rights
- Part III: Human rights of all migrant workers and members of their families
- Part IV: Other rights of migrant workers and members of their families who are documented or in a regular situation
- Part V: Provisions applicable to particular categories of migrant workers and members of their families
- Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families

Part I introduces the definitions and concepts included in the Convention. It recognizes both men and women as migrants and defines different categories of migrant workers that apply in all regions of the world.

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[3] 45 States as at September 2011; nearly all of them States that send rather than receive migrant workers.
[4] See *Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties: A Do-it-yourself Kit*; Mariette Grange, International Catholic Migration Commission; 2006.

The Convention's added value is that it considers migrant workers to be more than labourers or economic entities; instead it recognizes them as social entities with families. It encourages migrant workers to be in a documented or regular situation and requires all workers and employers to respect and comply with the laws and procedures of those States that are parties to the Convention. It also provides for the right of migrant workers to leave and enter their States of origin (article 1).

The Convention extends the concept of "equality of treatment" by requiring that migrant workers and members of their families who are non-nationals in States of destination (or employment) be treated equally to nationals in certain situations. Non-nationals, however, are not to have more rights than nationals.

Part II explains the principle of non-discrimination, which is central to realizing the rights of migrant workers. Article 7 obliges States to:

> … respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

2.1 Rights of all migrants, regardless of status

Part III of the Convention sets out a broad series of rights belonging to all migrant workers and members of their families, irrespective of their migration status. Many of these rights restate those included in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other core human rights treaties which have been broadly ratified in all regions of the world.

The Convention also includes rights that address the specific situation of migrant workers and reinforces rights in those areas where migrant workers are especially vulnerable or likely to be exploited.[5] The inhumane living and working conditions and instances of physical and sexual abuse that migrant workers can experience are addressed by the reaffirmation of the right to life (article 9), the prohibition against cruel, inhuman or degrading treatment or punishment (article 10) and the prohibition against slavery or servitude and forced or compulsory labour (article 11).

One reason that the Convention restates rights in other treaties is that some States have implemented human rights treaties in domestic legislation using terminology that refers to "citizens and/or residents, *de jure* excluding many migrants, especially those in irregular situations".[6]

For example, articles 16 to 20 and articles 23 and 24 specify that migrant workers should have equality before the courts and tribunals of the State concerned; are entitled to proper judicial process; and are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (article 18.1). In addition, they should have access to appropriate interpreting services and to the assistance of their own consulate and must not receive any disproportionate penalties. When imposing a

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[5] *The International Convention on Migrant Workers and its Committee*; Fact Sheet No 24 (Rev. 1); OHCHR; p. 5.
[6] *Achieving Dignity: Campaigner's Handbook for the Migrants Rights Convention*; International Migrants Rights Watch Committee; 1998; see "Section III: Importance and Content of the Convention".

sentence, humanitarian considerations regarding the person's migrant status should be taken into account.

The Convention also states that migrant workers and their families have the right not to have their documents of identity confiscated or destroyed (article 21); and the right not to be subject to arbitrary or collective expulsion (article 22). These articles directly address the human rights violations commonly experienced by migrant workers in different countries. In addition, the Convention emphasizes the right of migrant workers to equality with nationals in the host country with respect to remuneration, conditions of work overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and other terms of employment (article 25); as well as the right to freely join and take part in trade unions (article 26).

Equality with nationals also extends to the right to social security benefits (article 27); the right to receive emergency medical care (article 28); and the right of access to education (article 29).

The Convention also sets out other rights of migrant workers and their families:

- to have their cultural identity respected and to maintain a cultural link with their State of origin (article 31)

- to transfer their earnings and savings, as well as their personal effects and belongings, on completion of their term of employment (article 32)

- to be informed by the States concerned about their rights arising from the Convention, as well as the conditions of their admission and their rights and obligations in those States (article 33).

2.2 Rights of migrants who are documented or in a regular situation

Part IV of the Convention sets out the specific rights of migrant workers and their families who are documented or in a regular situation. These rights are in addition to those set out in Part III, which apply to all migrant workers regardless of their migration status (article 36).

The Convention provides for the right of documented migrant workers to substantial information regarding the conditions of their admission to the country of employment, their stay and their remunerated activities (article 37).

They also have the right to be temporarily absent for reasons of family needs and obligations, without effect on their authorization to stay or work (article 38); the right to liberty of movement and freedom to choose their place residence (article 39); and the right to transfer their earnings and savings, in particular those funds necessary for the support of their families (article 47).

Under the Convention, documented migrants have the right to form associations and trade unions to promote and protect their economic, cultural and other interests (article 40); and the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State in accordance with its legislation (article 41).

