

# GUIDE ON RATIFICATION



## *INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES*



THE INTERNATIONAL STEERING COMMITTEE FOR THE CAMPAIGN  
FOR RATIFICATION OF THE MIGRANTS RIGHTS CONVENTION

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# GUIDE ON RATIFICATION OF THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (ICRMW)

Prepared by

THE INTERNATIONAL STEERING COMMITTEE FOR THE CAMPAIGN FOR RATIFICATION OF THE MIGRANTS RIGHTS CONVENTION



The Steering Committee is a network among international and regional civil society organisations and concerned intergovernmental organisations committed to promote respect for migrants' human rights and dignity.

Its purposes are:

- To advocate for the universal ratification of the 1990 UN Convention for the protection of the rights of all migrant workers and members of their families
- To place the Convention in the context of advancing human rights
- To project a broad profile of support for the Convention and the Global campaign
- To facilitate cooperation and information sharing among different actors in the Global Campaign

Activities include information sharing, raising awareness and promoting ratification of the 1990 Convention through coordinated strategies, encouraging and mobilizing constituent activities of each member organisation, producing and circulating campaign materials, promoting cooperation among international and national campaign actors.

Participation reflects concerned UN and intergovernmental organisations, international trade union bodies, and civil society migrant, human rights, and faith-based organisations. While membership identification is by organization, Steering Committee activities, products and statements are determined by collective agreement of individuals participating; they do not necessarily represent participating organizations. A list of current participants in the Steering Committee and respective organizations appears on the back cover of this guide.

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## **CHAPTER I:**

### **THE CHALLENGES OF INTERNATIONAL MIGRATION AND THE IMPORTANCE OF RELATED CONVENTIONS**

#### **1. Overview**

International migration has become one of the fundamental features of a globalising world, one of the major opportunities for development and a challenge for governance and social cohesion.

Today, some 200 million people live outside their countries of birth or nationality. That would be the fifth most populous country in the world if all of the people were together in the territory of one State. Indeed, migration impacts on nearly all countries around the world, either as origin, transit or destination countries, and many countries are all three of these.

Migrants are first and foremost human beings, unequivocally the holders of universal human rights, whose rights, dignity and security require specific and special protection. Indeed, because they are outside the legal protection of their countries of nationality, international migrants can be particularly vulnerable to abuse and exploitation.<sup>1</sup> Legal and other forms of protection to ensure respect of human rights and decent work for migrants are not adequately established in many destination countries. Many governments simply do not have in place the adequate legislation, policies and structures to manage regular migration, reduce irregular migration, ensure decent work for migrant workers, and reinforce social cohesion in today's context of increasing cross-border mobility. Migrants are too often seen as exploitable and expendable, a source of cheap, docile and flexible labour, constrained to "3-D" work or working conditions: dirty, dangerous and degrading, that nationals are unavailable for and/or unwilling to accept.

As a result, basic human rights of migrants are too easily violated or ignored.

And yet, migration has long contributed to development and economic and social well-being in both destination and origin countries. In this age of globalisation, inevitable economic, technological and demographic trends have combined to make labour mobility an essential component of development and prosperity in all regions of the world. Today, the labour and skills of foreign workers are needed by low, middle and high-income countries alike.

In fact, migration has become a key feature in meeting economic, labour market and productivity challenges in a globalised economy. Migration serves as an instrument to adjust the skills, age and sectoral composition of national and regional labour markets. As seen in an increasing number of countries and regions in recent years, migration provides responses to changing needs for skills and personnel resulting from technological advances, changes in market conditions and industrial transformations. In countries of aging populations, migration replenishes declining work forces while injecting younger workers.

The International Labour Organization (ILO) estimates that some 90 million migrants – persons living outside their country of origin for three months or more – are economically

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<sup>1</sup> Patrick Taran. 2007. "Clashing Worlds: Imperative for a Rights-Based Approach to Labour Migration in the Age of Globalization" in *Globalization, Migration and Human Rights: International Law under Review*, Volume II (Bruylant, Bruxelles).

active, engaged in the world of work;<sup>2</sup> this represents nearly all of the working age migrant adults, taking into account that the global migrant population includes children and older dependents. Foreign-born workers commonly represent 10 percent of work forces in Western Europe, 15 percent in North America, and even higher proportions in some countries in Africa and the Middle East.

Consistently over the past 50 years, nearly as many women as men have migrated. In 2005, migrant women constituted 49.6 per cent of all migrants. That represents 94.5 million women,<sup>3</sup> up from 47 per cent in 1960.<sup>4</sup> While most women historically migrated as dependents of working husbands or other relatives or family reunification, recent decades have seen an increase in women—married and unmarried—who migrate independently, and as main income-earners instead of following or rejoining male relatives. Unfortunately, women, due to their increased dual vulnerability (as migrants and women) are still disproportionately affected by a variety of risks arising from their mobility.<sup>5</sup>

Economic data and research evidence increasingly reinforce the notion that protection of human and labour rights of all migrants enhances the development and productivity impact of migration.<sup>6</sup> Accordingly, denial of rights and abuse carry significant costs not only to migrants and their home countries, but also to host or employment countries. Moreover, the violation of the rights of migrants in any society contributes to social disintegration and declining respect for the rule of law.

For example, abuse and exploitation of migrant workers denies them decent work and earnings, reducing their contributions to host societies as well as their remittances that assist home countries. Discrimination and social exclusion against migrants destabilise social cohesion, thus ultimately jeopardising stability and democratic governance.

Given the tensions between economic pressures to exploit migrants and the need to protect them, as a matter of rights and to ensure social cohesion, a strong role is required of government to regulate migration and reconcile conflicting interests. Governing migration thus requires formulation and implementation of a deliberate, comprehensive and carefully crafted policy on migration.

Migration policies and practices can only be viable and effective when they are based on a firm foundation of legal norms, and thus operate under the rule of law. International standards set parameters both for the protection of migrant workers and their families as well as for the preservation of States' interests.<sup>7</sup> They provide a framework for national legislation, policy and practice as well as for cooperation within States and between States at different ends of the migration process.

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<sup>2</sup> ILO. Forthcoming. *International Migration: A Rights Based Perspective* (Geneva).

<sup>3</sup> UN Population Division. 2005. Trends in Total Migrant Stock: The 2005 Revision (Department of Economic and Social Affairs). Available at: <http://esa.un.org/migration>; IOM. 2008. *World Migration 2008. Managing Labour Mobility in the Evolving Global Economy* (Geneva).

<sup>4</sup> Ibid; UN-INSTRAW. 2007. *Feminization of Migration 2007*, Working Paper 1. Available at: <http://www.un-instraw.org/en/grd/facts-and-figures/facts-and-figures-feminization.html> .

<sup>5</sup> Nicola Piper; Margaret Satterthwaite. 2007. "Migrant Women" in Ryszard Cholewinski et al: *International Migration Law: Developing Paradigms and Key Challenges* (T.M.C Asser Press)

<sup>6</sup> Ryszard Cholewinski. 2005. *Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment*. Available at: <http://www2.ohchr.org/english/bodies/cmw/mwdiscussion.htm> .

<sup>7</sup> Ryszard Cholewinski et al (eds). 2007. *International Migration Law: Developing Paradigms and Key Challenges* (T.M.C Asser Press); Richard Perruchoud & Katarina Tomolova. 2007. *Compendium of International Migration Law Instruments* (T.M.C. Asser Press).

## **2. The Conventions pertaining to migrant workers**

Three complementary universal instruments provide the necessary legal framework not only for protection of migrants' human rights, including labour rights, but also for national migration policy and international cooperation to regulate migration. These are the:

- **1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)**
- **ILO Migration for Employment Convention, 1949 (C-97)**
- **ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (C-143)**

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) explicitly applies the rights elaborated in the International Bill of Rights (Universal Declaration on Human Rights and the 1966 International Covenants on Political and Civil Rights and on Economic, Social and Cultural Rights) to the specific situation of migrant workers and members of their families. Other instruments have similarly done so for other groups (e.g., women, children persons with disabilities, indigenous peoples). This makes the ICRMW a comprehensive instrument of legal guidance for States in the formulation of migration policy. The complementary ILO Conventions on migration for employment (C-97 and C-143) provide specific standards regarding migrant worker employment and occupation.

The fundamental importance of the ICRMW and the complementary ILO Conventions is that they provide a comprehensive normative framework for defining national and international migration policy under the rule of law. They outline a rights-based approach, but are far more than human rights treaties. They set parameters for a wide range of national policy and regulatory concerns, and they delineate the agenda for inter-State consultation and cooperation on most pertinent issues, including exchange of information, cooperation in combating irregular migration, smuggling of migrants and trafficking in persons, pre-departure orientation for migrants, orderly return and reintegration in home countries, and others.

The ICRMW draws in part from concepts and language in the two ILO Conventions outlined below.<sup>8</sup> It extends considerably the legal framework for migration, treatment of migrants, and prevention of exploitation and irregular migration. It covers the entire migration process of migrant workers and members of their families: preparation, recruitment, departure and transit; stay in States of employment; and their potential return to and reintegration in the home country or States of residence.

The ICRMW also provides an updated definition of migrant workers, including different categories of migrant workers, based on engagement in a "remunerated activity," thus addressing migrants in informal sector activity as well as formal sectors. The norms presented in this Convention are generally applicable to men and women migrant workers in their own right. While specific risks and vulnerabilities of women migrants are not delineated, it is important for legislation adopted in conformity with this Convention to ensure that the rights enumerated in the Convention are in fact, both clearly applicable and as fully protected for women migrants and the members of their families as they are for the men.

The Convention delineates certain basic human rights –defined in the Universal Declaration of Human Rights and other core international human rights treaties—that apply to all migrant workers and members of their families, regardless of nationality and legal status. It further elaborates on rights applying specifically to regular migrants and members of their families in

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<sup>8</sup> For a history of the Convention, see Graziano Battistella. 2009. "Migration and human rights: the uneasy but essential relationship" in Paul de Guchteneire, Antoine Pécoud and Ryszard Cholewinski (eds.) *Migration and human rights. The United Nations Convention on Migrant Workers' Rights*, (Cambridge University Press and Unesco Publishing).

social and civil spheres, recognising that migrant workers are human beings with roles and responsibilities beyond the labour and economic context.

At the same time, the ICRMW, in Article 79, includes explicit language safeguarding the prerogative of States to determine who may enter, remain, and/or work in their territories.

The content of the Convention is summarised in more detail in Chapter 3 of this booklet.

Regarding cooperation among States, the three Conventions provide essential guidelines for international cooperation in order to promote lawful, equitable and humane conditions of migration, and underscore that protection of rights of migrants is a shared responsibility. Specific guidance is provided in Part VI of the ICRMW regarding international inter-State consultation and cooperation on international migration in areas of exchange of information, providing information to migrants, cooperation on recruitment operations, orderly return of migrant workers and members of their families, as well as on preventing and eliminating irregular movements and employment of irregular migrant workers.

