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## Introduction: The UN Convention on Migrant Workers' Rights<sup>1</sup>

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The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) is the most comprehensive international treaty in the field of migration and human rights. It is an instrument of international law meant to protect one of the most vulnerable groups of people: migrant workers, whether in a regular or irregular situation. Adopted in 1990 by the United Nations (UN) General Assembly,<sup>2</sup> it sets a worldwide standard in terms of migrants' access to fundamental human rights, whether on the labour market, in the education and health systems or in the courts. At a time when the number of migrants is on the rise, and evidence regarding human rights abuses in relation to migration is increasing,<sup>3</sup> such a convention is a vital instrument to ensure respect for migrants' human rights.

Yet the ICRMW suffers from marked indifference: only forty-one states have ratified it and no major immigration country has done so. Even though it entered into force on 1 July 2003, most countries are reluctant to ratify the treaty and to implement its provisions. This stands in sharp contrast to other core human rights instruments, which have been very widely ratified.<sup>4</sup> This situation highlights how migrants remain

<sup>1</sup> We are grateful to Ryszard Cholewinski for his comments on an earlier draft of this chapter.

<sup>2</sup> General Assembly Resolution 45/158 of 18 December 1990.

<sup>3</sup> For recent evidence on the violation of migrants' human and labour rights, see Amnesty International (2006) and Shelley (2007).

<sup>4</sup> These are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965, 173 parties); the International Covenant on Civil and Political Rights (ICCPR, 1966, 164 parties); the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966, 160 parties); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979, 186 parties); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984, 146 parties); and the Convention on the Rights of the Child (CRC, 1989, 193 parties). Status as at June 2009 ([www2.ohchr.org/english/bodies/ratification/index.htm](http://www2.ohchr.org/english/bodies/ratification/index.htm) [last accessed 9 April 2009]).

largely forgotten in terms of access to rights; while the need to protect women and children, for example, is – at least on paper – uncontested, granting rights to migrants is not understood as a priority. Even though migrants' labour is increasingly essential in the world economy, the non-economic aspect of migration – and especially the human and labour rights of migrants – remains a neglected dimension of globalization.

This volume provides in-depth information on the ICRMW and on the reasons behind states' reluctance to ratify it. Part I documents the history, content, scope and mode of functioning of the Convention and features chapters by those directly involved in its drafting and implementation, including international civil servants and human rights activists. Part II provides case studies; focusing on major destination countries in four continents (Africa, Asia, Europe and North America), it explores the situation in terms of migrants' rights and the obstacles to and prospects for state ratification of the Convention. This introduction reviews the arguments developed in the contributions<sup>5</sup> and provides an overview of the issues surrounding the Convention.

### **Migrant vulnerability to human rights violations**

Today, one person in thirty-five is an international migrant. In 2005, the number of people who have settled down in a country other than their own was estimated at around 191 million (UN-DESA, 2006). This figure represents 3% of the world's population and has more than doubled since 1975. Nearly all countries are affected by international migration, whether as countries of origin, transit or destination, or as a combination of these. International migration has become an intrinsic feature of globalization, which raises the issue of the protection of the human rights of migrant workers and their families – the *raison d'être* of the Convention. There are at least two characteristics of migrants' position in host societies that expose them to potential human rights violations: as non-nationals or as people of foreign origin, they find themselves in an outsider situation that may increase their vulnerability; moreover, as workers active in what are often underprivileged sectors

<sup>5</sup> In addition to the case studies published here, this introduction makes occasional references to UNESCO-sponsored research in central and eastern Europe, North Africa and West Africa. For a more detailed discussion of their findings, see Pécoud and de Guchteneire (2006) and the UNESCO website ([www.unesco.org/migration](http://www.unesco.org/migration) [last accessed 9 April 2009]).

of the economy, they are disproportionately affected by the lack of respect for labour rights.

