



ASIA PACIFIC FORUM
ADVANCING HUMAN RIGHTS IN OUR REGION

Promoting and Protecting the Rights of Migrant Workers



The Role of National Human Rights Institutions

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Promoting and Protecting the Rights of Migrant Workers: The Role of National Human Rights Institutions

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Foreword

National Human Rights Institutions (NHRIs) are uniquely placed to play an important role in the protection and promotion of the rights of migrant workers. The APF's members have recognized the role they can play in this regard.

Since the APF's inaugural meeting in Darwin in 1996, APF Forum Councillors affirmed that NHRIs should "respond effectively and promptly to requests from other NHRIs to investigate violations of the human rights of their nationals present in a country that has a national institution". That affirmation established the precedent for cross-border human rights cooperation amongst the APF membership in the broader area of migration.

The APF Annual Meetings in Suva in 2006 and in Kuala Lumpur in 2008 culminated with APF members calling for greater consideration of the relevance of ILO conventions to the work of NHRIs and noting the importance of "regional standard setting on the human rights of migrants in irregular situations and migrant domestic workers." This shifted the APF's focus more specifically towards migrant workers. Consequently, since 2009, the APF has been collaborating with the Diplomacy Training Programme to provide training opportunities for staff from APF member institutions, with the aim of helping build NHRI capacity and encouraging greater collaboration in the promotion and protection of migrant workers' rights.

During the APF's Annual Meeting in Bali in 2010, APF members took a decisive step towards regional standard setting in the area of migrant workers' rights by calling for the designation of migrant workers' rights focal point officers within APF member institutions. I am very pleased to note that many of these focal point officers contributed to the development of this manual, through sharing information regarding the experiences and work of their respective institutions.

I trust this manual will be a useful resource for NHRIs in the Asia Pacific region, to support them in their vital work and to help further build their capacity to protect and promote the rights of migrant workers.



Kieren Fitzpatrick

Director

Asia Pacific Forum of National Human Rights Institutions

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Promoting and Protecting the Rights of Migrant Workers: The Role of National Human Rights Institutions is a publication of the Asia Pacific Forum of National Human Rights Institutions (APF), with input from the Diplomacy Training Program (DTP).

Erin Crawford, James Iliffe and Suraina Pasha from the APF jointly coordinated the development of the manual and prepared the content in Part II. Michael White from the New Zealand Human Rights Commission provided extensive advice and support.

Imelda Deinla, Patrick Earle and interns, Wei San Lee and Francis Wong, from the DTP developed the key content in Part I.

Design and layout was by Lisa Thompson of JAG Designs.

The manual was prepared in close cooperation with APF member institutions, through the active participation of “focal point” officers on migrant workers from a number of NHRIs. These focal point officers generously provided country-based information and case studies and, along with representatives from APF partner organizations, reviewed draft content.

The following NHRI officers contributed to the development of the manual: Latifa Al-Adba (Qatar National Human Rights Committee), Dr. Savita Bhakhry (National Human Rights Commission of India), Wan Kasim Wan Kadir (Human Rights Commission of Malaysia), Atef Al-Majali (Jordanian National Centre for Human Rights), and Moomina Waheed (Human Rights Commission of Maldives).

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List of abbreviations

APF	Asia Pacific Forum of National Human Rights Institutions
HRC	United Nations Human Rights Council
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
ILO	International Labour Organization
NGO(s)	Non-governmental organization(s)
NHRI(s)	National human rights institution(s)
NPM	National preventive mechanism under the Optional Protocol to the Convention against Torture
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
UN	United Nations
UPR	Universal Periodic Review

Introduction for users

The Asia Pacific Forum of National Human Rights Institutions (APF) is pleased to present *Promoting and Protecting the Rights of Migrant Workers: The Role of National Human Rights Institutions*.

National human rights institutions (NHRIs) – whether they are human rights commissions or ombudsman offices – can play a crucial role in advancing the rights of migrant workers, especially NHRIs that are established in accordance with the Paris Principles.¹

The manual aims to support and strengthen the work of NHRIs in countries of origin, transit and destination to identify and respond effectively to the human rights issues facing migrant workers and members of their families.

RATIONALE

NHRIs are a vital part of strong national human rights protection systems. They also play a key role in linking the international and domestic human rights systems.

Their mandate means that they can engage with all relevant actors at the national level, as well as interact with regional and international mechanisms, to advocate for laws, policies and practices that bolster protection for vulnerable groups, including migrant workers and members of their families.

Although NHRIs have broad mandates which require them to protect and promote all human rights for all people, the particular vulnerability of migrant workers – both documented migrant workers and those in an irregular situation – requires NHRIs to pay consistent and focused attention to the human rights issues they face.

The ILO estimates that there were 214 million international migrants in 2010, representing around three per cent of the global population, with migrant workers and members of their families making up roughly 90 per cent of this total.²

While migration is a positive and rewarding experience for many migrant workers, a significant number face serious violations of their human rights, which can occur at each stage of their journey.

This can include ill-treatment by immigration or law enforcement authorities, abusive or exploitative working conditions, an absence of basic workplace rights and protections, limited access to social security, systemic discrimination and wide-spread xenophobia and prejudice.

Migrants in an irregular situation can live and work at the very margins of basic protections and safety. In some cases, especially involving individuals who have been trafficked across borders, the working conditions they experience can amount to forced labour.

Promoting and protecting the rights of migrant workers is a priority for NHRIs in all parts of the world, with many international and regional meetings of NHRIs convened over the past decade to discuss emerging issues, exchange good practice and develop individual and shared programmes of action.

The 8th International Conference of National Institutions for the Promotion and Protection of Human Rights, held in October 2006, specifically addressed the role of NHRIs in promoting and protecting the rights of migrants.

The Santa Cruz Declaration, adopted at the conclusion of the conference, highlights the critical importance of NHRIs using all aspects of their mandates to promote positive change for migrants

1 Principles relating to the Status of National Institutions; General Assembly Resolution 48/134 of 20 December 1993.

2 *International Labour Migration: A Rights-based Approach*; ILO; 2010.

and migrant workers, including their advocacy, research, monitoring, investigation, reporting and public education functions.

Given the complex and transnational nature of the issues involved, NHRIs are also encouraged to develop “strategic partnerships” with a broad range of national stakeholders, including civil society, as well as cross-country cooperation with NHRIs in “neighbouring countries and sending, transit and receiving states”.³

A key recommendation of the 8th International Conference, as well as other regional meetings, is that NHRIs develop a comprehensive strategy to promote ratification of the International Convention on the Protection of All Migrant Workers and Members of their Families.

NHRIs are also encouraged to promote ratification of other key international human rights treaties and ILO conventions, as well as relevant regional human rights standards.

BACKGROUND

Since 2009, NHRIs in the Asia Pacific region have participated in an annual capacity building programme to better promote and protect the rights of migrant workers.

The programme – a partnership between the Diplomacy Training Program (DTP), Migrant Forum Asia and the APF – brings together representatives from NHRIs, NGOs and trade unions in the region. A key goal is to foster partnerships and practical collaboration to advance the rights of migrant workers at the national and regional level.

This manual has been designed by the APF as a key tool to support ongoing capacity building programmes involving representatives from APF member institutions, including those conducted in partnership with the DTP.

At its 15th Annual Meeting in 2010, the APF agreed to establish “focal points” on the rights of migrant workers in interested member institutions.

Through the coordination of the APF secretariat, these “focal points” contributed information and expertise on good practices of NHRIs in protecting and promoting the rights of migrant workers. Their valuable contributions have directly informed the development of this manual.

OBJECTIVES AND CONTENT

The manual has been developed to provide NHRIs with concise and practical information to support them in their important work to promote and protect the rights of migrant workers.

The manual is divided into two parts. The first section, primarily developed by the DTP, outlines the key international laws, standards and mechanisms to advance the rights of migrant workers and members of their families.

The second section, prepared by the APF, outlines many of the concrete steps that NHRIs can undertake to promote and protect the rights of migrant workers, whether they operate in countries of origin, transit or destination.

Examples of good practices from different APF member institutions have been included to encourage discussion about the different ways in which NHRIs can use their mandate to promote changes in law, policy and practice and to redress human rights violations experienced by migrant workers.

Each chapter includes key questions, the legal basis for the involvement of NHRIs, discussion of the major issues and options for further reading.

3 Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 18.

Facts and trends involving migrant workers

Over the past 50 years, there has been a rapid growth in the number of people migrating between countries, to pursue work, to make a better life for their family or to seek protection. During this time, the number of people living outside their country of origin has almost tripled, rising from 75 million in 1960 to 214 million people in 2010.⁴

While the total number of migrants has grown rapidly, and is expected to continue to do so in the years ahead, migration has generally kept pace with global population growth. Migrants made up 3.1 per cent of the global population in 2010, a slight increase from 3.0 per cent in 2005.⁵

According to data compiled by the ILO in *International Labour Migration – A Rights-based Approach*:

- migrant workers and members of their families accounted for approximately 90 per cent of international migrants in 2010
- there were around 105 million economically active migrant workers in 2010
- women made up almost half (49 per cent) of all migrant workers in 2010
- remittances in 2009 were estimated to be USD 441 billion, of which over 70 per cent (USD 316 billion) went to developing countries
- around 57 per cent of all migrants live in high-income countries, up from 43 per cent in 1990
- around one third of all migration from developing countries may be irregular.

FORCES DRIVING INTERNATIONAL MIGRATION

The interaction of different social, economic and environmental factors is expected to continue to drive international labour migration in the coming decades, including:

- the “pull” of changing demographics, such as ageing populations, and demand for labour in high-income countries
- the “push” of low wages and limited opportunities in less developed countries
- established networks in other countries, based on family, culture and history.⁶

TRENDS IN LABOUR MIGRATION

Almost half of all migrant workers today are women. Women migrant workers are employed in skilled positions (e.g. teachers, nurses and social workers) and less-skilled positions (e.g. domestic or care work, garment manufacturing, “entertainment” and agriculture). They can be especially vulnerable to discrimination, exploitation and abuse in countries of destination because of their gender and their status as migrant workers. However, migration can also be an empowering experience for many women. It can provide numerous benefits to them personally, as well as to their families and their countries of origin. It is therefore important “that policy-makers become more aware of the significant role that women play in labour migration and ... ensure that gender aspects of labour migration are mainstreamed into the relevant policies developed both in countries of origin and destination”.⁷

4 *International Labour Migration – A Rights-based Approach*; ILO; 2010; p. 115.

5 *Ibid*; p. 115.

6 *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination*; Organization for Security and Cooperation in Europe, International Organization for Migration and the International Labour Office; 2006; p. 18.

7 *Ibid*; p. 20.

Private agencies are increasingly playing a greater role in the recruitment and deployment of migrant workers. The absence of effective oversight or accreditation mechanisms can contribute to serious and systemic violations of the rights of migrant workers. The ILO notes that numerous abuses have been reported involving private recruitment agencies, “including confiscation of passports and fraudulent misrepresentation of the type of work for which people are being hired. Pregnancy and HIV/AIDS tests are used routinely by some of these agencies, disregarding recognized international standards”.⁸

There are growing numbers of migrants in an irregular situation. While the nature of irregular migration makes accurate figures impossible, it is estimated that around one third of all migration from developing countries today may be irregular. According to the ILO, “restrictive migration policies in traditional host countries, combined with an unacknowledged demand for labour is a main factor of that increase, depriving migrant workers of the possibility of using legal avenues to access existing jobs”.⁹ Similar factors have also contributed to a significant number of people being trafficked across borders, often involving organized crime networks. The ILO estimates that there are 2.45 million people globally in forced labour as a result of trafficking at any given time, including 1.36 million people in the Asia Pacific region.¹⁰



Photo by Richard Messenger.

8 *In Search of Decent Work – Migrant Worker’s Rights: A Manual for Trade Unionists*; ILO; 2008; p. 45.

9 *Ibid*; p. 45.

10 *A Global Alliance against Forced Labour*; ILO; 2005; p. 14.

TYPES OF MIGRATION

Migration across borders can take place through regular or irregular channels. The manner in which an individual enters another country determines many of the rights which that person is able to claim.

However, under customary international law and international human rights law, all States must protect the rights of all people within their jurisdiction.

There are different categories of migrants. While in reality a migrant may move between different categories depending on changes in his or her personal circumstances, it is important to understand the differences between these categories.

An **irregular migrant** can be defined as a person “who lacks legal status in a transit or host country; one who entered a state without authorization, or entered a country legally but then lost permission to remain”.¹¹

Individuals may also be **trafficked** across borders, having been “coerced to travel to another country for the purpose of exploitation”.¹² The UN Trafficking in Persons Protocol defines trafficking in persons as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹³ While the Protocol establishes the trafficking of persons as an international crime, it is important to note that this criminal liability only relates to the traffickers, rather than the victims of trafficking. Victims of trafficking are entitled to a range of protective measures under the UN Trafficking Protocol.

In addition, individuals can be **smuggled** across borders, travelling to another country voluntarily, but illegally, with the assistance of a third party who receives some form of benefit for this assistance. The UN Smuggling of Migrants Protocol defines smuggling of migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”¹⁴ The Protocol excludes migrants who have been smuggled from criminal liability, although it does call for criminal measures against the third parties who receive a benefit for smuggling migrants into States.

Individuals fleeing persecution in their home country may seek **asylum** in another country, under the grounds provided in the 1951 Convention Relating to the Status of Refugees. In general terms, the Convention defines a refugee as someone who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, who is outside the country of his nationality and is unable owing to such fear, to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”¹⁵ Those whose claims for asylum are accepted are granted **refugee** status, which generally brings with it certain rights and entitlements to protection under international law. Individuals may also seek protection from torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. When their claim is accepted they will be granted protected person status.

11 *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*; International Council on Human Rights Policy; 2010; see “Definitions”.

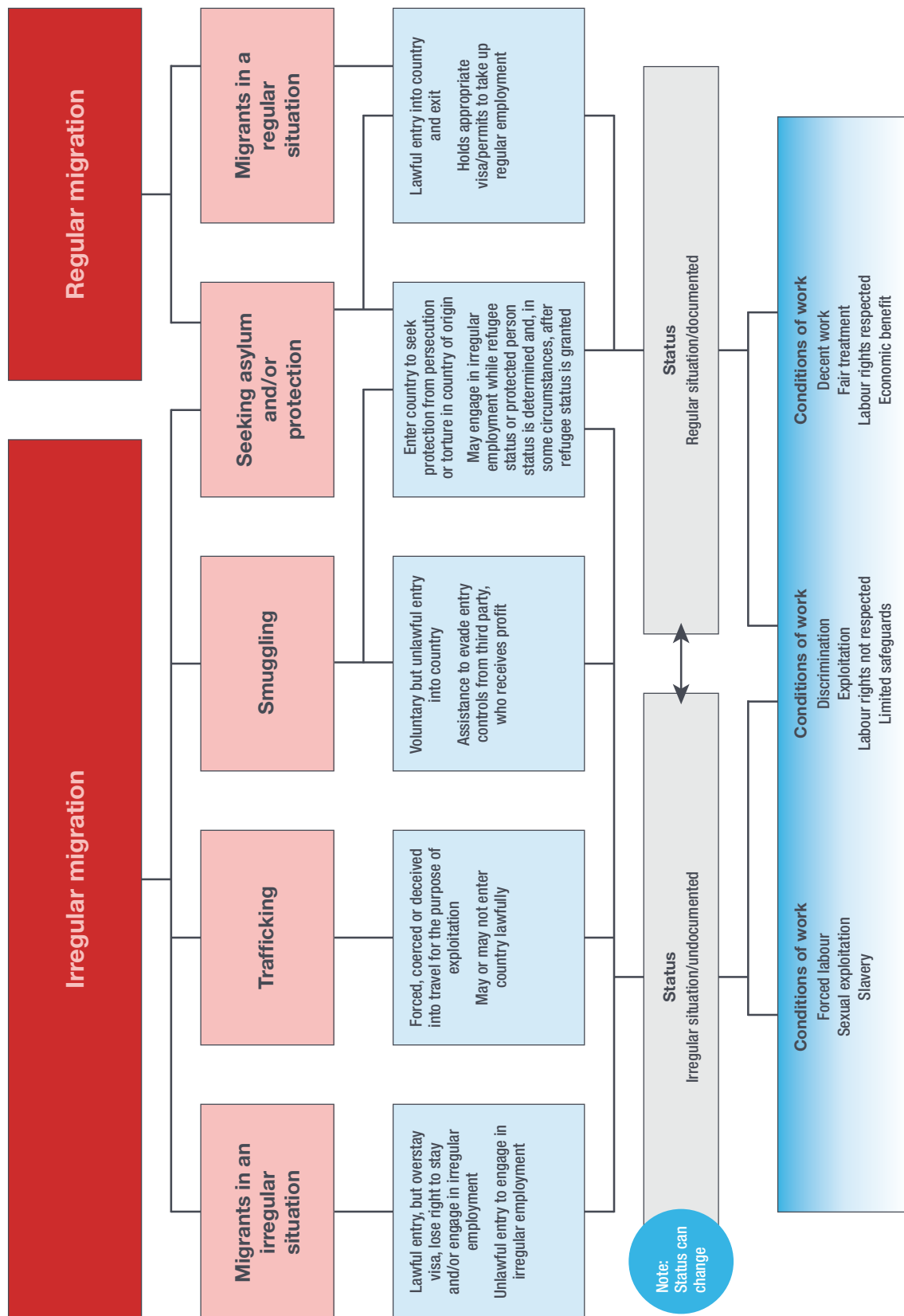
12 *Ibid*; see “Definitions”.