The earlier ILO Migration for Employment Convention (No. 97) provides the foundations for equal treatment between nationals and regular migrants in recruitment procedures, living and working conditions, and access to justice, tax and social security. It sets out details for contract conditions, participation of migrants in job training or promotion, provisions for family reunification, and appeals against unjustified termination of employment or expulsion, as well as other measures to regulate the entire migration process.

The complementary ILO Migrant Workers Convention (No. 143) provides specific guidance regarding treatment of irregular migration and facilitating integration of migrants in host societies. Article 1 establishes the obligation of ratifying States to “respect the basic human rights of all migrant workers,” independent of their legal situation in the host State. Its Part II details standards for integration of long term migrant workers.

### **3. Why are these Conventions significant?**

The importance of these international instruments is highlighted by seven points:

- 1) The three Conventions provide a comprehensive rights-based definition and legal basis for national policy and practice regarding international migrant workers and their family members.
- 2) They recognise that migrant workers and family members, being non-nationals residing in states of employment or in transit, may be inadequately protected; their rights may not be addressed by the national legislation of host states or by their own countries of origin. Therefore, they provide common minimum norms for national legislation.
- 3) These Conventions thus serve as tools to encourage States to establish or improve national legislation in harmony with international standards.
- 4) These instruments go well beyond providing a human rights framework. Numerous provisions in each add up to a comprehensive agenda for national policy covering many major aspects of governing labour migration.
- 5) The three Conventions also define a clear agenda for consultation and cooperation among States on labour migration policy formulation, exchange of information, providing information to migrants, orderly return and reintegration, etc.
- 6) These Conventions provide explicit measures to prevent and eliminate the exploitation of migrant workers and members of their families, including an end to their unauthorised or clandestine movements and to irregular or undocumented situations.

- 7) These instruments reflect evolution of legal standards over the last half century that progressively extended recognition of certain basic rights to all migrant workers; further rights having been recognised specifically for authorised migrant workers and members of their families, notably equality of treatment with nationals of states of employment in a number of areas. The Conventions reflect the anticipation by its drafters that the increasing international mobility of workers requires explicit legal regulation to ensure the protection of workers and their families not covered as citizens in their countries of employment, and that international cooperation and accountability among States need to be encouraged and focused by a common normative framework.

Entry into force of the ICRMW in 2003 and the growing number of ratifications allow it to be cited as an authoritative standard. In practice, this has already made it an instrument of reference for States parties and non-ratifying countries, including those that have stated explicitly that they do not wish to ratify it.

#### **4. Twelve reasons to ratify these Conventions**

- 1) To put in place the legal foundation essential for national migration policy to regulate labour migration and ensure social cohesion.
- 2) To uphold and strengthen the rule of law by ensuring that legal norms define the basis of labour migration policy, its implementation, and its supervision.
- 3) To contribute to ensuring that legal parameters define treatment of all persons on the territory of a country by setting the extent and limits of human rights of migrant workers and members of their families.
- 4) To signal that origin countries demand respect for the human rights of their nationals abroad and are accountable for the same standards as destination countries.
- 5) To reinforce the sovereign exercise of a State's prerogative to determine labour migration policy by affirming conformity with universal legal and ethical norms.
- 6) To obtain public support for and compliance with labour migration policy and practice by demonstrating legal soundness and conformity with internationally accepted principles of social justice and human rights.
- 7) To strengthen social cohesion by establishing that all persons must be treated with respect by virtue of legal recognition and protection of their rights.
- 8) To explicitly discourage the 'commodification' and consequent abuse of migrant workers by legally asserting their human rights.
- 9) To reduce irregular migration by eliminating incentives for labour exploitation, work in abusive conditions and unauthorised employment that fuel trafficking in persons and smuggling of migrants.
- 10) To facilitate the establishment of effective national policy by calling on advisory services as well as good practice examples provided by the relevant standards-based international organisations.
- 11) To obtain clear guidance for bilateral and multilateral cooperation for lawful, humane, and equitable labour migration.
- 12) To obtain international guidance on implementation of legal norms through the reporting obligations and periodic review by independent expert bodies.

#### **5. The record to date**

82 States have ratified or acceded to at least one of these three Conventions on migration and migrant workers; a number of States have ratified two of them and several have ratified all three complementary instruments (see Annex).

As of 28 December 2009, the ICRMW has 42 accessions or ratifications;<sup>9</sup> there are 49 for ILO C-97 and 23 for ILO C-143. Consequent good practice is that most of the ratifying countries have elaborated and implemented national policy and practice largely in accordance with these standards; practice verified by the periodic reports to and comments by the respective treaty supervisory bodies, the ILO Committee of Experts on the Application of Conventions and Recommendations and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Another 16 States have signed the ICRMW and may be proceeding to its ratification;<sup>10</sup> signature already signals a general disposition to compliance.

Indeed, all of these and a number of other countries have adopted national legislation and practices on migrant rights and labour migration drawing on the norms elaborated in the three Conventions.

## **6. Purpose of this guide**

This brief guide is intended to encourage adoption of the standards contained in the ICRMW and the two complementary ILO Conventions on migration for employment, preferably by ratification, and their incorporation into national legislation.

Following this introduction, Chapter II of the guide summarises what these international standards are and how they are elaborated. Chapter III offers a summary of the specific content of the ICRMW. Finally, Chapter IV discusses the process of ratification, related “pro” and “con” arguments, and the roles and possible actions of different actors in promoting adoption of this Convention.

It is anticipated that this information can contribute in particular to utilising these Conventions as references and guidance to shape the content of national policy on migrant rights and labour migration, both in devising an explicit national policy statement and/or plan of action on migration, and in shaping relevant enabling legislation, as well as for enhancing international dialogue and cooperation among countries.

This guide can also serve as an awareness-raising tool for public officials and other opinion leaders, not just to promote adoption of the Conventions but also to encourage them to make accurate and positive portrayals and references to migrant workers and labour migration.

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<sup>9</sup> As of December 2009, the 42 States Parties to the ICRMW are Albania, Algeria, Argentina, Azerbaijan, Belize, Bolivia, Bosnia-Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Honduras, Jamaica, Kyrgyzstan, Lesotho, Libyan Arab Jamahiriya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Senegal, Seychelles, Sri Lanka, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Uganda and Uruguay.

<sup>10</sup> As of December 2009, the 16 States that have signed (but not yet ratified) the Convention are Bangladesh, Benin, Cambodia, Cameroon, Comoros, Congo, Gabon, Guinea-Bissau, Guyana, Indonesia, Liberia, Montenegro, Sao Tome and Principe, Serbia, Sierra Leone and Togo.

## **CHAPTER II:**

### **INTERNATIONAL STANDARDS: WHAT THEY ARE AND HOW THEY ARE CREATED**

The central notion of human rights is "the implicit assertion that certain principles are true and valid for *all* peoples, in *all* societies, under *all* conditions of economic, political, ethnic and cultural life. Further, human rights implies that these principles are somehow present in the very fact of our common humanity..."<sup>11</sup> The notion places on individuals, every organ of society, and especially the State, responsibility for respecting and protecting these principles with regard to each and every human being.

This notion recognises a fundamental relationship between individual rights and society. As the Universal Declaration of Human Rights begins, "...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

Human rights standards are often laid out in declarations and proclamations. Declarations and proclamations are statements identifying and defining human rights. Important statements on both universal and very specific human rights have been made by the United Nations General Assembly, international intergovernmental conferences, and regional bodies. While such instruments are normative they generally have no legal effect in and of themselves, other than a few important exceptions.<sup>12</sup> Human rights standards are also presented however, in conventions and covenants which, unlike declarations and proclamations, are normative instruments elaborating standards that are legally binding upon the States that ratify or accede to those instruments.

All of these types of standard setting documents are commonly referred to as human rights "instruments," statements of the minimum legal principles upon which States agree. In short, they are the basic standards with which States should comply. In some countries, international human rights treaties are directly applicable by the national courts; in others, they need to be incorporated into legislation before they can be directly applied. Whatever system a country may have, the international norms form the basis for national legislation and policy, assist the judiciary in developing national application of human rights standards in individual cases and provide direction for society as a whole. Some treaties contain specific legal definitions which can be copied into national legislation. It is important to remember that the obligation to abide by international treaties transcends changes in government and thus provides the most stable protection against human rights violations, even more so than national legislation.

There is no single comprehensive instrument at the international level governing the migration process, or indeed protecting the rights of all persons involved in migration. On the contrary, rules governing migration are found in a number of instruments disseminated in different branches of international law. Among them, human rights law may be used as the broadest basis for the norms and sources protecting persons involved in migration. In fact, not only can human rights law be considered to be the core body of norms protective of persons involved in migration, it also operates as a link between different relevant branches of international law.<sup>13</sup>

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<sup>11</sup> Max L. Stackhouse. 1984. *Creeds, Society and Human Rights: A Study in Three Cultures* (Grand Rapids, MI: William B. Eerdmans Publishing).

<sup>12</sup> An important exception is the Universal Declaration on Human Rights: many of its articles are now accepted as constituting customary international law.

<sup>13</sup> Ryszard Cholewinski. 2007. *International Migration Law: Developing Paradigms and Key Challenges*, op. cit.

The development of International Labour Standards, a complementary body of international law covering human rights in the world of work, takes place under auspices of the International Labour Organization (ILO), a specialised agency of the United Nations. Elaboration and ratification of International Labour Standards entails a distinct process not covered in this publication.

## **1. History of human rights standards**

The development of strong labour movements in many countries helped prompt the formation of the ILO in 1919. That body has primary responsibility for developing a range of international agreements to provide minimum common standards for treatment of workers, workplace conditions, and so on. In a way, the first international rights-based instruments were developed within this context, protecting for instance women and children.

After the Second World War, the United Nations was established in 1945, in the desire to avoid repetition of the devastation that the war had brought upon the world. The Charter of the United Nations reaffirms faith in fundamental human rights and states that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

The fundamental human rights instrument is the Universal Declaration of Human Rights, adopted in 1948, a few years after the founding of the United Nations. This Declaration secured human rights as basic components of international law. It contains human rights standards evolved over many decades, growing out of efforts beginning in the 19th century to establish common codes for relations among States. Importantly, it places civil, political, economic, social and cultural rights on an equal level. Many of its provisions are recognised as constituting customary international law and are thus binding upon States.

Two major covenants covering the broad definitions of political and civil rights, and social, economic and cultural rights were adopted in 1966. Together with the Universal Declaration, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, are referred to as the "International Bill of Human Rights."

