

# The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat

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<sup>1</sup> ICESCR, ICCPR, CERD, CEDAW, CAT, and CRC

### **List of Acronyms:**

CAT:	Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT:	Committee against Torture
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW:	Committee on the Elimination of Discrimination against Women
CERD:	Committee on the Elimination of Racial Discrimination
CESCR:	Committee on Economic, Social and Cultural Rights
CMW:	Committee on Migrant Workers
CRC:	Convention on the Rights of the Child
CRC:	Committee on the Rights of the Child
GRULAC:	Latin American and Caribbean Group
CCPR <sup>2</sup> :	Human Rights Committee
ICRMW:	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICCPR:	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
TMB:	Treaty Monitoring Body/ies
WEOG:	Western European and Others [States] Group

As per United Nations treaty terminology, at times similar acronyms are used both for a given treaty and for the relevant supervisory body

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<sup>2</sup> Previously, the acronym for the Human Rights Committee was HRC. It is now CCPR.

# The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat<sup>3</sup>

*"International human rights law, international humanitarian law, international refugee law and international criminal law: each chapter of this corpus stands as a fundamental defence against assaults on our common humanity. [...] The very power of these rules lies in the fact that they protect even the most vulnerable, and bind even the most powerful. No one stands so high as to be above the reach of their authority. No one falls so low as to be below the guard of their protection."*

Sergio Vieira de Mello, High Commissioner for Human Rights, United Nations General Assembly, November 2002

## Introduction

Whether migrants fall so low so as to be below the guard of protection provided by the ensemble of international human rights treaties is the question at the heart of this research paper. There is a lack of comprehensive public research on whether governments extend the provisions of the international human rights treaties they have ratified to protect the human rights of migrants and not only the rights of their own nationals. To fill this gap, the International Catholic Migration Commission (ICMC) and December 18 vzw, with the support of United Nations Educational, Social and Cultural Organization (UNESCO), engaged in a pilot research project in 2004. They analysed country specific conclusions and recommendations issued by bodies of independent experts tasked with supervising the implementation of these conventions.

The initial research was carried out in Geneva between May and July 2004 and covered 10 years of Treaty Monitoring Bodies (TMB) conclusions and recommendations, from January 1994 to January 2004. Research for the present update was carried out between May and July 2007. This research examined whether the in-

creased emphasis on migration issues in the international context was reflected in the work of the human rights treaty monitoring bodies. This new report is based on data collected during these two research periods. It provides useful initial pointers regarding the current practice and priorities in the six TMB.

While migrants constantly make news headlines, TMB conclusions highlight the existing gap in ensuring non-discrimination and equal treatment with nationals for migrants and members of their families, as provided for in human rights treaties. Migration affects most countries today, yet over the last thirteen years, barely half of the TMB conclusions referred to migrant concerns. But there has been a significant increase over the last three years as compared to the 1994-2004 period. The issue of the protection of the rights of migrants and members of their families has gained visibility within the system. However, this growth does not imply that migrants' rights are fully protected: the conclusions of the examination of states' reports by the different treaty bodies unevenly reflect the span of rights relevant to migrants. Furthermore, the specificity of migrants' vulnerability and protection needs, and the applicability of many provisions of the core human rights treaties are not yet fully reflected in the work of TMB.

This piece of research is part of a strategy to enable civil society and other stakeholders to make better use of international human rights treaties and conventions. It seeks to determine to what extent states, reluctant to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), use relevant provisions in other core human rights treaties to protect the rights of migrants. The research also provides a useful "horizontal" case-study across the treaty monitoring system as United Nations (UN), government and NGOs experts attempt to rationalize and streamline treaty monitoring and observance. In the process, it might contribute to the mainstreaming of migrants' rights in the United Nations human rights system.

<sup>3</sup> This refers to the printing and distribution of secret or banned literature in the former Soviet Union.

# 1. Framework for the research project

## 1.1. Core international human rights treaties and migrants rights

The implementation of international human rights treaties is essential to ensure respect for the human rights of migrants. The most relevant of such treaties to the rights of migrants, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) entered into force in July 2003. However, only 39 countries have ratified it<sup>4</sup>. Whereas, 131 countries have ratified the following six human rights treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the International Covenant on Civil and Political Rights (ICCPR, 1966), the International Convention on the Elimination of All forms of Racial Discrimination (ICERD, 1965), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), and the Convention on the Rights of the Child (CRC, 1989). Together with the ICRMW, these seven conventions – as well as two recently adopted Conventions<sup>5</sup> – are known as the “core international human rights treaties”. All of them contain strong non-discriminatory clauses ensuring applicability of many provisions to migrants.

<sup>4</sup> As of 1 October 2008, 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, Paraguay, Philippines, Senegal, Seychelles, Sri Lanka, Syria, Peru, Tajikistan, Timor Leste, Turkey, Uganda and Uruguay.

<sup>5</sup> The Convention on the Rights of Persons with Disabilities was adopted by consensus by the Plenary of the General Assembly on 13 December 2006. It entered into force on 3 May 2008. The International Convention for the Protection of All Persons from Enforced Disappearances was adopted on 20 December 2006 by the General Assembly. It will become the ninth core human rights convention when it enters into force after 20 ratifications by States.

When a country ratifies one of these treaties, it assumes a legal obligation to implement the rights recognized in that treaty. But this is only the first step: recognition of rights on paper is not sufficient to guarantee that they will be enjoyed in practice. States Parties have an obligation to submit regular reports to the monitoring committee set up under that treaty. Governments collect information from their relevant ministries and administrative units in order to draft the initial and subsequent periodic reports. This exercise prompts them to take stock and analyse their legislation and practices in relation to a given treaty. In addition to the reporting procedure, some of the treaty bodies may perform additional monitoring functions through three other mechanisms: the inquiry procedure, the examination of inter-State complaints and the examination of individual complaints.

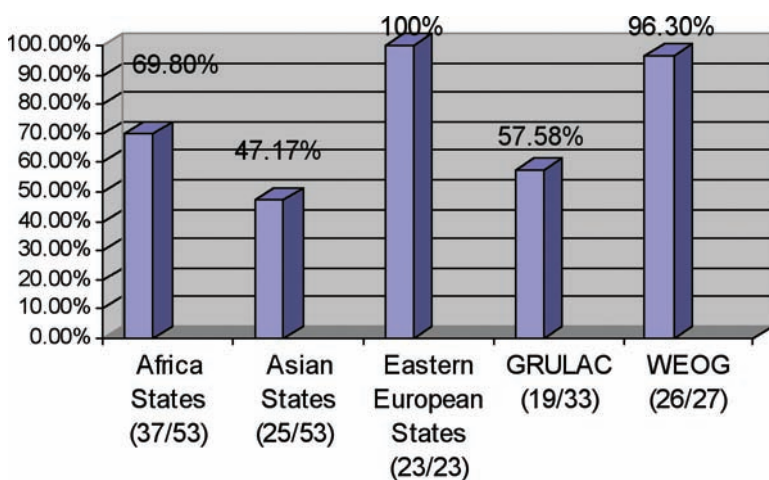
This system of human rights monitoring is common to most of the UN human rights treaties and is operated by the treaty monitoring bodies. They include the Human Rights Committee (CCPR, which monitors implementation of the ICCPR), the Committee on Economic Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Rights of the Child (CRC), the Committee against Torture (CAT) and the Committee on Migrant Workers (CMW).<sup>6</sup> Committee members are nationals of States Parties to the relevant conventions. They serve on the committees in their personal capacity and not as country representatives. In elections, consideration has to be given to equitable geographical distribution as well as to the principal legal systems.

The TMB system is unique in as much as governments voluntarily accept to have their human rights performance scrutinized. Unfortunately, partly because of its technical nature, this exercise does not enjoy high visibility and its findings often remain unknown. The different Commit-

<sup>6</sup> Members of the Committee on the Rights of Persons with Disabilities will be elected in November 2008 at the First Conference of State Party to the Convention.

tees of the TMB oversee and monitor the implementation of rights granted in the various conventions by the reporting of States. The analysis of the observations and conclusions of the TMB examination of country reports was used as the basis for this study.

**1.2. Ratification rate of six human rights treaties<sup>7</sup> by regional group members<sup>8</sup> - as of September 2008**



fied all six international core human rights conventions is Andorra, a small nation State whose population is about 71,000 inhabitants.<sup>10</sup> The United States of America, “associated” to WEOG, has only ratified half of the human rights conventions<sup>11</sup>. Israel, the other “associated” state with WEOG has ratified all of the six core treaties.

The medium to high ratification level in Latin America and the Caribbean, Africa and Europe respectively is also strengthened by the existence

of inter-governmental organisations in these regions (Organisation of American States, African Union, Council of Europe and European Union), which have adopted human rights conventions and mechanisms. These regional bodies both testify to and promote States’ willingness to collectively draft human rights instruments and accept supervisory mechanisms.

