The international legal framework on the rights of migrant workers and members of their families

Key questions

- How are migrant workers and members of their families defined?
- What human rights apply to migrant workers and members of their families?
- What obligations do States have towards migrant workers and members of their families?

1. Introduction

Migrant workers are a vital part of the global economy. The promise of decent working and living conditions drives the international movement of workers, both men and women, to seek out opportunities in other countries.

Labour migration can offer valuable opportunities for many people who are unable to secure adequate work in their own countries or who have little choice but to leave their country. It can also enhance the cultural, economic, social, civil and political structures in both countries of origin and destination.

However, the human costs of labour migration can outweigh the benefits, especially when the rights of migrant workers are not protected. These human costs continue to be a significant concern within and between countries.

Migrant workers are vulnerable to abuse by employers and government officials, among others, in both sending and receiving countries. Abuses of labour and human rights range from discrimination and hazardous working conditions, to extortion, arbitrary detention, deportation and violence, including rape and murder.

Women migrant workers are particularly vulnerable to human rights violations, They face multiple levels of discrimination and a general lack of protections in place in the jobs available to them, such as domestic work.

Factors that contribute to systemic patterns of human rights violations against migrant workers, and which can restrict access to effective redress for victims, include negative public attitudes, language barriers, restrictive immigration regimes, poor legal protection, lack of awareness, weak rule of law and impunity.

While the human rights issues that affect the growing number of migrant workers are pressing, there is a general lack of knowledge of relevant international legal standards and, in many instances, a lack of political will or institutional capacity to

apply these standards to laws, policy and practice. The international standards most relevant to migrant workers are among the least understood of any of the core human rights treaties or ILO conventions.

This chapter sets out the human rights standards that apply to migrant workers and members of their families.

2. Defining migrant workers and their families

The most comprehensive definition of a migrant worker is provided in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families ("the Convention on Migrant Workers").

Article 2.1 of the Convention on Migrant Workers defines a migrant worker:

> … as a person who is to be engaged, is engaged or has been engaged in a renumerated activity in a State of which he or she is not a national.

Article 2 also distinguishes between particular categories of migrant. These include "frontier worker", "seasonal worker", "project-tied worker", "itinerant worker", "seafarer" and "self-employed worker"; categories which have been excluded from other international standards developed in the past, including ILO conventions specific to the rights of migrant workers. Part V of the Convention sets out the rights that apply to these particular categories of migrant workers.

In particular, the definition of "self-employed worker" "recognizes the large number of migrant workers who operate a small family business by themselves or with other family members."[1] These definitions apply across all regions of the world.

In addition, the Convention recognizes migrant workers as social entities and extends recognition of rights to members of their families. Article 4 provides the following definition:

> 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.

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[1] *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; p. 17.

3. What human rights apply to migrant workers?

The protections that exist in international law for migrant workers and members of their families include:

- fundamental human rights that apply to all migrants, regardless of their status, which are set out in the core international human rights treaties and under customary international law
- international labour conventions and standards that provide basic protections for treatment and conditions at work, which apply to all workers regardless of their migration status.

In general, States are obliged to ensure that migrants receive comparable treatment and protection as nationals of the State.

3.1 The international human rights framework

The Universal Declaration of Human Rights has become an international "standard of achievement for all peoples and nations"[2] and is the foundation for the international human rights framework that has developed since 1948.

Strictly speaking, the Declaration as a whole is not a legally binding instrument. However many of the rights within the Declaration have acquired binding status either through their recognition within the framework of customary international law or through their incorporation into subsequent legally binding treaties.

Today, the international human rights framework consists of the Declaration and nine core human rights treaties:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- International Convention for the Protection of All Persons from Enforced Disappearance
- Convention on the Rights of Persons with Disabilities.

[2] Preamble to the Universal Declaration of Human Rights, 1948.

The principle of **non-discrimination** is central to the enjoyment of human rights and applies to everyone, regardless of their status. According to the Human Rights Committee, "discrimination" under the International Covenant on Civil and Political Rights involves:

> ... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[3]

The Committee on Economic, Social and Cultural Rights has also defined discrimination in similarly broad terms.[4]

Accordingly, article 2(1) of the International Covenant on Civil and Political Rights provides that States must respect and ensure civil and political rights without discrimination on any grounds. The Human Rights Committee has further confirmed that the guarantee of non-discrimination applies to nationals and non-nationals alike.[5]

Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination of any kind, including on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status.