13 See article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention on Transnational Organised Crime; General Assembly Resolution 55/25 of 15 November 2000.

14 See article 3(a) of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention on Transnational Organised Crime; General Assembly Resolution 55/25 of 15 November 2000.

15 See article 1A(2) of the 1951 Convention Relating to the Status of Refugees.

INTERRELATIONS BETWEEN REGULAR AND IRREGULAR MIGRATION*



* This figure draws on and adapts the flowchart in *Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide* (ILO; 2003); see Booklet 1, p. 25.

Part I

International laws and mechanisms



**Chapter 1: The international framework
on the rights of migrant workers**

**Chapter 2: The International Convention on the Protection of the
Rights of All Migrant Workers and Members of Their Families**

**Chapter 3: Other UN instruments and mechanisms
relevant to the rights of migrant workers**

Chapter 4: The International Labour Organization and migrant workers

**Chapter 5: Regional mechanisms for the promotion
and protection of the rights of migrant workers**

Chapter 1:

The international legal framework on the rights of migrant workers and members of their families

KEY QUESTIONS

- **How are migrant workers and members of their families defined?**
- **What human rights apply to migrant workers and members of their families?**
- **What obligations do States have towards migrant workers and members of their families?**



1. INTRODUCTION

Migrant workers are a vital part of the global economy. The promise of decent working and living conditions drives the international movement of workers, both men and women, to seek out opportunities in other countries.

Labour migration can offer valuable opportunities for many people who are unable to secure adequate work in their own countries or who have little choice but to leave their country. It can also enhance the cultural, economic, social, civil and political structures in both countries of origin and destination.

However, the human costs of labour migration can outweigh the benefits, especially when the rights of migrant workers are not protected. These human costs continue to be a significant concern within and between countries.

Migrant workers are vulnerable to abuse by employers and government officials, among others, in both sending and receiving countries. Abuses of labour and human rights range from discrimination and hazardous working conditions, to extortion, arbitrary detention, deportation and violence, including rape and murder.

Women migrant workers are particularly vulnerable to human rights violations. They face multiple levels of discrimination and a general lack of protections in place in the jobs available to them, such as domestic work.

Factors that contribute to systemic patterns of human rights violations against migrant workers, and which can restrict access to effective redress for victims, include negative public attitudes, language barriers, restrictive immigration regimes, poor legal protection, lack of awareness, weak rule of law and impunity.

While the human rights issues that affect the growing number of migrant workers are pressing, there is a general lack of knowledge of relevant international legal standards and, in many instances, a lack of political will or institutional capacity to apply these standards to laws, policy and practice. The international standards most relevant to migrant workers are among the least understood of any of the core human rights treaties or ILO conventions.

This chapter sets out the human rights standards that apply to migrant workers and members of their families.

2. DEFINING MIGRANT WORKERS AND THEIR FAMILIES

The most comprehensive definition of a migrant worker is provided in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (“the Convention on Migrant Workers”).

Article 2.1 of the Convention on Migrant Workers defines a migrant worker:

... as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

Article 2 also distinguishes between particular categories of migrant. These include “frontier worker”, “seasonal worker”, “project-tied worker”, “itinerant worker”, “seafarer” and “self-employed worker”; categories which have been excluded from other international standards developed in the past, including ILO conventions specific to the rights of migrant workers. Part V of the Convention sets out the rights that apply to these particular categories of migrant workers.

In particular, the definition of “self-employed worker” “recognizes the large number of migrant workers who operate a small family business by themselves or with other family members.”¹⁶ These definitions apply across all regions of the world.

In addition, the Convention recognizes migrant workers as social entities and extends recognition of rights to members of their families. Article 4 provides the following definition:

The term “members of the family” refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.



Photo by Richard Messenger.

¹⁶ *Guide on Ratification: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*; International Steering Committee for the Global Campaign for Ratification of the Convention on Rights of Migrants; 2010; p. 17.

3. WHAT HUMAN RIGHTS APPLY TO MIGRANT WORKERS?

The protections that exist in international law for migrant workers and members of their families include:

- fundamental human rights that apply to all migrants, regardless of their status, which are set out in the core international human rights treaties and under customary international law
- international labour conventions and standards that provide basic protections for treatment and conditions at work, which apply to all workers regardless of their migration status.

In general, States are obliged to ensure that migrants receive comparable treatment and protection as nationals of the State.

3.1. The international human rights framework

The Universal Declaration of Human Rights has become an international “standard of achievement for all peoples and nations”¹⁷ and is the foundation for the international human rights framework that has developed since 1948.

Strictly speaking, the Declaration as a whole is not a legally binding instrument. However many of the rights within the Declaration have acquired binding status either through their recognition within the framework of customary international law or through their incorporation into subsequent legally binding treaties.

Today, the international human rights framework consists of the Declaration and nine core human rights treaties:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- International Convention for the Protection of All Persons from Enforced Disappearance
- Convention on the Rights of Persons with Disabilities.

The principle of **non-discrimination** is central to the enjoyment of human rights and applies to everyone, regardless of their status.

According to the Human Rights Committee, “discrimination” under the International Covenant on Civil and Political Rights involves:

*... any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*¹⁸

The Committee on Economic, Social and Cultural Rights has also defined discrimination in similarly broad terms.¹⁹

¹⁷ Preamble to the Universal Declaration of Human Rights, 1948.

¹⁸ General Comment No. 18; Human Rights Committee; 1989; para. 7.

¹⁹ General Comment No. 20; Committee on Economic, Social and Cultural Rights; 2009; para. 13.

Accordingly, article 2(1) of the International Covenant on Civil and Political Rights provides that States must respect and ensure civil and political rights without discrimination on any grounds. The Human Rights Committee has further confirmed that the guarantee of non-discrimination applies to nationals and non-nationals alike.²⁰

Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination of any kind, including on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status.

The other treaties uphold non-discrimination in relation to specific human rights concerns (such as racial discrimination, enforced “disappearances” and torture and ill-treatment) and the vulnerabilities of particular groups of people (including women, children and people with disabilities).

The human rights protections that these treaties contain also belong to migrant workers and members of their families. This is particularly important given the current low number of States that have ratified the Convention on Migrant Workers.

3.2. Other human rights treaties relevant to migrant workers

There are a range of other human instruments – including declarations, principles and guidelines – that are relevant to the treatment of migrant workers and can be used to promote and protect their human rights, including:²¹

- United Nations Convention against Transnational Organized Crime and its Protocols:
 - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
 - Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime
- Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery
- Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live²²
- Durban Declaration and Programme of Action²³
- Recommended Principles and Guidelines on Human Rights and Human Trafficking – Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council²⁴
- Resolution of the UN Commission on Human Rights on the Human Rights of Migrants (2005)²⁵
- Resolution of the UN General Assembly on Protection of Migrants (2004).²⁶

20 General Comment No. 15; Human Rights Committee; 1986; and General Comment No. 18; Human Rights Committee; 1989.

21 “Migration and Human Rights – Other International Standards”; OHCHR; see: www2.ohchr.org/english/issues/migration/taskforce/standards.htm.

22 A/RES/40/144.

23 Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance; Durban, South Africa; 2001.

24 E/2002/68/Add.1.

25 E/CN.4/RES/2005/47.

26 A/RES/59/194.

3.3. Responsibilities to nationals and non-nationals

States may exercise their national sovereignty to decide who to admit into their territory. However, once an individual has entered a country, the Government is responsible for the protection of his or her rights. All persons regardless of their nationality, race, legal or other status are entitled to human rights and basic labour protections.

Some of the human rights treaties, however, do make distinctions between the rights of nationals and non-nationals and impose different obligations on States in relation to nationals and non-nationals. This can also extend to a State having different obligations towards migrants who are lawfully present in the State and those who are unlawfully present. For example, article 25 of the International Covenant on Civil and Political Rights (the right to vote) applies only to citizens. Article 12 (the right to freedom of movement and choice of residence) applies only to nationals and migrants who are lawfully present in the State.²⁷

However, differential treatment on the basis of nationality or migration must not be “disproportionate, arbitrary or discriminatory”.²⁸ Migration status alone will not justify any limit on basic human rights and labour standards.

The Human Rights Committee, the UN treaty body established under the International Covenant on Civil and Political Rights, has set out **conditions for differential treatment**, stating that it is permissible only if “the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.²⁹

The Committee on the Elimination of Racial Discrimination has also set out that “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”.³⁰

The rights provided in the International Covenant on Economic, Social and Cultural Rights extend to all persons, without discrimination, regardless of legal status or documentation.³¹ These include the right to work (article 6), the right to just and favourable conditions of work (article 7), the right to establish trade unions (article 8) and the right to an adequate standard of living, including adequate food, clothing, housing and the continuous improvement of living conditions (article 11).

The Human Rights Committee has further emphasized that temporary “derogation”³² from obligations are only permissible in exceptional circumstances (that is, during times of public emergency) and must not “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.³³

27 *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*; International Council on Human Rights Policy; 2010; p. 51. However, as the Human Rights Committee has noted, domestic law restrictions on the “entry of aliens” must be in line with States’ international obligations and any restrictions on the right under article 12(3) should be consistent with the rest of the Covenant rights. See: General Comment No. 27; 1999; paras. 4 and 11.

28 *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*; International Council on Human Rights Policy; 2010; p. 51.

29 General Comment No. 18; Human Rights Committee; 1989; para. 13.

30 General Recommendation No. 30; Committee on the Elimination of Racial Discrimination; 2004; para. 4.

31 General Comment No. 20 (article 2, para. 2); Committee on Economic, Social and Cultural Rights; 2009; para. 30.

32 Article 4 of the International Covenant on Civil and Political Rights sets out the limited circumstances in which States may temporarily “derogate” from or limit the application of Covenant obligations within tightly defined conditions. It further prohibits any derogation from articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 in the Covenant. The Human Rights Committee’s General Comment No. 29 (2001) on article 4 further provides some foundational principles regarding derogation from human rights treaties and indicates that the provisions explicitly listed in article 4 are not exhaustive; obligations may also be determined to be non-derogable on the basis of humanitarian law and the status of some rights in international law as “peremptory norms”.

33 General Comment No. 29 (2001); paras. 2 and 8.

Further, several civil and political rights can never be limited and do not allow for differential treatment between nationals and non-nationals. These include the following rights identified as **non-derogable** under the International Covenant on Civil and Political Rights:

- the right to life (article 6)
- freedom from torture or cruel, inhuman or degrading treatment (article 7)
- freedom from slavery, servitude and forced labour (article 8)
- the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (article 11)
- the right to equality before the law (article 16)
- freedom of thought, conscience and religion (article 18).

3.4. The Convention on Migrant Workers

The most comprehensive human rights treaty on the rights of migrant workers is the Convention on Migrant Workers, which was adopted in 1990 and entered into force in July 2003. It responds to the particular situations and vulnerabilities of migrant workers involved in international labour migration.

In general, the Convention does not create new rights but rather restates many of the rights found in the other human rights treaties and labour conventions. Importantly, however, it identifies a set of core rights that apply to all migrant workers, regardless of their migration status.

For example, the Convention specifies the following **non-derogable rights**:

- the right to life (article 9)
- protection from torture or cruel, inhuman or degrading treatment or punishment (article 10)
- freedom from slavery, servitude or forced or compulsory labour (article 11)
- freedom of thought, conscience and religion (article 12)
- the right to liberty and personal security and protection against arbitrary detention (article 16)
- the right to procedural guarantees (article 18).

These rights apply to both **documented and non-documented migrant workers** and members of their families.³⁴

Article 5 of the Convention sets out the definition of documented and non-documented migrant workers and states that “migrant workers and members of their families”:

(a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;

(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

The Convention provides additional rights to documented migrant workers and members of their families, such as the right to liberty of movement in the territory (article 39) and equal access to education, vocational guidance and training services, housing, social and health services and cultural rights (articles 43 and 45).

³⁴ Articles under Part III of the Convention (articles 8-35) apply to “all migrant workers and their families” as the title of that Part indicates. For further discussion of these articles, see: *The International Convention on Migrant Workers and its Committee*; Fact Sheet No. 24 (Rev 1), OHCHR; 2005; p. 5; and the *Guide on Ratification: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*; International Steering Committee for the Global Campaign for Ratification of the Convention on Rights of Migrants; 2010; p. 17.

In addition, the Convention identifies the specific rights of migrant workers at different stages of the labour migration process and also identifies the responsibilities of Governments in countries of origin, transit and destination (or employment).

More detailed information about the Convention on Migrant Workers is available in Chapter 2.

4. ILO CONVENTIONS

In addition to the international human rights treaties, the ILO has established a number of conventions that outline and protect the labour rights of migrant workers (see Chapter 4 for more information).

In particular, the ILO has approved two major conventions specifically on the rights of migrant workers:

- Migration for Employment Convention, 1949 (C-97)
- Migrant Workers (Supplementary Provisions) Convention, 1975 (C-143).

These conventions are supplemented by two (non-binding) ILO recommendations that provide further guidance on how the rights of migrant workers can be protected in practice:

- Migration for Employment Recommendation (Revised), 1949 (R-86)
- Migrant Workers Recommendation, 1975 (R-151).

The **Migration for Employment Convention** deals with international migration for employment and focuses on the recruitment of migrants and conditions of work in the host country. Its major provisions include non-discrimination in wages, union activities and benefits and social security (article 6). The Annexes deal with private and public recruitment, stressing that there should be a no-fee public option, the need to provide contracts for prospective migrant workers and that “any person who promotes clandestine or illegal immigration shall be subject to appropriate penalties” (Annex II, article 13).

The **Migrant Workers (Supplementary Provisions) Convention** is the first treaty to deal directly with the rights of migrants in irregular situations. It addresses in detail issues in relation to “migrations in abusive conditions” and the “promotion of equality of opportunity and treatment of migrant workers”. Article 2 requires each member State to “seek to determine whether there are illegally employed migrant workers on its territory” and article 6 calls for penalties against traffickers and for the illegal employment of migrant workers. Article 9 sets out requirements for “equality of treatment” in wages, social security and other benefits arising from the past employment of undocumented migrant workers.

There are a number of other ILO conventions that also have great relevance for migrant workers. For example, the Domestic Workers Convention, 2011 (C-189) is the most recent ILO convention and is particularly relevant as many domestic workers are migrant women.

5. INTERNATIONAL STANDARDS AND THE OBLIGATIONS OF STATES

5.1. General obligations

The UN Charter, the International Bill of Rights³⁵ and the Vienna Declaration on Human Rights impose on States the responsibility to cooperate in the realization of all human rights.

In addition, there is a broadly-accepted understanding that States have the obligation to **respect** rights and refrain from interfering with their enjoyment; to **protect** rights against violations, including through ensuring adequate and accessible avenues of redress when rights are violated; and to **fulfil** these rights by taking positive action, including through appropriate legislative and administrative action, policies and the allocation of resources.³⁶

35 The International Bill of Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its two Optional Protocols.

36 “What are human rights”; OHCHR; see: www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx.

5.2. Specific obligations under human rights treaties

Human rights treaties only bind States that are parties to those treaties, unless particular provisions have attained the status of customary international law.

When ratifying a human rights treaty, States parties accept certain responsibilities, including undertaking to review and amend domestic laws and policies to ensure they comply with the provisions of the treaty.

States also agree to provide an initial report, and subsequent periodic reports, to the treaty body established to monitor implementation of the treaty.

Detailed guidance on the content of particular rights and the specific obligations they impose, including minimum core obligations, are contained in “general comments” (or “general recommendations”) developed by the different treaty bodies.

Most human rights treaties also establish a mechanism that enables individuals to bring complaints about human rights violations. Complaints may be brought only against States that have recognized the competence of the treaty body to consider complaints from individuals. Depending on the treaty concerned, this will occur either through the State becoming a party to an Optional Protocol or through making a declaration under the relevant article of the treaty.

These complaints mechanisms have various rules of procedure but generally require that all domestic remedies be exhausted before a complaint is accepted by the treaty body. While not legally binding, the State has a good faith obligation to implement the treaty body’s findings and grant appropriate remedies.

It is important to note that, when ratifying human rights treaties, States can and often do enter “reservations” that limit or modify the applicability of certain provisions of the treaty.³⁷

More information on the treaty bodies and other international human rights mechanisms is included in Chapter 11.

