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# Human Rights of Migrants

**Course on International Migration Law**  
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# Objectives

1. International Human Rights Instruments
2. International Protection Mechanisms
3. Regional Frameworks and Supplementary Ways of Protecting the Human Rights of Migrants
4. Conclusions



# 1. International Human Rights Instruments

- General introduction to human rights instruments. Binding and non-binding instruments, customary international law
- Applicability of human rights instruments to migrants
- Norms of special relevance to migrants



# International Human Rights Instruments

- Universal Declaration of Human Rights (UDHR), 1948
- International Convention on the Elimination of all forms of Racial Discrimination (ICERD), 1965
- International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
- International Covenant on Civil and Political Rights (ICCPR), 1966
- Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984
- Convention on the Rights of the Child (CRC), 1989
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), 1990
- Convention on the Rights of Persons with Disabilities (CRPD), 2006
- International Convention for the Protection of All Persons from Enforced Disappearance, 2006 (CPED)



# International Human Rights Instruments

- UDHR
- ICERD 175 States parties
- ICESCR 160 States parties
- ICCPR 167 States parties
- CEDAW 187 States parties
- CAT 150 States parties
- CRC 193 States parties
- ICRMW 46 States parties
- CRPD 113 States parties
- CPED 33 States parties



# The Nature of norms

- A treaty is binding only upon States parties (*hard law*)
- Declaration and Resolutions are *soft law*, but also indications of *emerging hard law*. They can also embody norms that become *customary international law*



# Human Rights

## Human rights are:

- ✓ **Inalienable** – i.e. can not be taken away from a person
- ✓ **Applied without discrimination** – no distinction based on race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status
- ✓ **Not always absolute** – some rights are derogable in certain circumstances (e.g. in times of emergency, Art 4. ICCPR). Nonetheless, fundamental rights are non-derogable, i.e. they are absolute



# Applicability of human rights instruments to migrants

- All persons, by virtue of their humanity, have human rights
- Human rights are migrants' rights
- There are only very few exceptions to the general principle of equal treatment of migrants and citizens

**Citizens** (e.g. the right to vote)

**Regular migrants** (e.g. right to liberty of movement and freedom to choose residence)

**Irregular migrants**



# UDHR

- ‘Semi-binding’ instruments as it contains a number of provisions now considered to be customary international law
- Intended as a “common standard of achievement for all peoples and nations”
- “All persons are born free and equal in dignity and rights”
- Equality and non-discrimination



# ICERD

- Condemns... “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin...”
- Allows States to distinguish between nationals and non-nationals as long as non-nationals’ enjoyment of rights enshrined in other instruments is not limited and all non-citizens are treated equally
- Differential treatment may be allowed between nationals and non-nationals, but discrimination is not
- Discrimination connotes distinctions which are unfair, unjustifiable or arbitrary



# ICESCR

## Recognises:

- The right of everyone to the enjoyment of just and favourable conditions of work
- The right of everyone to form trade unions and join the trade union
- The widest possible protection and assistance should be accorded to the family
- The right of everyone to the enjoyment of the highest attainable standard of physical and mental health
- The right of everyone to education

## Limits:

- The rights of non-nationals by allowing developing countries to determine to what extent they provide economic rights to migrants



# ICCPR

- Requires State to ensure civil and political rights to “all individuals within its territory and subject to its jurisdiction”
- Freedom from arbitrary killing and detention, freedom from torture, inhuman or degradation treatment or punishment, equality before courts and tribunals, freedom of thought, conscience and religion, , right to marry, to receive protections as minors, and to peaceful association and assembly
- Derogation permitted in times of public emergency – includes distinction between nationals and non-nationals
- Broad non-discrimination clause, so derogation not permitted based on race, colour, language, sex, or social origin



# CEDAW

- Obliges States to suppress all forms of trafficking in women
- States should commit to upholding rights of all women, including women migrants



# CAT

- Prohibition on returning person to State where he or she might be tortured



# CRC

- Sets standards of treatment for all children under age 18
- Virtually every aspect of a child's life is covered – including rights to a name and registration at birth, nationality, health, education, etc.
- Whatever benefits a State gives to the children who are its citizens it must give to all children
- Obliges States to act “in the best interests of the child”