The other treaties uphold non-discrimination in relation to specific human rights concerns (such as racial discrimination, enforced "disappearances" and torture and ill-treatment) and the vulnerabilities of particular groups of people (including women, children and people with disabilities).

The human rights protections that these treaties contain also belong to migrant workers and members of their families. This is particularly important given the current low number of States that have ratified the Convention on Migrant Workers.

3.2 Other human rights treaties relevant to migrant workers

There are a range of other human instruments – including declarations, principles and guidelines – that are relevant to the treatment of migrant workers and can be used to promote and protect their human rights, including:[6]

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[3] General Comment No. 18; Human Rights Committee; 1989; para. 7.

[4] General Comment No. 20; Committee on Economic, Social and Cultural Rights; 2009; para. 13.

[5] General Comment No. 15; Human Rights Committee; 1986; and General Comment No. 18; Human Rights Committee; 1989.

[6] "Migration and Human Rights – Other International Standards"; OHCHR; see: http://www2.ohchr.org/english/issues/migration/taskforce/standards.htm.

- United Nations Convention against Transnational Organized Crime and its Protocols:
    - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
    - Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime
- Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery
- Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live[7]
- Durban Declaration and Programme of Action[8]
- Recommended Principles and Guidelines on Human Rights and Human Trafficking- Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council[9]
- Resolution of the UN Commission on Human Rights on the Human Rights of Migrants (2005)[10]
- Resolution of the UN General Assembly on Protection of Migrants (2004).[11]

3.3 Responsibilities to nationals and non-nationals

States may exercise their national sovereignty to decide who to admit into their territory. However, once an individual has entered a country, the Government is responsible for the protection of his or her rights. All persons regardless of their nationality, race, legal or other status are entitled to human rights and basic labour protections.

Some of the human rights treaties, however, do make distinctions between the rights of nationals and non-nationals and impose different obligations on States in relation to nationals and non-nationals. This can also extend to a State having different obligations towards migrants who are lawfully present in the State and those who are unlawfully present. For example, article 25 of the International Covenant on Civil and Political Rights (the right to vote) applies only to citizens. Article 12 (the right to freedom of movement and choice of residence) applies only to nationals and migrants who are lawfully present in the State.[12]

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[7] A/RES/40/144.

[8] Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance; Durban, South Africa; 2001.

[9] E/2002/68/Add.1.

[10] E/CN.4/RES/2005/47.

[11] A/RES/59/194.

[12] *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*; International Council on Human Rights Policy; 2010; p. 51. However, as the Human Rights Committee has noted, domestic

However, differential treatment on the basis of nationality or migration must not be "disproportionate, arbitrary or discriminatory".[13] Migration status alone will not justify any limit on basic human rights and labour standards.

The Human Rights Committee, the UN treaty body established under the International Covenant on Civil and Political Rights, has set out **conditions for differential treatment**, stating that it is permissible only if "the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".[14]
The Committee on the Elimination of Racial Discrimination has also set out that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim".[15]

The rights provided in the International Covenant on Economic, Social and Cultural Rights extend to all persons, without discrimination, regardless of legal status or documentation.[16] These include the right to work (article 6), the right to just and favourable conditions of work (article 7), the right to establish trade unions (article 8) and the right to an adequate standard of living, including adequate food, clothing, housing and the continuous improvement of living conditions (article 11).

The Human Rights Committee has further emphasized that temporary "derogation"[17] from obligations are only permissible in exceptional circumstances (that is, during

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law restrictions on the "entry of aliens" must be in line with States" international obligations and any restrictions on the right under article 12 (3) should be consistent with the rest of the Covenant rights. See: General Comment No. 27; 1999; paras. 4 and 11.

[13] *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*; International Council on Human Rights Policy; 2010; p. 51.

[14] General Comment No. 18; Human Rights Committee; 1989; para. 13.

[15] General Recommendation No. 30; Committee on the Elimination of Racial Discrimination; 2004; para. 4.

[16] General Comment No. 20 (article 2, para. 2); Committee on Economic, Social and Cultural Rights; 2009; para. 30.

