



Core Human Rights Instruments in relation to “Irregular” Migrants’ Rights vis-à-vis Gaps in Policy, Practice and Implementation

**10th Regional Conference on Migration
Current Perspectives and Strategies in Addressing
“Irregular” Migration
Singapore, 6-10 November 2006**

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Presentation outline

- **International and regional standards protecting irregular migrants**
 - International labour law (see ILO presentation)
 - International human rights law
 - International criminal law
 - Regional standards (with a focus on Europe)
- **Supplementary approaches to protection**
- **Legal and policy protection gaps**
- **Safeguarding irregular migrants' rights in practice**



International labour law

- **ILO Constitution espouses principles of social justice protecting persons in their working environment including those “in a country other than their own”**
- **ILO Declaration on Fundamental Principles and Rights at Work 1998**
 - **Member States must adhere to principles in the 8 core ILO Conventions (against forced labour and child labour, on trade union rights, and non-discrimination) even when they have not ratified the instrument/s in question**
- **Conventions and Recommendations, including specific instruments protecting migrant workers**



Specific ILO instruments protecting migrant workers

- **Convention No. 97 (1949)**
- **Convention No. 143 (1975), Part I**
 - **State obligation to respect the basic human rights of all migrant workers - Article 1**
 - **Irregular migrant workers to enjoy equal treatment with regular migrants in respect of rights arising out of past employment (remuneration, social security and other benefits) – Article 9(1)**
 - **State obligations to**
 - **take measures, in collaboration with other States, to detect and prevent irregular migration and the abuses associated with the phenomenon – Articles 2, 3**
 - **impose sanctions on traffickers, smugglers and employers – Articles 5, 6(1)**



International human rights law

- **International Bill of Human Rights**
 - **Universal Declaration of Human Rights 1948**
 - **Covenant on Civil and Political Rights 1966**
 - **Covenant on Economic, Social and Cultural Rights 1966**
- **Other core human rights instruments (thematic or protecting specific groups)**
 - **Convention on the Elimination of All Forms of Racial Discrimination 1965**
 - **Convention on the Elimination of All Forms of Discrimination Against Women 1979**
 - **Convention against Torture 1984**
 - **Convention on the Rights of the Child 1989**
 - **Migrant Workers Convention 1990**



IHR law: key principles

- **Universal human rights instruments apply to all persons irrespective of nationality and legal status: e.g. UDHR, ICCPR, ICESCR. Few exceptions**
 - **Political rights**
 - **Free movement within a country limited to lawfully resident migrants**
 - **Limited procedural safeguards for irregular migrants in the expulsion process (contrast Article 13 ICCPR with Article 22 ICRMW)**
- **ICESCR does apply to non-nationals, including irregular migrants**
 - **See ESC Committee General Comments and practice**
- **Importance of interdependence between ESC and CP rights**
- **Distinctions between citizens and non-citizens can only be justified if they serve a legitimate State objective and are proportional to the achievement of that objective**



UN Convention on Migrant Workers 1990

- Adopted by UN General Assembly – 18 December 1990
- Entry into force – 1 July 2003
- 34 States parties to date
 - Algeria, Azerbaijan, Belize, Bolivia, Bosnia, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Honduras, Kyrgyzstan, Lesotho, Libya, Mali, Mexico, Morocco, Nicaragua, Peru, Philippines, Senegal, Seychelles, Sri Lanka, Syria, Tajikistan, Timor-Leste, Turkey, Uganda, Uruguay
- Ratified almost exclusively by sending countries



UN Migrant Workers Convention

- **Part III on the human rights of all migrant workers and members of their families**
 - **Reiterates that fundamental civil and political rights and economic and social rights apply to all migrants**
 - **All migrant workers and their families to have equal treatment with nationals regarding following economic and social rights:**
 - **Conditions of work /terms of employment (Article 25)**
 - **Trade unions rights (Article 26)**
 - **But no express right to form trade unions**
 - **Social security (Article 27)**
 - **But linked to national legislation and applicable bilateral /multilateral treaties**
 - **Emergency medical treatment (Article 28)**
 - **cannot be refused because of irregularity of stay /employment**
 - **Access to education for migrant children (Article 30)**
 - **cannot be refused because of irregularity of stay /employment**



UN Migrant Workers Convention

- **Part VI – promotion of sound, equitable, humane and lawful conditions regarding international labour migration**
 - **State obligation to consult /cooperate to ensure labour migration takes place in humane and sound conditions**
 - **Provisions for sanctions against smugglers, traffickers and employers**
- **Protection of the human rights of irregular migrants in Part III is also seen as a means of preventing irregular migration**



International criminal law

Trafficking and Smuggling Protocols

- **Protocols to UN Convention against Transnational Organized Crime 2000 (Palermo Convention)**
- **Adopted in a law enforcement and not human rights context**
- **But also protection provisions in Trafficking Protocol for victims of trafficking**
 - **States to protect and assist victims with full respect for their human rights – Article 2**
 - **States to implement measures for the physical, psychological and social recovery of victims – Article 6**
 - **States to consider permitting victims to remain in their territory temporarily or permanently in appropriate cases – Article 7**