As outsiders, migrants may not master the language of the host state; they may be unfamiliar with its legal system and administration; or they can be troubled by the exposure to alien cultural and social practices. Of course, this varies greatly according to migrants' specificities: skilled migrants are better off than their less-skilled counterparts; migrants belonging to a large and well-organized minority should be better supported than isolated migrants, and so on. But it remains that, not being nationals, migrants have fewer rights. They have, for example, little input into policy-making processes that affect them directly. Moreover, the fact of crossing borders in search of employment leads migrants to operate in a transnational legal sphere characterized by loopholes, which range from the non-recognition of their qualifications and work experience to difficulties in maintaining connections to their state of origin.

Racism, xenophobia and discrimination are also frequent features of migrants' everyday experiences and they contribute to exacerbating their already fragile situation. While this is partly a matter of tensions between people of different ethno-cultural backgrounds, it is also the product of a general climate of socioeconomic uncertainty and reluctance towards the changes affecting many societies: unemployment, labour market deregulation, decreasing resources for social security and welfare programmes, political populism, as well as fears surrounding globalization and terrorism, all contributing to mistrust between 'natives' and 'foreigners'. As a consequence, migrants' poor living and working conditions rarely inspire solidarity from nationals who rather express scepticism towards their presence and, disregarding their economic, social and cultural contributions, scapegoat them for problems that have little to do with migration (de Varennnes, 2002).

In addition, migrant workers see their vulnerability increased by their labour conditions. As Patrick Taran argues in Chapter 6, migrants are among the workers most profoundly affected by global economic trends. In sending regions, free market and neoliberal policies are having disruptive effects on local economies and create human insecurity, hence favouring emigration. In advanced economies, the increasing interconnectedness and competition between countries (heightened by the development of non-Western economies) led, among other things, to deindustrialization and the growth of the services sector, accompanied by a deregulation of labour markets to make them more flexible and

competitive. As a consequence, labour markets experience a polarization that sees large numbers of jobs created at their lower end and characterized by conditions unattractive to national workers.

Rich countries are thus ready to look outside their borders for low-skilled workers. Where this enables nationals to enjoy better living and working conditions, it may also create a structural need for migrants who become over-represented in so-called 3-D jobs (dirty, dangerous and degrading). This is particularly visible in sectors such as agriculture, food processing, construction, manufacturing and low-wage services (domestic work, home healthcare) – all characterized by the underdevelopment of workers' protection. The situation is further worsened by migrants' ignorance of their rights: while existing trade unions are increasingly protecting them, this does not happen everywhere, and migrants can count on few other acknowledged institutions (such as civil society groups or migrant organizations) to support them. This makes it easier for cost-conscious and competition-minded employers to provide only minimal protection to migrant workers.

Nowhere is this clearer than with irregular migrants. Even before reaching destination states, they encounter situations of high vulnerability: as media reports show on an almost daily basis, significant numbers of people lose their lives trying to reach destination countries. At least one migrant dies every day at the Mexico-US border, while non-governmental organizations (NGOs) have counted more than 4,000 deaths at European borders between 1992 and 2003 (Cornelius, 2005; Rekacewicz and Clochard, 2004). Irregular migration is now a structural feature of people flows: it is estimated that there are between 11 million and 12 million irregular migrants in the United States, while most European countries are home to several hundreds of thousands of foreigners in an undocumented situation (Battistella, 2008).

Irregular migrants are prone to accept extremely precarious living and working conditions that favour discrimination and exploitation. They constitute a reserve of very flexible and cheap labour, and their status makes it difficult for them to have minimum work standards respected. While this would call for increased protection, in reality they encounter even more barriers to the realization of their rights. The situation is aggravated by the implicit tolerance of governments: despite their harsh discourses on the fight against unauthorized migration, they have limited funds (and political enthusiasm) for combating the employment of irregular migrants through measures such as workplace control.