As presented in the following chart, several other human rights treaties have been elaborated since, either to develop the standards of a specific human right or in order to protect the human rights of a vulnerable group.<sup>14</sup>

	Date of adoption
International Convention on the Elimination of All Forms of Racial Discrimination	21 Dec 1965
Convention on the Elimination of All Forms of Discrimination against Women	18 Dec 1979
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10 Dec 1984
Convention on the Rights of the Child	20 Nov 1989
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	18 Dec 1990
International Convention for the Protection of All Persons from Enforced Disappearance	13 Dec 2006 (not yet in force)
Convention on the Rights of Persons with Disabilities	20 Dec 2006

<sup>14</sup> For the status of ratification of these treaties, please consult <http://www2.ohchr.org/english/bodies/ratification/index.htm>.

At the World Conference on Human Rights held in Vienna in 1993, representatives of virtually all the governments of the world adopted the Vienna Declaration and Plan of Action which underlined that human rights are universal, inalienable and indivisible. The Vienna Declaration affirms that the rights laid out in the various instruments apply to everyone, everywhere, and that political and civil rights are inseparable from social, economic and cultural rights. Other summits and declarations, such as the Cairo International Conference on Population and Development 1994, the Copenhagen Declaration on Social Development 1995, and the Beijing Declaration on Women 1995 have brought to the fore the equal importance of civil, political, economic, social and cultural rights, and their specific applicability to all migrant workers. The Declarations and Plans of Action adopted by these conferences called on all States to consider ratifying the ICRMW.

In 1999, the United Nations Commission on Human Rights established the mandate of the Special Rapporteur on the Human Rights of Migrants. The Special Rapporteur is mandated to examine ways and means to overcome the obstacles to the full and effective protection of the human rights of migrants. The mandate of the Special Rapporteur covers all countries, irrespective of whether a State has ratified the ICRMW. On numerous occasions, including in the context of country visits, the Special Rapporteur has called upon States to ratify the ICRMW.

Following a decision it had made in 1997, the UN General Assembly organised in 2001 a World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in order to assess the growing complexity of racial discrimination and ethnic violence which are an increasing challenge for the international community. Held in Durban, South Africa, the conference's Durban Declaration and Programme of Action gave considerable attention to the situation of migrants and called upon all States to ratify the ICRMW. In 2009, a Durban review conference was held in Geneva from 20 to 24 April to evaluate the progress made in the implementation of the Durban Declaration and Programme of Action.

## **2. How standards are developed**

Treaties and other standards generally come into being at the initiative of at least one, but typically several concerned States that call for drafting a standard in relevant UN fora. A number of treaties were initiated in the former UN Commission on Human Rights; others were tabled directly in the General Assembly.

The Commission on Human Rights was the principle subsidiary body of the UN Economic and Social Council (ECOSOC) and met in annual sessions from 1946 until 2006, when it was replaced with the UN Human Rights Council. The UN Human Rights Council meets several times a year and reports directly to the General Assembly, which also elects the members of the Council from among the UN member States.

The General Assembly is the main deliberative and policy setting body for the UN; all member States have voice and vote in it. It meets annually in New York for a regular session from September to December, and thereafter as required.

Once States that wish to develop a new human rights instrument obtain the approval of the UN General Assembly, an intergovernmental working group or drafting group is appointed. Such groups normally include participation by States from all regions. They are usually led by representatives of governments seeking to promote the new standards.

However, countries that oppose such standards, or support them with major reservations, often also secure themselves a seat on the drafting committee to ensure that whatever draft is eventually produced is not to their mind too radical. Some treaties have taken many years to come into being. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families took ten years of work and negotiations after the working group was established in 1980.

Drafting groups generally study existing standards, including the decisions and recommendations of expert bodies, to draw on what may be relevant, comparable or applicable. They also often rely on expertise of independent legal and human rights organisations, including non-governmental bodies with competence in the field. In the case of the ICRMW, a number of intergovernmental organisations, UN and non-governmental organisations provided advice throughout the drafting process, in particular the International Labour Office, in view of its expertise in matters of labour migration.

International Labour Standards are elaborated through a distinct process under auspices of the International Labour Organization. A brief description of “How International Labour Standards are created” can be found on the ILO website.<sup>15</sup>

All international human rights standards are intended to serve as a basis for the creation of relevant national law and jurisprudence in all countries.

### **3. How treaties become international law: signing, ratifying, acceding**

Once the drafting group agrees on a text, it is submitted to the UN General Assembly for adoption, either by vote or consensus. Adoption of an international instrument is only the first, and often easiest, step in achieving its purpose of becoming an instrument of international law. In the global public forum of the General Assembly, few States will object to adoption of standards, since adoption by the General Assembly carries no binding commitment for individual States. To object to consensus or vote against would be to stand out as opposing human rights. States seldom view this as a productive diplomatic stance.

Any multilateral treaty must be agreed to formally by a minimum number of States, specified in the treaty, before it is binding even upon those signatory States. By formally agreeing to a treaty, a State agrees to incorporate and be accountable to its standards. Such agreement can be made in two formal steps or all in one. As a first step, a State may sign a treaty, which may be considered an expression of intent to adhere to it. This is usually done by the executive branch of government.

Ratification of a treaty then generally also requires the additional action of the legislative or lawmaking branch of government. It is a formal agreement to the text of the treaty and to adopt its standards as national law. If necessary, a government may indicate the subsequent steps that will be taken to bring national law into compliance with the treaty.

Alternatively, a State may proceed directly to accede to a treaty without the preliminary signing, by taking the necessary legislative action to adopt the treaty.

By ratifying or acceding, a State becomes a *State Party to the treaty* and the treaty becomes legally binding for that State once it enters into force.

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<sup>15</sup> [http://www.ilo.org/global/What\\_we\\_do/InternationalLabourStandards/Introduction/creation/lang--en/index.htm](http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Introduction/creation/lang--en/index.htm) .

#### **4. When a treaty comes into force**

As mentioned earlier, a multilateral treaty usually requires a minimum number of States to ratify or accede to it before it enters into force and becomes operational. This minimum number is usually set out in the treaty itself. Although the number may vary, recent treaties (including the ICRMW) have usually established a minimum of 20 States parties for their entry into force.

When a treaty enters into force, it becomes binding on those States that have ratified or acceded to it and they will have to report periodically about the measures they have taken to implement the norms contained in the treaty. States may ratify a treaty with "reservations," stating that they consider certain specified passages or articles in the instrument non-applicable or non-binding in their case. When States do so, other States may raise objections to the reservations, for instance when they consider that the reservations go against the object and purpose of the treaty. The treaty bodies monitoring the compliance of States also review the reservations made by States and on a few occasions have determined their incompatibility.

#### **5. The treaty monitoring system**

Human rights treaty bodies monitor the State Party's compliance with their respective treaties. They do this mainly through the consideration of State Party's reports. States parties are required to provide regular reports to the respective Committees on legislative, judicial, administrative or other measures taken to implement the treaty. Once a report is received, the national human rights institutions of the country concerned as well as domestic and international non-governmental organisations are given an opportunity to provide alternative information and comments on the report. The State Party's report is examined by the treaty body during a public session in the presence of a delegation from the State Party's government through a process of constructive dialogue. The treaty body's conclusions and recommendations are made public at the end of the session. This process of consideration of States' reports provides useful assistance to States on how to adopt concrete measures to improve the protection of human rights and helps them to identify their strengths and weaknesses in this respect.

Some treaty bodies also have the possibility of examining inter-State or individual communications that denounce violations by a State Party of any of the rights contained in the treaty concerned.

Most treaty bodies also make general statements on the interpretation and application of the treaty they are monitoring, often summarising conclusions they have reached during the examination of State Party's reports. Together with the treaty bodies' observations on State reports, these general comments provide guidance on the understanding of the treaty's core values and help to further the development of standards in this respect.

Members of treaty bodies are independent experts, elected periodically by the meeting of States parties to the treaty in question. Most treaty bodies meet two to three times a year. Their mandate is exclusively related to the treaty they are monitoring and only concerns the States that have adhered to the treaty in question.

A separate supervision system under ILO auspices monitors implementation of International Labour Standards, including the two ILO Conventions on migration for employment referred to earlier.

## 6. Other values of treaties

Domestic jurisprudence in a number of countries has allowed international treaties to be cited in legal complaints and court proceedings even when that country has not ratified or acceded to the particular treaty. Reference to international treaties and indeed to United Nations documents in general has increased sharply in recent years.<sup>16</sup>

The very existence of a treaty has been a powerful information and pressure tool in international fora against governments that insist on continuing practices that violate international norms. International standards have a powerful moral value, which also aids proponents of better standards or opponents of abuse of human rights in domestic public, press and parliamentary debates.

International standards serve as a useful guide and sometimes effective stimulus in the development of specific legislation incorporating some of the standards, even if a government is unwilling or unable to incorporate the entire content, and thus resists ratifying or acceding. In particular, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families can be used as a tool to promote a human rights-based approach to migration, both in the development of national migration policies and in bilateral or multilateral processes concerning migration.

International standards may be valuable organising tools for groups or communities of affected people. In and of itself, recognition as a group with rights that require protection can be very empowering for members of that group. It assists in upholding and restoring a sense of dignity to affected individuals. It can motivate organising and collective action by confirming international recognition and support for their situation.

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<sup>16</sup> See *inter alia* Paul Hellyer. 2007. "UN Documents in US Case Law" in *Law Library Journal*, vol. 99, p. 4. See also Oxford Law reports and the Lexis-Nexis databases.

## **CHAPTER III:**

### **IMPORTANCE AND CONTENT OF THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES**

#### **1. Why is the Convention important?**

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) constitutes the broadest framework in international law for the protection of the rights of migrant workers and members of their families and for guidance of States on how to develop labour migration policies while respecting the rights of migrants.

Its importance may be highlighted as in the following ten points:

1. The Convention seeks to establish minimum standards of protection for civil, political, economic, social and cultural rights of all migrant workers and members of their families. It encourages States to bring their legislation in closer harmony with the universal standards set forth in the Convention. As clearly stated in Article 79 of the Convention, States retain their prerogative to determine who is admitted to their countries and their terms of residency.
2. The Convention approaches migrant workers as more than labourers or economic commodities: they are human beings with human rights.
3. The Convention reflects the important role that the migration of workers plays in the global economy. The Convention recognizes that the contributions migrants make to the economies and societies of host countries as well as to development of their home countries depend on legal recognition and protection of their human rights. The Convention provides the standards to make these rights actionable and enforceable under national law.
4. While some migrant workers and their families are successful in their attempts to seek decent working and living conditions abroad, others are facing exploitation and discrimination and suffer from violations of their rights. In most countries, non-nationals in general will face more problems in obtaining recognition and protection of their rights than nationals of the country concerned. The Convention recognises the vulnerability in which migrant workers and members of their families find themselves and the consequent need for appropriate protection.
5. The Convention is the most comprehensive international instrument to date on migrant workers. It provides a set of international standards to address (a) the treatment, welfare and rights of all migrant workers and members of their families and (b) the obligations and responsibilities of States involved. These include States of origin, States of transit, and States of employment, all of which benefit from the international migration of workers. Bilateral and regional instruments are important because they enable the States parties to them to formulate and provide specific arrangements for migration at the bilateral or regional level, but such instruments are only of value if they do not conflict with agreed global norms or if they provide higher standards in addressing the protection of migrant workers and their families.

