
**Committee on the Protection of the Rights of All
Migrant Workers and Members of Their Families**
Fifteenth session
12-23 September 2011

**Day of General Discussion on the Protection of the Rights of
Migrant Workers in an Irregular Situation and Members of
their Families, 19 September 2011**

Background Note Prepared by the Secretariat

Part I

A. Introduction

On Monday 19 September 2011, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families will hold a Day of General Discussion in Geneva focusing on “the Protection of the Rights of Migrant Workers in an Irregular Situation and Members of their Families.”

The full day of discussion will take place during the fifteenth session of the Committee at the United Nations Office in Geneva (Palais Wilson). It is a public meeting in which representatives of governments, UN bodies and specialised agencies, intergovernmental organisations and non-governmental organisations are invited to participate.

The discussion is oriented towards four outcomes:

(a) to assist the Committee in developing concrete recommendations in relation to the protection of the rights of migrant workers in an irregular situation and members of their families, when examining reports of States parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW);

(b) to clarify the scope of the ICRMW in relation to the rights of migrant workers in an irregular situation;

(c) to assist the Committee in adopting a General Comment on migrant workers in an irregular situation and members of their families;

(d) to promote greater consideration of the particular situation and rights of migrant workers in an irregular situation and members of their families.

B. Format

After a general introduction, the discussions will take place in three working groups, each focusing on a different theme: (1) The criminalization of migrant workers in an irregular situation and members of their families, and their vulnerability to exploitation and abuse; (2) Availability and restrictions of economic and social rights of migrants workers in an irregular situation and members of their families and (3) The challenges of protecting the rights of migrant workers in an irregular situation and members of their families. Participants are requested to reflect upon the following questions, among others:

Working group 1: The criminalization of migrant workers in an irregular situation and members of their families, and their vulnerability to exploitation and abuse

- To what extent are migrants in an irregular situation treated as criminals?
- To what extent are migrants in an irregular situation perceived as a threat or danger to societies?
- To what extent are migrants in an irregular situation vulnerable?
- To what extent does the criminalization of migrants in an irregular situation have implications for their enjoyment of basic social rights?
- How to increase awareness about the rights of migrants in an irregular situation among the public and the migrants themselves?
- How can the right of migrant workers in an irregular situation to organize be ensured?
- Under what circumstances, if any, can migrants in an irregular situation and members of their families be detained and which rights should they enjoy, including access to detention centres by non-governmental organizations?
- To what extent are alternatives to administrative detention of migrants in an irregular situation implemented?
- How to establish effective complaint mechanisms for migrant workers in an irregular situation?
- What are the good practices?

Working group 2: availability and restrictions of economic and social rights of migrants workers in an irregular situation and members of their families

- What are the economic and social rights recognized to migrant workers in an irregular situation and members of their families, by the international law?
- To what extent are the economic and social rights of migrants in an irregular situation recognized in the domestic law?
- How can the legal and practical obstacles to access to health, education, housing, water and sanitation, social security, and labour rights be eliminated?
- Which monitoring mechanisms can ensure that economic social and cultural rights are upheld including in detention centres?
- What are the good practices?

Working group 3: The challenges of protecting the rights of migrant workers in an irregular situation and members of their families

- What are the major challenges faced by States when implementing the rights of migrant workers in an irregular situation and members of their families?
- How can these challenges be addressed?
- Is there any evidence that the Convention acts as a pull factor for irregular migration?
- How can the misunderstandings about the content of the Convention in relation to irregular migration and the obstacles to ratify it be surmounted?
- What are the good practices?

C. Modalities

The format of the discussion day is designed to enable participants to exchange views through a frank and open dialogue. The Committee therefore asks participants to avoid presenting formal statements during the discussion. Interpretation will be provided in English, French and Spanish during the plenary discussions and in the discussion in working group 3; working groups 1 and 2 will be without interpretation.