5.3. Specific obligations under ILO conventions

The ILO recognizes that there are three basic stages in the labour migration process during which the rights of migrants must be protected: the pre-departure stage; the post-departure and work stage; and the return stage.³⁸

Countries of origin and destination have differing responsibilities to protect the rights of migrant workers at each of these stages. This reflects the different events that take place before and after departure, with greater responsibility resting on countries of origin in the pre-departure and return stage, and greater responsibility resting on the destination countries in the post-departure and work stage. It also acknowledges the reality that countries have the ability to exercise more supervision within their own borders.

However, the ILO also recognizes the importance of “shared responsibility” through the “supervision and regulation of international labour migration and engagement in international cooperation in the interest of promoting and protecting the rights of migrant workers”.³⁹

37 Many treaties also allow for, and sometimes require, States to make “declarations” which explain how that State interprets the provisions of the treaty in whole or in part: see the “Glossary of Terms”; OHCHR; www2.ohchr.org/english/bodies/treaty/index.htm.

38 *Protecting the Rights of Migrant Workers: A Shared Responsibility*; ILO; 2009; p. 23.

39 *Ibid*; p. 2.

KEY POINTS: CHAPTER 1

- Under international law, States have an obligation to respect, protect and fulfil the rights of migrant workers and members of their families. This includes States that are countries of origin, transit and destination for migrant workers.
- The principle of non-discrimination is central to the enjoyment of human rights and applies to everyone, regardless of their status.
- In general, States are obliged to grant migrants the same protection as nationals. Only in exceptional circumstances, and within tightly defined conditions, may differential treatment be justified. However, some human rights treaties do make distinctions in relation to the rights of nationals and non-nationals, as well as the rights of documented and undocumented migrants.



FURTHER READING

International Labour Migration: A Rights-based Approach; ILO; 2010

Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence; International Council on Human Rights Policy; 2010

Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment; Ryszard Cholewinski; 1997

Migration and International Human Rights Law; Practitioner's Guide No. 6; International Commission of Jurists; 2011

Protecting the Rights of Migrant Workers: A Shared Responsibility; ILO; 2009



Chapter 2:

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

KEY QUESTIONS

- **What rights are protected under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families?**
- **Does the Convention make a distinction between the rights of documented and undocumented migrant workers?**
- **What obligations does the Convention place on States? How is compliance with the Convention monitored?**



1. INTRODUCTION

This chapter introduces and describes the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“the Convention on Migrant Workers”) and the obligations it imposes on States that have ratified it.

By ratifying core human rights treaties and ILO conventions, States agree to uphold a range of obligations in relation to the treatment of migrant workers in their territory.

In addition, all States have, by virtue of their obligations under the UN Charter and the ILO Constitution, accepted accountability to the international community in relation to the implementation and realization of human rights, including the human rights of migrant workers and members of their families.

The Convention on Migrant Workers is therefore not the only human rights treaty that protects the rights of migrant workers; however, it is the most comprehensive and detailed. It sets a worldwide standard in terms of migrants’ access to fundamental rights, whether in the labour market, in the education and health systems or in the courts.⁴⁰ It is the first universal codification of the rights of migrant workers and members of their families in a single instrument.⁴¹

However, the relatively low level of ratification of the Convention⁴² highlights the importance of drawing on the commitments made by States through their ratification of other human rights treaties and ILO conventions.

40 “Introduction, The UN Convention on Migrant Workers’ Rights”; Paul de Guchteneire and Antoine Pécoud; in *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009.

41 “The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation”; Juhani Lönnroth; *International Migration Review*; vol. 25; no. 4 (Winter 1991).

42 45 States as at September 2011; nearly all of them States that send rather than receive migrant workers.

It should also be noted that migrant workers are not a homogenous group and many can face situations of cumulative vulnerability. For example, female migrant workers can experience “multiple discrimination” – or “intersectional discrimination” – on the basis of their sex and gender, their nationality and their status as migrant workers.

As such, a comprehensive and coordinated approach, grounded in a range of international legal standards, is required to address the complex human rights issues facing many migrant workers.

2. THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

The Convention on Migrant Workers was adopted in 1990 and came into force in July 2003. It reinforces and complements the other core human rights treaties of the UN. It also responds to the specific circumstances and vulnerabilities of migrant workers and members of their families, similar to other human rights treaties which address the vulnerabilities of women, children and, more recently, persons with disabilities.⁴³

The Convention, which establishes minimum standards that all States parties are obliged to respect, protect and fulfil, is directly relevant to documented and undocumented migrant workers and members of their families.

Indeed, the Preamble to the Convention recognizes that “the human problems involved in migration are even more serious in the case of irregular migration” and highlights the need to encourage appropriate action “to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental rights”.

The Convention on Migrant Workers consists of six substantive parts:

- Part I: Scope and definitions
- Part II: Non-discrimination with respect to rights
- Part III: Human rights of all migrant workers and members of their families
- Part IV: Other rights of migrant workers and members of their families who are documented or in a regular situation
- Part V: Provisions applicable to particular categories of migrant workers and members of their families
- Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families

Part I introduces the definitions and concepts included in the Convention. It recognizes both men and women as migrants and defines different categories of migrant workers that apply in all regions of the world.

The Convention’s added value is that it considers migrant workers to be more than labourers or economic entities; instead it recognizes them as social entities with families. It encourages migrant workers to be in a documented or regular situation and requires all workers and employers to respect and comply with the laws and procedures of those States that are parties to the Convention. It also provides for the right of migrant workers to leave and enter their States of origin (article 1).

⁴³ See *Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties: A Do-it-yourself Kit*; Mariette Grange, International Catholic Migration Commission; 2006.

The Convention extends the concept of “equality of treatment” by requiring that migrant workers and members of their families who are non-nationals in States of destination (or employment) be treated equally to nationals in certain situations. Non-nationals, however, are not to have more rights than nationals.

Part II explains the principle of non-discrimination, which is central to realizing the rights of migrant workers. Article 7 obliges States to:

... respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

2.1. Rights of all migrants, regardless of status

Part III of the Convention sets out a broad series of rights belonging to all migrant workers and members of their families, irrespective of their migration status. Many of these rights restate those included in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other core human rights treaties which have been broadly ratified in all regions of the world.



UN Photo by Kibae Park.

The Convention also includes rights that address the specific situation of migrant workers and reinforces rights in those areas where migrant workers are especially vulnerable or likely to be exploited.⁴⁴ The inhumane living and working conditions and instances of physical and sexual abuse that migrant workers can experience are addressed by the reaffirmation of the right to life (article 9), the prohibition against cruel, inhuman or degrading treatment or punishment (article 10) and the prohibition against slavery or servitude and forced or compulsory labour (article 11).

One reason that the Convention restates rights in other treaties is that some States have implemented human rights treaties in domestic legislation using terminology that refers to “citizens and/or residents, *de jure* excluding many migrants, especially those in irregular situations”.⁴⁵

For example, articles 16 to 20 and articles 23 and 24 specify that migrant workers should have equality before the courts and tribunals of the State concerned; are entitled to proper judicial process; and are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (article 18.1). In addition, they should have access to appropriate interpreting services and to the assistance of their own consulate and must not receive any disproportionate penalties. When imposing a sentence, humanitarian considerations regarding the person’s migrant status should be taken into account.

The Convention also states that migrant workers and their families have the right not to have their documents of identity confiscated or destroyed (article 21); and the right not to be subject to arbitrary or collective expulsion (article 22). These articles directly address the human rights violations commonly experienced by migrant workers in different countries.

In addition, the Convention emphasizes the right of migrant workers to equality with nationals in the host country with respect to remuneration, conditions of work overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and other terms of employment (article 25); as well as the right to freely join and take part in trade unions (article 26).

Equality with nationals also extends to the right to social security benefits (article 27); the right to receive emergency medical care (article 28); and the right of access to education (article 29).

The Convention also sets out other rights of migrant workers and their families:

- to have their cultural identity respected and to maintain a cultural link with their State of origin (article 31)
- to transfer their earnings and savings, as well as their personal effects and belongings, on completion of their term of employment (article 32)
- to be informed by the States concerned about their rights arising from the Convention, as well as the conditions of their admission and their rights and obligations in those States (article 33).

2.2. Rights of migrants who are documented or in a regular situation

Part IV of the Convention sets out the specific rights of migrant workers and their families who are documented or in a regular situation. These rights are in addition to those set out in Part III, which apply to all migrant workers regardless of their migration status (article 36).

The Convention provides for the right of documented migrant workers to substantial information regarding the conditions of their admission to the country of employment, their stay and their remunerated activities (article 37).

44 *The International Convention on Migrant Workers and its Committee*; Fact Sheet No 24 (Rev. 1); OHCHR; p. 5.

45 *Achieving Dignity: Campaigner’s Handbook for the Migrants Rights Convention*; International Migrants Rights Watch Committee; 1998; see “Section III: Importance and Content of the Convention”.

They also have the right to be temporarily absent for reasons of family needs and obligations, without effect on their authorization to stay or work (article 38); the right to liberty of movement and freedom to choose their place residence (article 39); and the right to transfer their earnings and savings, in particular those funds necessary for the support of their families (article 47).

Under the Convention, documented migrants have the right to form associations and trade unions to promote and protect their economic, cultural and other interests (article 40); and the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State in accordance with its legislation (article 41).

In addition to the areas mentioned in Article 25, the Convention provides for equality of treatment in relation to employment and taxation and equal access to services in a broad range of areas, including educational institutions and services; vocational guidance, training and placement services; housing; social and health services; cooperatives and self-managed enterprises; and participation in cultural life (articles 43, 45, 48 and 55).

The Convention uniquely ensures that family members of a migrant worker do not find themselves in an irregular situation as a consequence of his or her death or after a divorce (article 50).

Further, depending on the specific terms of their authorisation of residence or work permits, documented migrant workers may have the right to equality of treatment in respect to protection against dismissal and unemployment benefits (article 54). In situations where migrant workers fulfil the requirements provided by applicable national legislation in their host country, they may also be entitled to access public work schemes intended to combat unemployment and access to alternative employment in the event of loss of work or termination of other remunerated activity (articles 54 and 27).

When a work contract is violated by the employer, a documented migrant worker has the right to address his or her case to the competent authorities in the State of employment (article 54(2)).



Photo by Mink/Samira Zaman.

2.3. Provisions applicable to particular categories of migrant workers

Part V of the Convention sets out the rights of particular categories of migrant workers and members of their families, including frontier workers (article 58); seasonal workers (article 59); itinerant workers (article 60); project-tied workers (article 61); specified-employment workers (article 62) and self-employed workers (article 63).

2.4. Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families

Part VI of the Convention establishes a framework for the sound, equitable, humane and lawful conditions for international migration. It outlines the specific duties of countries of origin, transit and destination.

The Convention also encourages consultation and collaboration between relevant countries to address the human rights issues relevant to the labour migration process and to formulate and implement policies on migration consistent with the Convention and aimed at ensuring better living and working conditions for migrant workers and their families.

Further, the Convention notes that the responsibilities of States go beyond issues of labour needs and resources and must consider “the, social, economic, cultural and other needs of migrant workers and members of their families involved”, as well as the impact of migration on the communities concerned (article 64).

3. RESPONSIBILITIES OF STATES UNDER THE CONVENTION

As noted by the International Migrant Rights Watch Committee,⁴⁶ articles 65 and 66 of the Convention oblige States parties to maintain appropriate services for:

- the formulation and implementation of migration policies
- the exchange of information, consultation and cooperation between competent authorities of the States concerned
- the provision of appropriate information to employers and workers on policies and laws concerning migration
- the provision of adequate consular services to meet the social, cultural and other needs of migrants
- the regulation of recruitment of migrant workers by restricting it to public services or bodies of the States concerned and through private agencies and employers and their agents, subject to authorization, approval and supervision.

States parties are encouraged to cooperate to adopt measures regarding the orderly return of migrant workers and members of their families to their State of origin “when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation” (article 67).

Article 68 requires States parties to consult and collaborate to prevent and eliminate “illegal or clandestine movements and employment of migrant workers in an irregular situation” by:

- taking appropriate measures against the dissemination of misleading information relating to emigration and immigration
- taking appropriate measures to detect and eradicate illegal labour migration

⁴⁶ *Achieving Dignity: Campaigner's Handbook for the Migrants Rights Convention*; International Migrants Rights Watch Committee; 1998; see “Section III: Importance and Content of the Convention”.

- imposing sanctions on those responsible for organizing and operating such movements, as well as employers of migrant workers in an irregular situation.

If there are migrant workers and members of their families within their jurisdiction in an irregular situation, article 69(1) stipulates that States parties should take appropriate measures to ensure that the situation does not persist.

Further, article 69(2) states that if States parties consider the possibility of regularizing the situation of irregular migrant workers in accordance with national legislation and bilateral or multilateral agreements, appropriate account should be taken of the circumstances of their entry, the duration of their stay and other relevant considerations, especially those relating to their family situation.

States are also required to take necessary measures, not less favourable than those applied to their nationals, to ensure that migrant workers and members of their families are provided with working and living conditions in keeping with standards of fitness, safety, health and human dignity (article 70).

3.1. Responsibilities of States of origin and States of employment

States of origin and States of employment are required to:

- provide information⁴⁷ to migrant workers regarding their rights arising from the Convention (article 33)
- establish institutions for the purpose of taking into account the special needs, aspirations and obligations of migrant workers and enable them to be represented in these institutions (article 41)
- consider the possibility of granting exemptions to migrant workers and members of their families from customs duties and taxes on their personal and household effects and equipment required for the remunerated activity in the State of employment (article 46)
- permit and facilitate the transfer of the migrant workers' earnings and savings to their States of origin (article 47)
- consider the possibility of avoiding double taxation for migrant workers (article 48).

Additionally, the States concerned should not exert pressure on migrant workers and members of their families to relinquish or forego any of their rights arising from the Convention (article 82).

3.2. Responsibilities of States of origin

Promoting and protecting the rights of migrant workers begins in States of origin. The Convention includes clauses that seek to protect migrant workers and members of their families from the outset, including with respect to pre-departure recruiting practices.

States of origin, or sending countries, have a number of specific obligations, including to:

- allow persons seeking employment abroad to leave and enter their country of origin (article 8)
- ensure that, before their departure to States of employment, documented migrant workers and members of their families are fully informed of all conditions applicable to their admission, stay and employment, as well as other requirements (article 37)
- facilitate the exercise of the right of documented migrant workers and members of their families to participate in public affairs, vote and be elected in elections in their home countries (article 41)
- provide adequate consular and other services required to meet the social, economic, cultural and other needs of their migrant workers and members of their families (article 65(2))

⁴⁷ Provision of relevant information to migrant workers should be free of charge and in a language understood by them (article 33(3)). Such information should also be disseminated to others involved in the migration process, including employers, trade unions and other relevant institutions and organizations (article 33(2)).

- regulate the recruitment of workers for overseas employment by restricting it to public services or bodies; recruitment by agencies, employers and their agents should be subject to authorization, approval and supervision (article 66)
- assist migrant workers and members of their families, including illegal migrants, to make an orderly return to their home country, including to take appropriate measures to promote adequate economic conditions for their resettlement and their social and cultural reintegration (article 67).

3.3. Responsibilities of States of employment

Protecting the rights of migrant workers and members of their families in States of employment is anchored in the long-established principle of non-discrimination, including in relation to civil and political rights, as well as economic, social and cultural rights.

States of employment, or receiving countries, have a number of specific obligations, including to:

- protect the liberty and security of migrant workers and members of their families (articles 9, 10 and 11)
- give protection to migrant workers and members of their families, including those arrested or detained, against violence and other forms of harassment by private individuals, public officials, groups or institutions (articles 16 and 17)
- ensure that the working and living conditions of migrant workers are in keeping with the standards of fitness, safety, health and principles of human dignity (article 70)
- ensure that migrant workers and members of their families are not arbitrarily deprived of their property and, if their assets are to be confiscated under the laws of the State of employment, that adequate compensation is paid (article 15)
- enable migrant workers and members of their families to enjoy equal treatment with nationals of the State before the courts of law and tribunals (article 18); in relation to remuneration and conditions of work (article 25); in relation to access to education, vocational training, guidance and placement, housing and social and health services (article 43); and in relation to access to social security (article 27)
- provide children of migrant workers, including those of undocumented workers, with access to education, including preschool education, on an equal basis with nationals of the State (article 30)
- permit migrant workers and members of their families to join trade unions and associations for the protection of their economic, social, cultural and other rights (article 26)
- ensure that the identity documents, work and residence permits of migrant workers are not confiscated or destroyed by unauthorized persons and that their passports are not destroyed by anyone (article 24)
- consider the possibility of enabling family members to join the migrant worker, in order to protect the unity of the family (article 44).

3.4. Responsibilities on States parties to report

In order to monitor the implementation of the Convention, article 73 requires States parties to submit a report on the legislative, judicial, administrative and other measures that have been taken to give effect to the provisions of the Convention.

This report must be submitted one year after the State has become a party to the Convention, with further reports to be submitted every five years after that. After reviewing the State's reports, the Committee will provide concluding observations on the report.