6. The Convention emphasises that all migrant workers, whether in a regular or irregular situation, are to have their rights recognised. It is inclusive of all migrant workers regardless of their legal status, but seeks to promote the placement of migrant workers in a documented or regular situation. It encourages all workers and employers to respect and comply with the laws and procedures of the States concerned.

7. The Convention's philosophy is based on the principle of non-discrimination. All migrant workers and members of their families, irrespective of their legal status, enjoy the same fundamental human rights as nationals of the country. Documented migrant workers and members of their families enjoy equal treatment with nationals in a further number of specified situations.

8. The Convention provides an internationally agreed definition of a migrant worker, which is broad in scope and includes all migrants, both men and women, who are to be engaged, are engaged or have been engaged in a remunerated activity in a country other than their own. The Convention also provides definitions of certain categories of migrant workers that are applicable to every region of the world.

9. The Convention seeks to prevent and eliminate the exploitation of all migrant workers and members of their families throughout the entire migration process. It expressly seeks to put an end to the illegal or clandestine recruitment and trafficking of migrant workers and to discourage the employment of migrant workers in an irregular or undocumented situation.

10. Finally, the Convention establishes the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Committee reviews the application of the Convention by the States parties through the consideration of reports on the measures States parties have taken to implement the Convention.

## **2. Highlights of the Convention**

### **A. Scope and definitions**

- *What aspects of migration does the Convention cover?*

The Convention applies to the entire migration process of migrant workers and members of their families. It extends them rights and protection at all stages: preparation, recruitment, departure and transit; stay in States of employment; and their return to and resettlement in their countries of origin or in States of residence (Art. 1).

- *Who is a migrant worker?*

For the first time in an international instrument, the Convention provides a definition of a migrant worker centred on engagement in a "remunerated activity." This definition is broad and includes protection of those who are planning to become migrant workers, or actually working outside their own country, or ending work abroad and returning to their countries of origin.

It states, "The term 'migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national" (Art. 2).

In addition to a general definition of migrant worker, the Convention also provides definitions for specific categories of migrant workers, such as "frontier worker," "seasonal worker,"

"project-tied worker," and "self-employed worker" (Art. 2). The "self-employed worker" category recognises the large number of migrant workers who operate a small family business by themselves or with other family members. Part V of the Convention then elaborates particular rights that apply to these categories of migrant workers and members of their families.

- *Who is a family member of a migrant worker?*

The Convention defines "members of the family" as "persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage," and their dependent children and other dependants as recognised by the legislation of States concerned (Art. 4). This terminology takes into consideration the different forms of family relations globally. The Convention elaborates rights and protection of family members in a range of situations, especially in the country of employment.

- *Who is not included?*

The Convention excludes its application to refugees<sup>17</sup> and stateless persons, employees of a State, employees of international organisations, students, investors and seafarers and workers on an off-shore installation (Art. 3).

- *Non-discrimination*

The Convention applies to all persons who meet the definition of migrant worker and member of the family; they are entitled to the protection of their rights under the Convention without distinction of any kind such as 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 (Art. 7).

## **B. Human rights of migrant workers and members of their families**

The Convention defines the rights of migrant workers under two main headings: the human rights of *all* migrant workers and members of their families (Part III), and other rights of migrant workers and members of their families who are documented or in a regular situation (Part IV). The human rights are applicable to all migrant workers and family members irrespective of their legal status while the other rights are applicable only to migrant workers and family members who are documented or in a regular situation.

The Convention does not present a new set of rights exclusively for migrant workers and members of their families. Rather, most of the rights enumerated in the Convention, for example, many of the articles included in Part III, restate and underscore the application to migrant workers and members of their families of corresponding rights spelled out in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the other core human rights treaties. The Convention does however include a number of rights addressing specific protection needs and providing additional guarantees in light of the particular vulnerability of migrant workers and members of their families.<sup>18</sup>

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<sup>17</sup> During the examination of States parties' reports, the Committee on Migrant Workers has clarified that the exclusion of the applicability of the Convention to refugees is limited to recognised refugees only, and not to asylum-seekers who fulfill the Convention's definition of migrant worker.

<sup>18</sup> For a comparative presentation of how the rights of migrants are enumerated among the core international human rights treaties, see ICMC. 2006. *Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties: A Do-it-yourself Kit*, 2<sup>nd</sup> edition. Available at [www.icmc.net](http://www.icmc.net).

- ***Basic rights and freedoms***

The Convention upholds the established right for all, including migrant workers, to leave any State and to enter and remain in their State of origin (Art. 8), irrespective of their migration status. The inhumane living and working conditions and physical (and sexual) abuse that migrant workers sometimes endure are addressed by the reaffirmation of their right to life (Art. 9) and prohibitions against cruel, inhuman or degrading treatment or punishment (Art. 10), slavery or servitude and forced or compulsory labour (Art. 11), as well as by the State's obligation to protect migrant workers and members of their families against violence, physical injury, threats and intimidation (Art. 16, para. 2).

All migrant workers and members of their families are also entitled to basic freedoms like freedom of thought, conscience and religion (Art. 12), and the right to hold and express opinions (Art. 13). They shall not be subjected to arbitrary or unlawful interference with their privacy, family, home, correspondence or other communications or to unlawful attacks upon their honour and reputation (Art. 14). Their property should not be confiscated arbitrarily (Art. 15).

Each child of a migrant worker shall have the right to a name, to registration at birth and to a nationality (Art. 29).

- ***Due process***

The Convention explains in detail the need to ensure due process for all migrant workers and members of their families (Arts. 16 - 20). Investigations, arrests and detentions must be carried out in accordance with established procedures. If arrested, migrants shall be informed in a language they understand of the reasons for their arrest. Their right to equality with nationals of the State before the courts and tribunals must be respected. If charged with a criminal offence, migrants must be provided with necessary legal assistance and free assistance of an interpreter if necessary. When imposing a sentence, humanitarian considerations regarding the person's migrant status should be taken into account. The arbitrary or collective expulsion of migrant workers is prohibited (Art. 22).

- ***Consular protection***<sup>19</sup>

The consular or diplomatic authorities of the migrant's country of origin shall be informed without delay of the migrant's arrest, if he or she so requests, and the migrant has the right to communicate with these authorities (Art. 16, para. 7). All migrants shall have the right to the protection and assistance of the consular or diplomatic authorities of their country of origin, including in case of expulsion (Art. 23).

- ***Equality with nationals***

All migrant workers are to be treated as equal to the nationals of the country of employment in respect of remuneration and conditions of work [overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of work contract, minimum age, restrictions on home work, etc. (Art. 25)]. They have the right to join any trade union and associations, and to take part in its meetings and activities (Art. 26).

Equality with nationals extends also to emergency medical care (Art. 28)<sup>20</sup> and to social security (Art 27), although it is not insignificant that the Convention links the right to social

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<sup>19</sup> Richard Perruchoud. 2007. "Consular Protection and Assistance" in Ryszard Cholewinski et al (eds) *International Migration Law: Developing Paradigms and Key Challenges* (T.M.C Asser Press) pp. 71-85.

security to the fulfilment of requirements that may exist in applicable domestic legislation and bilateral and multilateral treaties. Children of a migrant worker have the right of access to education on the basis of equality of treatment with nationals of the State concerned (Art. 30).

- ***Confiscation of identity documents***

The Convention prohibits the practice of confiscation by employers of migrant workers' passports and states clearly that only public officials duly authorised by law are allowed to confiscate or destroy identity documents, entry permits, residence permits or work permits (Art. 21).

- ***Transfer of earnings***

Upon the termination of their stay in the State of employment, all migrant workers and members of their families have the right to transfer their earnings and savings as well as their personal effects and belongings (Art. 32).

- ***Right to information***

Migrant workers and members of their families have the right to be informed by States of origin, of transit and of employment about their rights arising from the present Convention as well as the conditions of their admission, and their rights and obligations in those States. Such information should be made available to migrant workers free of charge and in a language understood by them (Art. 33).

- ***Respect for cultural identity***

States parties shall ensure respect for the cultural identity of all migrant workers and members of their families and shall not prevent them from maintaining cultural links with their country of origin (Art. 31). States parties must also respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions (Art. 12, para. 4).

- ***Obligation to comply with local law***

All migrant workers and members of their families have the obligation to comply with the laws and regulations of any State of transit or of employment as well as the obligation to respect the cultural identity of their inhabitants (Art. 34).

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<sup>20</sup> It is important to notice that Article 81(1) of the ICRMW ensures that nothing in the Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of the law or practice of a State Party; or any bilateral or multilateral treaty in force for the State Party concerned. The International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination are among the multilateral treaties that recognize a more favourable right to health for all. The human rights treaty bodies monitoring States Parties' compliance with the Covenant and with the Convention have emphasized that States Parties are under the obligation to respect the right of non-citizens to health by, *inter alia*, refraining from denying or limiting their access to preventive, curative and palliative health services. See *CESCR General Comment on the right to the highest attainable standard of health*, E/C.12/2000/4 and *CERD General Recommendation XXX on discrimination against non citizens*, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

### **C. Other rights of migrant workers and members of their families who are documented or in a regular situation**

The Convention recognises fuller and additional rights for migrant workers and members of their families who are documented or in a regular situation.

- *Freedom of movement*

Migrant workers and members of their families who are documented or in a regular situation have the right to liberty of movement in the territory of the State of employment and also the freedom to choose their residence (Art. 39).

- *Equality of treatment with nationals*

In addition to the areas mentioned in Article 25, migrant workers who are documented or in a regular situation shall enjoy equality with nationals of the State of employment in the following areas: access to education, vocational guidance and placement services, vocational training and retraining; access to housing including social housing schemes and protection against exploitation in respect of rents; access to social and health services; access to cooperatives and self-managed enterprises, access to and participation in cultural life (Art. 43). Documented members of the families of migrant workers also shall enjoy equality with nationals of States of employment in access to educational institutions and services, vocational guidance and training institutions and services, social and health services and participation in cultural life (Art. 45). States of employment shall pursue a policy aimed at facilitating the integration of children in the local school system, particularly in respect of teaching them the local language (Art. 45(2)). States of employment may also provide special schemes of education in the mother tongue of children of migrant workers (Art. 45(4)), where appropriate in cooperation with the States of origin.