Written contributions are invited on the issues and topics mentioned, within the framework outlined above. The deadline for the written contributions is 5 September 2011. The Committee is especially interested in receiving information about good practices. Please refer to the guidelines for participants for information on how to register for participation in the discussion day and for submission of contributions: http://www2.ohchr.org/english/bodies/cmw/docs/Guidelines_for_participants_

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Part II

1. The context

(a) Definitions

As defined by Article 2 of the ICRMW, the term “migrant worker” refers to any 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.” Furthermore, article 5 (b) specifies that migrant workers are considered as non-documented or in an irregular situation if they do not comply with the conditions provided in paragraph 5 (a), namely: “...if they are [NOT] authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of the State and to international agreements to which that State is a party.”

The term “migrant workers in an irregular situation” covers a variety of scenarios, e.g.: working without work and/or residence permits; non-registration at social insurance institutions; non-registration at tax institutions, insufficient registration of the employment contract; irregular extension of a regular work permit; “pseudo-self-employed” activities; etc. Many migrant workers in an irregular situation have entered regularly in the country but have subsequently lost their legal status.

(b) The extent of irregular migration in the world

Determining the extent of the irregular migration in the world is very difficult, due to the clandestine nature of the phenomenon. Although the exact number of migrants without proper legal status in transit or host countries is unknown, they are estimated to be in the tens of millions worldwide: approximately 10 to 15% of the world's 214 million international migrants are in an irregular situation (IOM, ILO, 2010).

(c) Vulnerability of migrant workers in an irregular situation and members of their families

Migrant workers in an irregular situation and members of their families experience discrimination, exclusion, exploitation and abuse at all stages of the migration process. They often face prolonged detention or ill-treatment, and in some cases enslavement, rape or even murder. They are also especially susceptible to xenophobia and racism and exposed to unscrupulous employers, criminal traffickers and smugglers. Rendered particularly vulnerable by their irregular status, which is compounded by linguistic or cultural barriers, these men, women and children are often afraid or unable to seek protection and relief from the authorities of the country of their origin, transit or destination.

Migrants in an irregular situation are often denied even the most basic labour protections, due process guarantees, personal security, and healthcare. Children, especially those unaccompanied and separated, are at risk of being denied enrolment in schools. Migrant women in an irregular situation experience multiple forms of discrimination, including a greater risk of sexual exploitation, gender-based violence, HIV transmission, and specific challenges in access to employment.

When examining State reports, the Committee has addressed issues related to migrant workers in an irregular situation, and has expressed the following concerns:

- (i) Vulnerabilities and abuses involving the employer
 - dependence on the employer (e.g., employer control of passport and identity papers; employee's legal status linked to a specific employer; employer abuse of immigration law and procedures; restrictions on movements);
 - high risk of exploitation of unaccompanied minors, including trafficking for the purposes of labour and sexual exploitation;
 - vulnerability of undocumented migrant women workers in domestic service to ill-treatment and sexual harassment or rape by their employers;
 - long working hours with little or no breaks, rest time or days off;
 - physical, psychological and emotional ill-treatment, including abusive threats of imprisonment and/or deportation.
- (ii) Protection gaps in national laws and procedures
 - right to a name, to registration at birth;
 - labour legislation often does not apply to irregular or unauthorized work;
 - lack of access to emergency medical care;
 - no access to the schooling system, whether public or private;
 - lack of access to complaint mechanisms and due process;

- cultural and procedural biases against migrants, in particular those in an irregular situation.

2. The rights of migrant workers in an irregular situation and members of their families

(a) International norms relevant to migrant workers in an irregular situation and members of their families

While, with very few and narrowly defined exceptions, international human rights law protect the human rights of all migrants regardless of their legal status, there are at present no international instruments that apply exclusively to migrants in an irregular situation, despite their specific vulnerability. However, in addition to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the other core human rights treaties spell out a number of rights that are particularly relevant for migrants, including those in an irregular situation.¹ For example:

- Right to non-discrimination and equal treatment: ICCPR, Arts. 2(1) and 26; ICESCR; Art. 2(2).
- Right not to be enslaved or subject to forced or compulsory labour: ICESCR, Art. 10(3), ICCPR, Art. 8(1, 2, 3a); CEDAW, Art. 6; CRC, Art. 11(1), 32(1), 34, 35, 36;
- Right to fair conditions of employment: ICESCR, Art. 6, 7; CRC, Art. 32(1);
- Right to form and join trade unions and other association: ICERD, Art. 5(e-iv) ICESCR, Art 8(1), ICCPR, Art. 22(1), CEDAW, Art. 14(2-e);
- Right to health care: ICERD, Art. 5 e-iv; ICESCR, Art. 12(1); CRC, Art. 24(1), 25, 39; CEDAW, Art. 14(2b);
- Right to education: ICERD Art. 5(e-v); ICESCR, Art. 13(1, 2), 14; CRC, Art. 28(1), 29(1);
- Protection from arbitrary arrest and detention and rights during detention or imprisonment: ICCPR, Art. 9(2, 3, 4, 5); CRC, Art. 40(1);
- Right of equality with nationals before the courts; right to due process: ICERD, Art. 5(a), 6; ICCPR, Art. 14(1), 16, 24; CAT, Art. 12, 13, 14; CRC Art. 12(2);
- Prohibition of collective expulsion: ICCPR, Art. 13 (read in light of the HRC's General Comment No. 15).

Migrant workers in an irregular situation are also protected by all international labour standards, except in a few cases where migrants are explicitly exempted. The 1998 ILO Declaration on Fundamental Principles and Rights at Work explicitly includes coverage of migrant workers under the **ILO** fundamental rights Conventions: Convention **No. 87** and **No. 98** (freedom of association, right to organize and collective bargaining), **No.**

¹ International Covenant on Economic, Social and Cultural Rights (ICESCR); International Covenant on Civil and Political Rights (ICCPR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Worker and Members of their Families (ICRMW); International Convention on the Rights of Persons with Disabilities (ICRPD), and the Convention for the Protection of All Persons from Enforced Disappearance (CPED).

100 and **No. 111** (equal remuneration and equality and non-discrimination in employment and occupation) **No. 29** and **No. 105** (abolition of forced labour), and **No. 138** and **No. 182** (elimination of child labour). The ILO Migrant Workers (Supplementary Provisions) Convention, 1975, **No. 143** obliges States parties to respect the basic human rights of *all* migrant workers (Art. 1) and to ensure that migrant workers in an irregular situation and members of their families are afforded equal treatment in respect of rights arising out of past employment as regards remuneration, social security and other benefits (Art.9 (1)).

Moreover, the treaty bodies that monitor the international human rights instruments have adopted general comments/recommendations relevant to migrant workers in an irregular situation, such as:

- CCPR General Comment No. 15: The position of aliens under the Covenant;
- CCRP General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (art. 14);
- CERD General Comment No. 30: Discrimination against non-citizens;
- CESCR General Comment No. 14: The right to the highest attainable standard of health
- CESCR General Comment 20: Non-Discrimination in economic, social and cultural rights (art. 2, para. 2);
- CRC General Comment No. 6: Treatment of unaccompanied separated children outside their country of origin;
- CEDAW General Recommendation No. 26: On women migrant workers;
- CEDAW General Recommendation No. 28: On the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women

In addition, in the context of the examination of States reports, the treaty bodies have articulated a series of specific recommendations to their States Parties for better protection of the rights of migrant workers and members of their families, including those in an irregular situation.

(b) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The ICRMW constitutes the broadest normative framework in international law for the protection of the rights of migrant workers and members of their families, and guidance for States on how to develop labour migration policies while respecting the human rights of migrants. One of the Convention's key values is making explicit that the set of fundamental rights contained in the Universal Declaration of Human Rights, the International Covenants and other core international human rights instruments, also need to be articulated in national law for all migrant workers and members of their families, in order to ensure that these rights are indeed applied universally.

The Convention applies to the entire migration process of migrant workers and members of their families. It describes their rights and related protection at all stages of that process: during preparation, recruitment, departure and transit; stay in states of employment; and their return to or resettlement in countries of origin or residence.