Another consequence of irregular migration is to put the asylum system under pressure: refugees are suspected of being disguised economic migrants circumventing migration restrictions, which blurs the distinction between refugees and migrants. In principle, refugees' rights are outlined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, whereas migrant workers' rights are dealt with by the 1990 ICRMW (as well as by earlier International Labour Organization (ILO) Conventions Nos. 97 and 143, discussed below); article 3(d) of the Convention thus excludes refugees from its scope (along with stateless persons).<sup>6</sup> In practice, however, the boundary is often difficult to establish. Refugee status is granted on the basis of persecutions, and people fleeing other kinds of situations (such as civil disorders, environmental devastation or economic uncertainty) have no access to protection, even if they actually need it, and fall into the 'migrant' category. On the other hand, refugees sometimes avoid presenting themselves as such as claiming this status can be a long and uncertain process. This eventually threatens the very principles of the asylum system, thereby jeopardizing one of the major humanitarian achievements of the last decades (Joly, 2002).

A final obstacle to migrants' access to rights is that of implementation. In Italy, for example, laws do protect migrants but are often not implemented – especially when it comes to irregular migrants, who are *de facto* deprived of many fundamental rights (see Chapter 14). In a recent study, the NGO Médecins du Monde (2007) found that undocumented migrants' access to health services in Europe, which is in principle guaranteed by national laws, was in practice extremely poor; people do not know about their rights, the administrative procedures are complex and some health professionals refuse to treat irregular migrants, who are also afraid of possible denunciations (see also Da Lomba, 2004). This illustrates the 'disjuncture' between rights and their enjoyment in practice, which is particularly visible in the case of non-nationals (Weissbrodt, 2007).

To sum up, migration is today associated with substantial violations of migrants' physical integrity and dignity. This highlights the inability of current policies to address migration in a way that ensures respect for fundamental human rights. These tragic outcomes of migration take place in a context that sees many destination states heavily preoccupied with the surveillance of their borders and with the prevention of

<sup>6</sup> The situation of asylum seekers is more complex as the Geneva Convention grants some rights (including right of access to employment) to recognized refugees only.

unauthorized migration, and much less with the protection of (especially irregular) migrants' rights. It is perhaps too optimistic to believe that the Convention would resolve these problems, but it may at least contribute to shifting policies and practices in a different direction.

### International migration law and the history of the ICRMW

The mobility of people across international borders, whether for trade, protection or work-related reasons, is as old as borders themselves, and the vulnerability of non-nationals to various kinds of abuse is thus not a new phenomenon. Migration history shows that, already in the nineteenth century, foreign workers were subject to discriminatory rules on the basis of their health, religion, race or economic usefulness. Indeed, non-nationals have historically enjoyed very little legal protection; the dominant idea has long been that rights were connected to nationality and citizenship, thereby granting aliens with very limited protection (Tiburcio, 2001).

The international community's concern with the rights of migrant workers began in the first part of the twentieth century. As Graziano Battistella (Chapter 2) and Patrick Taran (Chapter 6) recall, the 'protection of the interests of workers when employed in countries other than their own' was mentioned in the original Constitution of the ILO, which was drafted at the time of the creation of the League of Nations in 1919. But the beginnings were difficult: the ILO's attempts to create standards in the recruitment and treatment of foreign workers found little support in the pre-Second World War context, characterized by economic crises and strong nationalist/protectionist tendencies (Haseneau, 1991). In the second half of the twentieth century, the development of human rights brought new forms of protection to aliens: by definition, human rights protect all individuals, regardless of their status, and migrants, whether in a regular or irregular situation, thus enjoy their protection. Human rights also introduced the principle of non-discrimination, which permits only reasonable differences in treatment between nationals and non-nationals (if such measures pursue legitimate state objectives and are applied proportionately to those objectives), while granting migrants many civil and political rights (Fitzpatrick, 2003).