In addition to the areas mentioned in Article 25, the Convention provides for equality of treatment in relation to employment and taxation and equal access to services in a broad range of areas, including educational institutions and services; vocational guidance, training and placement services; housing; social and health services; cooperatives and self-managed enterprises; and participation in cultural life (articles 43, 45, 48 and 55).

The Convention uniquely ensures that family members of a migrant worker do not find themselves in an irregular situation as a consequence of his or her death or after a divorce (article 50).

Further, depending on the specific terms of their authorisation of residence or work permits, documented migrant workers may have the right to equality of treatment in respect to protection against dismissal and unemployment benefits (article 54). In situations where migrant workers fulfil the requirements provided by applicable national legislation in their host country, they may also be entitled to access public work schemes intended to combat unemployment and access to alternative employment in the event of loss of work or termination of other remunerated activity (articles 54 and 27).

When a work contract is violated by the employer, a documented migrant worker has the right to address his or her case to the competent authorities in the State of employment (article 54(2)).

2.3 Provisions applicable to particular categories of migrant workers

Part V of the Convention sets out the rights of particular categories of migrant workers and members of their families, including frontier workers (article 58); seasonal workers (article 59); itinerant workers (article 60); project-tied workers (article 61); specified-employment workers (article 62) and self-employed workers (article 63).

2.4 Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families

Part VI of the Convention establishes a framework for the sound, equitable, humane and lawful conditions for international migration. It outlines the specific duties of countries of origin, transit and destination.

The Convention also encourages consultation and collaboration between relevant countries to address the human rights issues relevant to the labour migration process and to formulate and implement policies on migration consistent with the Convention and aimed at ensuring better living and working conditions for migrant workers and their families.

Further, the Convention notes that the responsibilities of States go beyond issues of labour needs and resources and must consider “the, social, economic, cultural and other needs of migrant workers and members of their families involved”, as well as the impact of migration on the communities concerned (article 64).

3. Responsibilities of States under the Convention

As noted by the International Migrant Rights Watch Committee[7] articles 65 and 66 of the Convention oblige States parties to maintain appropriate services for:

- the formulation and implementation of migration policies
- the exchange of information, consultation and cooperation between competent authorities of the States concerned
- the provision of appropriate information to employers and workers on policies and laws concerning migration
- the provision of adequate consular services to meet the social, cultural and other needs of migrants
- the regulation of recruitment of migrant workers by restricting it to public services or bodies of the States concerned and through private agencies and employers and their agents, subject to authorization, approval and supervision.

States parties are encouraged to cooperate to adopt measures regarding the orderly return of migrant workers and members of their families to their State of origin "when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation" (article 67).

Article 68 requires States parties to consult and collaborate to prevent and eliminate "illegal or clandestine movements and employment of migrant workers in an irregular situation" by:

- taking appropriate measures against the dissemination of misleading information relating to emigration and immigration
- taking appropriate measures to detect and eradicate illegal labour migration
- imposing sanctions on those responsible for organizing and operating such movements, as well as employers of migrant workers in an irregular situation.

If there are migrant workers and members of their families within their jurisdiction in an irregular situation, article 69(1) stipulates that States parties should take appropriate measures to ensure that the situation does not persist.

Further, article 69(2) states that if States parties consider the possibility of regularizing the situation of irregular migrant workers in accordance with national legislation and bilateral or multilateral agreements, appropriate account should be taken of the circumstances of their entry, the duration of their stay and other relevant considerations, especially those relating to their family situation.

States are also required to take necessary measures, not less favourable than those applied to their nationals, to ensure that migrant workers and members of their families are provided with working and living conditions in keeping with standards of fitness, safety, health and human dignity (article 70).

3.1. Responsibilities of States of origin and States of employment

States of origin and States of employment are required to:

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[7] *Achieving Dignity: Campaigner's Handbook for the Migrants Rights Convention*; International Migrants Rights Watch Committee; 1998; see "Section III: Importance and Content of the Convention".

- provide information[47] to migrant workers regarding their rights arising from the Convention (article 33)
- establish institutions for the purpose of taking into account the special needs, aspirations and obligations of migrant workers and enable them to be represented in these institutions (article 41)
- consider the possibility of granting exemptions to migrant workers and members of their families from customs duties and taxes on their personal and household effects and equipment required for the remunerated activity in the State of employment (article 46)
- permit and facilitate the transfer of the migrant workers' earnings and savings to their States of origin (article 47)
- consider the possibility of avoiding double taxation for migrant workers (article 48).