Regular migrant workers and members of their families shall not be liable to taxes or charges higher or more onerous than those imposed on nationals in similar circumstances and shall be entitled to deductions or exemptions from taxes and tax allowances applicable to nationals in similar circumstances (Art. 48).

Regular migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of protection against dismissal, unemployment benefits, access to 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 (Art. 54).

- *Further rights*

Migrant workers and members of their families who are documented have the right to be fully informed, at the latest at the time of their admission to the State of employment, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage (Art. 37). States of employment shall make every effort to authorise documented migrant workers to be temporarily absent without effect on their authorisation to stay or work (Art. 38).

Migrant workers and members of their family who are documented shall have the right to form associations and trade unions in the State of employment (Art. 40). They have 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. (Art. 41). States shall consider the establishment of procedures or institutions for the purpose of taking into account the special

needs, aspirations and obligations of migrant workers and members of their families. Migrant workers may have their freely chosen representatives in these institutions (Art. 42).

Migrants are entitled to protection of the unity of their families, and States shall take measures "that they deem appropriate" to facilitate family reunification for regular migrant workers and members of their families (Art. 44). They enjoy exemption from import and export duties in respect of their personal and household effects as well as their professional equipment (Art. 46). Regular migrant workers also have the right to send remittances and States shall take appropriate measures to facilitate such transfers (Art. 47). When work contracts are violated by the employer, the migrant worker has the right to address his or her case to the competent authorities in the State of employment (Art. 54 (2)).

#### **D. Consultation and Cooperation among States in the promotion of sound, equitable, humane and lawful conditions of international migration**

The Convention recognises that "the human problems involved in migration are even more serious in the case of irregular migration" and emphasises 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" (Preamble).

In order to promote sound, equitable and humane conditions of international migration, States parties to the Convention should consult and cooperate with one another, while paying regard not only to labour needs and resources but also to the needs of migrants and the consequences of migration for the communities concerned (Art. 64). Part VI of the Convention provides States with a framework for developing migration policies that are consistent with human rights norms.

Article 65 of the Convention provides that States should maintain appropriate services to deal with questions of international migration. Such services should formulate and implement migration policies as well as exchange information, consult and cooperate with the competent authorities of other States involved in migration affecting the State concerned. Furthermore, these services should be responsible for providing appropriate information, especially to employers, workers and their organisations, on policies, laws and regulations relating to migration and employment and on agreements with other States in this field. Finally, these services should be in charge of providing information and assistance to migrants regarding requisite authorisations and formalities and arrangements in order to prepare for their orderly migration.

Provision of information about lawful conditions of migration should go hand in hand with appropriate measures against the dissemination of misleading information relating to migration in an effort to stop unlawful and clandestine migratory movements, in accordance with Article 68 of the Convention. States must also take measures to detect and eradicate illegal or clandestine movements and to impose effective sanctions on those organising such movements. Employment of workers in an irregular situation is to be eliminated, including through sanctions on the employers of such workers.<sup>21</sup>

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<sup>21</sup> The so-called Palermo Protocols (the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 United Nations Convention against Transnational Organized Crime) also require States to criminalise acts of trafficking in persons and smuggling of migrants. Victims of trafficking in persons should be treated in full compliance with the OHCHR Recommended Principles and Guidelines on human rights and human trafficking. The rights of victims of the crime of smuggling of migrants must be respected and protected.

Strict supervision of recruitment operations in countries of origin is also an important tool in preventing unlawful practices, including trafficking. Article 66 of the Convention restricts the right to undertake operations for the recruitment of migrant workers to the public services of the country of origin, the public services of the country of employment on the basis of an agreement between the two countries or a body established by virtue of a bilateral or multilateral agreement. As far as private agencies or employers are concerned, they should only be allowed to recruit migrant workers if they have obtained the requisite authorisation by the public authorities of the countries concerned and operate under their supervision.

States Parties concerned shall co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers and members of their families to the state of origin. The States of origin must take appropriate measures to promote adequate economic conditions for the resettlement of those who return, including irregular migrants, and facilitate their social and cultural reintegration (Art. 67).

### **3. Monitoring the Convention**

- *Committee on Migrant Workers*

In accordance with Article 72 of the Convention, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families reviews the implementation of the Convention. The Committee held its inaugural session from 1 to 5 March 2004 in Geneva. Since then, it has held two sessions a year.

From its formation, the Committee has consisted of ten experts of high moral standing, impartiality and recognised competence in the field covered by the Convention. However, with the forty-first ratification of the Convention in March, 2009, their number will now be increasing to fourteen. As is the case with other treaty bodies, Committee members are nominated and elected by the States parties to the Convention.

Article 74 of the Convention sets out the role of the Committee and its functions, which can be described as follows:

- *Consideration of States parties' reports*

The primary task of the Committee is to study reports by States parties on the legislative, judicial, administrative and other measures they have taken to give effect to the Convention's provisions. A State Party is requested to present a first report within one year of the entry into force of the Convention for the State Party concerned, and thereafter every five years. At its second session, held in Geneva in April 2005, the Committee adopted its guidelines for the submission of initial reports by States parties. The guidelines request the States parties concerned to provide information of a general nature concerning the framework governing the implementation of the Convention, any agreements entered into with other States concerning migration, the characteristics and nature of migration flows, the practical situation with regard to the implementation of the Convention, the measures taken to promote the Convention and their cooperation with civil society. As to the information on the implementation of the Convention, in view of the length of the Convention, the guidelines suggest that reporting States group the information per clusters of articles. At its 8<sup>th</sup> session, the Committee adopted guidelines for the presentation of further periodic reports by States.

The consideration of the report takes place in two public meetings in the presence of a delegation of the State Party. Intergovernmental organisations, United Nations organisations,

national human rights institutions and non-governmental organisations can all provide information to the Committee, either in writing or orally.<sup>22</sup> The ILO is expected to review and provide comments on reports by States Parties in light of its mandate and complementary standards on migrant workers. The consideration of the reports ends with the adoption of the concluding observations by the Committee, which are transmitted to the State Party at the end of the session and made public.<sup>23</sup>

- ***Consideration of communications received under Articles 76 and 77 of the Convention***

Optional article 76 of the Convention provides for the consideration by the Committee of communications from a State Party claiming that another State Party is not fulfilling its obligations under the Convention. Optional article 77 provides for the consideration by the Committee of communications received from or on behalf of individuals who claim that their individual rights as established by the Convention have been violated by a State Party. The articles require, however, that ten States parties make the declaration before the procedure enters into force. So far, Guatemala is the only State Party that has made the declaration under article 76; Guatemala and Mexico have made the declaration under article 77.

- ***Annual reports***

In accordance with article 74, paragraph 7, the Committee presents an annual report to the General Assembly of the United Nations on the implementation of the Convention, containing its considerations and recommendations.

- ***Complementary activities***

The Committee has been actively engaged in the ongoing discussion on International Migration and Development. On 15 December 2005, it organised a Day of General Discussion under the title: “Protecting the rights of all migrant workers as a tool to enhance development”. The Committee was inspired in its choice of subject by the decision of the General Assembly to organise a High-Level Dialogue on International Migration and Development in New York on 14-15 September 2006, and aimed at emphasising the importance of human rights in this context.<sup>24</sup>

Following the Day of General Discussion, the Committee adopted a written contribution to the General Assembly’s High-Level Dialogue on International Migration and Development. In its contribution, the Committee noted that migrants are above all human beings with rights, as well as active agents of development. Therefore, for the Committee, the question of migration must be approached from a human rights perspective, in conformity with the Universal Declaration on Human Rights as well as State obligations under core international

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<sup>22</sup> The International Platform on the Migrant Workers Convention (IPMWC) was created to facilitate and strengthen the participation of international and national non-governmental organisations who are interested in providing alternative information to the Committee on Migrant Workers. See: [www.ipmwc.net](http://www.ipmwc.net).

<sup>23</sup> The text of the concluding observations can be consulted on the Committee’s website: <http://www2.ohchr.org/english/bodies/cmw/index.htm>. At the time of writing, the Committee had examined the following initial reports: Mali (4<sup>th</sup> session), Mexico (5<sup>th</sup> session), Egypt (6<sup>th</sup> session), Ecuador (7<sup>th</sup> session), Syrian Arab Republic (8<sup>th</sup> session), Bolivia (8<sup>th</sup> session) and El Salvador (9<sup>th</sup> session), Azerbaijan, Bosnia-Herzegovina, Colombia, Philippines (10<sup>th</sup> session) and Sri Lanka (11<sup>th</sup> session).

<sup>24</sup> The programme of the day of general discussion and the texts of the contributions can be found on: <http://daccessdds.un.org/doc/UNDOC/GEN/G06/436/66/PDF/G0643666.pdf?OpenElement>.

human rights treaties. The Committee further emphasised that the concept of development encompasses not just economic development, but also cultural, social and political development. In this context, the Committee observed that migration stimulates cultural and economic exchanges among nations, which in turn promote peace and understanding in keeping with the goals of the United Nations.<sup>25</sup>

At its eighth session, in April 2008, the Committee celebrated the fifth anniversary of the entry into force of the Convention through the organisation of a round table on the importance of a human rights-based approach to migration and the relevance of the Convention in this regard.<sup>26</sup> During that same session, the Committee adopted a contribution on the topic of migration, development and human rights, as its contribution to the second meeting of the Global Forum on Migration and Development in Manila in October 2008.<sup>27</sup>

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<sup>25</sup> See Note by the Secretary-General transmitting the summary of the discussions of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families to the High-Level Dialogue on International Migration and Development, A/61/120.

<sup>26</sup> The programme of the 5<sup>th</sup> anniversary roundtable and the texts of the intervention can be found on: <http://www2.ohchr.org/english/bodies/cmw/roundtable.htm> .

<sup>27</sup> See the Committee's Annual Report to the General Assembly, A/63/48.

## **CHAPTER IV:**

### **ACHIEVING RATIFICATION**

As of December 28, 2009, 42 States have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Sixteen other States have signed the ICRMW, in a preliminary step to ratification. As well, 49 States have ratified the ILO Migration for Employment Convention No. 97 (1949), and 23 countries have ratified the ILO Migrant Workers (Supplementary Provisions) Convention No. 143 (1975). In total, 82 different countries have ratified at least one of these three complementary international standard setting instruments on the protection of migrant workers rights and international cooperation on migration (see Annex).

#### **1. Preparing for ratification**

Before a State can become a party to a treaty, usually a number of steps have to be taken to ensure that the national legislation and practice is in compliance with the treaty. In most countries, formal approval by the national legislature is needed to ratify or accede to a treaty. However, even after that procedure has been finalised, the State still must deposit its instrument of ratification or accession at the United Nations in order for the treaty to become binding on the State.