In principle, therefore, migrants enjoy the protection of international human rights law. The most important human rights treaties, which are based on the 1948 Universal Declaration of Human Rights (UDHR) – such as the ICCPR and the ICESCR adopted in 1966 – have been widely

ratified and extend protection to all human beings, including migrants. Extension of these rights to vulnerable groups turned out to be difficult, however, which motivated the elaboration of more specific international treaties, including the 1979 CEDAW and the 1989 CRC.

At the ILO, the post-war economic boom in Western industrial states led to a renewed interest in migration and to the adoption of the 1949 ILO Convention No. 97 (Convention concerning Migration for Employment (Revised)). Later, when the oil crisis of the early 1970s caused a general economic downturn, the international community became more concerned with irregular migration and the possible associated abuses, which led to the adoption of ILO Convention No. 143 in 1975 (Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers). Yet the stress of the latter on the need to address undocumented migration was met with scepticism by many countries of origin interested in sending their nationals to work abroad. Destination countries were also critical of this convention, as they believed it discouraged temporary migration. These mixed reactions hindered the acceptance of this treaty and paved the way for the ICRMW.

Shortly after the adoption of ILO Convention No. 143, Mexico and Morocco started a campaign for the elaboration of a UN convention on the protection of the human rights of migrants. Apart from their dissatisfaction with former ILO treaties, these countries were reluctant to leave migration issues to the ILO because of this organization's tripartism, which, for many governments, grants unions too important a role (Böhning, 1991). Moreover, UN conventions are, unlike ILO treaties, subject to reservations, which make it possible to accommodate some states' concerns. At that time, developing countries were hoping to seize the opportunity of the oil crisis to promote a new economic order, and the UN was seen as more open to such a developing world majority than the ILO.

An open-ended working group for the drafting of this new Convention was established in 1979 and chaired by Mexico and Morocco. In an account of its work, Graziano Battistella (Chapter 2) stresses how progress was slowed by the difficulty of finding a consensus between states and by the little support coming from some of them. While the less-developed countries of the G-77<sup>7</sup> were prominent in their support for the

<sup>7</sup> The 'Group of 77' (G-77) is a coalition of developing nations that was founded in 1964 and designed to promote its members' collective interests, particularly within the UN. The G-77 now has 130 members.



Convention, a group of European states – the so-called MESCA countries (Finland, Greece, Italy, Norway, Portugal, Spain and Sweden) – played a key role in its drafting, to the extent that the Convention is to some extent a European text. Battistella also underlines how humanitarian concerns over migrants' rights and economic interests in their labour were constantly intertwined, both among countries of origin and destination. About half of the UN Member States participated at one stage or another in this drafting process, and on 18 December 1990 the UN General Assembly adopted the ICRMW by consensus.

### Content of the Convention

The ICRMW is an attempt to ensure that a broad range of human rights (civil and political, and economic, social and cultural) are accessible to the migrant worker, defined as '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' (article 2(1)). While the Convention does establish a few new rights specific to the condition of migrants (such as the right to transfer remittances or to have access to information on the migration process), it mostly offers a more precise interpretation of human rights in the case of migrant workers. Most of the rights listed were formulated in earlier conventions, but their application to non-nationals had generally not been specified.

While this may seem a redundant point, it actually represents a major step forward: as Groenendijk (2004, p. xix) recalls,

it took lawyers and judges in most European countries several decades to accept that 'everyone' in the European Convention on Human Rights... really means every human being, that non-citizens are covered and protected by most of the provisions of human rights instruments, and that these instruments also apply to immigration law...this may appear self-evident today. It surely was not...in the early seventies.

The ICRMW is comprehensive as it applies to the whole migration continuum, such as the recruitment process and the rights of migrants once they have been admitted.

The ICRMW is composed of nine parts. After the definition of the concepts set out in Part I, Part II provides for a general non-discrimination clause. Part III lists the rights that all migrants should enjoy, irrespective of their status, which therefore also apply to undocumented migrants; Part IV then adds rights that are specific to migrants in a regular situation.