Additionally, the States concerned should not exert pressure on migrant workers and members of their families to relinquish or forego any of their rights arising from the Convention (article 82).

3.2 Responsibilities of States of origin

Promoting and protecting the rights of migrant workers begins in States of origin. The Convention includes clauses that seek to protect migrant workers and members of their family from the outset, including with respect to pre-departure recruiting practices. States of origin, or sending countries, have a number of specific obligations, including to:

- allow persons seeking employment abroad to leave and enter their country of origin (article 8)
- ensure that, before their departure to States of employment, documented migrant workers and members of their families are fully informed of all conditions applicable to their admission, stay and employment, as well as other requirements (article 37)
- facilitate the exercise of the right of documented migrant workers and members of their families to participate in public affairs, vote and be elected in elections in their home countries (article 41)
- provide adequate consular and other services required to meet the social, economic, cultural and other needs of their migrant workers and members of their families (article 65(2))
- regulate the recruitment of workers for overseas employment by restricting it to public services or bodies; recruitment by agencies, employers and their agents should be subject to authorization, approval and supervision (article 66)
- assist migrant workers and members of their families, including illegal migrants, to make an orderly return to their home country, including to take appropriate measures to promote adequate economic conditions for their resettlement and their social and cultural reintegration (article 67).

3.3 Responsibilities of States of employment

Protecting the rights of migrant workers and members of their families in States of employment is anchored in the long-established principle of non-discrimination, including in relation to civil and political rights, as well as economic, social and cultural rights. States of employment, or receiving countries, have a number of specific obligations, including to:

- protect the liberty and security of migrant workers and members of their families (articles 9, 10 and 11)
- give protection to migrant workers and members of their families, including those arrested or detained, against violence and other forms of harassment by private individuals, public officials, groups or institutions (articles 16 and 17)
- ensure that the working and living conditions of migrant workers are in keeping with the standards of fitness, safety, health and principles of human dignity (article 70)
- ensure that migrant workers and members of their families are not arbitrarily deprived of their property and, if their assets are to be confiscated under the laws of the State of employment, that adequate compensation is paid (article 15)
- enable migrant workers and members of their families to enjoy equal treatment with nationals of the State before the courts of law and tribunals (article 18); in relation to remuneration and conditions of work (article 25); in relation to access to education, vocational training, guidance and placement, housing and social and health services (article 43); and in relation to access to social security (article 27)
- provide children of migrant workers, including those of undocumented workers, with access to education, including preschool education, on an equal basis with nationals of the State (article 30)
- permit migrant workers and members of their families to join trade unions and associations for the protection of their economic, social, cultural and other rights (article 26)
- ensure that the identity documents, work and residence permits of migrant workers are not confiscated or destroyed by unauthorized persons and that their passports are not destroyed by anyone (article 24)
- consider the possibility of enabling family members to join the migrant worker, in order to protect the unity of the family (article 44).

3.4 Responsibilities on States parties to report

In order to monitor the implementation of the Convention, article 73 requires States parties to submit a report on the legislative, judicial, administrative and other measures that have been taken to give effect to the provisions of the Convention.

This report must be submitted one year after the State has become a party to the Convention, with further reports to be submitted every five years after that. After reviewing the State‟s reports, the Committee will provide concluding observations on the report.

More information on the treaty reporting process, including the role that NHRIs can play, is available in Chapter 11.

4. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

While the implementation of the Convention rests on its States parties, article 72 establishes the Committee on the Protection of the Rights of All Migrant Workers and

Members of Their Families to monitor "[f]or the purpose of reviewing the application of the present Convention".

The Committee consists of 14 independent experts. Members of the Committee are elected by secret ballot, with appropriate consideration given to fair geographical distribution, including both States of origin and States of employment, and to represent the world‟s main legal systems. The members serve in their own personal capacity and are appointed for a term of four years.

Given the traditional role of the ILO to protect the rights of migrant workers, article 74 of the Convention encourages close cooperation between the Committee and the ILO. Reports submitted by States parties are provided to the ILO on a consultative basis, in order to draw on that organization‟s expertise to address relevant matters raised in the reports.

4.1 Treaty reporting process

The Convention establishes a reporting procedure which requires States parties to regularly present a report on their compliance with, and implementation of, their treaty obligations.

The report is examined during a public session of the Committee, which considers the information provided by the State party and information received from other sources, including NHRIs and NGOs.[8]

Based on this process, the Committee provides its concluding observations, which cover both the positive aspects of the State‟s implementation of the Convention and areas where the State is recommended to take further action.

The treaty reporting process is intended to generate positive change on a progressive basis, with steps taken by the State to implement the recommendations of the Committee reviewed during subsequent reporting sessions.