# ICRMW

- Comprehensive instrument applicable to the whole migration process from departure to return and regulating the legal status of migrant workers and their families
- Protects the basic human rights of all migrant workers and their families (lawfully resident and irregular / irregular migrants)
- Grants regular migrants a number of rights on the basis of equality with nationals



# International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

- Adopted by UN General Assembly – 18 December 1990
- Entered into force – 1 July 2003
- 46 States parties to date:
  - Albania, Algeria, Argentina, Azerbaijan, Bangladesh, Belize, Bolivia, Bosnia-Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Guyana, Honduras, Indonesia, Jamaica, Kyrgyzstan, Lesotho, Libyan Arab Jamahiriya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Saint Vincent and the Grenadines, Senegal, Seychelles, Sri Lanka, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Uganda and Uruguay
- 16 States that have signed (but not yet ratified) to date:
  - Benin, Cambodia, Cameroon, Comoros, Congo, Gabon, Guinea-Bissau, Liberia, Montenegro, Mozambique, Palau, Sao Tome and Principe, Serbia, Sierra Leone, Togo and Venezuela (Bolivarian Republic of)



# Convention structure

- Part I – Scope and definitions
- Part II – Non-discrimination with respect to rights
- Part III – Human rights of all migrant workers
- Part IV – Other rights of regular migrants
- Part V – Rights of particular categories of migrant workers
- Part VI – State cooperation/ obligations in promoting sound, equitable, humane and lawful migration conditions
- Part VII – Application of Convention
- Part VIII – General Provisions
- Part IX – Final Provisions



# Groups of migrants covered

- Migrant workers and members of their families
  - Family members defined to include common law spouses, dependent children and other dependent persons
- Persons to be engaged or who have been engaged in employment
- Lawfully resident and irregular migrants
- Specific groups of (temporary) migrant workers
  - e.g. seasonal workers/ project-tied workers
- But not certain categories of foreigners
  - e.g. diplomats, international organization officials, students or trainees, refugees, investors



# Rights covered: Civil and Political Rights

- Civil and political rights
  - E.g. freedom from cruel, inhuman or degrading treatment, slavery, forced labour - Arts 10-11
  - Procedural protection against individual expulsion applicable to all migrant workers – Art. 22
- Employment rights
  - Rights to equal work/ employment conditions with nationals – Art. 25
  - Trade union rights (freedom of association)
    - to join existing trade unions - Part III, Art. 26
    - to form own trade unions and associations for promotion and protection of their interests - Part IV, Art. 40
  - Rights arising out of past employment
    - Remuneration (past wages) – Art. 25(3)
    - Social security – Art. 27



# Economic, social and cultural rights

- All migrant workers and their families (including irregular migrants)
  - Emergency medical care – Art. 28
  - Equal access with nationals to education – Art. 30
    - Primary education not to be refused to children of irregular migrants
  - Respect for cultural identity – Art. 31
- Lawfully resident migrant workers and families only
  - Equal access with nationals to housing - Art 43(1)(d)
  - Equal access to social and health services - Art 43(1)(e)
  - Family reunification – Art. 44
  - Access to employment – Arts 52, 53



# Migrant-specific rights

- Effective protection by the State against violence, physical injury, threats and intimidation – Art. 16(2)
- Prohibition on confiscation and destruction of identity and travel documents (e.g. passports) – Art. 21
- Recourse to protection and assistance of consular/ diplomatic authorities of State of origin – Art. 23
- Transfer of earnings and savings (i.e. remittances) – Art. 32
- Free provision of information on Convention rights and conditions of admission and, as far as possible, in a language migrants can understand – Art. 33



# Inter-state cooperation (Part VI)

- States have obligations to
  - consult and cooperate to promote sound, equitable and humane migration conditions – Art. 64(1)
  - collaborate to prevent and eliminate irregular migration – Art. 68
  - punish traffickers, smugglers and those who exploit migrant workers (e.g. employers) – Art. 68(1)-(2)
    - see also ILO Convention No. 143 (1975) and the Trafficking and Smuggling Protocols supplementing the UN Convention against Transnational Organized Crime 2000 (Palermo Convention)



# **“State sovereignty” clause (Part VIII, Art. 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. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.”