The 100% ratification rate for Eastern European States is very markedly linked to the fall of the Berlin Wall and to the subsequent eagerness of Eastern European democracies to ratify international human rights treaties. The same applies for ratification or accession for countries from the Balkans. For the Western European and Others Group<sup>9</sup> (WEOG), the only State that has not rati-

Asia (including the Middle East region), lags behind in terms of ratification and does not have regional inter-governmental mechanisms with a human rights focus. Despite this, in the last three years, its ratification rate has increased by nearly 37%.<sup>12</sup> However, in view of the low level of ratifi-

7 ICESCR, ICCPR, CERD, CEDAW, CAT, and CRC

8 Regional groups refer to the five regional groups in the United Nations (African States, Asian States, Eastern European States, Latin American and Caribbean States and Western European and Other States) (United Nations Handbook, Wellington: New Zealand Ministry of Foreign Affairs, 1961-).

9 In addition to Western Europe, the group includes Australia, Canada, Israel and New Zealand. The USA is not a member of any regional group but attends meetings of this group as an observer and is considered to be a mem-

ber for electoral purposes. Turkey participates fully in both the Asian and WEOG groups, but for electoral purposes is considered a member of WEOG only.

10 Andorra has ratified all human rights conventions except ICESCR.

11 Although it has not ratified the Convention on the Rights of the Child, it has ratified the two optional protocols to the Convention, (relating to the involvement of children in armed conflicts, and to the sale of children, prostitution and child pornography) which are not the object of this report.

12 The ratification rate in Asia was 33.3% in 2004, and rose to 47.17% in 2008.

cation in this region, the relatively high number of TMB conclusions referring to migrant issues is very commendable and reflects that migration is high on its agenda, both for countries of origin and destination.

In the GRULAC, most Caribbean countries have not ratified the six core human rights treaties studied in this report (Antigua and Barbuda, Bahamas, Barbados, Cuba, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia and Trinidad and Tobago). Belize (Central America) has ratified all except ICE-SCR and Suriname (Southern America) has ratified all except CAT.

The combined reporting obligations to various human rights TMB reportedly put a heavy burden on the smaller administrations of small Western European States. This might also account for the low ratification rate in many small island States in the Pacific (Fiji, Kiribati<sup>13</sup>, Marshall Islands, Micronesia, Nauru, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu).

### 1.3. Basis for States Parties reporting on migrant issues

The international human rights treaties oblige States Parties to report back to the TMB. Each TMB has *Guidelines on the Form and Content of Reports to be submitted by States Parties*.<sup>14</sup> In many instances, they do specifically refer to reporting on migrants.

The **Committee on Economic, Social and Cultural Rights (CESCR)** asks States to indicate to what extent and in what manner are non-nationals not guaranteed the rights recognized in the Covenant and their justification for any difference. It specifically refers to children of migrant and immigrant workers in its section on the right to education and lists migrant workers among

<sup>13</sup> Kiribati (geographically in Asia) is not a member of any regional group (Government of New Zealand, Ministry of Foreign Affairs and Trade, *United Nations Handbook*, 44th Edition, 2006/07).

<sup>14</sup> *United Nations Index: HRI/GEN/2/Rev.2*

especially vulnerable or disadvantaged groups on whom States Parties should provide data in relation to the right to adequate food.

The **Human Rights Committee (CCPR)**, which monitors the implementation of the ICCPR, advises that States Parties should “examine progress made towards and the current situation concerning the enjoyment of Covenant rights by persons within its territory or jurisdiction” as a starting point in drafting periodic reports.

The **Committee on the Elimination of Racial Discrimination (CERD)** lists migrants as part of vulnerable groups and asks for information on available social indicators of forms of disadvantage that may be linked with racial discrimination.

Guidelines for the **Committee on the Elimination of Discrimination against Women (CEDAW)** recommend that: “Taking into account the gender dimensions of declarations, platforms and programmes of action adopted by relevant United Nations conferences, summits and special sessions of the General Assembly (such as the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Second World Assembly on Ageing), reports should include information on the implementation of specific aspects of these documents which relate to specific articles of the Convention in the light of the subjects with which they deal (for example, migrant women or older women).”

The **Committee on the Rights of the Child (CRC)** requests that States’ reports indicate the measures adopted to ensure the rights set forth in the Convention to each child under the jurisdiction of the State without discrimination of any kind, including non-nationals, refugees and asylum-seekers. It also asks whether the Convention has been translated and made available in the languages spoken by the larger refugee and immigrant groups in the country concerned.

Reporting guidelines for the **Committee against Torture (CAT)** have been recently reviewed, paying more attention to migrants by making

specific reference to foreigners as a vulnerable group. With respect to periodic reports, States are requested to give details on the kind of training provided to officials dealing with the expulsion, return or extradition of foreigners and to medical personnel dealing with detainees or asylum seekers. Article 3 (on expulsion and guarantees against non-refoulement or extradition in case the person might be subject to torture) is relevant for migrants as well.

#### 1.4. General Comments<sup>15</sup>

Over the years, TMB have issued interpretative comments of the content of human rights provisions and on thematic issues. These are called “general comments”<sup>16</sup> (CCPR, CESCR, CAT, CRC, CMW) or “general recommendations” (CERD and CEDAW). They seek to clarify the reporting duties of States Parties with respect to certain provisions and suggest approaches regarding the implementation of treaty provisions. The General Comments listed below specifically underscore the obligations of Member States with respect to non-nationals, including migrants:

CCPR General Comment 15 on “The position of Aliens under the Covenant” adopted in 1986. Its opening paragraph reads: “Reports from States Parties have often failed to take into account that each State Party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction” (Art. 2 para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”

CCPR General Comment 23, on “The rights of minorities” adopted in 1994. It states, regarding the rights of persons belonging to minorities who “exist” in a State Party (Art. 27), that “given the nature and scope of the rights envisaged

under that article, it is not relevant to determine the degree of permanence that the term “exist” connotes. (...) Thus, migrant workers or even visitors in a State Party constituting such minorities should not be denied the exercise of those rights. As any other individual in the territory of the State Party, they would, also for this purpose, enjoy general rights, for example, to freedom of association, of assembly, and of expression.”

CCPR General Comment 32, on “Right to equality before courts and tribunals and to a fair trial” adopted in 2007, states that “The right of access to courts and tribunals and equality before them is not limited to citizens of States Parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.”

CESCR General Comment 14, on the Right to the Highest Attainable Standard of Health, adopted in 2000. It reads: “States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services.”

CESCR General Comment 16, adopted in 2005, on The equal right of men and women to the enjoyment of all economic, social and cultural rights states that: “The principle of non-discrimination is the corollary of the principle of equality. Subject to [...] temporary special measures, it prohibits differential treatment of a person or group of persons based on his/her or their particular status or situation, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status.”

CESCR General Comment 18, on the Right to Work, adopted in 2005, declares that: “The principle of non discrimination as set out in Article 2.2

<sup>15</sup> General Comments adopted after the second spell of research for this 2007 update are also relevant, including CESCR General Comment 19 on the Right to Social Security adopted in 2008

<sup>16</sup> UN Index: HRI/GEN/1/Rev.7

of the Covenant (...) should apply in relation to employment opportunities for migrant workers and their families. In this regard the Committee underlines the need for national plans of action to be devised to respect and promote such principles by all appropriate measures, legislative or otherwise.”

CEDAW General Recommendation 21, on Equality in marriage and family relations, adopted in 1994, states: “Migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them.”

CEDAW General Recommendation 24 adopted in 1999 on Women and Health states that “special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and women with physical or mental disabilities.”

CRC General Comment No. 3, on HIV/AIDS and the rights of the child, adopted in 2003, states that: “Vulnerability to HIV/AIDS is more acute for a number of children, including migrant children, and underlines their need for special protection.”

CRC General Comment No. 6, on Treatment of unaccompanied and separated children outside their country of origin, adopted in 2005 clarifies the scope of Art. 2 of the Covenant, according to which: “State obligations under the Convention apply to each child within the State’s territory and to all children subject to its jurisdiction. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State Party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.”

CERD General Recommendation 30, adopted in August 2004, on Discrimination against non-citizens. It clarifies general principles for responsibil-

ities of States Parties to the Convention vis-à-vis non-citizens and deals in particular with issues of protection against hate speech and racial violence; access to citizenship; administration of justice; expulsion and deportation of non-citizens; economic, social and cultural rights. It recommends that States Parties adopt a set of measures including that they “Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.”