These issues can also be considered, and recommendations for action presented, as part of the State‟s participation in the Universal Periodic Review (see Chapter 11 for more information).

4.2 Individual complaints procedure

Under Article 77, a State party of the Convention may declare that it recognizes the competence of the Committee to receive and consider complaints from, or on behalf of, individuals within that State‟s jurisdiction who claim that their rights under the Convention have been violated. The Committee may request written explanations and express its views after considering all available information. The individual communication procedure requires ten declarations by States parties to enter into force.[9]

4.3 General comments

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[8] "Committee on Migrant Workers and Implementation of the ICRMW"; Carla Edelenbos; *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009.

[9] Two States had accepted this procedure at May 2011.

The Committee, like other treaty bodies, may also develop and disseminate general comments that elaborate particular areas of concern or provide interpretative guidance on the content of particular rights within the Convention. In February 2011, the Committee adopted its first general comment on the Rights of Migrant Domestic Workers.[10]

Further information on general comments relevant to migrant workers made by other human rights treaty bodies is available in Chapter 3.

5. Myths and misconceptions about migrant workers and the Convention

1. Ratifying the Convention will create an influx of migrant workers

While the Convention protects the rights of migrant workers, it does not entitle an individual to become a migrant worker in a foreign country. Ratifying the Convention does not mean a State has an obligation to accept more migrant workers; that remains the sole decision of the State. Article 79 states that "[n]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families".

2. Migrant workers take the jobs of nationals

Migrant workers are often sought to fill sectors that are not being adequately filled by domestic workers. The Convention is actually beneficial to local workers because it ensures that basic labour rights and standards are maintained for all and, therefore, that migrant workers are not more attractive to prospective employers because of their exploitability, as is often the case where the rights of migrant workers are not properly implemented.

3. Migrant workers create unemployment

Increased numbers of workers in the population actually stimulate economic growth, creating more jobs for all.

4. Migrant workers create a drain on government resources

Documented migrant workers contribute to their host States through the payment of taxes. If migrant workers are not properly documented they will probably not be registered with the Government for tax purposes. It is in the interests of Governments to implement the Convention so that all migrant workers are properly documented and therefore contributing taxes.

5. Migrant workers create downward pressures on wages

Migrant workers, if properly documented and recognized, do not receive lower wages for the same job. They simply tend to work in lower-paid positions than the general population, giving the impression they are driving down wages.

[10] CMW/C/GC/1.

6. The Convention creates new burdens on States to provide for non-nationals

While the Convention requires migrant workers to be granted certain economic and social rights, it goes no further than existing international law.

7. The Convention creates an obligation on the State to grant all regular migrants the right to family reunification

Article 44 of the Convention merely requires States parties to take such measures "*as they deem appropriate* to facilitate the reunification of migrant workers with their spouses … as well as with their minor dependent unmarried children". This leaves the State free to determine what measures are "appropriate" and does not impose any concrete measures.

8. The rights of migrant workers are already provided for in existing international law

While the Convention reiterates many human rights standards in existing treaties, the sheer number of migrant workers throughout the world today makes the issue one deserving of a specific legal instrument, similar to other vulnerable groups such as women, children and persons with disabilities.

Key points: Chapter 2

- The Convention sets out a broad series of rights belonging to all migrant workers and members of their families, irrespective of their migration status. Many of these rights restate those included in the core human rights treaties.

- The Convention includes protections that respond to the specific situations that migrant workers and members of their families can experience, especially those which can leave them vulnerable to exploitation or human rights violations.

- Documented migrant workers and members of their families have specific rights under the Convention, in addition to those which apply to all migrant workers.

- States of origin and destination have specific obligations to respect, protect and fulfil the rights of migrant workers and members of their families.

- The Convention establishes a treaty body to review reports prepared by States on their compliance with the Convention and to make recommendations to encourage further action by States. Individuals will be able bring complaints of human rights violations to the treaty body once a sufficient number of States have accepted this procedure.

Further reading

- *Achieving Dignity: Campaigner's Handbook for the Migrants Rights Convention*; International Migrants Rights Watch Committee; 1998
- *Guide on Ratification: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*; International Steering Committee for the Global Campaign for Ratification of the Convention on Rights of Migrants; 2010
- *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009
- *Special Issue: U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;* International Migration Review 1991 (Vol. 25, No. 94); Center for Migration Studies of New York
- *Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties: A Do-it-yourself Kit;* Mariette Grange, International Catholic Migration Commission; 2006
- *The International Convention on Migrant Workers and its Committee*: Fact Sheet No. 24 (Rev.1); OHCHR; 2005