- **Signature of the treaty**

One of the steps that lead up to a State becoming a party to a treaty can be the signature of the treaty in question. Usually, a government, through an executive or other national authority, can sign treaties without prior authorisation of the national legislature. The signature of a treaty indicates the government's consent to become bound by its provisions. It entails an obligation for the State concerned not to defeat the object and purpose of the treaty, but does not create any legal obligation to comply with the treaty's provisions. The ICRMW is open for signature indefinitely (Art. 86, par. 1). This means that any State wishing to do so can still sign the Convention.

- **Starting the Process**

Ratification of a Convention usually requires steps by both the executive and legislative branches of government. In many countries, the proposal to consider signature and ratification or accession to an international instrument is initiated by the Ministry of Foreign Affairs. In the case of international labour standards and other instruments related to workers—including migrant workers—it may be the ministry concerned with labour and employment that initiates consideration.

The process of consideration usually includes a study of existing legislation and implications of ratification, elaboration of a recommendation, circulation of a proposal for ratification to other concerned ministries and departments within the executive branch for comment, and, ultimately, its decision to either sign the Convention and/or proceed to accession or ratification.

In some cases, the executive branch of government may decide to sign the Convention as an initial step in its consideration.

Once the executive branch has agreed on ratification or accession to the Convention, it usually will prepare and submit a proposal to the national legislature for ratification. This proposal may incorporate the content of the Convention into proposed national legislation;

alternatively, approval of the ratification may be proposed as a distinct act, accompanied by a commitment to incorporate the convention standards into national law.

Nonetheless, the national legislature can also take steps to initiate consideration. It can, for example, commission a study and/or convene hearings to introduce the issue onto its own agenda and that of the executive branch. This process would usually be initiated by a concerned committee of the legislature. Some national parliaments have a committee that specifically addresses migration; more often migration matters are taken up by labour and social affairs committees, home affairs committees and/or the committee addressing foreign affairs. Groups of parliamentarians can also write to the head of state or the minister concerned to ask that the government take up consideration of ratification.

- **Achieving Compatibility**

Before a government begins the process of adhering to a treaty, it is appropriate to study the domestic legislation and practice in order to see whether they are in compliance with the treaty, what the legal, judicial, administrative and practical implications of ratification may be, and whether all needed changes can be made in domestic law. Such a study can be undertaken by one or more government departments (in case of the ICRMW for instance by the departments for Labour and Justice) or it can be delegated to independent experts, for instance to a university department or research centre. In some occasions, it may be useful to establish a commission with members representing different expertise in order to carry out the study.

At the same time, or after the study has been finalised, the government may wish to start a consultative process with the main stakeholders in society who will be most affected by the Convention. In the case of the ICRMW, this may involve trade unions, employers' organisations, migrants associations, health service organisations, the educational system, religious organisations, women's organisations, students' associations, human rights groups, etc. They may be asked to comment in writing on the proposal to adhere to the Convention, and on the results of the compliance study, if this has already been finalised.

The study and the consultations with civil society may well show that parts of domestic law and practice are not fully in compliance with the Convention. The government may have to introduce new legislation or amendments to existing legislation in order to fill gaps and reconcile divergences.

It can happen that a government may determine that there are certain provisions in the Convention it does not wish to adopt into national law, even if there is agreement with most of the standards in the Convention. If this is the case, the ICRMW provides for the possibility of making reservations to the application of some of its provisions (see Art. 91). Reservations can be entered to restrict the application of a particular provision; however the Convention does not allow a State to exclude the application of one or more entire Parts of the Convention, nor does it permit the exclusion of any particular category of migrant workers (Art. 88). Moreover, reservations incompatible with the object and purpose of the Convention are not permitted (Art. 91, para. 2). Reservations may be withdrawn at any time as soon as the reason for the reservation has ceased to exist.

- **Ratification or accession**<sup>28</sup>

Once there is clarity about the compatibility of the domestic legislation and the desirability of becoming bound by the Convention, it has to be approved in accordance with the procedure set out in the State's Constitution. As noted above, usually this involves seeking the approval of the treaty in question by the national legislature and may entail official publication of the treaty. Good practice would also require publication in an easily accessible official journal.

The ICRMW designates the Secretary-General of the United Nations as the depositary of the Convention. This means that all instruments of ratification or accession have to be deposited with the Secretary-General in order to be valid. Instruments of ratification or accession have to be signed by the Head of State, the Head of Government or the Minister of Foreign Affairs. For signature, it is possible that the Head of State, the Head of Government or the Minister of Foreign Affairs provide full powers to a designated representative in order to sign the treaty.

Accession has the same legal effect as ratification. However, unlike ratification, which must be preceded by signature to create binding legal obligations under international law, accession requires only one step, namely, the deposit of an instrument of accession.

- **Implementation**

The ICRMW enters into force for the State concerned on the first day of the month following a period of three months after the date of deposit of its instrument of ratification or accession (Art. 87). Within one year of the entry into force of the Convention for the State concerned, the State party is required to submit an *initial* report on the legislative, judicial, administrative and other measures it has taken to give effect to the provisions of the Convention (Art. 73(1)(a)). These reports shall also indicate factors and difficulties, if any, affecting the implementation of the Convention and shall include information on the characteristics of migration flows in which the State party is involved (Art. 73(2)). After the initial report, States parties are required to submit a *periodic* report to the Committee every five years and whenever the Committee so requests (Art. 73(1)(b)). After reception, the Committee examines the reports submitted by States parties and transmits to the State concerned its comments and recommendations (Art. 74).

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the body of experts monitoring implementation of the Convention by all States Parties, has issued guidelines for the submission of *initial* reports (HRI/GEN/2/Rev.2/Add.1). The Committee's guidelines for the submission of *periodic* reports were adopted in April 2008 (CMW/C/2008/1).

## **2. Practical Effects of Implementation**

Most of the States Parties to the ICRMW have moved to put in place national policy and practice largely in accord with the standards specified in the Convention; their compliance with the Convention is monitored by the Committee on Migrant Workers. As recognised by several States Parties, the Convention serves as reference for the development and definition of comprehensive national labour migration policies, which pay due attention to the human rights of migrant workers and members of their families. It assists States in generating conditions that promote more harmonious relations among different population groups and respect for the culture and rights of migrant workers and members of their families.

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<sup>28</sup> More details on the procedure of signing a treaty, or of depositing the instrument of ratification or accession, can be found on the website of the UN Office of Legal Affairs: <http://untreaty.un.org/English/TreatyHandbook/hbframeset.htm> .

Among other things, the Committee on Migrant Workers identifies and promotes good practices through its examination of reports of States Parties. Examples of innovative as well as standard good practices include:

- Implementation of measures against the dissemination of misleading information relating to emigration, e.g., by the creation of a State Ministry in charge of providing information to nationals who may be intending to emigrate;
- The inclusion of civil society organisations as participants within institutional processes formulating public policies on migration with a rights-based approach;
- Efforts to regulate private recruitment agencies and to close down those which do not comply with the national legislation;
- Adoption of bilateral agreements between countries of employment and countries of origin in compliance with international human rights and labour standards (including the ICRMW);
- Establishment of special groups to protect and counsel migrants in transit in the State's territory;
- The implementation of migration regularisation programmes with the aim of documenting irregular migrant workers;
- Efforts by countries of origin to extend voting rights to citizens' residing abroad.

### **3. Facilitating ratification: Addressing concerns and challenges to ratification of the Convention**

The number of ratifications of the ICRMW is growing steadily but continues to be relatively low compared to the other core UN human rights conventions. Different studies have been undertaken to assess the reasons for this slow pace of progress,<sup>29</sup> which differ from one region to the other and often seem to vary depending on whether the State concerned is mainly a country of origin, transit or employment for migrant workers. Importantly, whereas many of the first states to ratify the Convention were principally migrant countries of origin, it is no longer true that the Convention has only been ratified by the so-called “sending” countries. In fact, more recent ratifications, coupled with significant changes in migratory patterns, have resulted in States Parties to the Convention no longer consisting solely of countries of origin but also an increasingly important number of countries of transit and/or destination as well, including Argentina, Egypt, Mauritania, Mexico, Morocco, Senegal, Syria and Turkey.

Several countries, such as Mexico and the Philippines, have engaged in diplomatic efforts to widen ratification—reflected in the considerable number of Latin American States that have ratified to date.

The European Parliament, on several occasions, has explicitly called for the ratification of the ICRMW by European Union Member States. For example, in July 2006, the European Parliament urged “all Member States to ratify the International Convention on the Protection

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<sup>29</sup> For case studies on European countries, Canada, South Africa, the Asia Pacific and Mexico, see Paul de Guchteneire, Antoine Pécoud & Ryszard Cholewinski (eds). 2009. *Migration and human rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press and Unesco Publishing). For an overview of obstacles in Africa, the Asia Pacific and Central and Eastern Europe, see Antoine Pécoud & Paul de Guchteneire. 2006. “Migration, Human Rights and the United Nations. An investigation into the low ratification record of the UN Migrant Workers Convention” in *Windsor Yearbook of Access to Justice* 24(2), pp. 241-266. See also: Euan MacDonald and Ryszard Cholewinski. 2007. *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives* (UNESCO).

of the Rights of All Migrant Workers and Members of Their Families and fully honour their international commitments with regard to the protection of migrants and their families”.<sup>30</sup>

The European Economic and Social Committee (EESC), an advisory body which issues opinions to the European Commission, Council and Parliament has also given a positive advice in favour of ratification: “The European Union, which is keen to establish international rules in a host of areas (e.g. in international trade within the WTO), must also ensure that the basic rights of immigrants are guaranteed via such international norms. The EU has a particular responsibility in this regard. On the one hand, it has made multilateralism a constant principle of its external relations. On the other, it could and should serve as a model to others in implementing – and even going beyond – its international commitments”.<sup>31</sup>

### **Challenges faced with regard to ratification of the Convention**

A number of arguments have been raised to challenge the value of the Convention, even to actively discourage consideration of ratification by concerned countries. They range from asserting inadequacies in the content and scope of the Convention to posing costs and constraints of application. The following are four groups of the arguments most commonly articulated, with responses to each one.

#### **A. Arguments on the utility and scope of the Convention**

- **“The Convention is superfluous:”** that is the relevant norms applying to migrant workers are already contained in other core international human rights covenants and conventions or regional instruments that most States have ratified.