Four of the Committees (CCPR, CERD, CAT and CEDAW) can, under certain conditions, receive petitions - individual complaints - from individuals who claim that their rights under the treaties have been violated. CAT adopted only one General Comment, in 1997. It relates to conditions for filing such complaints with respect to implementation of Article 3 and states that “No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

## 1.5. Methodology

The research was conducted electronically through the public Treaty Bodies Database of the Office of the United Nations High Commissioner for Human Rights (OHCHR). The phrase “migrant workers” as such seldom appears in TMB conclusions (cf. Section 2.2. “Terminology”). Hence, broader and related concepts were used to conduct searches in the UN Database. Keywords included:

- “migrant/migration”
- “work” (in order to also cover overseas, irregular, foreign or undocumented worker),
- “minorities”
- “alien”
- “unaccompanied”
- “national/citizen” (to identify treatment of “non-nationals” and “non-citizens”)
- “foreign”
- The keyword “rejected” (asylum-seeker),

which had not produced any result in the first period of research (1994-2004), has been used, even if rarely, in the last three years (2004-2007).

- For the second research spell covering 2004-2007), other words were used to identify migrants, such as “returnees”, “stateless” or “unregistered persons”.

Following this initial broad cast of the “electronic research net”, only relevant entries were retained for the study. Informal discussions were also conducted with UN officials and non-governmental organisations representatives in Geneva, prior to and during the research.

## 2. Findings

As stated above, the research covers six core TMB<sup>17</sup> conclusions and recommendations adopted since 1994, including reports from all sessions with country specific conclusions, as well as TMB annual reports to the General Assembly. A total of 1351 concluding observations were surveyed (298 for 2004-2007), of which 782 contained migrant related issues (256 for 2004-2007). The compilation of relevant excerpts from conclusions is 443-pages long (156 for 2004-2007).

The full research findings are posted on a database on the December 18 website. The database allows for searches by country as well as by TMB.

### 2.1. Breakdown by treaty of Treaty Monitoring Bodies' conclusions referring to migrant-related issues

On average between 1994 and 2007, close to 58% of TMB conclusions refer to migrants. The two Committees with the highest percentage of references to migrants, CEDAW and CRC overwhelmingly focus on trafficking. This is especially the case since 2000, when the Convention against Transnational Organized Crime, together with its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, was adopted. The same trend is also observed within CESCR since 2001. The lower figure for CAT conclusions is not surprising. Torture and ill-treatment are more likely to be the hallmark of political regimes with little respect for the rule of law, which tend to target their own nationals as victims of human rights violations. However, as international migrants represent close to 3% of the world population, it is not surprising that 33% of CAT conclusions refer to migrant-related issues.

#### TMB Conclusions referring to Migrants over the 1994-2007 period:

	Conclusions adopted during 1994-2007	Conclusions referring to migrants	Percentage of conclusions referring to migrants
CERD	316	157	50%
CCPR	174	86	49%
CESCR	157	84	54%
CEDAW	243	187	77%
CAT	172	56	33%
CRC	289	212	73%
<b>Total 1994-2007</b>	<b>1351</b>	<b>782</b>	<b>58%</b>

In the period of 2004-2007, the average rate of conclusions referring to migrants has increased by 72%.<sup>18</sup> From 2004 to 2007 all TMB referred more to migrants than during the previous decade.<sup>19</sup> The

<sup>17</sup>This research does not include conclusions from the Committee on Migrant Workers, which started working in 2004, nor from the newly elected Committee on the Rights of Persons with Disabilities.

<sup>18</sup>From 50% over 1994-2004 to 86% over 2004-2007.

<sup>19</sup>Although the timeframe for both research periods is different (10 years for the first pilot project and 3 years for the update) there is a marked increase in references to migrants. The entry into force of the Migrant Workers Convention in July 2003,

most impressive result is that of CAT, whose percentage of references to migrants was multiplied by five.<sup>20</sup> The number of CEDAW concluding observations referring to migrant issues also increased significantly over the past three years. Between 2004 and 2007, 99 % of its concluding observations referred to migrant-related issues. This is due to the fact that systematic reference to the Migrant Workers Convention is made in almost all concluding observations: 76 over 79 CEDAW conclusions between 2004 and 2007 refer to the ICRMW. More surprisingly, the percentage of references to migrants by CCPR, which remains lower than the others, has increased by 17% over the last three years.

**TMB Conclusions referring to Migrants over the 1994-2004 period:**

	Conclusions adopted during 1994-2004	Conclusions referring to migrants	Percentage of conclusions referring to migrants
CERD	267	114	43%
CCPR	136	62	46%
CESCR	133	64	48%
CEDAW	164	109	66%
CAT	134	23	17%
CRC	219	155	71%
<b>Total 1994-2004</b>	<b>1053</b>	<b>527</b>	<b>50%</b>

**TMB Conclusions referring to Migrants over the 2004-2007 period:**

	Conclusions adopted during 2004-2007	Conclusions referring to migrants	Percentage of conclusions referring to migrants
CERD	49	43	88%
CCPR	38	24	63%
CESCR	24	21	88%
CEDAW	79	78	99%
CAT	38	33	87%
CRC	70	57	82%
<b>Total 2004-2007</b>	<b>298</b>	<b>256</b>	<b>86%</b>

*and the subsequent creation of the seventh TMB, the Committee on Migrant Workers, seems to have prompted other TMB to pay more attention to migrants' rights.*

*<sup>20</sup>From 17% during the period 1994-2004 to 87% over the period 2004-2007.*

## 2.2. Terminology used in Treaty Monitoring Bodies' conclusions and in State reporting

The specific term "migrant worker" is not used frequently. Other words such as "alien", "foreigner", "immigrant" are by far more common. Generally speaking most occurrences of the expression "migrant worker" in TMB conclusions appear either in connection with direct references to the Migrant Workers Convention (about 140 occurrences, of which 118 during 2004-2007, 76 of them by CEDAW) or in relation to discrimination in access to economic, social and cultural rights and especially to education and social services (of which many in relation to children of undocumented migrants).<sup>21</sup>

The use of "migrant worker" varies according to TMB and countries examined:

- CAT and CCPR rarely use it (8 occurrences for CAT and 7 for CCPR);
- CEDAW uses it mostly in relation to the protection of women migrants (particularly domestic women workers), often with a very general wording such as: "The Committee urges the State Party to step up its efforts to protect women migrant workers"<sup>22</sup> or "urges the Government to address the issue of women migrant workers"<sup>23</sup>.
- CERD mostly uses "migrant workers" in sentences covering discrimination/inequality, lack of data, or general concern for their situation, in particular with reference to domestic women workers.
- ICESCR mostly refers to migrant workers as part of general protection issues.
- CRC refers to migrant children in relation to discrimination, difficulties in ensuring birth registration and general concern for their situation and vulnerability.

### Occurrences of the phrase "migrant worker" in TMB concluding observations referring to migrant related issues (1994-2007)

	TMB conclusions referring to migrant related issues	Occurrences of the phrase "migrant workers"	Percentage between 1994 and 2007	Percentage between 1994 and 2004
Western European and Others Group (WEOG)	245	45	18 %	9%
Eastern Europe	133	20	15%	3%
Asia	179	65	36%	19%
Africa	115	31	27%	9%
Latin American and the Caribbean (GRULAC)	111	39	35%	12%
Total	783	200	26%	11%

<sup>21</sup>About 30 occurrences.

<sup>22</sup>Ethiopia CEDAW/C/2004/I/CRP.3/Add.7/Rev.1 30 January 2004.

<sup>23</sup>Greece. 01/02/99. A/54/38, paras.172-212. or Bangladesh. 12/08/97. A/52/38/Rev.1, (Part II) paras.409-464

TMB often mirror the wording used by the respective States in their reports. The terminology used varies according to countries and regions: sending countries such as Sri Lanka, Mexico, Philippines or China and receiving countries of the Middle East or Asia (Libyan Arab Jamahiriya, Lebanon, Jordan, Kuwait, Israel, Saudi Arabia, Kazakhstan or the Republic of Korea), use the term “migrant worker”. For European receiving countries, Canada or Australia, “immigrant” is much more common, as well as “non-citizens”, “aliens”, and “foreigner”. It is striking that in recent years only three occurrences of the expression “migrant worker” were found in conclusions on Western countries, (Italy, Canada and Israel), 22 other occurrences simply refer to the Migrant Workers Convention. This reflects the perspective which these countries take with respect to their own immigration policy.

The use of the adjective “illegal” to qualify the status of migrants, rather than “irregular” or “undocumented” as is more commonly accepted, in TMB conclusions is surprising.<sup>24</sup> It usually reflects the terms used by States in their reports and has not stopped after the entry into force of the Migrant Workers Convention.

### 2.3. Treaty provisions quoted by Treaty Monitoring Bodies when dealing with migrant issues

TMB at times specifically quote relevant treaty articles in country conclusions.