Part V deals with the rights applying to specific categories of migrants, while Part VI details the obligations and responsibilities of states. Finally, Parts VII, VIII and IX deal with the application of the Convention as well as with possible reservations and restrictions by states.<sup>8</sup>

Part III, which concerns both documented and undocumented migrants, contains rights such as:

- the right to life (article 9)
- the right not to be subjected to inhuman or degrading treatment such as torture (article 10)
- the right to freedom of thought, conscience and religion, as well as the right to freedom of opinion and expression (articles 12–13)
- the right not to be deprived of property (article 15)
- the right to equality with nationals before the courts and tribunals, which implies that migrant workers are subject to correct judicial procedures, have access to interpreting services and to the assistance of their consulate, and are not sentenced to disproportionate penalties (articles 16–20, 23–24)
- the right not to have identity documents confiscated (article 21)
- the right not to be subject to collective expulsion and to condition individual expulsions to lawful and correct procedures (article 22)
- the right to equality with nationals with respect to remunerations, working conditions and social security (articles 25, 27)
- the right to take part in trade unions (article 26)
- the right to emergency medical care (article 28)
- the right to education for migrants' children (article 30)
- the right to respect for cultural identity (article 31)
- the right to transfer earnings (article 32)
- the right to have access to information on their rights (article 33).

Part IV adds further rights that are reserved for documented migrants. This includes more substantial rights in terms of access to information (article 37), participation in trade unions (article 40); equality of treatment with nationals (articles 43, 45, 54–55); transfer of remittances (article 47); and expulsion procedures (article 56). In addition, this includes:

<sup>8</sup> This section only provides a short overview of the content of the ICRMW. For more detailed discussions, see the contributions to *International Migration Review's* special issue on the Convention (1991), as well as Cholewinski (1997), de Varennes (2002) and Hune and Niessen (1991, 1994). The text of the Convention is available in Annex 1.

- the right to be temporarily absent from the state of employment (article 38)
- the right to freedom of movement, residence and employment in the state of employment (articles 39, 51–53)
- the right to participate in public affairs in the state of origin, through voting notably (article 41)
- the right to family reunification (article 44).<sup>9</sup>

Part V lists the rights specific to certain categories of migrants, including frontier workers (article 58), seasonal workers (article 59), itinerant workers (article 60), project-tied workers (article 61), specified-employment workers (article 62) and self-employed workers (article 63). Regarding the obligations of states, Part VI of the Convention promotes 'sound, equitable, humane and lawful conditions' for the international migration of workers and members of their families, which includes, for example, cooperation between states (articles 64, 67–68); the establishment of policies on migration, the exchange of information with other States Parties, the provision of information to employers, workers and their organizations on policies, laws and regulations, and assistance to migrant workers and their families (article 65); and the prevention of irregular migration (articles 68–69). It is worth noting in this respect that, even though most obligations concern the countries in which migrant workers are employed, their countries of origin also have obligations. These include: notably providing information on conditions of admission and remunerated activity; giving the right to emigrate and return; regulating and monitoring recruitment agencies; assisting migrants in the resettlement and reintegration process; and providing overseas voting rights.

Finally, the Convention contains a supervision mechanism to monitor the way States Parties abide by their obligations. According to article 73, States Parties must submit to the UN Secretary-General a report on the measures they have taken to implement the Convention. These reports are examined by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), which is composed of ten independent experts.<sup>10</sup> Given its historic role in

<sup>9</sup> Note that this right, which addresses a politically sensitive issue, is formulated in a very careful and qualified way: 'States Parties shall take measures that *they deem appropriate* and that fall *within their competence* to facilitate the reunification of migrant workers with their [family members]' (article 44(2), emphasis added).

<sup>10</sup> Following the ratification of the forty-first country (Niger, in March 2009), the numbers of members will rise to fourteen on 1 January 2010.