This perspective is important to address, and unequivocally, because it also applies to the other international conventions that focus on vulnerable groups, e.g., women, children, racial and ethnic minorities and disabled people. The reason for such emphatic focus in these distinct conventions is that, despite the existence of universal normative instruments, rights were not, in fact, adequately being recognised or extended to vulnerable groups, and it became necessary to elaborate Conventions explicitly and specifically detailing the application of universal rights to them. Indeed as regards migrants, in some countries, human rights norms contained in the broader international or regional instruments were made applicable only in the context of citizenship, thereby categorically limiting or excluding their extension to non-nationals or non-citizens. Accordingly, the ICRMW provides specific guidance on application of international standards to one important group at risk of otherwise being inadequately protected in national law.

Moreover, although other international and regional human rights instruments indeed apply to migrants, they may lack specificity on how to apply these rights to migrants in what are often migrant-specific situations.<sup>32</sup> Such application is supported further by the ICRMW’s monitoring mechanism. The Committee on Migrant Workers has the expertise to look at migration in a comprehensive way, bringing together all

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<sup>30</sup> European Parliament. 2006. *Resolution on Development and Migration*, Doc. P6\_TA(2006)0319, 6 July.

<sup>31</sup> European Economic and Social Committee. 2004. *Opinion on the ‘International Convention on Migrants’*, 2004/C 302/12, Official Journal of the European Union, 7 December.

<sup>32</sup> December 18, 2007. *The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat* (Brussels) Available at: <http://www.december18.net/web/docpapers/doc7039.pdf> ;

Isabelle Slinckx. 2009. “Migrants’ rights in UN human rights conventions” in Paul de Guchteneire, Antoine Pécoud & Ryszard Cholewinski (eds.): *Migration and human rights. The United Nations Convention on Migrant Workers’ Rights* (Cambridge University Press and Unesco Publishing).

elements of the human rights-based approach to migration and applying it to the specific situation of the country concerned, thereby assisting it in addressing possible deficiencies in the application of the rights of migrants. In this context it is also important to remember that national legislation and practice which may at present be in compliance with human rights standards can be easily changed, while treaty obligations remain binding for States Parties and thus provide a permanent protection against human rights violations.

- **“The Convention is too long”**—a lengthy, complex instrument that recognises rights in different fields, with the result that its implementation requires the involvement of many government departments, coordination of which may not be easy.

The length and detail of the Convention, can be one of its advantages: it is long because it contains, not vague principles, but concrete language on how to guarantee the rights of migrant workers and members of their families. Much of this language can be easily incorporated in national laws and regulations, thereby facilitating the task of the legislative and policymaking bodies.

- **“The Convention is too limited;”** its scope excludes seafarers, trainees, and refugees; it does not address private recruitment agencies, it does not include gender specificity regarding the particular risks and vulnerabilities of women migrant workers, and it does not adequately address the challenge of regulating migration.

The drafters of the ICRMW excluded certain categories of people crossing borders because these categories are explicitly covered under other international instruments or distinct legal regimes. In particular, seafarers, refugees, and civil servants are covered by other specific international instruments, such as ILO Maritime Conventions, the 1951 Convention on the Status of Refugees, and international diplomatic law.

With regard to gender-based vulnerabilities, perhaps by today’s expectations, such a Convention should include more specific normative guidance to ensure gender-specific protection against the specific risks faced by women migrants. However, the Convention certainly does not preclude gender-specific legal provisions and implementation measures in the incorporation of its provisions in national law and practice. The same is evidently true of other international human rights instruments lacking gender specificity. Moreover, compared to a number of earlier core international human rights instruments, the ICRMW is deliberately drafted in gender-neutral language.

On the issue of balancing migration regulatory measures with protections, the logic of this Convention, shared with that of other human rights instruments, is that *protection* of vulnerable populations is not about regulating them and their movement through coercive or restrictive measures. Rather, the Convention recognises that the first need for proper regulation is to provide explicit, enforceable and accountable legal protection to vulnerable persons, in this case in the context of increasing international labour mobility. Regulation of movement itself can and should be done by other means, including by supervising labour market supply and demand. Indeed, one of the express objectives of the Convention is to eliminate a main incentive for seeking and hiring irregular migrant labour: the ease with which such labour can be exploited due to non-protection of rights and unequal treatment of migrants.

Furthermore, there are other, specific and complementary international standards that provide guidance on how to address criminal forms of moving persons across borders and/or exploiting them in destination countries, notable among them the Protocols on

trafficking in persons and smuggling of migrants supplementing the 2000 United Nations Convention against Transnational Organized Crime.

## **B. Arguments on respecting State prerogatives**

- **“The Convention infringes upon State sovereignty”**: Some governments claim that the “ICRMW would limit the sovereign rights of States to decide upon who enters their territory and for how long they can remain”,<sup>33</sup> and invoke this as a reason not to ratify.

However, this notion is clearly dispelled by the first sentence of Article 79 of the Convention: “Nothing 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.”

States Parties to the Convention thus retain their sovereignty with regard to the decision whether to admit or refuse entry to any migrant, in accordance with peremptory international law norms.

- **“The Convention impedes flexibility”**: Officials of a few countries of origin have expressed concern that ratifying the Convention would make it more difficult for their governments to conclude agreements with countries of destination to obtain employment opportunities for their nationals, as these countries would prefer concluding agreements with States that have not ratified the Convention.

In practice however, studies have shown that this fear is generally unfounded.<sup>34</sup>

## **C. Arguments on the role and rights of migrants relative to nationals**

- **“The Convention does not adequately give preference to nationals”**: For example, one analyst has noted that “countries suffering from unemployment and fiscal constraints are disinclined to grant foreign workers equal access to economic, social and educational benefits” and “wish to reserve the right to give preference to national workers over foreign workers.”<sup>35</sup>

This question goes to the heart of the notions of non-discrimination and equality of treatment well established in human rights norms. It also challenges premises of labour market stability and social cohesion in industrialised societies, societies whose work forces are increasingly internationalised.

The Convention recognises that the challenge of protection of migrant workers—and national workers—is fundamentally the challenge of ensuring equal treatment. It is also bound up in the challenge of stability of labour markets and working conditions. In established industrial economies, labour market stability depends on the conservation of gains manifested in prevailing wages and working conditions that have been achieved as consequences of economic development, increases in

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<sup>33</sup> Ryszard Cholewinski; Euan MacDonald. 2007. *The Migrant Workers Convention in Europe. Obstacles to ratification of ICRMW: EU/EEA Perspectives* (UNESCO Migration Studies, Paris) pp. 51-54.

<sup>34</sup> Robyn Iredale, Nicola Piper, Amelia Ancog. 2005. *Impact of Ratifying the 1990 UN Convention on the Rights of All Migrant Workers and Members of Their Family: Case Studies of the Philippines and Sri Lanka*, APMRN Working Paper No. 15.

<sup>35</sup> Bimal Ghosh. 2007. *Human Rights and Migration: The Missing Link* (The Hague Process on Refugees and Migration Foundation, The Hague).

productivity, and by collective bargaining between employers and workers' unions. Permitting differential treatment—differential levels of rights protections—directly allows for undermining and underbidding prevailing wages and working conditions.

Furthermore, explicitly polarising different identities in the labour force, such as between national and foreign workers, sets the stage for rejection, hostility, xenophobia and even violence against the targeted group. This is accentuated when groups such as migrants are implicitly or explicitly identified as the cause of unfair labour market competition and lowering of standards and pay levels. Targeted groups are often vulnerable and under-protected to begin with; such differentiations accentuate their marginalisation and increase their vulnerability to exploitative employment with substandard pay and conditions. The Convention provides norms of equality of treatment precisely to prevent discriminatory treatment that would undermine working conditions and labour market stability, and consequently provoke resentment, xenophobia and violence against migrants blamed for deteriorating conditions and unemployment.

- ***“The Convention ‘gives’ rights to undocumented and irregular migrants”:***

All migrant workers and members of their families are human beings, regardless of immigration status. A main impetus for elaborating this Convention was to provide States with explicit guidance on the application of universal human rights to migrants whatever their status, given that they were often without recognition or protection as human beings in host countries. One of the Convention's main values is making explicit that the set of fundamental rights contained in the Universal Declaration of Human Rights, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, and other core international human rights instruments, need to be articulated in national law for migrants as well, in order to ensure that these rights are indeed applied universally.

The recognition that such fundamental rights extend to undocumented and irregular migrants is increasingly reaffirmed in regional as well as international processes and jurisprudence. For example, the Inter-American Court of Human Rights ruled in an Opinion in 2003 that, once in an employment relationship, unauthorized workers are rights holders entitled to the full panoply of labor and employment rights available to authorized workers.<sup>36</sup>

In actuality, economies of many countries benefit from the employment of irregular migrant workers who are paid lower wages and whose labour conditions are not protected. In some countries, this unfair competition is evidently tolerated by authorities. Implementation of the equal treatment required by the Convention should do much to take away the incentive for employers to hire irregular migrant workers and would thus diminish the demand for such labour.<sup>37</sup>

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<sup>36</sup> In its Opinion, the Court decided unanimously, that “The migrant quality of a person cannot constitute justification to deprive him of the enjoyment and exercise of his human rights, among them those of labor character. A migrant, by taking up a work relation, acquires rights by being a worker, that must be recognized and guaranteed, independent of his regular or irregular situation in the State of employment. These rights are a consequence of the labor relationship.” Corte Interamericana de Derechos Humanos. *Condición Jurídica y Derechos de los Migrantes Indocumentados* Opinion Consultativa OC-18/03 de 17 de Septiembre de 2003, solicitada por los Estados Unidos de Mexico.

<sup>37</sup> See also the Preamble to the Convention “Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all

## D. Arguments on the consequences of implementing the Convention

- **“The Convention promotes irregular migration”**: This argument suggests that explicitly recognising the basic rights of all migrants by ratifying the Convention encourages further inflows of irregular migrants, and/or “sends the wrong signal.”

While a country’s recognition of the rights of any particular group may conceivably be an attraction to that country for members of the group concerned, there is no empirical evidence that ratification of the Convention by destination countries so far has been followed by increased arrivals of irregular migrants. More to the contrary, there is evidence that most irregular migrants do not choose their destination country on the basis of a comparison between the benefits of different welfare systems.<sup>38</sup> Migrants arrive because they are looking for work, and as long as there is a demand for their labour, they will come.

Nor is there conclusive evidence that regularisation programmes by a considerable number of migrant destination countries in Europe and elsewhere in recent years have led to increased arrivals of irregular migrants hoping for possible subsequent regularisation opportunities.

Nonetheless, history also demonstrates that people have often “voted with their feet” to escape oppression, privation and denial of human rights to migrate to lands of greater freedom and opportunity.

- **“The Convention places substantial strains on government resources”**: for example: in countries of employment, the costs of enforcing labour protection for foreign workers dispersed in informal work or for social services already inadequate for nationals; in countries of origin, the costs of monitoring private recruitment agencies.