For instance CCPR mainly quotes the following articles of the ICCPR:

- Art. 3 (Equality of men and women before the law);
- Art. 8 (Prohibition of slavery, forced labour and traffic in persons);
- Art.12 (Right to freedom of movement; Right to leave any country including one’s own and to return);
- Art. 13 (Restrictions on expulsion of aliens lawfully in the territory of the State);
- Art. 26 (Non-discrimination, equality before the law) and
- Art. 27 (Right to culture, religion and language for minorities).

CESCR rarely mentions specific articles and limits itself to the following:

- Art. 2 (Obligations of the States Parties for the progressive realisation of the rights recognised in the Covenant and the exercise of those rights without discrimination);
- Art. 3 (Equality of men and women before the law);
- Art. 6 (Right to work);
- Art.7 (Right to the enjoyment of just and favourable conditions of work) and
- Art. 8 (Right to form and join trade unions).

For CERD, the articles include the following:

- Art. 2 (Condemnation of racial discrimination and adoption of measures for the protection of certain racial groups);
- Art. 4 (Condemnation of racist propaganda);
- Art. 5 (Elimination of racial discrimination and guarantee enjoyment of rights);
- Art. 6 (Provision of effective protection and remedies against any acts of racial discrimination) and
- Art. 7 (Measures to combat prejudice)<sup>25</sup>.

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<sup>24</sup>Several occurrences of the use of “illegal migrants”, “illegal workers”, “illegal immigrants” or “illegal aliens” have been found in conclusions of all TMB except CEDAW.

<sup>25</sup>And also: art. 1 (Definition of “racial discrimination”; non-discrimination against non-citizens) and art. 3 (Condemnation of racial segregation and apartheid).

CRC mainly quotes:

- Art. 2 (States Parties shall respect and ensure the rights set forth in the Convention to each child without discrimination of any kind);
- Art. 3 (Best interest of the child – well-being);
- Art. 22 (Refugee and irregular immigrant children);
- Art. 7 (Birth registration and right to acquire a nationality);
- Art. 34 (Protection against all forms of sexual exploitation and sexual abuse);
- Art. 35 (Prevention of traffic) and
- Art. 30 (Right to culture, religion and language for children belonging to a minority)<sup>26</sup>.

CEDAW rarely mentions specific articles and limits itself to the following:

- Art. 4 (Special measures to accelerate equality between men and women);
- Art. 6 (Adoption of measures to suppress all forms of traffic);
- Art. 9 (Right to acquire a nationality);
- Art. 11 (Non-discrimination in the field of employment) and
- Art. 16 (Non-discrimination in all matters relating to marriage and family relations).

CAT mainly mentions the following:

- Art. 3 (Non-refoulement clause);
- Art. 11 (Review of interrogation rules, instructions, methods and practices for custody and treatment of persons arrested or detained);
- Art. 12 (Prompt and impartial investigation of acts of torture) and
- Art. 16 (Prevention of other acts of cruel, inhuman or degrading treatment or punishment)<sup>27</sup>.

<sup>26</sup>Other articles at times quoted include: Art. 4, 6, 8 10, 12-18, 28-29, 31-33, 36-40.

<sup>27</sup>And also: art..1-2, 5-8, 10 and 13.

Whether country conclusions refer to specific articles varies enormously from one TMB to another.<sup>28</sup> CESCR, CEDAW and CRC tackle specific issues in their analyses of country reports and of the responses of delegations without quoting the specific articles of the relevant treaty. The average rate of country conclusions referring to specific articles has only grown by 6% for CESCR and 4% for CEDAW and decreased by 13% for CRC in the period 2004-2007. During that time, CCPR, CERD and CAT members systematically quoted the specific articles of the Treaties in their analyses.<sup>29</sup> Although specific references to key articles might sound very technical, it is useful for government delegates to be informed precisely as to which provision of a given treaty their legislation or practice infringes upon.

**Percentage of TMB Conclusions referring to migrants, which refer to a specific Article of the relevant Convention between 1994 and 2007:**

	From 1994 to 2004	From 2004 to 2007	From 1994 to 2007
<b>CERD</b>	42%	86%	54%
<b>CCPR</b>	34%	100%	52%
<b>CESCR</b>	12%	19%	14%
<b>CEDAW</b>	8%	13%	10%
<b>CAT</b>	21%	61%	45%
<b>CRC</b>	50%	35%	46%

**2.4. The enhancement of human rights of migrants in State reports**

States Parties are encouraged to report on positive measures adopted as a part of the implementation of the treaties they have ratified. Committees usually “note with satisfaction” or “welcome” positive aspects relating to the

<sup>28</sup>Percentage of conclusions referring to a specific provision of the relevant treaty for the period 1994-2007: CERD: 54%, CCPR: 52%, CRC: 46%, CAT: 45% CESCR: 14% and CEDAW: 10%.

<sup>29</sup>Percentage of conclusions referring to a specific provision of the relevant treaty for the period 2004-2007: CCPR: 100%, CERD: 86%, CAT: 61%.

adoption or amendment of legislation or measures such as the setting up of national strategies or plans of action. However, these positive aspects are usually less detailed than the negative aspects and are frequently couched in very general terms. They comprise of measures to promote the human rights of migrants (including undocumented migrants), integration of immigrants, effective implementation of existing legislation, measures relating to the fight against discrimination and for equality (especially in employment), regularization of irregular migrant workers and counter-trafficking. Studies, surveys and data on the enjoyment of rights are also frequently highlighted among positive aspects, as well as ratification or steps towards the ratification of the Migrant Workers Convention, the Palermo Protocol against the Smuggling of Migrants by Land, Sea and Air, or relevant International Labour Organisation (ILO) Conventions.

Below is a cross section of thematic (civil, political, economic and social rights) and country specific examples of positive aspects noted by various TMB:

- A new Law on Foreigners that includes a provision **prohibiting the deportation** of individuals who could face **torture** if returned to their own country. (Croatia, CAT, 2004)
- The new regulations on deportation procedures banning, inter alia, the use of any means blocking the respiratory system and providing for the **medical examination of the alien** prior to the flight, as well as the observance of the proportionality principle in exercising measures of coercion. (Austria, CAT, 2005)
- The accession by the State Party to other international human rights instruments in the reporting period, including the **ICRMW**. (Syrian Arab Republic, CCPR, 2005)
- Implementation of the “Aliens Act” in 1991 and other legislative measures which broaden the criteria for the issuance of **residence permits**, create procedures for the **review of deportation decisions**, give the **Ombudsman for Aliens** a role in these proceedings, and give alien residents the **right to vote** in local elections. (Finland, CCPR, 2001)
- **Children of illegal immigrants are entitled to education and medical care.** (Belgium, CCPR, 1998)
- The adoption, in November 2004, of the revised Ordinance on the Movement of Persons, in which the **integration of foreigners** was legally enshrined as a State objective, and the establishment, in November 2006, of the Task Force on Integration within the Office of Equal Opportunity. (Liechtenstein, CERD, 2007)
- The enactment in 2002 of the new Civil Code which stipulates that **non-citizens** have the same rights as citizens in civil legal matters. (Mongolia, CERD, 2006)
- **Access** by the Office of the United Nations High Commissioner for Refugees and non-governmental organisations **to the Carmichael Road Detention Centre** where undocumented migrants and asylum-seekers are held. (Bahamas, CERD, 2004)
- A new Act on Citizenship, which came into force on 1 July 2001, accepting the possibility of **dual citizenship** and facilitating the **acquisition of Swedish citizenship for children** of foreign background. (Sweden, CERD, 2004)
- The initiative to include non-Saudis in a **health insurance system**. The Committee noted with satisfaction that measures have been taken to put an **end to the practice of employers retaining the passports** of their foreign employees, in particular domestic workers. It also noted the high number of **schools** that have been authorized to offer programmes for the **education of children of migrant workers** that have been designed in their country of origin. (Saudi Arabia, CERD, 2003)