More information on the treaty reporting process, including the role that NHRIs can play, is available in Chapter 11.



Photo by Karen Blumberg.

4. THE COMMITTEE ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

While the implementation of the Convention rests on its States parties, article 72 establishes the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families to monitor “[f]or the purpose of reviewing the application of the present Convention”.

The Committee consists of 14 independent experts. Members of the Committee are elected by secret ballot, with appropriate consideration given to fair geographical distribution, including both States of origin and States of employment, and to represent the world’s main legal systems. The members serve in their own personal capacity and are appointed for a term of four years.

Given the traditional role of the ILO to protect the rights of migrant workers, article 74 of the Convention encourages close cooperation between the Committee and the ILO. Reports submitted by States parties are provided to the ILO on a consultative basis, in order to draw on that organization’s expertise to address relevant matters raised in the reports.

4.1. Treaty reporting process

The Convention establishes a reporting procedure which requires States parties to regularly present a report on their compliance with, and implementation of, their treaty obligations.

The report is examined during a public session of the Committee, which considers the information provided by the State party and information received from other sources, including NHRIs and NGOs.⁴⁸

Based on this process, the Committee provides its concluding observations, which cover both the positive aspects of the State's implementation of the Convention and areas where the State is recommended to take further action.

The treaty reporting process is intended to generate positive change on a progressive basis, with steps taken by the State to implement the recommendations of the Committee reviewed during subsequent reporting sessions.

These issues can also be considered, and recommendations for action presented, as part of the State's participation in the Universal Periodic Review (see Chapter 11 for more information).

4.2. Individual complaints procedure

Under Article 77, a State party of the Convention may declare that it recognizes the competence of the Committee to receive and consider complaints from, or on behalf of, individuals within that State's jurisdiction who claim that their rights under the Convention have been violated. The Committee may request written explanations and express its views after considering all available information. The individual communication procedure requires ten declarations by States parties to enter into force.⁴⁹

4.3. General comments

The Committee, like other treaty bodies, may also develop and disseminate general comments that elaborate particular areas of concern or provide interpretative guidance on the content of particular rights within the Convention. In February 2011, the Committee adopted its first general comment on the Rights of Migrant Domestic Workers.⁵⁰

Further information on general comments relevant to migrant workers made by other human rights treaty bodies is available in Chapter 3.

5. MYTHS AND MISCONCEPTIONS ABOUT MIGRANT WORKERS AND THE CONVENTION

1. Ratifying the Convention will create an influx of migrant workers

While the Convention protects the rights of migrant workers, it does not entitle an individual to become a migrant worker in a foreign country. Ratifying the Convention does not mean a State has an obligation to accept more migrant workers; that remains the sole decision of the State. Article 79 states that "[n]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families".

2. Migrant workers take the jobs of nationals

Migrant workers are often sought to fill sectors that are not being adequately filled by domestic workers. The Convention is actually beneficial to local workers because it ensures that basic labour rights and standards are maintained for all and, therefore, that migrant workers are not more attractive to

48 "Committee on Migrant Workers and Implementation of the ICRMW"; Carla Edelenbos; *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009.

49 Two States had accepted this procedure at May 2011.

50 CMW/C/GC/1.

prospective employers because of their exploitability, as is often the case where the rights of migrant workers are not properly implemented.

3. Migrant workers create unemployment

Increased numbers of workers in the population actually stimulate economic growth, creating more jobs for all.

4. Migrant workers create a drain on government resources

Documented migrant workers contribute to their host States through the payment of taxes. If migrant workers are not properly documented they will probably not be registered with the Government for tax purposes. It is in the interests of Governments to implement the Convention so that all migrant workers are properly documented and therefore contributing taxes.

5. Migrant workers create downward pressures on wages

Migrant workers, if properly documented and recognized, do not receive lower wages for the same job. They simply tend to work in lower-paid positions than the general population, giving the impression they are driving down wages.

6. The Convention creates new burdens on States to provide for non-nationals

While the Convention requires migrant workers to be granted certain economic and social rights, it goes no further than existing international law.

7. The Convention creates an obligation on the State to grant all regular migrants the right to family reunification

Article 44 of the Convention merely requires States parties to take such measures “*as they deem appropriate*” to facilitate the reunification of migrant workers with their spouses ... as well as with their minor dependent unmarried children”. This leaves the State free to determine what measures are “appropriate” and does not impose any concrete measures.

8. The rights of migrant workers are already provided for in existing international law

While the Convention reiterates many human rights standards in existing treaties, the sheer number of migrant workers throughout the world today makes the issue one deserving of a specific legal instrument, similar to other vulnerable groups such as women, children and persons with disabilities.

KEY POINTS: CHAPTER 2

- The Convention sets out a broad series of rights belonging to all migrant workers and members of their families, irrespective of their migration status. Many of these rights restate those included in the core human rights treaties.
- The Convention includes protections that respond to the specific situations that migrant workers and members of their families can experience, especially those which can leave them vulnerable to exploitation or human rights violations.
- Documented migrant workers and members of their families have specific rights under the Convention, in addition to those which apply to all migrant workers.
- States of origin and destination have specific obligations to respect, protect and fulfil the rights of migrant workers and members of their families.
- The Convention establishes a treaty body to review reports prepared by States on their compliance with the Convention and to make recommendations to encourage further action by States. Individuals will be able bring complaints of human rights violations to the treaty body once a sufficient number of States have accepted this procedure.

**FURTHER READING**

Achieving Dignity: Campaigner's Handbook for the Migrants Rights Convention; International Migrants Rights Watch Committee; 1998

Guide on Ratification: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; International Steering Committee for the Global Campaign for Ratification of the Convention on Rights of Migrants; 2010

Migration and Human Rights: The United Nations Convention on Migrant Worker Rights; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009

Special Issue: U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; International Migration Review 1991 (Vol. 25, No. 94); Center for Migration Studies of New York

Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties: A Do-it-yourself Kit; Mariette Grange, International Catholic Migration Commission; 2006

The International Convention on Migrant Workers and its Committee: Fact Sheet No. 24 (Rev.1); OHCHR; 2005



Chapter 3:

Other UN instruments and mechanisms relevant to the rights of migrant workers

KEY QUESTIONS

- Which international human rights treaties can be used to promote and protect the rights of migrant workers and members of their families?
- What are the roles and functions of the UN special procedures? Which special procedures are relevant to the rights of migrant workers?
- How can issues relevant to the rights of migrant workers be addressed through the Universal Periodic Review?



1. INTRODUCTION

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (“the Convention on Migrant Workers”) is the most comprehensive human rights treaty on the rights of migrant workers.

However, as noted in previous chapters, other core international human rights treaties and mechanisms also promote and protect the rights of migrant workers and members of their families.

While the Convention on Migrant Workers is currently one of the least-ratified human rights treaties, especially among destination countries, most States have ratified one or more of the other core UN human rights instruments.

Therefore, even if a State has not ratified the Convention on Migrant Workers, it will be bound by one or more of the other treaties which impose obligations and responsibilities on Governments to promote and protect the rights of migrant workers.

This chapter provides information on the rights set out in these core UN instruments and the references they contain to migrants or non-nationals, as well as interpretations by treaty bodies about the application of specific human rights and human rights treaties to migrant workers.

The chapter also looks at the different mechanisms of the UN Human Rights Council that can be used to highlight and address human rights issues experienced by migrant workers, including the special procedures and the Universal Periodic Review.

2. CORE HUMAN RIGHTS TREATIES

The international human rights framework consists of the Universal Declaration of Human Rights and nine core human rights treaties:

Treaty	Entered into force	Ratification ⁵¹
International Covenant on Civil and Political Rights	23 March 1976, in accordance with article 49	167 States parties
International Covenant on Economic, Social and Cultural Rights	3 January 1976, in accordance with article 27	160 States parties
International Convention on the Elimination of All Forms of Racial Discrimination	4 January 1969, in accordance with article 19	174 States parties
Convention on the Elimination of All Forms of Discrimination against Women	3 September 1981, in accordance with article 27(1)	187 States parties
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	26 June 1987, in accordance with article 27(1)	149 States parties
Convention on the Rights of the Child	2 September 1990, in accordance with article 49(1)	193 States parties
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	1 July 2003, in accordance with article 87(1)	45 States parties
Convention on the Rights of Persons with Disabilities	3 May 2008, in accordance with article 45(1)	102 States parties
International Convention for the Protection of All Persons from Enforced Disappearance	23 December 2010, in accordance with article 39(1)	29 States parties

Many of the core human rights treaties extend protection to all persons under the State's territory and jurisdiction, including non-nationals. This is reflected in the language of the provisions,⁵² including:

- **non-discrimination clauses** that prohibit distinctions of any kind, including on grounds such as race, colour, language, national, ethnic or social origin: for example, articles 2(1) and 26 of the International Covenant on Civil and Political Rights; article 2(2) of the International Covenant on Economic, Social and Cultural Rights
- the **use of the terms “every human being”, “everyone”, “no one”, “all persons” or “all individuals within its territory”** in relation to various rights including the right to life; freedom of thought, conscience and religion; equality and equal protection before the law; and freedom of association: for example, articles 6, 10, 14, 17, 18, and 22 and 26 of the International Covenant on Civil and Political Rights
- the **use of the term the “right of everyone”** to, among others, social security and adequate standard of living; for example, articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights.

51 As at 28 March 2012. For updated information, see “Status of Treaties”; Chapter IV: Human Rights; on the UN Treaty Collection website: <http://treaties.un.org/Pages/Treaties.asp?id=4&sbid=A&lang=en>.

52 The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights provide a foundation for the principle of non-discrimination, which is reflected in and further developed by other core human rights treaties.

2.1. Treaty articles relevant to the rights of migrant workers

Following is an outline of treaty articles quoted by the relevant treaty bodies to highlight the obligations of States in relation to promoting and protecting the rights of migrant workers.⁵³

Treaty	Treaty body	Relevant treaty articles
International Covenant on Civil and Political Rights	Human Rights Committee	<ul style="list-style-type: none"> • Article 3; equality of men and women before the law • Article 8; prohibition of slavery, forced labour and trafficking in persons • Article 12; right to freedom of movement; right to leave any country including one's own and to return • Article 13; restrictions on expulsion of aliens lawfully in the territory of the State • Article 26; non-discrimination, equality before the law • Article 27; right to culture, religion and language for minorities
International Covenant on Economic, Social and Cultural Rights	Committee on Economic Social and Cultural Rights	<ul style="list-style-type: none"> • Article 2; obligations of States parties for the progressive realisation of the rights in the Covenant, exercised without discrimination • Article 3; equality of men and women before the law • Article 6; right to work • Article 7; right to the enjoyment of just and favourable conditions of work • Article 8; right to form and join trade unions
International Convention on the Elimination of All Forms of Racial Discrimination	Committee on the Elimination of Racial Discrimination	<ul style="list-style-type: none"> • Article 2; condemnation of racial discrimination and adoption of measures to protect certain racial groups • Article 4; condemnation of racist propaganda • Article 5; elimination of racial discrimination and the guarantee of enjoyment of rights • Article 6; provision of effective protection and remedies against any acts of racial discrimination • Article 7; measures to combat prejudice
Convention on the Elimination of All Forms of Discrimination against Women	Committee on the Elimination of Discrimination against Women	<ul style="list-style-type: none"> • Article 4; special measures to accelerate equality between men and women • Article 6; adoption of measures to suppress all forms of trafficking • Article 9; right to acquire a nationality • Article 11; non-discrimination in employment • Article 16; non-discrimination in all matters relating to marriage and family relations

⁵³ This section is drawn mainly from *The UN Treaty Monitoring Bodies and Migrant Workers: A Samizdat*; December 18; updated July 2007; pp. 15-16.

Treaty	Treaty body	Relevant treaty articles
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Committee against Torture	<ul style="list-style-type: none"> • Article 3; non-refoulement • Article 11; review of interrogation rules, instructions, methods and practices for custody and treatment of persons arrested or detained • Article 12; prompt and impartial investigation of acts of torture • Article 16; prevention of other acts of cruel, inhuman or degrading treatment or punishment
Convention on the Rights of the Child	Committee on the Rights of the Child	<ul style="list-style-type: none"> • Article 2; obligations of States parties to respect and ensure the rights in the Convention to each child without discrimination • Article 3; the best interests of the child to be a primary consideration • Article 7; registration of birth and right to acquire a nationality • Article 22; refugee and irregular immigrant children • Article 30; right to culture, religion and language for children belonging to a minority • Article 34; protection against all forms of sexual exploitation and sexual abuse • Article 35; prevention of trafficking

3. TREATY BODIES AND MIGRANT WORKERS

Each of the nine core human rights treaties has its own treaty body that promotes and monitors the performance of treaty obligations by States parties. In addition, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has its own treaty committee – the Subcommittee on the Prevention of Torture – that carries out the responsibilities given to it under the Optional Protocol.

In all cases but one, the treaty itself establishes the treaty monitoring body. The exception is the Committee on Economic, Social and Cultural Rights, which was established by a decision of the United Nations Economic, Social and Cultural Council.⁵⁴

⁵⁴ The Committee was established under the United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to ECOSOC in Part IV of the International Covenant on Economic, Social and Cultural Rights.

Treaty body	Treaty	Examination of reports	Individual complaints
Human Rights Committee	International Covenant on Civil and Political Rights (1966)	Yes	First Optional Protocol (1966)
Committee on Economic, Social and Cultural Rights	International Covenant on Economic, Social and Cultural Rights (1966)	Yes	Optional Protocol (2008) ⁵⁵
Committee on the Elimination of Racial Discrimination	International Convention on the Elimination of All Forms of Racial Discrimination (1965)	Yes	Article 14
Committee on the Elimination of Discrimination against Women	Convention on the Elimination of All Forms of Discrimination against Women (1979)	Yes	Optional Protocol (1999)
Committee against Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984)	Yes	Article 22
Committee on the Rights of the Child	Convention on the Rights of the Child (1989)	Yes ⁵⁶	No
Committee on Migrant Workers	International Convention on the Rights of All Migrant Workers and Members of Their Families (1990)	Yes ⁵⁷	Article 77
Subcommittee on Prevention of Torture	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (2002)	No	No
Committee on the Rights of Persons with Disabilities	Convention on the Rights of Persons with Disabilities (2006)	Yes	Optional Protocol
Committee on Enforced Disappearances	International Convention for the Protection of All Persons from Enforced Disappearances (2006)	Yes	Article 31

55 This protocol is not yet in force (May 2012).

56 On 19 December 2011, the General Assembly adopted a new Optional Protocol to the Convention on the Rights of the Child to give this Committee a complaint function similar to that of other treaty bodies. The Optional Protocol can be expected to come into effect within two or three years.

57 The individual complaints procedure has not yet been accepted by a sufficient number of States parties to make it operational (May 2012).

3.1. Concluding observations related to the rights of migrant workers

An important function of the treaty bodies is to monitor the compliance of States parties with their obligations under the respective human rights treaties. Each treaty establishes a reporting procedure which requires States parties to regularly present a report on their compliance with, and implementation of, their treaty obligations.

At the conclusion of the reporting process, which includes an interactive dialogue with the State party under review, the treaty body issues concluding observations (also known as concluding comments), which usually include recommendations for further action by the State to meet its obligations under the treaty. Concluding observations are meant to be concrete, focused and able to be implemented. There is also increasing attention on measures to ensure effective follow-up of the recommendations made.

This section summarizes the key issues raised by the different treaty bodies in relation to the treatment of migrant workers in their concluding observations. These have varied on a regional basis, reflecting the different issues raised and the level of protection generally given to migrants.⁵⁸ The main areas of concern raised by treaty bodies include trafficking; discrimination; deportation and detention; irregular migrants; working conditions; migrant women; and national security and anti-terrorism measures.⁵⁹

The two main areas of concern raised by the **Human Rights Committee** have been the detention and deportation of aliens.⁶⁰ The Committee has also addressed issues of trafficking; ill-treatment by law enforcement officials; the impact of anti-terrorism laws; freedom of expression; freedom of association (especially regarding trade unions); and freedom of movement of migrants.⁶¹

The main focus of the **Committee on Economic Social and Cultural Rights** has been issues relating to the terms of employment, which includes minimum wages; health and maternity benefits; pension benefits; unemployment benefits; safe working conditions; and access to trade unions.⁶² The Committee has also addressed discrimination in the enjoyment of economic, social and cultural rights by migrant workers, including in housing; access to social security schemes; education; and access to work.⁶³

The **Committee on the Elimination of Discrimination against Women** has addressed the issue of trafficking and sexual exploitation of women migrant workers.⁶⁴ Migrant women can be particularly vulnerable to experiencing multiple forms of discrimination. The Committee's recommendations to State parties address the obligations of States of origin and States of destination.⁶⁵

The **Committee on the Rights of the Child** has a strong interest in, and has raised the issue of, trafficking, including trafficking of migrant children and their situation once they return to their country of origin.⁶⁶ The Committee has also raised the issue of discrimination in access to adequate social services, in particular health and education facilities for migrant children, including irregular migrant children.⁶⁷

The **Committee on the Elimination of Racial Discrimination** commonly addresses the issue of negative racial attitudes of host populations towards migrants and, in particular, asylum seekers. It has drawn attention to political speech, ill-treatment and violence, expressions of prejudice in the media

58 *The UN Treaty Monitoring Bodies and Migrant Workers: A Samizdat*; December 18; updated July 2007; p. 19.