[17] Article 4 of the International Covenant on Civil and Political Rights sets out the limited circumstances in which States may temporarily "derogate" from or limit the application of Covenant obligations within tightly defined conditions. It further prohibits any derogation from articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 in the Covenant. The Human Rights Committee"s General Comment No. 29 (2001) on article 4 further provides some foundational principles regarding derogation from human rights treaties and indicates that the provisions explicitly listed in article 4 are not exhaustive; obligations may also be determined to be non-derogable on the basis of humanitarian law and the status of some rights in international law as "peremptory norms".

times of public emergency) and must not "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".[18]

Further, several civil and political rights can never be limited and do not allow for differential treatment between nationals and non-nationals. These include the following rights identified as **non-derogable** under the International Covenant on Civil and Political Rights:

- the right to life (article 6)
- freedom from torture or cruel, inhuman or degrading treatment (article 7)
- freedom from slavery, servitude and forced labour (article 8)
- the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (article 11)
- the right to equality before the law (article 16)
- freedom of thought, conscience and religion (article 18).

3.4 The Convention on Migrant Workers

The most comprehensive human rights treaty on the rights of migrant workers is the Convention on Migrant Workers, which was adopted in 1990 and entered into force in July 2003. It responds to the particular situations and vulnerabilities of migrant workers involved in international labour migration.

In general, the Convention does not create new rights but rather restates many of the rights found in the other human rights treaties and labour conventions. Importantly, however, it identifies a set of core rights that apply to all migrant workers, regardless of their migration status.

For example, the Convention specifies the following **non-derogable rights**:

- the right to life (article 9)
- protection from torture or cruel, inhuman or degrading treatment or punishment (article 10)
- freedom from slavery, servitude or forced or compulsory labour (article 11)
- freedom of thought, conscience and religion (article 12)
- the right to liberty and personal security and protection against arbitrary detention (article 16)
- the right to procedural guarantees (article 18).

These rights apply to both **documented and non-documented migrant workers** and members of their families.[19]

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[18] General Comment No. 29 (2001); paras. 2 and 8.

[19] Articles under Part III of the Convention, (articles 8 to 35) apply to "all migrant workers and their families" as the title of that Part indicates. For further discussion of these articles, see: *The International Convention on Migrant Workers and its Committee*; Fact Sheet No. 24 (Rev 1), OHCHR; 2005; p.

Article 5 of the Convention sets out the definition of documented and non-documented migrant workers and states that "migrant workers and members of their families":

(a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;
(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

The Convention provides additional rights to documented migrant workers and members of their families, such as the right to liberty of movement in the territory (article 39) and equal access to education, vocational guidance and training services, housing, social and health services and cultural rights (articles 43 and 45).

In addition, the Convention identifies the specific rights of migrant workers at different stages of the labour migration process and also identifies the responsibilities of Governments in countries of origin, transit and destination (or employment).
More detailed information about the Convention on Migrant Workers is available in Chapter 2.

4 ILO conventions

In addition to the international human rights treaties, the ILO has established a number of conventions that outline and protect the labour rights of migrant workers (see Chapter 4 for more information).

In particular, the ILO has approved two major conventions specifically on the rights of migrant workers:

- Migration for Employment Convention, 1949 (C-97)
- Migrant Workers (Supplementary Provisions) Convention, 1975 (C-143).

These conventions are supplemented by two (non-binding) ILO recommendations that provide further guidance on how the rights of migrant workers can be protected in practice:

- Migration for Employment Recommendation (Revised), 1949 (R-86)
- Migrant Workers Recommendation, 1975 (R-151).

5; and the *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; p. 17.

The **Migration for Employment Convention** deals with international migration for employment and focuses on the recruitment of migrants and conditions of work in the host country. Its major provisions include non-discrimination in wages, union activities and benefits and social security (article 6). The Annexes deal with private and public recruitment, stressing that there should be a no-fee public option, the need to provide contracts for prospective migrant workers and that "any person who promotes clandestine or illegal immigration shall be subject to appropriate penalties" (Annex II, article 13).
The **Migrant Workers (Supplementary Provisions) Convention** is the first treaty to deal directly with the rights of migrants in irregular situations. It addresses in detail issues in relation to "migrations in abusive conditions" and the "promotion of equality of opportunity and treatment of migrant workers". Article 2 requires each member State to "seek to determine whether there are illegally employed migrant workers on its territory" and article 6 calls for penalties against traffickers and for the illegal employment of migrant workers. Article 9 sets out requirements for "equality of treatment" in wages, social security and other benefits arising from the past employment of undocumented migrant workers.