- Decree Law modifying the regulations on the entry, stay and departure of foreigners with a view to, inter alia, introduce penal legislation against the **illegal trafficking** of migrant workers as well as an enlarged definition of the beneficiaries of **family reunification**. The establishment of the **Consultative Council on questions of immigration** and the **participation in it of representatives of immigrants' associations**. (Portugal, CERD, 2001)
  - A "migratory amnesty", which was in force from 1 February 1999 to 31 July 1999, allowed for the **regularization of the situation of a large number of clandestine immigrants** in order to ensure their enjoyment of social, economic and cultural rights, particularly in regard to work. (Costa Rica, CERD, 1999)
  - The adoption of Act No. 1296 of 12 May 2005 on the transmission of **Monegasque nationality from mothers to their children**. (Monaco, CESC, 2006)
  - The establishment of a bilateral commission by the Governments of the Dominican Republic and Haiti, as well as the agreement signed with the Government of Haiti concerning the granting of **temporary work permits for Haitian seasonal** sugarcane cutters during the next harvest, in order to give them a **legal status** and to protect them from the exploitation related to the lack of such status. (Dominican Republic, CESC, 1997)
  - The Act which establishes the **offence of trafficking of children**. (Gabon, CRC, 2002)
  - Initiative to **document and register children of migrant workers** and to provide all children in the State Party with unrestricted access to education and health services. (Malaysia, CRC, 2007)
  - Act amending the Aliens Act, providing for an **independent right to residence for foreign spouses in the event of separation** after two years of cohabitation in Germany or earlier under the hardship clause. (Germany, CEDAW, 2004)
  - The positive changes in Immigration Law, including (...) the establishment of a **service unit for migrant women** at the federal level. (Austria, CEDAW, 2007)
  - National health policy for women providing **innovative primary health care** and emphasizing services for disadvantaged groups of women, including Aboriginal and Torres Strait Islanders, as well as **migrant women**. (Australia, CEDAW, 1997)
- Other positive aspects noted by CERD include the effort to guarantee that **non-citizens**, including **economic migrants**, can exercise their human rights without discrimination in Antigua and Barbuda; repayment to migrant workers of **social security contributions** which they had made during the period of their employment prior to their departure in Italy; monitoring the employment of foreign domestic servants to ensure that **recruitment agencies** act in a fair and just manner in Kuwait; assistance to ethnic associations, to cultural and information activities for and about immigrants and refugees, as well as to **integration projects** in Denmark; administrative guidelines on the **protection of foreign industrial trainees** in order to ensure protection on an equal basis with nationals, as well as the setting up of **complaint centres** in all immigration control centres, where foreign workers can file complaints when their rights have been violated in Korea. The CESC notes equal standing for regularly present foreigners with Italian citizens regarding access to **residential and public housing, and credit** on favourable terms for building, acquiring or renting their first home in Italy; and the possibility for foreign workers, who are not citizens of the European Union, to acquire a one-year work permit to **serve on joint enterprise committees** in Luxembourg. The CRC welcomes the incorporation of the **principle of the best interests of the child** in the new Immigration and Refugee Protection Act of Canada.

## 2.5. Concerns about the human rights of migrants as identified by the Treaty Monitoring Bodies

Conclusions are more specific when they address more developed countries as this mirrors the level of detail in country reports. There is also a difference in the issues raised according to regions, depending on the level of protection generally given to migrants. TMB conclusions will usually argue for application of relevant treaty provisions to undocumented migrants in European countries, whereas in the Middle East for instance, conclusions recommend a more general and basic protection for legally residing migrants.

The **CCPR** examines issues such as trafficking, detention, expulsion, deportation, ill-treatment by law enforcement officials and impact of anti-terrorism laws. Some of these are common to most TMB. CCPR's aim is to focus on various forms of discrimination in the access to civil and political rights guaranteed in the Covenant affecting non-citizens in general and undocumented migrants in particular. In addition to CCPR Articles listed in the section 2.4, rights of concern to the Committee are included in: Art. 2 (Obligations of the States Parties to ensure to all individuals the rights recognized in the Covenant); Art. 6 (Right to life); Art. 7 (Right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment); Art. 9 (Right to liberty and security of person against arbitrary arrest or detention); Art. 10 (Right to human treatment and respect for human dignity); Art. 14 (Equality before courts and right to fair and public hearing); Art. 16 (Right to recognition as person before law); Art. 17 (Right to privacy); Art. 20 (Prohibition on advocacy of national, racial, or religious hatred); Art. 21 (Right of peaceful assembly); Art. 23 (Protection of the family, right to marry); Art. 24 (Right related to name, identity, nationality, birth registration and measures of protection for children); Art. 25 (Right to participate in public life).

Other freedoms and rights of migrants that are frequently infringed upon are notably freedom of expression, freedom of association (especially

regarding trade unions) and more than anything freedom of movement (linked to issues of naturalization and citizenship).

It is interesting to note the definition of "own country" with reference to ICCPR Article 12.4 on the right to enter one's own country. The CCPR recalled that the words "one's own country" are not synonymous with "country of one's own nationality" and strongly urged a State Party to remove from its law the necessity for permanent residents (for example persons of Korean origin born in Japan) to obtain a permit to re-enter prior to departure (Japan, 19 November, 1998, CCPR/C/79/Add.102).

**CESCR** migrant focus is on working conditions and, especially during the period 2004-2007, on access to housing, health services and education. The Committee notes with concern the unfair terms of employment and the discrimination in the enjoyment of economic, social and cultural rights affecting migrant workers, with growing attention to the situation of migrant women. Other specific aspects of concern regarding migrants recently observed by the Committee include: widespread poverty and homelessness; discrimination in access to social housing; limited enjoyment of family rights; restricted access to free compulsory education for migrant children and poor school performance.

Similar to CERD, it considers that non-nationals should be on an equal footing with nationals as far as the enjoyment of economic, social and cultural rights in employment is concerned (i.e. minimum wage, health and maternal benefits, pension benefits, unemployment benefits and safe working conditions). CERD notes that specific sectors with high density of illegal work where legal protection is likely to be incomplete should be targeted e.g. domestic work, hotel and catering, agriculture, textile, cleaning and building industries.

The Committee welcomes the enjoyment of basic social services, health care and education by irregular workers in some countries, but notes that in general the protection they enjoy in the area of welfare is very limited, which aggravates

their precarious situation. CESCR therefore welcomes measures taken to regularize the situation of clandestine immigrant workers.

Just like CRC, the CESCR carries out a more detailed analysis of the causes of emigration than other Committees. This includes the consequences and constraints on the enjoyment of economic, social and cultural rights as well as low salaries and high rates of unemployment in the country of origin; pre-departure information and education of potential migrant workers about their rights and possible difficulties faced abroad.

**CERD** conclusions deal first and foremost with growing racism and intolerance of host populations towards foreigners in general and asylum seekers and immigrants in particular. Migrant workers are not considered a specific category but rather seen as a group among non-citizens. To counter the rise in racism and xenophobia, CERD recommends that States adopt various measures and criminalize violence against members of national, ethnic or racial minorities and religious groups; prohibit racist organizations; consider racial discrimination as an aggravating circumstance for other offences; fight ill-treatment by law enforcement officials also with adequate training; introduce intercultural mediators in schools; promote participation of non-citizens in local election; and include more relevant data and information in their periodical reports.

Secondly, the Committee focuses on the enjoyment of the rights set forth by the Convention by foreigners, with increasing attention to the specific case of migrant workers, and especially on the right to security of person under Article 5b of CERD and economic, social and cultural rights under Article 5e. According to the Committee, discrimination against migrants is noted in the areas of education; employment and housing; access to public services; land property; social security benefits; family rights, as well as between migrants themselves according to the kind of work they perform or depending on their nationality.

According to the Committee, migrant workers should enjoy the same labour protection as

national workers, but are often discriminated against on the basis of their colour or ethnic or national origin. Labour protection is particularly important as regards minimum protection against poor working conditions and low wages; social security and services; right to security of person; right to property; and proper representation of ethnic minority groups in the labour market. The Committee emphasizes that the principle of equality before the law and equality in the exercise of the rights and freedoms between nationals and non-nationals be ensured. Undocumented migrant workers, trainees and domestic workers constitute particularly vulnerable categories. In the period 2004-2007, it paid increased attention to the double discrimination suffered by foreign women, especially regarding access to the labour market.

CERD also puts a strong focus on regularization of undocumented workers. As regards post September 11 anti-terrorist measures, CERD recalls that States should ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin (See CERD General Recommendation 20, above).

By far the main issues of concern to **CEDAW** regarding women migrants are trafficking and sexual exploitation. The Committee provides a detailed analysis of the causes of vulnerability of women to traffickers and of the various measures to combat trafficking, punish perpetrators and protect victims. The second most common conclusion regards emigration. CEDAW analyzes the causes of migration and the measures towards respect of the human rights of women migrants.

The Committee lists minimal labour rights women migrants should enjoy. Special attention is given to typical female labour sectors with higher risk of abuse such as domestic work, "entertainment", agricultural work, free trade zones and tourist and maquiladora industries.<sup>30</sup> According

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<sup>30</sup>*Maquiladoras are assembly factories, run by large companies in foreign countries (i.e.: at the Mexican-US border) that often operate in sweat-shop like conditions.*

to CEDAW, in order to ensure the full enjoyment of migrant women rights under the Convention, receiving countries should put in place information and awareness-raising programmes about the availability of social services, information on rights of women, residence permits, legal remedies and language classes. The Committee stresses that migrant women, including undocumented, are victims of multiple discriminations with respect to health, education, employment, social and political participation and violence, including domestic violence, due to the intersection of gender with ethnic and religious factors. Migrant women are also victims of discriminatory laws with respect to access to residency or citizenship. CEDAW advises that culturally and gender-sensitive measures can be necessary and that the specific needs of women should be taken into account in the areas of health and protection against violence. In order to prevent discrimination regarding participation in public life, the Committee recommends using temporary special measures.