# Obstacles to its ratification

- **Practical/ Administrative**
  - Inadequate knowledge of the Convention
  - Implementation
    - Length and complexity of instrument
    - Requires resources and coordination between different government departments
- **Legal/ Political**
  - Explicit safeguards for irregular migrant workers
  - Argument that migrant workers' rights are adequately protected by other human rights instruments
  - Relevance – i.e. changes to labour migration landscape in the era of globalization
  - General lack of political will



# 12 Reasons to Ratify

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



# 12 Reasons to Ratify (cont.)

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



# CRPD

Ensures that persons with disabilities enjoy the same human rights (e.g. Under Article 18 to liberty of movement, to freedom to choose their residence and to a nationality) on an equal basis with others and are able to lead their lives as full persons who can make valuable contributions to society if given the same opportunities as others



# Norms of special relevance to migrants

- ✓ Freedom of Movement (ICCPR, Art.12; ICRMW, Art. 8; CRC, Art. 10)
  - right to leave any country & right to enter one's own country
- ✓ Guarantees surrounding the expulsion (ICCPR, Art. 13; ICRMW, Artt. 22 & 56; CAT, Art. 3)
- ✓ Protection against arbitrary detention (ICCPR, Art. 9; ICRMW, Artt. 16, 17(3))
- ✓ Protection of the family (ICESCR, Art.10(1); ICCPR, Artt. 17 & 23; ICRMW, Artt. 14 & 44; CRC, Artt. 10(1), 7 &16)
  - family reunification & rights of the child
- ✓ The right to health (ICESCR, Art. 12; ICRMW, Artt. 28, 43, 45)



## 2. Protection Mechanisms

- Treaty based procedures
- Charter based procedures



# Treaty based procedures

- List and functions of the Treaty Bodies
- Individual complaints mechanism under the treaties
- Inquiry procedures under the human rights instruments
- Inter-State complaint mechanisms (has not been used)



# Treaty Bodies

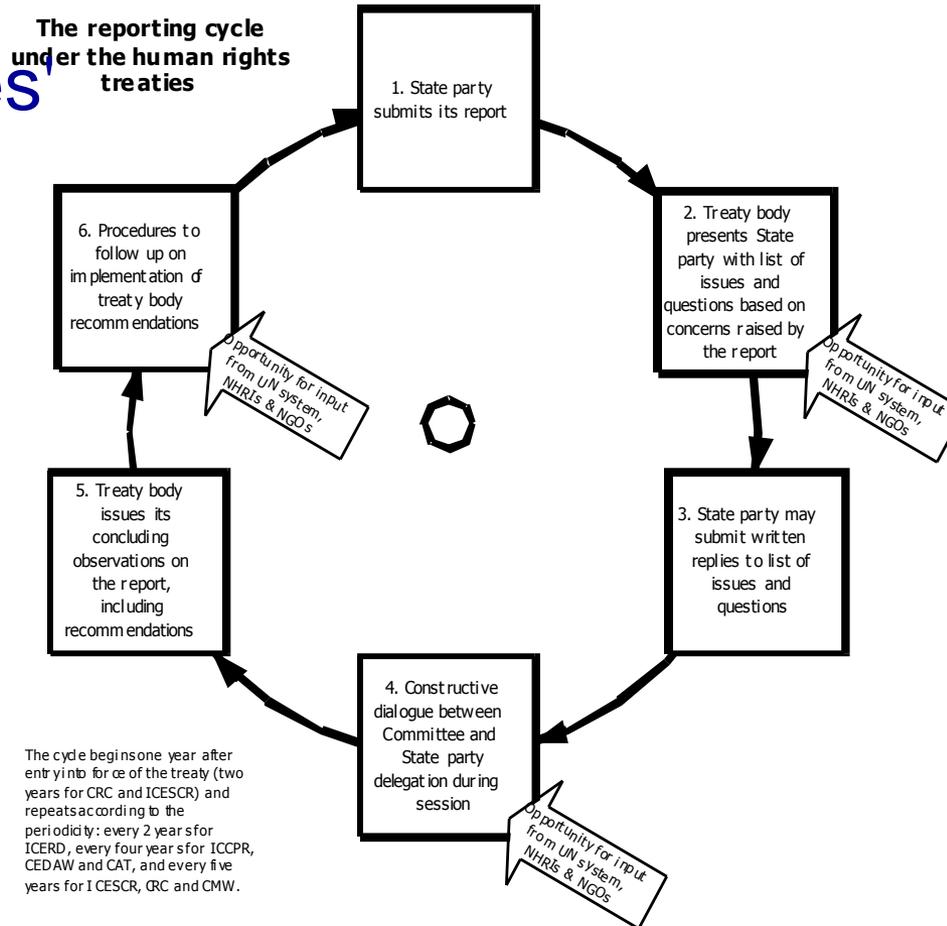
- ICESCR: Committee on Economic, Social and Cultural Rights (CESCR)
- ICCPR: Human Rights Committee (CCPR)
- ICERD: Committee on the Elimination of Racial Discrimination (CERD)
- CAT: Committee against Torture (CAT)
- CEDAW: Committee on the Elimination of Discrimination against Women (CEDAW)
- CRC: Committee on the Rights of the Child (CRC)
- ICRMW: Committee on Migrant Workers (CMW)
- CRPD: Committee on the Rights of Persons with Disabilities (CPD)
- CPED: Committee on Enforced Disappearances (CED)