Regional standards – Europe

- **Non-binding Council of Europe standards**
 - **Parliamentary Assembly Recommendation 1755 (2006) on the human rights of irregular migrants**
 - **Council of Europe Committee of Ministers 20 Guidelines on Forced Return (4 May 2005)**
 - **Includes standards concerning detention (Chapter III)**
- **Proposed EU law**
 - **European Commission Proposal for a Directive on common standards and procedures for returning illegal residents (COM (2005) 391, 1 Sept 2005)**



Regional standards – Europe

- **European Convention on Human Rights**
 - Ratified by 46 European countries
 - Applies to everyone within the jurisdiction of States parties (Article 1)
- **European Social Charter and Revised Charter**
 - Appendix (Charter only applicable to lawfully resident migrants from other Contracting Parties)
- **Collective Complaints Protocol to Charter**
 - Complaint 14/2003 International Federation of Human Rights (FIDH) v. France
 - Limitation of access to health care for children of irregular migrants is a violation of Article 17 of the Charter (protection and assistance to children and young persons)



Regional standards – Americas

- **Advisory Opinion OC-18-03 of the Inter-American Court of Human Rights on the juridical condition and rights of undocumented migrants (17 Sept 2003)**
 - **request by Mexico for an authoritative opinion**
 - **migratory status of a person cannot constitute a justification in depriving him/ her of the enjoyment and exercise of his/ her human rights, including those related to work and that the migrant, upon taking up a work related role, acquires rights by virtue of being a worker that should be recognised and guaranteed independently of his or her regular or irregular situation in the State of employment**
- **Yean and Bosico v. Dominican Republic (8 Sept 2005)**
 - **discriminatory application of nationality and birth registration laws to children born in DR but whose parents were irregular migrants contravened ACHR by rendering them stateless**



Supplementary approaches to protection

- **UN Special Rapporteur on the human rights of migrants (currently Jorge Bustamante)**
 - Annual and Country reports (Philippines is the only Asian country visited to date)
 - Initial focus on analysis of real demand in destination countries for migrant workers, including irregular migrants
- **Special Rapporteurship on Migrant Workers and Members of their Families**
 - Established by Inter-American Commission on Human Rights
- **ILO Multilateral Framework on Labour Migration (see ILO presentation)**
- **International Agenda for Migration Management (IAMMM)**
 - Product of Berne Initiative (state-owned consultative process)
 - “Migrants in an irregular situation are entitled to protection of their human rights”



Legal and policy protection gaps

- **Insufficient international attention devoted to regulating illicit recruitment practices**
 - **but see ILO Convention No. 181 on Private Employment Agencies (1997) – ratified by 20**
- **Inadequate safeguards for women migrants in non-regulated sectors where women predominate (exacerbated by irregular status)**
 - **Domestic work, care work, sex work**
- **Lack of explicit protection for temporary migrant workers**



Legal and policy protection gaps

- **Detailed legally binding standards on administrative detention and expulsion /return of irregular migrants still to be developed (with exception of prohibition on collective expulsion)**
 - **Issues: Under what circumstances may detention take place? Conditions of detention? Length of detention? Possibilities of challenging detention? Substantive and procedural safeguards against expulsion?**
- **No international legal standards on regularization**
- **No explicit safeguards facilitating the enjoyment by irregular migrants of their human and labour rights in practice**



Regularisation and resident rights

- **No international or regional legal standards on regularization (national issue)**
- **Problems with national regularisation approaches**
 - Migrants drift in and out of regularised status
 - Different purposes: e.g. social inclusion v. ensuring flexible supply of labour
- **Possible common approaches**
 - An individual “right” to regularisation?
 - e.g. right to “earned adjustment” (ILO, 2004) (i.e. no criminal offence other than unauthorised entry or work; in employment; integrated)
 - Adoption of equitable regularisation standards (see Platform for International Cooperation on Undocumented Migration – PICUM)
 - <http://www.picum.org/>



Safeguarding migrants' rights in practice

**Source: R. Cholewinski, Irregular Migrants: Access to Minimum Social Rights
(Council of Europe, 2005)**

Legal obstacles

- **Invalidity of employment contracts involving irregular migrants**
- **Formal obligation on officials in some countries to denounce irregular migrants to immigration authorities**
- **Criminalization of the provision of assistance to irregular migrants**
- **No availability of legal aid before employment tribunals**

Practical obstacles

- **Fear of expulsion**
- **Difficulties of irregular migrants to access health care system in view of absence of information on their rights and onerous bureaucratic conditions**
- **No access to adequate schooling for children despite compulsory education requirements**
- **Higher mobility of irregular migrants within a country**



Conclusions: protection of irregular migrants

- **IHR law protects all persons regardless of nationality or legal status**
- **But elaboration of this principle in more detailed instruments not widely accepted**
- **Legal and policy gaps regarding the protection of (irregular) women migrants**
- **More detailed standards on the detention and expulsion /return of irregular migrants still to be developed**
- **Legal and practical obstacles in accessing rights, particularly economic and social rights**



Thank you.