Migrant-related issues in **CAT** conclusions are mostly to be found in concluding observations on European countries and in connection with conditions of detention and removal of foreigners in an irregular situation, often asylum-seekers, unaccompanied children but possibly also irregular migrants. Procedures of expulsion often break the Convention, especially regarding fundamental safeguards and non-refoulement clause. The main concern of the Committee against Torture regarding migrant workers is the excessive use of force and discriminatory practices by the police, especially in detention prior to and during expulsion procedures.

The Committee also expresses concerns about the difficulties faced by victims of abuse to obtain redress and adequate compensation, in particular when they are immigrants. It stresses the necessity to train immigration officials on human rights, focusing on the prohibition of torture. These issues are common to most Committees, but they are more detailed under CAT. CAT's recommendations are also more specific in dealing with migrants, whether documented or undocumented.

Until 2003 **CRC** tended to refer to foreign children in general without singling out migrant children. Since then it has started to clarify the status of foreign children: whether they are migrant children, children of migrant workers, documented or undocumented, refugee children or asylum seekers, or children under special protection measures. From 2000 onwards, CRC has also developed a strong interest in trafficking, including trafficking of migrant children and their situation once returned to their country of origin. This is notably due to the adoption in 2000 and entry into force in 2002 of the Optional Protocol on the Sale of Children.

The main concern of the Committee is discrimination in access to adequate social services, in particular health and education facilities for migrant children in general, and irregular migrant children in particular. Both education and social services are often accessible de facto but not de jure to irregular migrant children and unaccompanied children, notably in Europe and other countries of immigration. De facto discrimination continues to affect migrant children in general. This is in contradiction with CRC Articles 2 (non-discrimination) and 3 (best interest of the child). Another concern of CRC is the issue of birth registration for undocumented migrant children and children born of foreign parents. The Committee also examines child labour and economic exploitation and recommends that the best interest of the child be taken into account in procedures, as well as administrative and legal frameworks having an impact on children. The Committee also expresses concern over the situation of migrant children in immigrant reception centres and in detention.

In relation to labour emigration, the Committee notes that parents who emigrate often leave their children behind with relatives or in institutions. It has a negative impact on the exercising of parental responsibilities in the upbringing and development of children and exposes them to abuse and exploitation. The Committee also draws the attention to the impact of emigration of professionals who, as specialized educators or health workers, play a pivotal role for children. The Committee often refers to the situation of

vulnerability of migrant children and unaccompanied minors and expresses concern at the legal standards, administrative frameworks and procedures that fail to ensure their protection. Amongst all TMB, the CRC insists most on a good dissemination of information about the Convention in the general public and in particular among new immigrants, in their languages, and with appropriate material for children. In recent years, the CRC also emphasized the need for more disaggregated data concerning migrant children.

## 2.6. Cross-cutting references in the six Treaty Monitoring Bodies

Some concerns and clusters of rights related to migrants are examined by a number of TMB, though with varying perspectives according to the specificity of the relevant treaty.

### Deportation

CAT focuses on the prohibition of ill-treatment, harassment and extortion, on the use of excessive force during involuntary expulsion and on the provision of appeals which would suspend expulsion if a fear of torture in the destination country is alleged. It welcomes the involvement of relevant non-governmental organizations during the deportation process. CCPR's main concern is that States give access to legal advice and information to detainees. Furthermore, like CAT, CCPR stresses the importance of a possibility to review the expulsion measure when the deportee could be exposed to a violation of his/her rights in the country of return. Both CCPR and CAT recommend the organization of training programmes on international refugee law with emphasis on the content and scope of the principle of non-refoulement for migration police officers and administrative officials handling deportation procedures. For CRC, States should make sure that expelled children are effectively returned to their family or to social welfare agencies in their country of origin. It also recommends an impact assessment on children of the deportation of close relatives taking into account the best interest of the child. CESCR and CEDAW hardly mention deportation.

### Trafficking

Trafficking is an issue of concern to all Committees especially since 2000, when the UN Convention on Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children was adopted. Before then, relevant issues used to be referred to as "sexual exploitation"<sup>31</sup> The extent to which the different Committees consider trafficking varies, but not so much the content. CEDAW and CRC are the two Committees giving most attention to trafficking. CEDAW tends to focus more on measures of prevention, prosecution and punishment of offenders, as well as measures to rehabilitate and reintegrate victims. Other main issues highlighted by the Committee include the possibility to give evidence (witness), the need for adequate training of officials to investigate trafficking cases and the opportunity of conducting awareness-raising campaigns on the risks and consequences of trafficking of women and girls.

CRC examines the causes of trafficking and the types of activities trafficked children are forced into and insists on protection measures for trafficked children, among others, through family reunification. The Committee also addresses the issue of trafficked children returned to their country of origin. It is concerned about the difficulties they face in reintegrating in their community of origin. Another aspect touched upon by CRC is the training of law enforcement officials, social workers and prosecutors on how to monitor, receive, investigate and prosecute reported cases of sexual abuse in a child-sensitive manner. Cooperation with United Nations Children's Fund (UNICEF) and the International Organization for Migration (IOM) is recommended. Trafficking-related issues stressed by CEDAW and CRC largely overlap. The observations issued by the CRC under the Optional Protocol on the Sale of Children since its entry into force in 2002 give additional details.

In CCPR conclusions, women and child migrants are explicitly referred to in relation to trafficking. The Committee is concerned about the reported

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<sup>31</sup> *The definition of exploitation in the Protocol also covers other forms of exploitation including slavery and bonded labour as well as the removal of organs.*

lack of effective protection of victims including witness protection mechanisms.

CAT dwells upon the lack of public investigation and prosecution in some cases of trafficking and underlines the importance for trafficked people to be treated as victims and not as irregular migrants whilst both CERD and CESCR focus essentially on actions for the protection of victims. However, it is worth underlining that CERD has in recent years paid more attention to the issue.

### **Working conditions**

This is CESCR's main concern. It particularly emphasises unfair terms of employment and discrimination in enjoyment of economic, social and cultural rights such as the right to work; fair conditions of employment; minimum wage; health and maternal benefits; pension benefits; unemployment benefits and safe working condition. The Committee notes with concern that all these problems are especially acute for migrant workers. CESCR recommends that States oversee whether employers treat migrant workers in conformity with ILO standards and the provisions of the Covenant. It also recommends sanctions for employers, compensation for victims of violations, freedom for foreign workers to change employer for the legal duration of their stay and to seek new employment upon expiration of their contract.

CERD is concerned with discrimination between national and non-national workers who should enjoy the same protection especially regarding minimum wages and good working conditions; social security and services; right to security of person; right to property and proper representation of ethnic minority groups in the labour market. Like CEDAW and CRC, it puts a significant focus on domestic migrant workers conditions, recommending they fully benefit from the protection of the national labour legislation.

CCPR also considers that the risk of abuse facing migrant workers is a result of the distinctions made in legislation between national and non-national workers. Irregular migrants and domestic workers in particular should enjoy legal protection. Forced labour should be eliminated.

Access to legal information, to courts and to trade unions should be guaranteed.

CEDAW's main concerns in relation to working conditions cover: the pay gap and the disproportionate rate of unemployment between women and men; the lack of legal provisions on sexual harassment in the workplace; the lack of employers' compliance with safety and health standards; the fact that the majority of women still work in the informal sector as well as in part-time and low-paid work. CEDAW also lists minimum conditions for the most vulnerable workers, with a growing special focus on migrant domestic workers, the vast majority of whom are women.

CRC concerns cover forced labour, exploitation of children, minimum age for employment and the fact that migrant children are often employed in clandestine work or illegal activities than other children. Another concern expressed by the Committee, especially in recent years, is regarding the situation of a large number of domestic child workers who are particularly exposed to abuse and who work under hazardous conditions.

CAT focuses on violence commonly faced by migrant workers, particularly domestic female workers and a lack of measures that protect such employees at risk.

### **Emigration and its human consequences**

It is mostly CESCR that deals with this issue and carries out a detailed analysis of the causes of emigration. It notes that migrants are often skilled and semi-skilled workers and that their massive emigration can have a negative impact on social and economic development in countries of origin. The Committee also recommends that States inform and educate potential migrant workers about their rights and the difficulties likely to be faced abroad.