There are a number of other ILO conventions that also have great relevance for migrant workers. For example, the Domestic Workers Convention, 2011 (C-189) is the most recent ILO convention and is particularly relevant as many domestic workers are migrant women.

5 International standards and the obligations of States

5.1 General obligations

The UN Charter, the International Bill of Rights[20] and the Vienna Declaration on Human Rights impose on States the responsibility to cooperate in the realization of all human rights.

In addition, there is a broadly-accepted understanding that States have the obligation to **respect** rights and refrain from interfering with their enjoyment; to **protect** rights against violations, including through ensuring adequate and accessible avenues of redress when rights are violated; and to **fulfil** these rights by taking positive action, including through appropriate legislative and administrative action, policies and the allocation of resources.[21]

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[20] The International Bill of Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its two Optional Protocols.

[21] "What are human rights"; OHCHR; see: http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx.

5.2 Specific obligations under human rights treaties

Human rights treaties only bind States that are parties to those treaties, unless particular provisions have attained the status of customary international law.

When ratifying a human rights treaty, States parties accept certain responsibilities, including undertaking to review and amend domestic laws and policies to ensure they comply with the provisions of the treaty.

States also agree to provide an initial report, and subsequent periodic reports, to the treaty body established to monitor implementation of the treaty.

Detailed guidance on the content of particular rights and the specific obligations they impose, including minimum core obligations, are contained in "general comments" (or "general recommendations") developed by the different treaty bodies.

Most human rights treaties also establish a mechanism that enables individuals to bring complaints about human rights violations. Complaints may be brought only against States that have recognized the competence of the treaty body to consider complaints from individuals. Depending on the treaty concerned, this will occur either through the State becoming a party to an Optional Protocol or through making a declaration under the relevant article of the treaty.

These complaints mechanisms have various rules of procedure but generally require that all domestic remedies be exhausted before a complaint is accepted by the treaty body. While not legally binding, the State has a good faith obligation to implement the treaty body‟s findings and grant appropriate remedies.

It is important to note that, when ratifying human rights treaties, States can and often do enter "reservations" that limit or modify the applicability of certain provisions of the treaty.[22]

More information on the treaty bodies and other international human rights mechanisms is included in Chapter 11.

5.3 Specific obligations under ILO conventions

The ILO recognizes that there are three basic stages in the labour migration process during which the rights of migrants must be protected: the pre-departure stage; the post-departure and work stage; and the return stage.[23]

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[22] "What are human rights"; OHCHR; see: http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx.

[23] *Protecting the Rights of Migrant Workers: A Shared Responsibility*; ILO; 2009; p. 23.

Countries of origin and destination have differing responsibilities to protect the rights of migrant workers at each of these stages. This reflects the different events that take place before and after departure, with greater responsibility resting on countries of origin in the pre-departure and return stage, and greater responsibility resting on the destination countries in the post-departure and work stage. It also acknowledges the reality that countries have the ability to exercise more supervision within their own borders.

However, the ILO also recognizes the importance of "shared responsibility" through the "supervision and regulation of international labour migration and engagement in international cooperation in the interest of promoting and protecting the rights of migrant workers".[24]

Key points: Chapter 1

- Under international law, States have an obligation to respect, protect and fulfil the rights of migrant workers and members of their families. This includes States that are countries of origin, transit and destination for migrant workers.
- The principle of non-discrimination is central to the enjoyment of human rights and applies to everyone, regardless of their status.
- In general, States are obliged to grant migrants the same protection as nationals. Only in exceptional circumstances, and within tightly defined conditions, may differential treatment be justified. However, some human rights treaties do make distinctions in relation to the rights of nationals and non-nationals, as well as the rights of documented and undocumented migrants.

Further reading

International Labour Migration: A Rights-based Approach; ILO; 2010
Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence; International Council on Human Rights Policy; 2010
Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment; Ryszard Cholewinski; 1997
Migration and International Human Rights Law; Practitioner‟s Guide No. 6; International Commission of Jurists; 2011
Protecting the Rights of Migrant Workers: A Shared Responsibility; ILO; 2009

[24] Ibid; p. 2.