# Functions of the Treaty Bodies

## Consideration of States Parties reports

### The reporting cycle under the human rights treaties





# Functions of the Treaty Bodies

## General Comments and Recommendations

- HRC General Comment 15 on the position of aliens under the ICCPR (1986)
- CERD General Recommendation 30 on discrimination against non-citizens (2004)
- CRC General Comment 6 on unaccompanied minors and separated children outside their country of origin (2005)
- CEDAW General Recommendation 26 on women migrant workers (2008)
- CESCR General Comment 20 on non-discrimination in economic, social and cultural rights (Art. 2, para. 2) (2009)
- CMW General Comment 1 on migrant domestic workers (2010)



# Individual complaints mechanism under the treaties

- Established by e.g. ICERD, Art. 14; CAT, Art. 22
- Only applicable to States **parties to the procedure**
- Initiated by a complaint from or on behalf of an individual about an alleged violation of his/her rights under the treaty in question by a State party
- Allow for **interim measures of protection** (e.g. CAT, rule 108; CERD, rule 94(3))
- Confidential (final decisions are made public)
- Conducted in writing (no oral hearings)
- Have two stage procedure: 1) admissibility and 2) merits (semi-judicial procedure)

Final decisions of treaty bodies on the merits of a case constitute an **authoritative interpretation** of the human rights treaty in question



# Inquiry procedures under the human rights instruments

- Established under certain instruments (e.g. CAT, CEDAW OP, CRPD OP)
- May be initiated if the Committee receives reliable information indicating that the rights contained in the Convention are being systematically violated by the State party
- Confidential.

The Committee invites the State party to cooperate in the examination of the information by submitting observations

It may decide to designate one or more of its members to make a confidential inquiry and report to the Committee urgently



# Charter Based Procedures

- Characteristics
- Mandates on human rights of migrants and others
- Complaints Procedure
- Universal Periodic Review



# Characteristics

## Special mechanisms

- 29 thematic; 9 country mandates
- based on the UN Charter
- **applicable to all (member) States**
- apply the **Universal Declaration of Human Rights**
- originally established by either ECOSOC or the Commission on Human Rights
- After the establishment of the Human Rights Council (GA 60/251, 15 March 2006), the HRC assumed and reviewed all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights



## Mandates on:

### Human rights of migrants

#### The Special Rapporteur:

- is responsible for requesting and receiving information from migrants and members of their families on violations of their human rights as well as issuing recommendations
- reports to the HRC about the global state of protection of migrants' human rights
- conducts country visits upon the invitation of the Government

Others (Trafficking, Sale of children, Working Group on Arbitrary Detention, Racism, Violence against women, Minority issues, Human Rights while countering terrorism, Contemporary forms of slavery)



# Complaints Procedure

- examines country situations to see whether they reveal a **consistent pattern of gross and reliably attested violations of human rights**
- is **confidential**
- three stage procedure: Human Rights Council Advisory Committee: Working Group on Communications (five experts) - meets 2x year; Human Rights Council's Working Group on Situations (five regional representatives) – meets 2x year; Human Rights Council (plenary) – discusses situations brought to its attention whenever necessary
- aimed at **constructive dialogue** with concerned State in order to improve the human rights situation in the country