CEDAW approaches emigration mainly from the perspective of the feminisation of migration and analyzes the causes and risks facing women migrants abroad, especially in typically female occu-

pations. It also recommends detailed measures for the protection of human rights of migrant workers at all stages of the migration process.

CRC is concerned about the children whose parents have emigrated and who are left behind with relatives or in institutions and the repercussions they face.

CERD notes the impact of emigration on particular ethnic or national groups.

### **Irregular migrants**

CCPR mostly refers to irregular migrants in connection to detention and expulsion. The Committee also considers them to be more often victims of discrimination in access to rights guaranteed in the Covenant than others. CEDAW draws attention to the fact that undocumented migrant women are particularly at risk as regards potential violation of their labour rights. In recent years, the Committee appears particularly concerned about migrant women becoming victims of trafficking, sexual exploitation and marriage enslavement because of their irregular status.

CERD is predominantly worried that undocumented workers may suffer from abuses such as long working days; lack of health insurance; physical and verbal ill-treatment including extortion; sexual harassment; and threats that they will be handed over to the migration authorities. The Committee is also concerned about the lack of investigation into many of these cases, especially when the abuses are perpetrated by law enforcement personnel. It recommends various protection measures including the prohibition of retention of passports by employers, controls on recruitment agencies, possibility to lodge complaints in case of infringement and education for children of parents in irregular situations. On illegal immigration, the Committee notes the difficulties faced by States Parties linked to large influx of migrants and refugees. It encourages regularization of undocumented migrant workers, as it is difficult to implement the provisions of the Convention on persons without status. This measure, it argues, would enable them to enjoy economic, social and cultural rights, in particular access to work, social services and housing.

According to the CESCR, sectors with a high density of illegal work and where legal protection is likely to be incomplete should be specifically targeted for government action. The Committee welcomes the enjoyment by irregular migrant workers of basic social services, good working conditions and education, but notes that in general the protection they enjoy in the area of welfare is very limited and that they find themselves in a very precarious situation. It therefore welcomes measures to regularize the situation of clandestine immigrant workers. It also recommends that States take educational measures to combat xenophobia and racism.

CRC focuses on persisting disparities in the enjoyment of economic, social and cultural rights (health, social welfare, education and housing) for non-national children, migrant children (whether documented or undocumented), irregular seasonal workers, minority children and refugee and asylum-seeking children. Birth registration procedures are important and should be known by the population and especially irregular immigrant families. Recently the Committee has encouraged governments to prevent irregular migration through the adoption of measures such as: raising awareness about the risks involved, and promoting adequate conditions for the resettlement and reintegration of these children and their families upon their return.

### **Post-September 11**

CERD, and to a lesser extent CCPR, recalls that the fight against terrorism cannot be a source of abuse and/or discrimination.<sup>32</sup> CERD is concerned with possible indefinite detention without charge or trial for foreigners. This point is shared by CAT. CCPR calls on States to protect the rights to privacy and freedom of expression for foreigners or people of foreign origin. Furthermore, the Committee stresses the importance of ensuring that immigration laws are not used so as to detain persons suspected of terrorism or any other criminal offences with fewer guarantees than in criminal proceedings and that States Parties should also ensure that those improperly detained receive appropriate reparation. CRC

<sup>32</sup>See CERD General Recommendation 20, Section 1.3 above.

expresses its concern about the possible side effects that some anti-terrorism legislation may have on certain groups of children.

### **Discrimination**

CRC looks at discrimination regarding access to welfare, nationality, documentation, education, health care and housing for non-national children, migrant children (whether documented or undocumented), refugee children or asylum seekers and irregular seasonal workers.

CAT highlights discriminatory practices by the police and argues in favour of the possibility of complaint without any discrimination in law. It urges States to prosecute and punish perpetrators with penalties appropriate to the nature of their acts.

CCPR comments on various forms of discrimination in the access to the rights guaranteed in the Covenant, especially by Articles 2, 3, 6, 7, 8, 9 and 10 (see Sections 2.4 and 2.6), affecting non-citizens in general and undocumented migrants in particular. Regarding working conditions, the Committee notes in broad terms that the risk of abuse facing migrant workers is due to distinctions made in legislation between national and non-national workers.

CEDAW notes that migrant women are faced with multiple discrimination in society at large and in their own communities. The intersection of gender with ethnic and religious factors negatively affects access to health, education, permanent residence status, work permit and employment as well as participation in public life. Another concern raised by the Committee regards access to birth registration in relation to the father's nationality.

CERD recommends the elaboration of national plans on the rights of foreigners, migrants, refugees and stateless persons. States should also adopt legislation establishing equality between nationals and non-nationals in the exercise of rights and freedoms and prohibiting discrimination on grounds of colour, racial or ethnic origin and nationality. Discrimination against migrants is seen in the areas of education, employment,

housing, access to public services, land property, family rights, social security benefits as well as discrimination among migrants according to the kind of work they perform or their nationality. The Committee notes with concern the re-emergence of discriminatory and racist attitudes towards migrants and foreigners in general and considers that racist organizations should be prohibited and racial discrimination considered an aggravating circumstance.

For CESCR, migrant workers are discriminated against with regard to the enjoyment of working conditions and of economic, social and cultural rights. National law should put them on an equal footing with nationals in this regard. The Committee recommends that social welfare should not exclude foreign workers and observes that in general the protection they enjoy in this area is very limited and that they find themselves in very precarious situation. Various recommendations are formulated on the need for equal rights and freedoms with nationals including as regards training, appeals in court and trade union rights. The Committee also advocates for family reunification and naturalization without discrimination between non-nationals. Yet, it stresses the importance to guarantee full access to free compulsory education for migrant children. States should adopt penal measures to combat all forms of discrimination, whether by police and law-enforcement officials or on the labour market.

### **Birth registration**

CCPR emphasizes the importance of registration at birth in so far as it conditions the enjoyment of political and electoral rights, and the possibility to hold public positions. The Committee, while recognizing that registration is distinct from conferral of nationality, expresses concern that some children are registered at birth without a nationality. Recently, also, CEDAW has begun paying attention to this issue, sharing CCPR's concern. It furthermore deplores the lack of information on the situation of immigrant women who are unable to obtain birth certificates for their children. According to CRC, States should ensure birth registration for all children, including those of undocumented migrants, to avoid stateless-

ness and ensure full enjoyment of rights, such as access to health and education. Children should be registered even when they are not entitled to nationality. CERD observes with concern the discrimination against children in access to birth registration on account of their father's nationality.

### **Migrant Women conditions**

In recent years, all Committees have increasingly dealt with migration from a gender perspective. This is due to the fact that half of migrants in the world today are women. CEDAW is of course the Committee that pays more attention to the situation of migrant women. A common focus is the double discrimination suffered by women migrants, though with varying perspectives according to the issues of concern of each Committee. CESCR is concerned with the particularly poor conditions that migrant women may face with regard to work, housing, health service and education. CERD focuses on restricted access to labour market. CRC dwells upon discriminatory regime against women as regards birth registration of children and transmission of nationality as a consequence of marriage. CAT puts emphasis on the issue of trafficked women, who represent 80% of trafficked people in the world.<sup>33</sup>

### **2.7. Gaps in States' reporting on human rights of migrants<sup>34</sup>**

As migrant workers and members of their families find themselves outside the territory of their country of origin, they are often beyond the protection afforded to its citizens by that State. They are in a particularly vulnerable situation and rarely find full protection under the legislation of receiving or transit States. Notwithstanding the level of protection migrants could and at times do enjoy under the combination of the

core international human rights treaties and the growing attention paid to migrant workers and members of their families in recent years by the respective TMB, there remain gaps in fulfilling some of the specific rights of migrants. Some categories of rights important for migrants are characterized only in the Migrant Workers Convention. These are not new rights, but merely highlight specific protection needs. Some of them are covered in other conventions, and are expanded upon in the ICRMW.

What follows is a list of rights elaborated upon in the 1990 Migrant Workers Convention which are not covered, or only partially so, by other human rights conventions and treaties. Therefore States that have not ratified the ICRMW do not have the obligation to report on these rights to the other six TMB.

The Migrant Workers Convention contains strong safeguards against collective and arbitrary expulsions. It also protects migrant workers from destruction of identity and other documents.

Article 23 provides the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their States of origin or of a State representing the interest of that State, particularly in case of expulsion.