59 *Ibid*; pp. 22-27.

60 "Migrants' rights in UN human rights conventions"; Isabelle Slinckx; in *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009; p. 130.

61 *The UN Treaty Monitoring Bodies and Migrant Workers: A Samizdat*; December 18; updated July 2007; p. 19.

62 "Migrants' rights in UN human rights conventions"; Isabelle Slinckx; in *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009; p. 132.

63 *Ibid*; p. 132.

64 *Ibid*; p. 133.

65 *Ibid*; pp. 134-135.

66 *The UN Treaty Monitoring Bodies and Migrant Workers: A Samizdat*; December 18; updated July 2007; p. 21.

67 *Ibid*; p. 21.

and violent attacks against ethnic minorities.⁶⁸ Discrimination against migrants is noted in the areas of education, housing, access to public services, social security benefits and discrimination in the type of work that migrants perform.⁶⁹ The Committee also puts a strong focus on the regularization of undocumented workers⁷⁰ and, since 2011, has stated that anti-terrorism measures should not discriminate in purpose or effect on the grounds of race, colour, descent or national or ethnic origin.⁷¹

The main concern raised by the **Committee against Torture** regarding migrant workers is the excessive use of force and discriminatory practices by police when dealing with foreigners.⁷² The Committee has also addressed issues of detention prior to removal, including the excessive length of detention, the principle of “non-refoulement” (i.e. the prohibition on the deportation for individuals who risk being subjected to torture if returned to their own country) and trafficking.⁷³

Information on the ways in which NHRIs can engage with the treaty bodies, and how they can participate in the treaty reporting process, is included in Chapter 11.

3.2. Selected general comments relevant to migrant workers

Each treaty body also issues “general comments” (also called “general recommendations” for the Committee on the Elimination of Discrimination against Women and the Committee on the Elimination of Racial Discrimination) which provide an interpretation of the human rights content of a treaty, thematic issues or the methods of work of the treaty body.

Over the years, the treaty bodies have issued general comments that address the rights of migrant workers and have developed jurisprudence concerning the application of the respective treaties with regards to migrant workers.

However, there is no uniformity in the use of terminology when referring to migrants and migrant workers. The general comments and concluding observations issued by the different treaty bodies can use a range of terms, such as “alien”, “foreigner”, “immigrant” and “non-citizens”. Often these terms are also linked to the legal status of the migration. For example, terms such as “illegal”, “irregular” and “undocumented” are often used.⁷⁴

The general comments listed below address the views of treaty bodies in relation to the obligation of States parties in respect of non-nationals, including migrants.⁷⁵

68 “Migrants’ rights in UN human rights conventions”; Isabelle Slinckx; in *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009; p.128.

69 Ibid; p. 129.

70 Ibid; p. 129; and *The UN Treaty Monitoring Bodies and Migrant Workers: A Samizdat*; December 18; updated July 2007; p. 20.

71 “Migrants’ rights in UN human rights conventions”; Isabelle Slinckx; in *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009; p. 130.

72 Ibid; p. 135.

73 Ibid; pp.136-137.

74 *The UN Treaty Monitoring Bodies and Migrant Workers: A Samizdat*; December 18; updated July 2007; pp. 14-15.

75 This section is drawn mainly from *The UN Treaty Monitoring Bodies and Migrant Workers: A Samizdat*; December 18 (updated July 2007; pp. 9-10) but has also been updated to reflect later general comments. The general comments for each treaty body are available on that treaty body’s section of the OHCHR website.

Human Rights Committee	
General Comment No. 15 on the position of aliens under the Covenant (1986)	“Each State party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction” (article 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” and “must be guaranteed without discrimination between citizens and aliens.”
General Comment No. 23 on the rights of minorities (1994)	“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.”
General Comment No. 31 on the nature of the general legal obligation imposed on States parties (2004)	“The enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.”
General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial (2007)	“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.”
Committee on Economic Social and Cultural Rights	
General Comment No. 13 on the right to education (article 13) (1999)	“The right to TVE (technical and vocational education) ... consists, in the context of the Covenant’s non-discrimination and equality provisions, of programmes which promote the TVE of women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.
General Comment No. 14 on the right to the highest attainable standard of health (2000)	“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.”
General Comment No. 15 on the right to water (articles 11 and 12) (2002)	“Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.”
General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (2005)	“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.”

General Comment No. 18 on the right to work (2005)	“The principle of non discrimination as set out in article 2.2 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.”
General Comment No. 19 on the right to social security (2008)	“... the Committee notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country ... Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support ... Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes.”
General Comment No. 20 on non-discrimination in economic, social and cultural rights (2009)	“The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”
General Comment No. 21 (2009) on the right of everyone to take part in cultural life	“States parties should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events. States parties should not prevent migrants from maintaining their cultural links with their countries of origin.”
Committee on the Elimination of Discrimination against Women	
General Recommendation No. 21 on equality in marriage and family relations (1994)	“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.”
General Recommendation No. 24 on women and health (1999)	“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.”
General Recommendation No. 26 (2008) on women migrant workers	Clarifies the obligation of State parties vis-à-vis sex- and gender-based discrimination against migrant women and the application of CEDAW to both documented and undocumented migrant women. It deals with the application of the Convention in countries of origin, transit, and destination; the lifting of discriminatory bans or restrictions on migration; providing education, awareness-raising and training to migrant workers; regulations and monitoring systems to ensure that recruiting agents and employment agencies respect the rights of all women migrant workers; access to services including health services and legal and administrative assistance; travel documents; safeguarding remittances of income; facilitating the right to return and services upon return; diplomatic and consular protection; legal protection for the rights of women migrant workers; access to remedies; legal protection for the freedom of movement; non-discriminatory family reunification schemes; non-discriminatory residency regulations; and rights of women migrant workers in detention.

General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (2010)	“... the obligations of States parties apply without discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory.”
Committee on the Rights of the Child	
General Comment No. 3 on HIV/AIDS and the rights of the child (2003)	“Vulnerability to HIV/AIDS is more acute for a number of children, including migrant children, and underlines their need for special protection.”
General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin (2005)	Clarifies the scope of article 2, 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.”
Committee on the Elimination of Racial Discrimination	
General Recommendation No. 30 on discrimination against non-citizens (2004)	Clarifies general principles for responsibilities 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.”
Committee against Torture	
General Comment No. 1 on refoulement and communications (implementation of article 3 in the context of article 22) (1997)	Concerns the principle of “non-refoulement”, where a State party must not extradite a person to another State where there are substantial grounds for believing that s/he would be in danger of being subjected to torture. While the text does not mention migrant workers, it has been argued that it applies to undocumented migrants that are to be deported. ⁷⁶
General Comment No. 2 on the implementation of article 2 by States parties (2007)	States that the term “any territory under its jurisdiction,” applies to “any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party.”

76 “Migrants’ rights in UN human rights conventions”; Isabelle Slinckx; in *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009; p. 128.

4. SPECIAL PROCEDURES

Special procedures are mechanisms established by the Human Rights Council to address thematic issues or country specific situations worldwide.⁷⁷ Special procedures can either be individuals or working groups.

Individual special procedures can be called a “Special Rapporteur”, a “Special Representative of the Secretary-General” or an “Independent Expert”. Working groups are generally comprised of five members.

Special procedures are given mandates to examine, monitor, advise and publicly report on human rights situations in specific countries or territories (known as “country mandates”) or on major global human rights issues (known as “thematic mandates”). Currently, there are 35 thematic mandates and ten country mandates.

The mandates of the special procedures are established and defined by the resolution creating them.

Although their mandates vary, most special procedures:

- undertake studies, through which they contribute to the development of international human rights law
- investigate situations of human rights violation arising under the mandate
- undertake country visits
- receive and consider complaints from victims of human rights violations and intervene with States on their behalf
- issue urgent action requests
- promote the mandate
- report to the Human Rights Council and to other intergovernmental bodies on their findings, conclusions and recommendations.

The strength of the special procedures lies in their independence; mandate holders are human rights experts appointed in an individual capacity.

Information on the ways in which NHRIs can engage with the special procedures is provided in Chapter 11.

4.1. The Special Rapporteur on the human rights of migrants

The mandate of the Special Rapporteur on the human rights of migrants was established in 1999 by the former United Nations Commission on Human Rights (resolution 1999/44) to “examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of [migrants], including obstacles and difficulties for the return of migrants who are non-documented or in an irregular situation”.⁷⁸

The OHCHR states that the main functions of the Special Rapporteur are to:

- examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, recognizing the particular vulnerability of women, children and those undocumented or in an irregular situation
- request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families
- formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants, wherever they may occur

⁷⁷ Detailed information about the special procedures is available at: www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx.

⁷⁸ United Nations Commission on Human Rights Resolution 1999/44; para. 3.

- promote the effective application of relevant international norms and standards on the issue
- recommend actions and measures applicable at the national, regional and international levels to eliminate violations of the human rights of migrants
- take into account a gender perspective when requesting and analysing information, and to give special attention to the occurrence of multiple discrimination and violence against migrant women
- give particular emphasis to recommendations on practical solutions with regard to the implementation of the rights relevant to the mandate, including by identifying best practices and concrete areas and means for international cooperation
- report regularly to the Council, according to its annual programme of work, and to the General Assembly, at the request of the Council or the Assembly.⁷⁹

The Special Rapporteur's mandate extends to all countries, irrespective of whether a State has ratified the Convention on Migrant Workers.

The mandate is implemented through a range of activities, including receiving and responding to communications, undertaking country visits, awareness raising activities and regular reporting to the Human Rights Council and the General Assembly.

4.1.1. Communications

The Special Rapporteur is able to “to request, receive and exchange information on violations of the human rights of migrants [wherever they may occur] from Governments, treaty bodies, specialized agencies, Special Rapporteurs for various human rights questions and from intergovernmental organizations, other competent organizations of the United Nations system and non-governmental organizations, including migrants’ organizations, and to respond effectively to such information”.⁸⁰

The Special Rapporteur receives and responds to communications that fall into two main categories:

- information regarding individual cases of alleged violations of the human rights of migrants
- information regarding general situations concerning the human rights of migrants in a specific country.⁸¹

Based on these communications, the Special Rapporteur establishes a dialogue with the Government concerned, “with a view to clarifying the allegations raised and to preventing or, as necessary, investigating alleged violations of the human rights of migrants”.⁸²

This can involve “letters of allegation”, which include requests for information and cooperation from the Government, and “urgent appeals”, which raise serious and time-sensitive matters.

4.1.2. Reports

The Special Rapporteur reports annually to the Human Rights Council about the global state of protection of the human rights of migrants, as well as areas of concern and examples of good practice.

In this report, the Special Rapporteur informs the Council of all the communications sent and the replies received from States. The report may also examine key thematic issues and propose specific recommendations to better promote and protect the human rights of migrants.

Upon the request of the Human Rights Council, the Special Rapporteur may also present reports to the General Assembly.

79 “Special Rapporteur on the human rights of migrants”; OHCHR; see: www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx.

80 United Nations Commission on Human Rights Resolution 1999/44; para. 5.

81 “Communications/Submitting information to the Special Rapporteur”; OHCHR; see: www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Communications.aspx.

82 Ibid.

Some of the important issues addressed through reports prepared by the Special Rapporteur include:

- irregular migration and criminalization of migrants (A/HRC/17/33 in 2011)
- the situation of women migrant workers and violence against them (E/CN.4/2002/94 in 2002 and E/CN.4/2005/85 in 2005)
- protection of children in the migration process (A/HRC/17/33 in 2011 and A/HRC/11/7 in 2009)
- enjoyment of the right to health and adequate housing by migrants (A/HRC/17/33 and A/HRC/14/30 in 2011)
- racism and discrimination against migrants (E/CN.4/2005/85 in 2005)
- the human rights of migrant domestic workers (E/CN.4/2004/76 in 2004)
- the deprivation of liberty in the context of migration management (E/CN.4/2003/85 in 2003).⁸³

4.1.3. Country visits

One of the most important functions of the special procedures is to conduct country visits (also known as a fact-finding visit).

A country visit cannot be carried out without the approval of the particular State. However, “the Special Rapporteur may solicit an invitation, based on factors such as the number, credibility and gravity of the allegations received, and the potential impact that the mission may have on the overall human rights situation”.⁸⁴

During the fact-finding visit, the Special Rapporteur will have contact with a wide range of stakeholders, such as Government officials, NHRIs, NGOs and other civil society organizations. The report of the country visit includes conclusions on the country situation and makes recommendations to the Government.

Between 2000 and the end of 2011, the Special Rapporteur on the human rights of migrants undertook 22 country visits, including visits to the Asia Pacific countries of the Philippines (2002), Indonesia (2006), South Korea (2006) and Japan (2010).

4.2. Other special procedures relevant to the rights of migrants

In addition to the Special Rapporteur on the human rights of migrants, there are a number of other special procedures with mandates particularly relevant to the protection of the rights of migrants and migrant workers.

They include, among others, the:

- Working Group on **Arbitrary Detention**
- Special Rapporteur on **trafficking in persons**, especially in women and children
- Special Rapporteur on **contemporary forms of racism**, racial discrimination, xenophobia and related intolerance
- Independent Expert on **minority issues**
- Special Rapporteur on **contemporary forms of slavery**, including its causes and consequences
- Special Rapporteur on **torture** and other cruel, inhuman or degrading treatment or punishment
- Special Rapporteur on the rights to **freedom of peaceful assembly and of association**
- Special Rapporteur on **freedom of religion or belief**
- Special Rapporteur on **adequate housing** as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

⁸³ “Annual Reports”; OHCHR; see: www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx.

⁸⁴ “Country Visits”; OHCHR; see: www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/CountryVisits.aspx.

- Special Rapporteur on the **right to education**
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of **physical and mental health**
- Independent Expert in the field of **cultural rights**
- Special Rapporteur on **violence against women**, its causes and consequences
- Working Group on the issue of **discrimination against women** in law and in practice
- Working Group on **transnational corporations and other business enterprises**.⁸⁵

5. THE UNIVERSAL PERIODIC REVIEW

The Universal Periodic Review (UPR) is a unique process which reviews the human rights records of all UN Member States.

When the General Assembly established the Human Rights Council, the newly-formed Council was mandated to “undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States”.⁸⁶

The aim of the UPR is to improve the human rights situation in all countries and address human rights violations wherever they occur.

The UPR has six objectives:

- the improvement of the human rights situation on the ground
- the fulfilment of the State’s human rights obligations and commitments and assessment of positive developments and challenges faced by the State
- the enhancement of the State’s capacity and of technical assistance, in consultation with, and with the consent of, the State concerned
- the sharing of best practice among States and other stakeholders
- support for cooperation in the promotion and protection of human rights
- the encouragement of full cooperation and engagement with the Council, other human rights bodies and OHCHR.⁸⁷

The review provides an opportunity for all States to highlight the steps they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights.

Between late 2007 and 2011, the Human Rights Council reviewed the human rights performance of all the then 192 Member States. In 2010 and 2011, towards the end of the first cycle of State reviews, the Council reviewed the UPR process and, with minor amendments, decided to commence the second cycle in June 2012.⁸⁸

All 193 Member States⁸⁹ will have their human rights compliance reviewed under the UPR between June 2012 and the end of 2016. The second and subsequent cycles will be four and a half years in length.⁹⁰

Information about the contribution and participation opportunities for NHRIs at each stage of the UPR process is included in Chapter 11.

85 Information about the mandates of these special procedures is available at: www2.ohchr.org/english/bodies/chr/special/index.htm.

86 General Assembly Resolution 60/251; para. 5(e).

87 HRC Resolution 5/1; part I.B.2; para. 4.

88 HRC Resolution 16/21, as supplemented by HRC Resolution 17/119.

89 On 14 July 2011, the General Assembly admitted the Republic of South Sudan as the 193rd Member State of the UN.

90 The calendar for the 2012–2016 UPR cycle can be found at: www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx.



UN Photo by Jean-Marc Ferré.