Part III of the Convention (arts. 8 to 35) grants basic human rights to all migrant workers and members of their families, irrespective of their immigration status. Part IV provides additional rights to migrant workers and members of their families who are documented or in a regular situation.

Some of the most relevant rights established in Part III of the Convention are:

- Article 11: Right not to be subject to slavery, servitude, forced or compulsory labour;
- Article 18: Equality of migrant workers with nationals of the State concerned before courts and tribunals;
- Article 21 Protection of identity documents, documents authorizing entry or stay, residence or establishment in the national territory, or work permits;
- Article 22 Prohibition of collective expulsion and guaranties in case of expulsion;
- Article 23 Right to the protection and assistance of the consular or diplomatic authorities of their State of origin (jointly with Article16(7));
- Article 28 Right to urgent health care on the basis of equality of treatment with nationals of the State concerned;
- Article 30 Right to education on the basis of equality of treatment with nationals of the State concerned;
- Article 33 Right to be informed concerning their rights and the conditions of admission.

In addition, there are some specific rights recognized to migrants in an irregular situation by the ICRMW which are not covered by other international human rights instruments, namely: the right not to have identification documents confiscated or destroyed (Art.21), the right to consular protection and assistance (Art.23), and the right to transfer savings and earnings (Art.32). However these three specific rights spelled out in the ICRMW could be seen as declensions of more general human rights.

3. Misconceptions related to the scope of ICRMW and its added value with respect to reducing irregular movements of migrants:

A common misconception is that the Convention encourages irregular migration by providing rights to migrant workers and members of their families in an irregular situation and that it thus limits the State's freedom in elaborating its migration policies. On the contrary, the Convention explicitly contains measures to be taken by States in order to discourage irregular migration. Thus, in conformity with Article 68: "States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation". In addition, the scope of the application of the Convention finds it limits in the sovereign right of State to decide who can and cannot enter and remain on the national territory, as set out in Article 79: "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.". Indeed, the ICRMW contains three -cumulative- elements that can contribute to reducing irregular movements of migrants:

- (a) Recognizes their basic human rights to avoid the unfair competition that their unauthorized work facilitates;
- (b) Recognizes more rights to regular migrant workers in order to encourage the regular employment of migrants; and
- (c) Foresees sanctions for employers that resort to irregular migrant labour.

ICRMW provisions which aim to prevent irregular migration require:

- -Cooperation among States (Part VI and in particular Articles 64, 65, 67, 68);
- -Promotion of sound equitable and humane conditions of migration (Article 64);
- -Evaluation of labour needs and the consequences of international labour migration (Article 64);
- -Elaboration and implementation of clear policies for entry and stay in the country (Article 5);
- -Adequate information to employers and migrant workers (Article 65), and appropriate measures against the dissemination of misleading information (Article 68.1);
- -Monitor recruitment of migrant workers by private agencies (Article 66);
- -Sanctions for employers of migrants in an irregular situation, while ensuring that the rights of the migrant worker vis-à-vis their employer arising from employment are not impaired by such measures (Article 68.2); as well as for smugglers and traffickers (Article 68.1)
- -Addressing the irregular status of migrants and considering possibilities for their regularization (Article 69);
- -Orderly return of migrants (Article 67.1).

4. Further reading

- *The International Convention on Migrant Workers and its Committee*; OHCHR Human Rights Fact Sheet No. 24 (rev.1).
- 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*, 2nd edition. Available at www.icmc.net
- OHCHR Regional Office for Europe. 2011. *Migrant Workers' Rights in the Europe*, http://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf
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- Steering Committee for the Campaign for Ratification of the Migrants' Rights Convention. 2009. *Guide on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, <http://www.migrantsrights.org/documents/SCRatificationGuide4-2009Final.pdf>
- *The Migrant Workers Convention in Europe*, UNESCO Migration studies 1, 2007, <http://unesdoc.unesco.org/images/0015/001525/152537e.pdf>
- IOM, *The world migration report*, 2010.