The ICRMW expands on the protection of human rights of migrants by, amongst others, providing broader grounds for discrimination than those initially listed in the Universal Declaration on human rights or elaborated upon in subsequent conventions. Its wording reflects the evolving international context. The ICRMW Article 1 includes "conviction", "nationality", "age", "economic position" and "marital status".<sup>35</sup> CRC for its part contains "disability" as an additional ground. This list contains helpful grounds in view of the trends observed in human rights violations of migrants, as is for instance detailed

<sup>33</sup> *International Federation for Human Rights (FIDH), Women and Migration 2007, Lisbon: [http://www.fidh.org/IMG/pdf/Femme\\_Migrations\\_Eng.pdf](http://www.fidh.org/IMG/pdf/Femme_Migrations_Eng.pdf)*

<sup>34</sup> *For a detailed and complete analysis of the gaps in protection of migrants' rights by the six core TMB and the added value of the ICRMW and its Committee, see SLINCKX Isabelle, "Migrants' Rights in United Nations Human Rights Conventions", Migration and Human Rights, UNESCO, to be published.*

<sup>35</sup> *GRANGE Mariette, Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties: a Do-it-yourself Kit, International Catholic Migration Commission, Revised edition, 2006.*

in annual reports of the United Nations Special Rapporteur on the human rights of migrants.<sup>36</sup>

The Convention also addresses issues of employment and residence authorization. ICRMW Article 25 (3) stipulates: “States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle [equality of treatment] by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.” This is important inasmuch as, even in an irregular situation, a migrant worker is entitled to receiving remuneration. This is particularly relevant prior to forced expulsions for instance.

Article 38 encourages States of employment to authorize migrant workers and members of their families to be temporarily absent without effect upon their authorization to stay or to work.

Article 41 provides the right for migrant in a regular situation to participate in public affairs of their State of origin and to vote and to be elected at elections of that State.

Transfer of earnings and savings is guaranteed under the Convention (Articles 32 and 47). This is crucial as remittances often are a main source of support for families in countries of origin. The Convention also prohibits double taxation and refers to exemption of import and export duties for personal effects and the equipment necessary to engage in the activity for which migrant workers were admitted in the State of employment.

The ICRMW gives particular importance to the rights and protection of members of the migrants’ families, for example in the event of the death of a migrant worker or dissolution of marriage. Article 71 relates to States facilitating the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families.

Finally, the ICRMW covers categories of migrant workers excluded from other international conventions, such as frontier workers and self-employed workers.

Despite a recent growing interest in obtaining information on the situation of migrant workers by the TMB, there is hence an objective gap in government reporting on implementation of treaties that do not contain provisions specific to the situation of migrant workers and members of their families. The perspective and level of detail of the Migrant Workers Convention can be used to inform other committees and give substance to some clusters of rights when they examine State reports. This however does not replace the added value of actual ratification and implementation of ICRMW.

### 3. Conclusion

This piece of research provides a measuring rod to assess if governments that have not ratified the Migrant Workers Convention, and that show no sign of ratifying it, actually use other human rights treaties to protect migrants. The sum of TMB references and recommendations on migrants is comforting but falls short of offering comprehensive and coherent protection to migrant workers and members of their families.

It is positive that over half of country specific concluding observations of TMB refer to migrant issues: as long as only 20% of UN member states have ratified the Migrant Workers Convention, excluding large Western host States, the combined implementation of the six core human rights treaties studied in this paper represents the best compromise to monitor and implement respect for and protection of the human rights of migrant workers and members of their families. However, as very few countries in the world remain unaffected by migration, it is clear that there remains a substantive protection gap.

Some very practical and detailed positive elements can be registered (Section 2.4). While concluding observations often remained very vague throughout the initial period covered by the

<sup>36</sup>See: <http://www2.ohchr.org/english/issues/migration/rapporteur/annual.htm>.

research (i.e.: “the situation of migrants should be improved”), in recent years the different TMB have made efforts to give clearer guidance to States as to how and in which area they should improve their performance. The regular reporting of 193 States Parties to the CRC has made a quantitative and qualitative difference: since its creation in 1990, the CRC has been one of the TMB that stress almost systematically the situation of migrant children.

The terminology used by reporting States sometimes makes it difficult to identify whether the category of non-citizens described in reports includes migrant workers and members of their families. Refugees, asylum-seekers, unaccompanied minors and at times also minorities, ethnic groups and trafficked persons are often not disaggregated in reporting. Hence the use of terminology by treaty bodies sometimes suffers from incoherence. TMB have begun to encourage States to provide more specific data regarding migrants, including from a gender perspective.

There is no consistent streamlining of migrant concerns in the six TMB studied above. This creates gaps and some overlaps. Recurrent cross-cutting references in most TMB conclusions include deportation, trafficking, working conditions and exploitation, emigration and its negative consequences on countries of origin, irregular migrants, discrimination, post-September 11 effect and migrant women. Detention is another concern. These are serious issues which should be approached in an integrated manner. In addition, some other major concerns regarding migrants’ rights are not covered by the recommendations of the six TMB.

More cross referencing with the public findings of relevant UN thematic mechanisms (thematic “special procedures”), such as the Special Rapporteurs on the Human Rights of Migrants, on Torture, on Violence against Women, and on Trafficking should feed into the overall supervision of treaty implementations. The Office of the

High Commissioner for Human Rights (OHCHR), which services the TMB as well as the various special procedures, is uniquely placed to act as a focal point on the human rights of migrants. The Office created a new unit on women’s human rights and gender in 2006: it should create a similar unit on human rights and migration.<sup>37</sup>

The entry into force of the Migrant Workers Convention in 2003 may have prompted some TMB to more consistently deal with migrants’ rights. Despite the proliferation of regional consultative processes on migration and the recent interest for migration at the international level - notably the High Level Dialogue on Migration and Development organised by the UN General Assembly in September 2006 and the following intergovernmental Global Forums on Migration and Development in July 2007 in Brussels and in October 2008 in Manila - the question of the human rights of migrants is still far from featuring prominently on the global agenda. The emerging recognition by the international community of the positive potential of migration, in particular with respect to development, has generally not resulted in a bigger focus on migrants’ rights or a rights-based approach to migration. When migrants’ rights are integrated in the debates, this is often side-lined or undermined by the increasing criminalisation of migrants and a utilitarian approach to migration management. Despite the fact that one of the three themes in Manila is “Migration, Development and Human Rights,” many fear that the Forum will downplay the rights-based approach.

This report provides some leads on how to advance the protection of the human rights of migrants through the combined work of human rights treaty monitoring bodies. Non-governmental organisations, UN experts, lawyers and interested stakeholders should more systemati-

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<sup>37</sup> But the OHCHR has an informal, internal Task Force on Migration that started in 2004. The Task Force has contributed to reinforce the Office’s attention to the issue of migrants’ rights. It has led to the elaboration of Migration discussion papers that cover issues such as Administrative Detention; Family Reunification; or the Right to Education of Migrant Children

cally use TMB conclusions to hold governments accountable to their international obligations. Pending progress in the reform of the overall treaty monitoring system, the 1990 Migrant Workers Convention does offer the only comprehensive tool to ensure integrated state reporting on protection of the human rights of migrant workers and members of their families. The voluntary State reporting system instituted by the international human rights treaties remains unique. It has demonstrated its value over the past four decades for other groups of human beings, including women and children. It provides a unique tool to advance protection of the rights of all migrant workers and members of their families.

## Links and further information

For further information on this update you can contact:

- December 18 vzw  
Rue Gaucheret 164, 1030 Brussels (Belgium)  
[www.december18.net](http://www.december18.net)  
[info@december18.net](mailto:info@december18.net)

For additional information on the pilot research project you can also contact:

- International Catholic Migration Commission  
[www.icmc.net](http://www.icmc.net)
- UNESCO  
[www.unesco.org/migration](http://www.unesco.org/migration)

For further information about treaty monitoring bodies:

- [International Network for Economic, Social and Cultural Rights \(ESCR Net\)](#)  
ESCR-Net seeks to strengthen economic, social and cultural rights by working with organizations and activists worldwide to facilitate mutual learning and strategy sharing, develop new tools and resources, engage in advocacy, and provide information-sharing and networking.
- [Anti-Racism Information Service \(ARIS\)](#)  
ARIS was set up to make the Convention on the Elimination of Racial Discrimination better known and to publicize the work of the Committee for the Elimination of Racial Discrimination (CERD) which monitors the application of the Convention.
- [International Service for Human Rights](#)  
The Treaty Body Monitor is an ISHR publication, which provides reports on each country examined by the seven UN treaty monitoring bodies and an overview of each session,

including information about the drafting of General Comments or General Days of Discussion (when relevant). The Treaty Body Monitor is part of ISHR's Human Rights Monitor Series and is currently an online publication.

- [NGO Group for the Convention on the Rights of the Child](#)

The group brings together international Non Governmental Organisations (NGOs) directly involved in the implementation of the Convention. The NGO Group aims to raise awareness about the Convention and make its implications known, to promote full implementation of the Convention, and to be an active source of information for the Committee on the Rights of the Child, concerned UN bodies and interested NGOs.





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