5.1. Basis of the review

The UPR is to review the “fulfilment by each State of its human rights obligations and commitments based on human rights treaties and other instruments that they have ratified”.⁹¹

It is based on obligations arising from:

- the United Nations Charter
- the Universal Declaration of Human Rights
- the human rights treaties to which the State is a party
- voluntary pledges and commitments made by the State, including those undertaken when presenting its candidatures for election to the Human Rights Council⁹²
- applicable international humanitarian law.⁹³

The second and subsequent cycles of the UPR will also examine the implementation of recommendations accepted by the State under previous reviews, as well as developments in the human rights situation in the State.⁹⁴

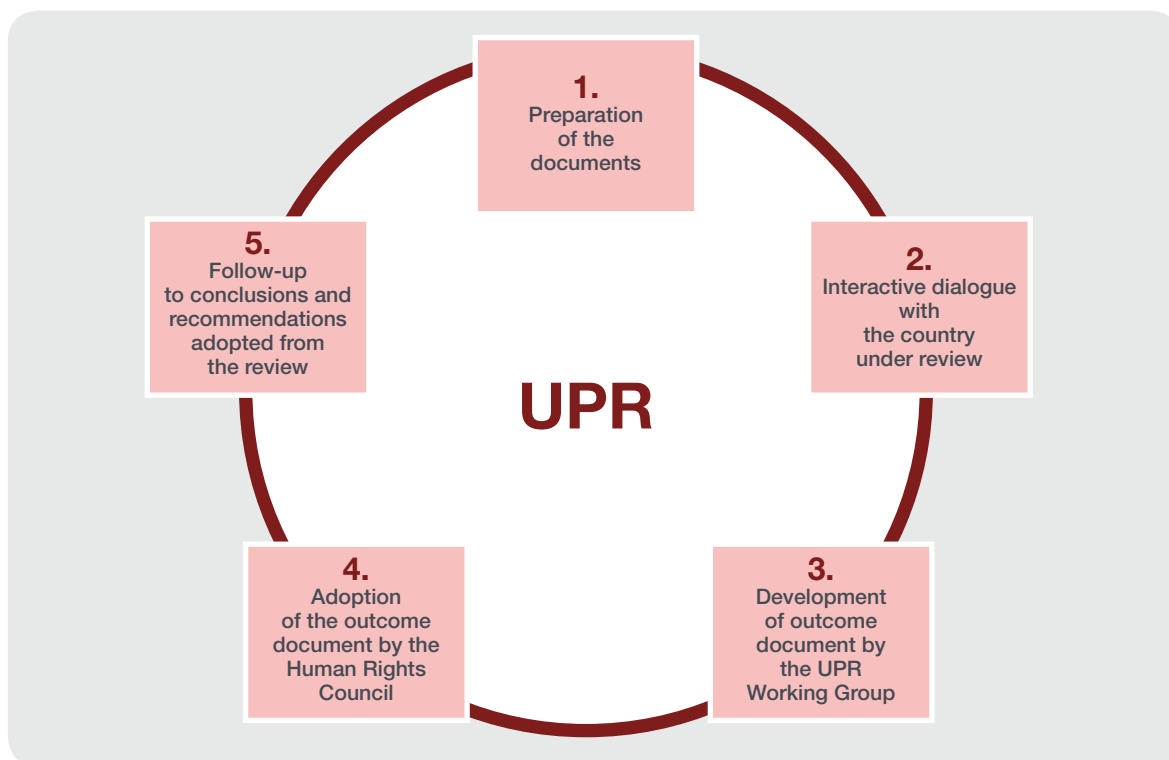
⁹¹ General Assembly Resolution 60/251; para. 5(e).

⁹² HRC Resolution 5/1; Part I.A; para. 1.

⁹³ HRC Resolution 5/1; Part I.A; para. 2.

⁹⁴ HRC Resolution 16/21; para. 6.

5.2. The UPR cycle⁹⁵



5.3. Documentation for the review process

The review of a State is based upon three documents:

- information prepared by the State concerned, not exceeding 20 pages
- a compilation prepared by OHCHR of the information contained in the reports and official documents of relevant UN bodies and agencies, including treaty bodies and special rapporteurs, not exceeding ten pages
- a summary prepared by OHCHR of “[a]dditional, credible and reliable information provided by other relevant stakeholders”, including NHRIs and NGOs, not exceeding ten pages.⁹⁶

5.4. Review of the State

Based on the documentation provided, the human rights situation of the State is reviewed during a three-hour session of a UPR Working Group of the Human Rights Council, consisting of all 47 member States.

Each State review is facilitated by three rapporteurs, known as the “troika”, chosen by lot, from the member States and representing different regional groups. A different troika is chosen for each State under review. The troika prepares the review, including oversight of the documentation, gathering questions from States in advance of the interactive dialogue and preparing the report.

The review takes the form of an “interactive dialogue” with the State delegation and participation is only open to member and observer States of the Human Rights Council. The State can seek to pre-empt

⁹⁵ A Practical Guide to the United Nations’ Universal Periodic Review (UPR); Tatiana Bejar; Human Rights Project at the Urban Justice Center; 2010.

⁹⁶ HRC Resolution 5/1; Part I.D; para. 15.

criticism and anticipate recommendations by offering voluntary commitments in its opening statement. These are promises of actions it will take to increase its compliance with international human rights law.

Following the interactive dialogue, a report is prepared by the troika and discussed in a half-hour session of the UPR Working Group. The Working Group report on each State under review includes a summary of the proceedings; conclusions; recommendations made by individual States in the dialogue; and voluntary commitments made by the State under review.⁹⁷

5.5. Adoption of the report and implementation

The UPR Working Group report on each State under review is considered and adopted at a regular session of the Human Rights Council soon after the completion of the UPR Working Group session.

The State under review speaks first during the one-hour plenary meeting. It is expected to respond to the recommendations in the Working Group report either before or during the plenary debate. It can also reply to questions and issues that were not sufficiently addressed during the Working Group session.

The “A status” NHRI of the State under review has special status. It is “entitled to intervene immediately after the State under review during the adoption of the outcome of the review by the Council plenary”.⁹⁸

5.6. Implementation of recommendations

Implementation of recommendations is the principal objective of the UPR process. States are expected to act on the recommendations they accept and to consider further those that they have not accepted.

In the second cycle of the UPR, States are required to report on their follow-up and implementation of recommendations accepted from the first cycle.⁹⁹ In subsequent cycles, they will be required to report on follow-up and implementation of recommendations in all past review reports. In addition, they are encouraged to provide the Human Rights Council with a mid-cycle report on implementation.¹⁰⁰

The Voluntary Fund for Financial and Technical Assistance¹⁰¹ has been set up to assist countries implement UPR recommendations and support follow-up activities at the country level.

Information about the role that NHRIs can play in following up on recommendations made to the State is available in Chapter 11.

5.7. Migrant workers and the UPR

The rights of migrants generally, and the rights of migrant workers specifically, were the subject of regular discussion during the first UPR cycle. These issues were also addressed in recommendations made to States by the UPR Working Group.

In many instances, States undertook to take positive action to improve the living and working conditions of migrant workers through, for example, the ratification of human rights treaties and ILO conventions, making amendments to domestic laws and policies, issuing standing invitations to the special procedures and undertaking measures to combat human trafficking.

A compiled list of recommendations that each State has accepted or rejected is available at www.upr-info.org.

97 HRC Resolution 5/1; Part I.E; para. 26.

98 HRC Resolution 16/21; para. 13.

99 HRC Resolution 16/21; para. 6.

100 HRC Resolution 16/21; para. 18.

101 For more information about the Voluntary Fund, see: www.ohchr.org/EN/HRBodies/UPR/Pages/UPRVoluntaryFundFinancialAndTechnicalAssistance.aspx

KEY POINTS: CHAPTER 3

- Even if a State has not ratified the Convention on Migrant Workers, it will be bound by one or more of the other core international human rights treaties it has ratified, which include obligations relevant to the rights of migrant workers.
- The general comments developed by the UN treaty bodies provide States with guidance to interpret and apply particular provisions of the human rights treaties, many of which are relevant to the rights of migrant workers.
- The activities of the UN special procedures – which include receiving and responding to communications, issuing urgent appeals, undertaking country visits and preparing regular reports – can provide practical assistance to promote and protect the rights of migrant workers.
- The mandate of the Special Rapporteur on the human rights of migrants extends to all countries, irrespective of whether a State has ratified the Convention on Migrant Workers.
- Through their participation in the UPR process, States can agree to implement recommendations that improve the living and working conditions of migrant workers and members of their families.



FURTHER READING

Migration and Human Rights: The United Nations Convention on Migrant Worker Rights; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pecoud, United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009

Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties: A Do-it-yourself Kit; Mariette Grange, International Catholic Migration Commission; 2006

The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat (updated); December 18; 2007

Working with the United Nations Human Rights Programme: A Handbook for Civil Society; OHCHR; 2008



Chapter 4:

The International Labour Organization and migrant workers

KEY QUESTIONS

- **What international labour standards are relevant to the rights of migrant workers?**
- **What protections do these standards provide to migrant workers?**
- **How is compliance with these standards monitored? Can complaints be made if a State breaches its obligations under these standards?**



1. INTRODUCTION

The International Labour Organization (ILO) was established in 1919 following the First World War, predating the formation of the United Nations. Today it is a specialized agency of the UN with the aim of promoting rights at work, as encapsulated in the slogan: “Decent work for all men and women”. This mission is based on an understanding of the inextricable relationship between labour rights, social justice and the conditions for “lasting peace, progress and prosperity”.¹⁰²

The ILO is the only UN body with an explicit constitutional mandate for the protection of workers in international labour migration.¹⁰³ This focus has been restated in the Declaration of Philadelphia, 1994¹⁰⁴ and the ILO Declaration on Fundamental Principles and Rights at Work, 1998 (see below).

This chapter provides information on the key ILO standards relevant to the rights of migrant workers. It also explains the structure of the ILO and its supervisory and complaints procedures.

Upholding core labour standards is essential for ensuring that the human rights of migrant workers are respected in practice. The right to decent work is a fundamental right that enables the realization of many other rights for migrant workers.

2. ILO STANDARDS AND MIGRANT WORKERS

The ILO has adopted over 180 conventions addressing specific labour issues and concerns, including those that specifically address the rights of migrant workers. In addition to these legally binding conventions, the ILO has codified standards through non-binding guidelines in the form of “recommendations”.

The ILO was also actively involved in the drafting of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It recognizes the definition of migrant workers that the Convention provides and acknowledges the Convention as one of the key framework instruments on the rights of migrant workers.¹⁰⁵

¹⁰² “Mission and Objectives”; ILO; see: www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm.

¹⁰³ “MIGRANT: International Migration Branch”; ILO; see: www.ilo.org/public/english/protection/migrant/index.htm.

¹⁰⁴ Declaration concerning the aims and purposes of the International Labour Organization; ILO Constitution, Annex.

¹⁰⁵ *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*; ILO; 2006; see: “Section V: Protection of Migrant Workers”; para. 9(b); *In Search of Decent Work – Migrant Worker’s Rights: A Manual for Trade Unionists*; International Labour Office; 2008; p. 78.

2.1. ILO conventions and recommendations specific to migrant workers

The ILO has adopted two legally-binding instruments specifically on migrant workers:

- Migration for Employment Convention, 1949 (C-97)
- Migrant Workers (Supplementary Provisions) Convention, 1975 (C-143).

These instruments promote the **principles of equal treatment, equality of opportunity and non-discrimination**. A total of 49 countries have ratified C-97 and 23 countries have ratified C-143.¹⁰⁶ Only two countries with NHRIs that are members of the APF – the Philippines and New Zealand – have ratified C-97; and only the Philippines has ratified C-143.

The **Migration for Employment Convention, 1949** provides a framework to regulate and provide protection to a “migrant for employment” at all stages of the migration process. Member States must provide assistance and information on departure, journey and entry, including medical assistance. They must also take steps to eliminate misleading propaganda on emigration and immigration and to prevent the expulsion of irregular migrants.

The Convention defines a migrant for employment as a person who migrates from one country to another with a view to being employed otherwise than on his or her own account and includes any person regularly admitted as a migrant for employment (article 11). It therefore applies to regular migrants (article 8) and is not applicable to frontier workers, seamen, short-term entry of members of the liberal professions and artistes, or to self-employed foreign migrants.



Photo by Richard Messenger.

¹⁰⁶ For a list of countries that have ratified these conventions, see the “Standards” section of “MIGRANT: International Migration Branch”; ILO; www.ilo.org/public/english/protection/migrant/areas/standards.htm.

The Convention requires member States to accord equal treatment to regular migrant workers in relation to working conditions; membership of trade unions and enjoyment of the benefits of collective bargaining; accommodation; social security; employment taxes; and legal proceedings relating to the matters referred to in the Convention (article 6).

The **Migrant Workers (Supplementary Provisions) Convention, 1975** sets out a comprehensive approach to address labour migration, starting with a commitment to the protection of basic human rights of all migrant workers (article 1). It provides minimum standards for the protection of migrant workers in both regular and irregular situations.

The Convention is the first international instrument to deal with problems arising from irregular migration. It seeks to suppress the clandestine migration and the illegal employment of migrants (article 3) and encourages the prosecution of “manpower trafficking” (article 5).¹⁰⁷

The Convention requires member States to guarantee equality of opportunity and treatment for documented migrant workers and their families in respect to employment and occupation, social security, trade unions, cultural rights and individual and collective freedoms (article 10). However, this provision does not apply to frontier workers, short term entry of the liberal professions and artistes, seamen, trainees and persons coming for training or education and persons who come for specific duty assignments (article 11(2)).

In addition, the Convention stresses the importance of consulting representative organizations of employers and workers in relation to the laws, regulations and other measures provided for in the Convention which are designed to prevent and eliminate migration in abusive conditions.¹⁰⁸

The **Migrant Workers Recommendation, 1975** calls for further elaboration and broadening of the standards set out in C-143, within the framework of a coherent policy on international migration for employment. It seeks to promote effective equality of opportunity and treatment with nationals for migrant workers lawfully within the territory of a member State in respect to vocation and employment training, security of employment, working conditions, trade union membership and remuneration for work of equal value, as well as living conditions, including housing, social services and access to education and health services (article 2).

The Recommendation encourages member States to provide the free choice of employment and geographical mobility for migrant workers who have resided lawfully in the country (article 6(a));¹⁰⁹ to ensure the efficient resolution of cases where migrant workers with irregular status may be regularized, and where they cannot be regularized, to ensure equal treatment with regards to certain rights arising from past and present employment (article 8); to formulate social policy appropriate to the conditions and specific needs of migrant workers (article 9), to promote family reunification (article 13) and to provide assistance and information in adapting to the economic, social and cultural environment of the country of employment (article 24).

The ILO has a dedicated unit for labour migration, the International Migration Programme (MIGRANT), which promotes international standards and cooperation and provides technical assistance and capacity building to member States on labour migration and the promotion of migrant worker's rights.¹¹⁰

¹⁰⁷ The Convention does not specifically define the phrase “manpower trafficking” which, in summary, refers to trafficking for labour. For a comprehensive definition of trafficking in persons, which includes trafficking for the purposes of labour exploitation, see the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.

¹⁰⁸ See article 7 in particular and, more generally, articles 2, 4 and 12.

¹⁰⁹ The provision is limited to those who have migrated for work purposes for a prescribed period of two years or less.

¹¹⁰ “MIGRANT: International Migration Branch”; ILO; see: www.ilo.org/public/english/protection/migrant/index.htm.

2.2. Core labour standards and other relevant conventions

All core ILO labour rights – known as the Fundamental Conventions of the ILO and enshrined in the **ILO Declaration on Fundamental Principles and Rights at Work** – apply in equal measure to all migrant workers.

Adopted in 1998, the Declaration states in its Preamble that the ILO “should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation”.

Article 2 of the Declaration states that:

all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;*
- (b) the elimination of all forms of forced or compulsory labour;*
- (c) the effective abolition of child labour; and*
- (d) the elimination of discrimination in respect of employment and occupation.*

The eight conventions considered “fundamental” by the ILO include:

- Forced Labour Convention, 1930 (C-29)
- Freedom of Association Convention, 1948 (C-87)
- Right to Organize and Collective Bargaining Convention, 1949 (C-98)
- Equal Remuneration Convention, 1951 (C-100)
- Abolition of Forced Labour Convention, 1957 (C-105)
- Discrimination (Employment and Occupation) Convention, 1958 (C-111)
- Minimum Age Convention, 1973 (C-138)
- Worst Forms of Child Labour Convention, 1999 (C-182).

There are other ILO standards that are directly relevant to rights of migrant workers.¹¹¹ Of particular importance are the Private Employment Agencies Convention, 1997 (C-181) and the Domestic Workers Convention, 2011 (C-189).

The **Private Employment Agencies Convention, 1997** provides guidance for designing a legal framework to address illegal recruitment practices and trafficking of human beings, especially women and children. It applies to all private employment agencies and all categories of workers, including migrant workers, but excludes the recruitment and placement of seafarers from its coverage (article 2(2)).

Some of the Convention’s key provisions include:

- that member States ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability (article 5)
- the protection of worker’s privacy in processing worker’s data (article 6)

¹¹¹ For a list of other relevant standards, see the *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*; 2006; Annex I; pp. 33-34.

- that private employment agencies not charge directly or indirectly, in whole or in part, any fees or costs to workers (article 7)
- that member States provide adequate protection for, and prevent abuses of, migrant workers recruited or placed in its territory by private employment agencies, including laws or regulations which provide for penalties, including prohibition of private employment agencies which engage in fraudulent practices and abuses (article 8(1))
- that member States ensure that child labour is not used or supplied by private employment agencies (article 9)
- provisions for adequate mechanisms to deal with complaints, abuses and fraudulent practices of private employment agencies (article 10)
- adequate remedies including penalties for violations of the Convention (article 14(3)).