# Universal Periodic Review

Established in 2007

- will review the human rights situation in all 192 UN member States over a 4 year cycle
- the review is conducted in a Working Group (WG) composed of the 47 member States of the Council
- the review is based on:
  - information prepared by the State concerned
  - compilation of information from UN HR treaty bodies, special procedures and other official UN documents
  - information provided by stakeholders (NGOs, NHRIs etc)
- the WG's report is reviewed in the plenary of the Human Rights Council which officially adopts the outcome of the UPR
- During and after the review, the concerned State indicates which recommendations included in the WG report it accepts to fulfill



# 3. Regional Legal Frameworks

## ➤ Africa

- African Charter on Human and Peoples' Rights 1981
- Free movement regimes (e.g. ECOWAS, SADC)
- AU Migration Policy Framework for Africa 2006

## ➤ Americas - American Convention on Human Rights 1969

## ➤ Middle East - Arab Charter on Human Rights 2004

## ➤ Asia - ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (13 January 2007)

## ➤ Europe

- Council of Europe standards
- European Union
  - Free movement of EU workers regime
  - Developing EU law and policy on asylum and migration from third countries



# Regional Legal Frameworks

## American Convention on Human Rights

- Advisory Opinion OC-18-03 of the Inter-American Court of Human Rights on the juridical condition and rights of undocumented migrants (17 September 2003)
  - Request by Mexico for an authoritative opinion
  - Migratory status of a person cannot constitute a justification in depriving him/ her of the enjoyment and exercise of his/ her human rights, including those related to work and that the migrant, upon taking up a work related role, acquires rights by virtue of being a worker that should be recognised and guaranteed independently of his or her regular or irregular situation in the State of employment
- Yean and Bosico v. Dominican Republic (8 September 2005)
  - Discriminatory application of nationality and birth registration laws resulting in violations of rights of children of irregular migrants



# Regional Legal Frameworks

CoE

- European Convention on Human Rights 1950
  - Art. 8 – right to respect for family and private life
  - Art. 14 – non-discrimination (including nationality)
  - First Protocol, Art. 1 – protection of property
- European Social Charter 1961/ Revised Charter 1996
  - Pertinent provisions regarding admission (Art. 18) and treatment (Art. 19) of migrant workers, social security (Art. 12) and medical assistance (Art. 13)
- Additional Protocol to the European Social Charter Providing for a System of Collective Complaints 1995
  - FIDH v. France (2005) concerning access of children of irregular migrants to adequate health care provides an expansive interpretation of the Charter
  - Defence of Children International v. the Netherlands (2009) concerning access of irregular migrant children to adequate housing



# Supplementary Ways of Protecting Migrants' Rights

- UN Special Rapporteur on the human rights of migrants
- Non binding global and regional consultative processes
  - ILO Multilateral Framework on Labour Migration
  - Global Forum on Migration and Development (GFMD)
  - Colombo Process
- Protection through national provisions in countries of origin
  - E.g. regulation and close supervision of private recruitment
- By emphasizing legal status of migrant workers in bilateral agreements / arrangements
  - Equitable standard employment contracts before departure
  - Equal work and employment conditions with nationals



# Supplementary Ways

## ILO Multilateral Framework on Labour Migration

- Plan of Action for migrant workers adopted by International Labour Conference in June 2004
- To be implemented by ILO and its constituents in partnership with other international governmental organizations
- Objective: to develop “a non-binding multilateral framework for a rights-based approach to labour migration, which takes account of labour market needs”
- Framework adopted by Tripartite Meeting of Experts in December 2005 and ILO Governing Body approved its publication and dissemination in March 2006
  - Comprises international principles and guidelines on best practices in a broad range of areas
  - Available from ILO website  
[http://www.ilo.org/public/english/protection/migrant/download/multilat\\_fwk\\_en.pdf](http://www.ilo.org/public/english/protection/migrant/download/multilat_fwk_en.pdf)



## 4. Conclusions

- Human rights apply to migrants
- Mechanisms of implementation, supervision and redress exist
- Migrants too often face discrimination and abuse
- More attention needs to be paid to preventive measures



Thank you!