It is undeniable that protecting and enforcing rights under the rule of law entails costs, for law enforcement, for pursuit of due process and justice, for training of authorities and for public education. However, cost-benefit analyses have consistently shown that, firstly, the costs of non-recognition of rights, of tolerating discrimination and exclusion of vulnerable groups are ultimately far higher than the costs of administration of rights and justice. Secondly, innumerable studies in a broad range of countries have demonstrated that, over time, migrants and immigrants contribute considerably more through taxes and labour to host societies than they draw in benefit or welfare payments and services.<sup>39</sup>

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migrants and employers to respect and comply with the laws and procedures established by the States concerned”.

<sup>38</sup> Román Romero-Ortuño. 2004. “Access to Health Care for Illegal Immigrants in the EU: Should We Be Concerned?” in *European Journal of Health Law*, 11(3).

<sup>39</sup> See inter alia: Sharan Burrow. 2006. *Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development*, Presentation to the Roundtable 3 on Globalization and Labour Migration, ECOSOC High-Level Segment, Geneva, 5 July 2006; Miguel Sebastián. 2006. *Inmigración y economía española: 1996-2006*; UK Home Office. 2007. *The economic and fiscal impact of immigration: A Cross-departmental submission to the House of Lords Select Committee on Economic Affairs*; Reiner Münz et al. 2007. *What are the migrants’ contributions to employment and growth? A European approach* (Hamburg, Hamburg Institute of International Economics, Migration Research Group); and ILO. 2004. *Towards a Fair Deal for Migrant Workers in the Global Economy*, Report VI, International Labour Conference.

#### **4. Facilitating ratification: advocacy and cooperation**

Obtaining ratification of the ICRMW has been and will continue to be a challenge of awareness-raising, advocacy and dialogue. Ultimately, ratification and implementation of this Convention require that governments assume commitments and, in most countries, that national legislatures take formal action.

Civil society organisations, faith-based agencies, trade unions and migrant groups have played critical roles in communicating and working with government officials, parliamentarians and communications media in a number of the countries that consequently ratified this Convention. In some countries, they mobilised public opinion through their own activities and networks to support action by government and parliaments to ratify.

International organisations, in particular ILO, IOM, OHCHR and UNESCO, can assist by providing technical advice and assistance to governments and legislative bodies in consideration of ratification. This may include review of legal and legislative implications of incorporating the Convention standards in national law, review of draft legislation to do so, provision of guidance and sharing ‘good practice’ models on administrative mechanisms and institutions for implementing and monitoring Convention standards. Normally, such advice and assistance is formally requested by interested governments.

Parliamentary bodies can also call on expertise of the relevant specialised international organisations to support consideration of ratification by inviting participation in hearings, in parliamentary conferences, or by requesting documentation. Organisations such as ILO and IOM have on occasion co-sponsored meetings or seminars with legislative bodies to facilitate awareness raising and information sharing for national parliaments.

Realising the protection of the human rights of migrants and the international cooperation on migration called for by the Convention require involvement from many actors, across government and across society. The inter-organisational Steering Committee on the International Convention on the Rights of Migrant Workers reflects broad cooperation among UN and international organisations and civil society organisations. The member organisations of the Steering Committee and the broad constituencies that they represent are valuable resources for expertise, practical action and public support in implementation of the Convention. These organisations welcome opportunities to dialogue and cooperate with government officials and parliamentarians on ensuring the effective protection of rights of all migrants and productive international cooperation on regulating migration.

## ANNEX: RATIFICATIONS OF INTERNATIONAL INSTRUMENTS ON MIGRATION/MIGRANTS RIGHTS

As of 28 December 2009

- ILO Migration for Employment Convention No. 97 of 1949.
- ILO Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975.
- 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

### STATUS:

ILO Convention 97: 49 ratifications  
 ILO Convention 143: 23 ratifications  
 ICRMW: States Parties: 42 (Non-ratified signatories: 16)  
**Summary: 82 States have ratified one or more of these three instruments.**

State (In bold, has ratified one or more instruments)	Ratification ILO C-97	Ratification ILO C-143	Ratification or accession (a) 1990 Convention	Signature 1990 Convention
<b>Albania</b>	02 Mar. 2005	12 Sept. 2006		05 June 2007
<b>Algeria</b>	19 Oct. 1962		(a)	21 Apr. 2005
<b>Argentina</b>				23 Feb. 2007
<b>Armenia</b>	27 Jan. 2006	27 Jan. 2006		10 Aug. 2004
<b>Azerbaijan</b>			(a)	11 Jan. 1999
<b>Bahamas</b>	25 May 1976			
Bangladesh				07 Oct. 1998
<b>Barbados</b>	08 May 1967			
<b>Belgium</b>	27 July 1953			
<b>Belize</b>	15 Dec. 1983		(a)	14 Nov. 2001
<b>Benin</b>		11 June 1980		15 Sept. 2005
<b>Bolivia</b>			(a)	12 Oct. 2000
<b>Bosnia &amp;-Herzegovina</b>	02 June 1993	02 June 1993	(a)	13 Dec. 1996
<b>Brazil</b>	18 June 1965			
<b>Burkina Faso</b>	09 June 1961	09 Dec. 1977		26 Nov. 2003
Cambodia				16 Nov. 2001
<b>Cameroon</b>	03 Sept. 1962	04 July 1978		27 Sept. 2004
<b>Cape Verde</b>			(a)	15 Dec. 2009
<b>Chile</b>				16 Sept. 1997
<b>Colombia</b>				21 Mar. 2005
Comoros				24 May 1995
Congo (Brazzaville)				22 Sept. 2000
<b>Cuba</b>	29 Apr. 1952			29 Sept. 2008
<b>Cyprus</b>	23 Sept. 1960	28 June 1977		
<b>Dominica</b>	28 Feb. 1983			
<b>Ecuador</b>	5 Apr. 1978		(a)	06 Feb. 2002
<b>El Salvador</b>				14 Mar. 2003
<b>Egypt</b>			(a)	13 Sept. 2002
<b>France</b>	29 Mar. 1954			19 Feb. 1993
Gabon				
<b>Germany</b>	22 June 1959			15 Dec. 2004
<b>Ghana</b>			(a)	
<b>Granada</b>	9 July 1979			08 Sept. 2000
<b>Guatemala</b>	13 Feb. 1952			
<b>Guinea</b>		05 June 1978	(a)	14 Mar. 2003
Guinea-Bissau				07 Sept. 2000
<b>Guyana</b>	8 June 1966			12 Sept. 2000
<b>Honduras</b>				15 Sept. 2005
<b>Hong Kong (China SAR)*</b>	22 Jan. 1951			11 Aug. 2005
Indonesia				
				22 Sept. 2004

<b>Israel</b>	30 Mar. 1953				
<b>Italy</b>	22 Oct. 1952	23 June 1981			
<b>Jamaica</b>	22 Dec. 1962			25 Sept. 2008	25 Sept. 2008
<b>Kenya</b>	30 Nov. 1965	09 Apr. 1979			
<b>Kyrgyz Republic</b>	10 Sept. 2008		(a)	29 Sept. 2003	
<b>Lesotho</b>				16 Sept. 2005	24 Sept. 2004
Liberia					22 Sept. 2004
<b>Libyan Arab Jamahiriya</b>			(a)	18 June 2004	
<b>The former Yugoslav Republic of Macedonia</b>	17 Nov. 1991	17 Nov. 1991			
<b>Madagascar</b>	14 June 2001				
<b>Malawi</b>	22 Mar. 1965				
<b>Malaysia (Sabah)</b>	03 Mar. 1964				
<b>Mali</b>			(a)	06 June 2003	
<b>Mauritania</b>			(a)	22 Jan. 2007	
<b>Mauritius</b>	02 Dec. 1969				
<b>Mexico</b>				8 Mar. 1999	22 May. 1991
<b>Moldova</b>	12 Dec. 2005				
<b>Montenegro</b>	03 June 2006	03 June 2006			23 Oct. 2006
<b>Morocco</b>				21 June 1993	15 Aug. 1991
<b>Netherlands</b>	20 May 1952				
<b>New Zealand</b>	10 Nov. 1950				
<b>Nicaragua</b>			(a)	26 Oct. 2005	
<b>Niger</b>			(a)	18 March 2009	
<b>Nigeria</b>	17 Oct. 1960			27 July 2009	
<b>Norway</b>	17 Feb. 1955	24 Jan. 1979			
<b>Paraguay</b>				23 Sept. 2008	13 Sept. 2000
<b>Peru</b>				14 Sept. 2005	22 Sept. 2004
<b>Philippines</b>	21 April 2009	14 Sept. 2006		05 July 1995	15 Nov. 1993
<b>Portugal</b>	12 Dec. 1978	12 Dec. 1978			
<b>Rwanda</b>			(a)	15 Dec. 2008	
<b>Saint Lucia</b>	14 May 1980				
<b>San Marino</b>		23 May 1985			
Sao Tome & Principe					06 Sept. 2000
<b>Senegal</b>			(a)	09 June 1999	
<b>Serbia</b>	24 Nov. 2000	24 Nov. 2000			11 Nov. 2004
<b>Seychelles</b>			(a)	15 Dec. 1994	
Sierra Leone					15 Sept. 2000
<b>Slovenia</b>	29 May 1992	29 May 1992			
<b>Spain</b>	21 Mar. 1967				
<b>Sri Lanka</b>			(a)	11 Mar. 1996	
<b>Sweden</b>		28 Dec. 1982			
<b>Syria</b>				02 June 2005	
<b>Tajikistan</b>	10 Apr. 2007	10 Apr. 2007		08 Jan. 2002	07 Sept. 2000
<b>Tanzania (Zanzibar)</b>	22 June 1964				
<b>Trinidad &amp; Tobago</b>	24 May 1963				
<b>Timor Leste</b>			(a)	30 Jan. 2004	
<b>Togo</b>		08 Nov. 1983			15 Nov. 2001
<b>Turkey</b>				27 Sept. 2004	13 Jan. 1999
<b>Uganda</b>		31 Mar. 1978	(a)	14 Nov. 1995	
<b>United Kingdom</b>	22 Jan. 1951				
<b>Uruguay</b>	18 Mar. 1954		(a)	15 Feb. 2001	
<b>Venezuela</b>	09 June 1983	09 June 1963			
<b>Zambia</b>	02 Dec. 1964				

\* China notified 1 July 1997 regarding continued application of ILO Convention 97 in Hong Kong Special Administrative Region. Texts & information on ILO Conventions at [www.ilo.org/ilolex](http://www.ilo.org/ilolex). Text & information on the 1990 Convention at <http://www2.ohchr.org/english/bodies/cmw/index.htm> and/or [www.december18.net](http://www.december18.net)

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