The **Domestic Workers Convention, 2011** – also known as the Convention Concerning Decent Work for Domestic Workers – is a landmark standard that aims to protect and improve the lives and working condition of domestic workers worldwide. The ILO estimates that there are around 53 to 100 million domestic workers, the vast majority of whom are women and girls.¹¹²

Migrant workers make up a large proportion of domestic workers and their earnings represent a significant proportion of remittances to developing countries. Migrant domestic workers can be at high risk of exploitation and abuses. Partly because domestic work is “invisible”, domestic workers are undervalued, overworked and unprotected. Migrant domestic workers can experience a range of human rights violations, ranging from excessive recruitment fees and confiscation of passports, through to forced labour, trafficking, sexual exploitation and rape.

In giving legal recognition to domestic work as “work”, the Convention grants protections to domestic workers that are commensurate to other workers, such as reasonable hours of work, weekly rest of at least 24 consecutive hours, limitations on in-kind payment and clear information on terms and conditions of employment. It also includes provisions regarding fundamental principles and rights at work, including freedom of association and the right to collective bargaining, and that a written work contract is provided before the migrant travels to the country of destination. Member States are also required to provide clear rules and regulations on private employment agencies to prevent fraudulent and abusive practices.

2.3. ILO Multilateral Framework on Labour Migration

The ILO Multilateral Framework on Labour Migration, adopted in March 2006, is a non-binding instrument that promotes a rights-based approach to labour migration and protection for migrant workers. It was developed in response to the absence of a multilateral process to govern labour migration and to mitigate some of the associated problems, such as the exploitation of migrants, the growth of irregular migration and the “brain drain” on developing countries.¹¹³

The framework contains comprehensive principles and guidelines in relation to labour migration and provides practical guidance to Governments. While the framework is non-binding, member States are urged to promote and respect the framework as a way of fostering coherence and consistency in migration policy at the national, regional and international level.

A key focus of the framework is to ensure equality for, and improve protection of, migrant workers and to prevent disadvantage or exploitation. It applies to all migrant workers and seeks to improve the circumstances of especially vulnerable groups. The framework emphasizes the special position of women, who make up half of all migrant workers and often migrate alone.

¹¹² *Global and regional estimates on domestic workers*; Domestic Work, Policy Brief No 4; ILO; 2011; pp. 6-9.

¹¹³ *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*; ILO; 2006; p. v.

The framework provides non-binding principles and guidelines in eight areas:

- decent work for all including migrant workers
- international cooperation on labour migration
- creation of global knowledge base
- effective management of labour migration
- protection of human rights of all migrant workers regardless of status
- prevention and protection against abusive migration practices
- promotion of orderly and equitable process of labour migration
- promotion of social integration and inclusion.

3. THE ILO TRIPARTITE STRUCTURE AND ITS SUPERVISORY SYSTEM

The ILO is unique among UN agencies in providing a forum for non-government actors to participate as independent social partners in discussing and resolving common issues.

The ILO structure consists of three main bodies:

- the International Labour Conference
- the Governing Body
- the International Labour Office.

These organs are represented equally by Governments, employer organizations and trade unions in their deliberations and decision-making processes.

The International Labour Conference acts like an international parliament of labour and is responsible for setting international labour standards and policies. The Governing Body is the executive arm, while the International Labour Office functions as the secretariat.

Each member State of the ILO sends four representatives to the International Labour Conference: two Government delegates, an employer delegate and a worker delegate. Each delegate has equal voting rights.¹¹⁴

The ILO regularly assesses the application of standards in member States and identifies how they could be better applied in law and practice. If there are difficulties in the application of standards, the ILO seeks to engage with, and provide technical assistance to, the countries concerned.

The ILO has two kinds of supervisory mechanism:

- the regular system of supervision, which involves the “examination of periodic reports submitted by member States on the measures they have taken to implement the provisions of the ratified conventions”¹¹⁵
- special procedures, which includes “a representations procedure and a complaints procedure of general application, together with a special procedure for freedom of association”.¹¹⁶

114 ILO Constitution; article 4.

115 “Applying and promoting international labour standards”; ILO; see: www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm?lang=en#RegularSupervision.

116 Ibid.



Photo by Richard Messenger.

3.1. Regular system of supervision

According to the ILO, “the regular system of supervision is based on the examination by two ILO bodies of reports on the application in law and practice sent by member States and on the observations on these matters sent by workers’ organizations and employers’ organizations.”¹¹⁷

After ratification of ILO conventions, member States are required to submit their reports to the **Committee of Experts on the Application of Conventions and Recommendations** (CEACR), which is composed of 20 independent experts chosen from across geographic regions.

The reporting obligations of ILO member States include an:

- obligation to report on ratified conventions
- obligation to report on unratified conventions
- obligation to report on recommendations.¹¹⁸

Periodic reports submitted by governments are considered by the CEACR, which provides comments in the form of “observations” and “direct requests”. Observations are comments on fundamental questions raised by the application of a particular convention, and which are published in the Annual Report, while direct requests are technical in nature and communicated directly to member States.

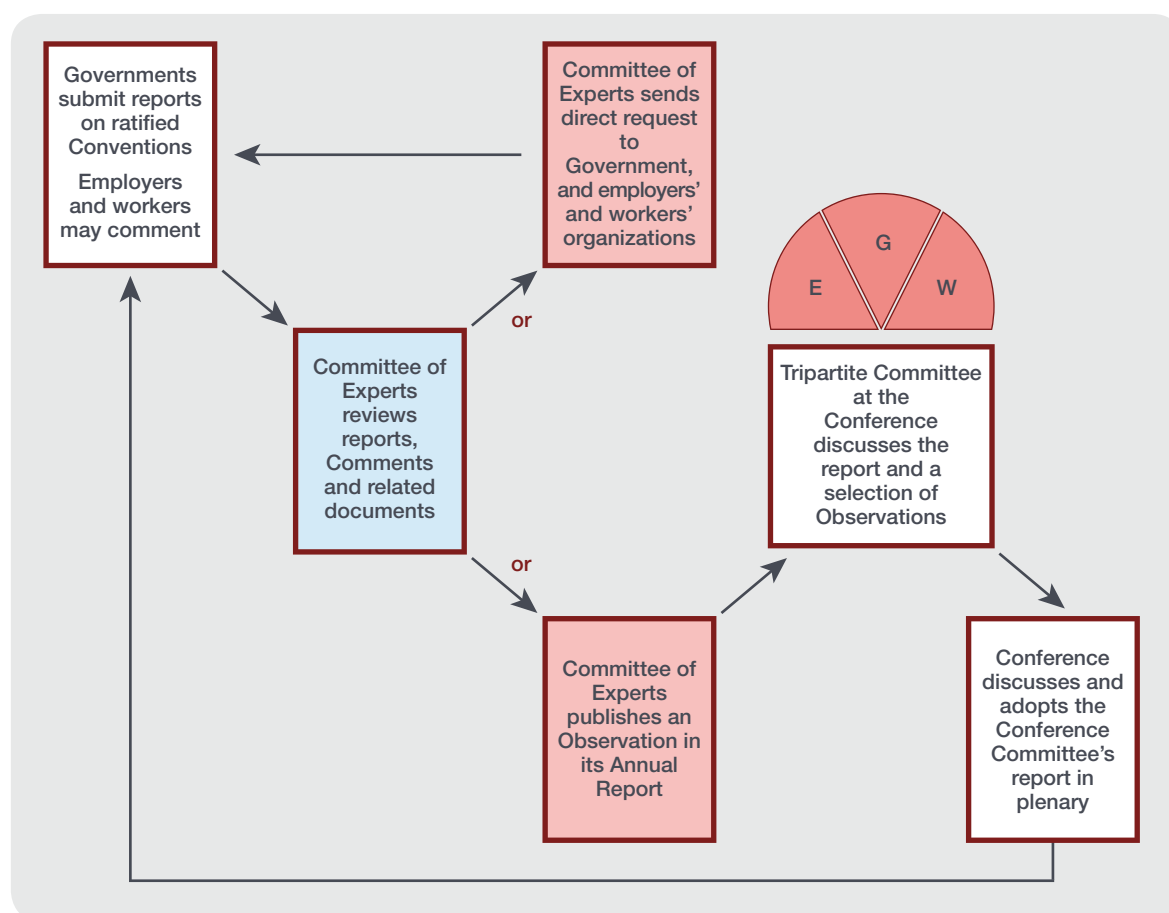
¹¹⁷ “ILO supervisory system/mechanism”; ILO; see: www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm.

¹¹⁸ ILO Constitution; articles 22, 19(5e) and 19(6d).

CEACR reports are submitted to the next session of the International Labour Conference and examined by the tripartite **Conference Committee on the Application of Standards**. The Conference Committee considers a selection of observations, invites the concerned Government to respond to the observations and then presents recommendations to the Government to address specific issues or to invite ILO missions or technical assistance. The findings of the Conference Committee are published in its report.

The ILO regular system of supervision has been credited with progress in reforming some labour laws and policies in some countries.¹¹⁹ In recent years, member States have also been “more receptive to the Committee’s comments” and “tending to implement them more fully”.¹²⁰

Figure 4.1: ILO regular supervisory process¹²¹



119 *The Committee of Experts on the Application of Conventions and Recommendations: its dynamic and impact*; Eric Gravel and Chloé Charbonneau-Jobin; ILO; 2003. See also: 'Facing up to the Complexities of the ILO's Core Labour Standards Agenda'; Philip Alston; *European Journal of International Law*; June 2005; pp. 467-80.

120 *The Committee of Experts on the Application of Conventions and Recommendations: its dynamic and impact*; Eric Gravel and Chloé Charbonneau-Jobin; ILO; 2003; p. 24.

121 "Committee of Experts on the Application of Conventions and Recommendations":ILO; see: www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm.

3.2. Special procedures

The special procedures are engaged upon the submission of a “representation” or a complaint. They include:

- the procedure for representations on the application of ratified conventions
- the procedure for complaints over the application of ratified conventions
- the special procedure for complaints regarding freedom of association.

The **representation procedure** allows an industrial association of employers or workers to bring a “representation” or allegation to the ILO Governing Body against a member State for failure “to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party” (article 24, ILO Constitution). A tripartite Committee is set up by the Governing Body which examines the issues raised and the response of the Government concerned. If the Government response is not considered satisfactory, the Governing Body publishes both the representation and the response (article 25, ILO Constitution).

The representation must satisfy certain conditions before it can be examined by the Committee. Officers of the ILO Governing Body determine whether the representation has been submitted according to formal requirements and whether it establishes in what respects the Government is alleged to have failed to effectively observe a convention it has ratified.¹²²

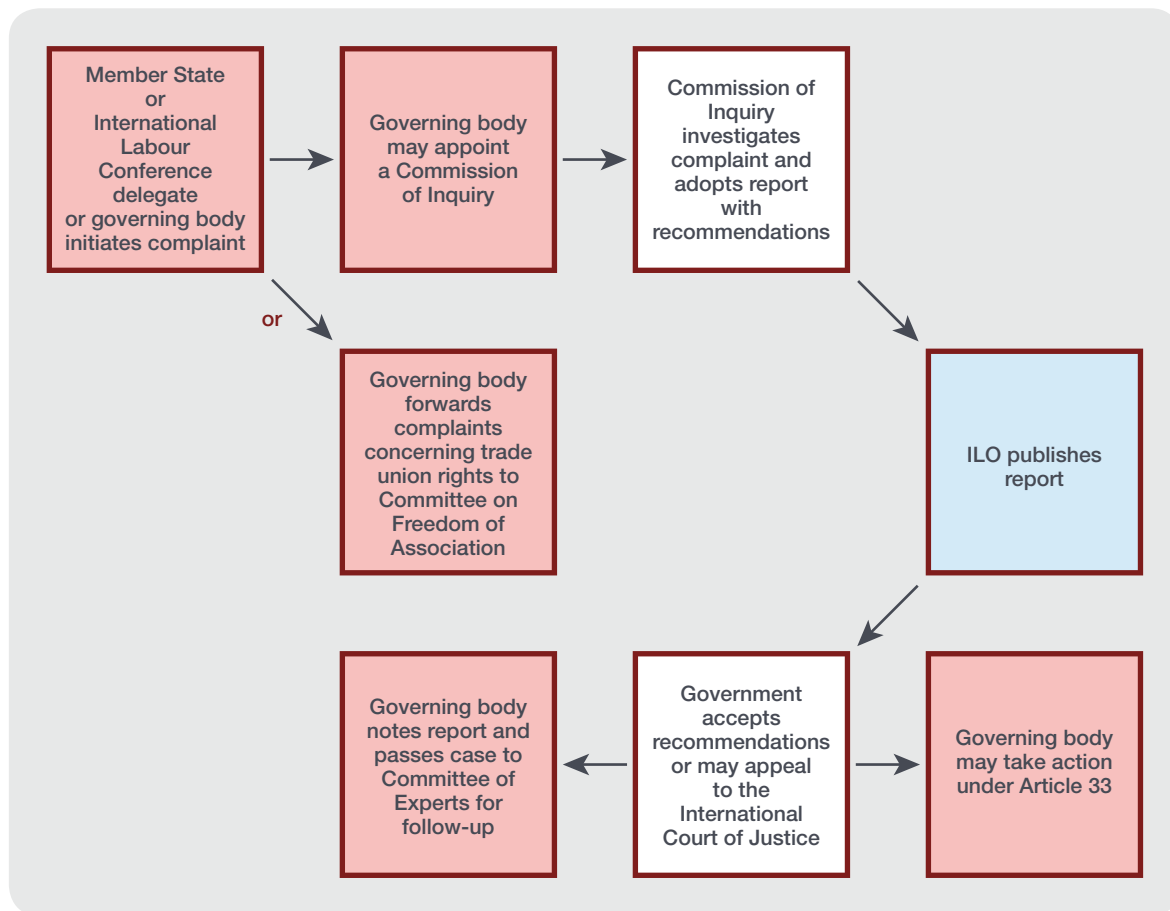
Under the **complaints procedure**, a member State, a delegate to the International Labour Conference or the ILO Governing Body on its own accord, may submit a complaint against another member State for failing to secure the effective observance of a convention ratified by both member States (article 26, ILO Constitution). The ILO Governing Body may refer the matter for examination to a Commission of Inquiry or forward complaints on violation of trade union rights to the Committee on Freedom of Association. Articles 26 to 34 of the ILO Constitution govern this procedure.

The Commission of Inquiry is the highest investigative level procedure at the ILO and is set up to deal with complaints involving persistent and serious violations and persistent refusal to address such violations by a Member.¹²³ Since 1996, there have been 11 Commissions of Inquiry set up by the ILO. The Commission of Inquiry conducts a full investigation of the complaint and prepares a report setting out all questions of facts and recommendations (articles 26 to 28, ILO Constitution).

The Government against which the complaint is made may accept the recommendations or refer the matter to the International Court of Justice (article 29, ILO Constitution). If the member State refuses to take action on the recommendations, the Governing Body may recommend to the International Labour Conference “such action as it may deem wise and expedient to secure compliance” (article 33, ILO Constitution). Article 33 has been used once, in 2000, when the ILO Governing Body asked the International Labour Conference to take measures against Myanmar to end the use of forced labour.

¹²² For complete procedure and requirements, see: Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution; ILO; 1932 (modified 1938, 1980 and 2004).

¹²³ “Complaints”; ILO; www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm.

Figure 4.2: ILO complaints procedure¹²⁴

In the 1950s, the ILO established supervisory procedure to ensure compliance with the fundamental principle of freedom of association and collective bargaining, enshrined in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (C-87) and the Right to Organise and Collective Bargaining Convention, 1949 (C-98). The **special procedure on freedom of association** can apply to member States that have not ratified these conventions.

There are three competent bodies of the ILO that can hear complaints of alleged infringement of trade union rights:

- the Committee on Freedom of Association
- the Fact-Finding and Conciliation Commission on Freedom of Association
- the Governing Body itself.¹²⁵

The **Fact-Finding and Conciliation Commission on Freedom of Association** was established in 1950, following discussions between the ILO and the United Nations Economic and Social Council (ECOSOC). All complaints received by the ECOSOC concerning allegations of infringement of trade union rights are referred to the ILO Governing Body and then to the Fact-Finding and Conciliation Commission. Generally, the procedure applies to member States of the ILO. Non-member States of the ILO may give their consent to the referral.

¹²⁴ Ibid.

¹²⁵ For further information, see: ILO Special procedures for examination in the International Labour Organization of complaints alleging violations of freedom of association; Annex I.

The **Committee on Freedom of Association** was created in 1951 with nine regular members and nine deputies, representing Governments, trade unions and employer groups in equal proportion. The Committee's mandate is to determine whether any given legislation or practice complies with the principles of freedom of association and collective bargaining set out in the relevant conventions and to examine whether the evidence is satisfactory to support the complaint. The Committee conducts the preliminary examination and prepares a report to the ILO Governing Body and recommends measures to address the situation. It can also seek the consent of the Government concerned to refer the complaint to the Fact-Finding and Conciliation Commission.

At any stage of the procedure, either during an examination or taking action on recommendations, **on-the-spot missions** can be undertaken by the ILO Director General or representative. This involves visiting the country concerned and making on-the-spot enquiries with a view to overcoming difficulties. On-the-spot missions are generally undertaken in the context of allegations of a particularly serious nature. They can be carried out only with the approval of the Committee and the consent of the concerned Government. This approach, which has been used successfully, is similar in purpose to "direct contacts" with Governments employed by the Fact-Finding and Conciliation Commission.

Complaints to the ILO special procedures can be lodged either directly with the ILO or through the UN. Complaints are deemed "receivable" only when submitted by a national organization directly interested in the matter, by international organizations of employers or workers having consultative status with the ILO, or other international organizations of employers or workers where the allegations relate to matters directly affecting their affiliated organizations. If the complaints are found to be substantiated, the ILO Governing Body can communicate with the concerned Government, publicize the matter or take other alternative actions.



UN Photo by Shelley Rotner.

KEY POINTS: CHAPTER 4

- All core ILO labour rights – enshrined in the ILO Declaration on Fundamental Principles and Rights at Work – apply equally to all migrant workers, regardless of their migration status.
- The ILO has developed labour standards specifically relating to the rights of migrant workers. Other ILO conventions relevant to migrant workers address the rights of domestic workers, the operation of private employment agencies, illegal recruitment practices and human trafficking.
- The ILO has established a regular system of supervision to monitor implementation of these standards. Complaints can also be brought to the ILO for an alleged failure to uphold labour standards.



FURTHER READING

International Labour Migration: A Rights-Based Approach; ILO; 2010

International Labour Standards on Migrant Workers' Rights: Guide for Policymakers and Practitioners in Asia and the Pacific, ILO; 2007

Migration and International Human Rights Law; Practitioner's Guide No. 6; International Commission of Jurists; 2011

Monitoring International Labor Standards; National Research Council; 2004

Protecting the Rights of Migrant Workers: A Shared Responsibility; ILO; 2009



Chapter 5:

Regional mechanisms for the promotion and protection of the rights of migrant workers

KEY QUESTIONS

- What regional human rights mechanisms have been established?
- How do regional human rights mechanisms promote and protect the rights of migrant workers?



1. INTRODUCTION

In the 1970s, the UN endorsed the creation of regional human rights mechanisms to encourage cooperation among States in different geographical areas in order to more effectively promote and protect human rights. Regional mechanisms are seen as an important complement to existing international and national human rights systems.

Regional human rights mechanisms and instruments are particularly significant for migrant workers. Globalization has created certain conditions that limit the capacities of States to respond to economic and social issues. The issues facing migrant workers are transnational and cross-cutting in nature and, as such, migrant workers can be vulnerable to a range of abuses and discrimination in sending, transit, and receiving countries. Regional groupings can consist of countries that belong to one, two or all three of these categories.

Economic, political and geographic conditions account for a country's position in the migration process. Some countries may have a complex relationship with migrant workers due to their levels of economic development and their proximity to border countries where there are high outflows of migration. Therefore, regional cooperation and policy coordination among States can be vital for developing sustainable, long-term solutions that address the human rights issues experienced by migrant workers.

This chapter examines the different regional human rights mechanisms that have been established and their relevance to rights of migrant workers.

2. REGIONAL HUMAN RIGHTS MECHANISMS

Regional human rights mechanisms and their corresponding instruments have gained importance as critical platforms in seeking redress for violations against migrant workers, developing common standards to protect migrant workers and securing cooperation and commitments from States to better promote and protect the rights of migrant workers.

The benefits of establishing a regional human rights mechanism include the potential to:

- narrow the gap between international and national human rights standards
- establish cooperation among countries with diverse human rights policies and practices
- impose mandatory obligations on member States
- provide a mechanism for monitoring compliance of States' human rights obligations.

Protection and promotion of migrant workers' rights at the regional level can either involve "soft law", which includes voluntary commitments and declarations, or legally binding instruments.

There are currently five regional human rights mechanisms with varying mandates.

Region	Main human rights mechanism	Year established	Main charter
Africa	African Commission on Peoples and Human Rights	1987	African Charter on Human and Peoples' Rights (1981)
	African Court on Human and Peoples' Rights	1998	
Americas	Inter American Commission on Human Rights	1959	American Declaration of the Rights and Duties of Man (1948) Charter of the Organization of American States (1951) American Convention on Human Rights (1969)
	Inter American Court of Human Rights	1979	American Convention on Human Rights (1969)
Arab States	Arab Human Rights Committee	2009	Arab Charter on Human Rights (2004)
Europe	European Court of Human Rights	1959	European Convention for the Protection and Promotion of Human Rights and Fundamental Freedoms (1950)
	European Committee of Social Rights	2001	European Social Charter (1961) Charter of Fundamental Rights of the European Union (2000)
South East Asia	ASEAN Intergovernmental Commission on Human Rights	2009	ASEAN Charter (2007)

2.1. The European human rights system

The European human rights system is the oldest and the most comprehensive regional human rights system.¹²⁶

Europe's principal human rights mechanisms operate through the Council of Europe (COE) to implement the European Convention for the Protection and Promotion of Human Rights and Fundamental Freedoms (the European Convention), 1950 and the European Social Charter, 1961.

¹²⁶ "A tongue but no teeth?": The emergence of a regional human rights mechanism in the Asia Pacific region"; Andrea Durbach, Catherine Renshaw and Andrew Byrnes; *Sydney Law Review*; Vol. 31; pp. 211-238.

The COE is comprised of a number of independent agencies which work together to promote and protect “human rights, democracy and the rule of law”¹²⁷ across the region, including:

- the European Court of Human Rights
- the Commissioner for Human Rights
- the Parliamentary Assembly of the Council of Europe
- the Conference of International Non-Governmental Organizations.

2.1.1. The European Convention and the European Court of Human Rights

The European Convention has been ratified by all of the 47 member countries of the COE.¹²⁸ Every State party to the Convention has a legally enforceable duty to “secure the fundamental civil and political rights, not only to their own citizens but also to everyone within their jurisdiction”.¹²⁹

In guaranteeing these rights and freedoms, article 14 of the Convention includes a prohibition on discrimination based on “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” in relation to the substantial rights guaranteed by the Convention.

The Convention is judicially administered by the European Court of Human Rights, which has the power to receive and rule on individual and State complaints of human rights violations. Migrant workers have successfully used certain provisions in the Convention, in particular the right to private and family life and the right to enjoyment of possessions.¹³⁰

2.1.2. The European Social Charter

The European Social Charter (1961) supplements the European Convention on Human Rights on issues in relation to economic and social rights. It provides specific protection to migrant workers and their families who are nationals of States parties.

The Charter (revised in 1996) guarantees certain rights to all migrant workers who are nationals of a State party and their families when in territories of another party, in addition to other rights which specifically apply to migrant workers “lawfully within” the territory of States parties.¹³¹

It also establishes the European Committee of Social Rights to monitor State compliance through periodic reporting and by receiving collective complaints. Collective complaints may only be received against State parties which have accepted this procedure.¹³²

2.1.3. The Commissioner for Human Rights

The Commissioner for Human Rights was established in 1999.¹³³ It has a promotional and monitoring role to “foster the effective observance of human rights and assist member states in the implementation

127 “The Council of Europe in Brief: Our Objectives”; Council of Europe; see: www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en.

128 Albania, Czech Republic, Ireland, Netherlands, Spain, Andorra, Denmark, Italy, Norway, Sweden, Armenia, Estonia, Latvia, Poland, Austria, Finland, Liechtenstein, Portugal, “The former Yugoslav Republic of Macedonia”, Azerbaijan, France, Lithuania, Romania, Turkey, Belgium, Georgia, Luxembourg, Russian Federation, Ukraine, Bosnia and Herzegovina, Germany, Malta, San Marino, United Kingdom, Bulgaria, Greece, Moldova, Serbia, Croatia, Hungary, Monaco, Slovak Republic, Cyprus, Iceland, Montenegro and Slovenia. Ratification is a precondition of membership to the COE.

129 “The Court in Brief”; European Court of Human Rights; see: www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/.

130 “The ICRMW and the European Union”; Euan MacDonald and Ryszard Cholewinski; *Migration and Human Rights: The United Nations Convention on Migrant Worker Rights*; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (ed); United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009; p. 379.

131 For example, see articles 18 and 19.

132 To date, 15 States have accepted this procedure; see “Member States of the Council of Europe and the European Social Charter”; Council of Europe; www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp.

133 Resolution 99 (50) on the Council of Europe Commissioner for Human Rights; adopted by the Committee of Ministers on 7 May 1999.

of Council of Europe human rights standards”.¹³⁴ Among its principal objectives, the Commissioner aims to collaborate with and provide support to national human rights institutions in the COE, and provides technical assistance for the establishment of new institutions. It may also intervene in proceedings of the European Court of Human Rights.

2.1.4. The Parliamentary Assembly of the Council of Europe

The Parliamentary Assembly of the Council of Europe (the Assembly), along with the Committee of Ministers, form the statutory arms of the COE. The Assembly has adopted many recommendations and resolutions regarding migrants, including in 2011, Recommendation 1985 on undocumented migrant children in an irregular situation; Resolution 1821 on the interception and rescue at sea of asylum seekers, refugees and irregular migrants; and Resolution 1811 on protecting migrant women in the labour market.¹³⁵

2.1.5. The Conference of International Non-Governmental Organizations

The Conference of International Non-Governmental Organizations (INGOs) enables the participation of civil society in the decision-making structures of the COE. INGOs applying for participatory status “must be particularly representative in the field(s) of their competence and at European level, share the Council of Europe’s aims, and contribute actively to its work.”¹³⁶

2.1.6. The Tampere Conclusions 1999

The European Council, which is composed of Heads of States and responsible for setting the policy directions of the European Union (EU), has produced a policy declaration on the creation of a common EU asylum and migration policy. This policy is embodied in the conclusions of the EU Council Summit of 1999, known as the “Tampere Conclusions”, and is part of the broader goal of creating an area of “freedom, security and justice”.¹³⁷ It sets out a common approach to migration and asylum in the EU addressing four areas of collaboration: a common European asylum system; country partnerships; fair treatment of third country nationals (nationals from outside the EU); and migration management.

Paragraphs 18 and 21 of the Tampere Conclusions set out the policy of fair treatment of “third country nationals” who legally reside or have legal long-term residency in EU Member States. “Third country nationals” refers to nationals of countries who are not EU Member States, which includes certain categories of migrant workers. Fair treatment means giving third country nationals rights “as near as possible” to those enjoyed by EU citizens. The principle of “non-discrimination” should guide the treatment of non-EU citizens in relation to their enjoyment of a broad range of economic, social, and cultural rights.

2.2. The Inter-American human rights system

The Inter-American human rights system was established by the Organization of American States (OAS) to protect and defend human rights in the Americas. There are 35 Member States of the OAS.¹³⁸

The main human rights instruments of the Inter-American human rights system are the American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights

134 “Commissioner for Human Rights: Mandate”; Council of Europe; see: www.coe.int/t/commissioner/Activities/mandate_en.asp.

135 To search adopted texts of the Assembly, see “Adopted Texts”; Parliamentary Assembly of the Council of Europe (PACE); http://assembly.coe.int/ASP/Doc/XrefATListing_E.asp.

136 *The Conference of International Nongovernmental Organisations of the Council of Europe: History, Structures, Projects*; Conference of INGOs of the Council of Europe; p. 1.

137 “Presidency Conclusions, Tampere European Council, 15 and 16 October 2009: Introduction”; European Parliament; see: www.europarl.europa.eu/summits/tam_en.htm.

138 At the time of writing, 24 of the 35 Organization of American States (OAS) Member States have ratified the American Convention on Human Rights: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

(1969). Today, the Declaration is generally considered to have gained the status of regional customary law, while the Convention imposes specific and legally binding obligations on Member States.¹³⁹

Article 106 of the Charter of the Organization of American States, the constitutive instrument of the OAS, provided for the creation of the Inter-American Commission on Human Rights, “whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.”

The Inter-American Court of Human Rights was established by the OAS in 1979, following the Convention’s entry into force. The Court has adjudicatory and advisory functions. Only the Commission and States parties to the Convention can bring petitions or complaints before the Court.¹⁴⁰ Individual complaints are not allowed to be filed in the Court.

In a landmark Advisory Opinion requested by Mexico, the Court upheld the fundamental right of undocumented migrant workers to be protected from discrimination.¹⁴¹ The Court reaffirmed that the principle of equality and non-discrimination has attained the status of *jus cogens*¹⁴² norms and that States are bound to respect the principles regardless of their non-ratification of treaties.

2.2.1. Rapporteurship on Migrant Workers and Members of their Families

In 1996, the OAS established the Rapporteurship on Migrant Workers and Members of their Families. The Special Rapporteur has the mandate to promote awareness of the vulnerabilities of migrant workers and their families, to make recommendations to Member States, to prepare reports and studies on migrant workers and migration and to act promptly on petitions or communications of human rights violations occurring in Member States.

The Rapporteurship has identified the rights of migrant workers protected under the Inter-American human rights system, based on the case law of the Commission and the Court.¹⁴³ These rights, organized thematically, include:

- right to life, liberty, personal security, to equality and to a fair trial
- right to life, personal integrity, circulation, residence, and to special protection of children in the family
- right to life, to a fair trial, and to information about consular protection
- right to a fair trial and to judicial protection
- right to a fair trial and asylum
- right to a fair trial and to the protection of the family
- right to personal integrity, to a fair trial, to privacy, to property, to judicial protection, freedom of conscience and religion and of association
- right to personal liberty and to information on consular protection
- right to personal liberty, to a fair trial, and to information on consular protection
- right to personal liberty, to a fair trial, to movement and residence and to judicial protection
- right to liberty and protection from arbitrary arrest
- right to equality and to non-discrimination
- right to residence and movement and to due process of law
- right to nationality and to education.

139 “The Inter-American Human Rights System: An Effective Institution for Regional Human Rights Protection?”; Lea Shaver; *Washington University Global Studies Law Review*; Vol. 9 (2010); p. 643.

140 American Convention on Human Rights; 1969; article 61(1).

141 Advisory Opinion OC-18/03 requested by the United Mexican States: Juridical Condition and Rights of the Undocumented Migrants; 17 September 2003.

142 *Jus cogens* norms are defined as a set of “peremptory norms accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”; Vienna Convention on the Law of Treaties, 1969; article 53. As such, *jus cogens* norms override any inconsistent provision in another treaty or customary law.

143 “Rapporteurship on the Rights of Migrants”; Inter-American Commission on Human Rights; see www.cidh.org/Migrantes/migrants.caselaw.htm.

2.2.2. Regional Inter-American arrangements to protect the rights of migrant workers

Two regional trade organizations in the Americas – the Common Market of the South (Mercosur) and the Andean Community (CAN) – have developed regional social and labour policies that apply to migrant workers. Mercosur is the largest trading bloc in South America¹⁴⁴ while CAN comprises four countries in Latin America.¹⁴⁵

Mercosur has approved the following regional instruments that seek to protect the rights of migrant workers: the Mercosur Social-Labour Declaration; the Agreement on Residence for State Party Nationals of Mercosur; the Agreement on Visa Exemptions; and the Agreement on Social Security.

The Andean Labour Migration Instrument 2003 provides a comprehensive provision on the movement and rights of Andean migrant workers and members of their families. It provides for four categories of migrant workers – individually moving worker, company worker, seasonal worker and border worker (article 4) – and recognizes the principle of equal treatment and opportunities among migrant workers, regardless of the category to which they belong (article 10).

2.3. The African human rights system

The African regional human rights system is administered by the African Union (AU), which replaced the former Organisation of African Unity (OAU) in 2001. The AU has 54 member states.¹⁴⁶

Similar to the Inter-American System, the African system consists of both the African Commission on Human and People's Rights and the African Court on Human and People's Rights, established by two principal human rights instruments.

2.3.1. The African Charter on Human and Peoples' Rights

In 1981, the OAU adopted the African Charter on Human and Peoples' Rights (the "Banjul Charter"), which entered into force in 1986. The Banjul Charter provides for the establishment of the African Commission on Human and People's Rights (article 30) and is the foundation human rights instrument in the African system.

The Commission is mandated to promote and protect both human rights and "peoples'" (collective) rights, as defined in the Charter, and to interpret the provisions of the African Charter at the request of States parties, organs of the AU and individuals.¹⁴⁷ Under its protection mandate, the Commission can receive complaints from individuals, organizations and States against State parties to the Charter regarding violations of its provisions (articles 48, 49 and 55). The Charter further requires States parties to report to the Commission every two years on their implementation of the Convention.

Article 66 permits other standards and agreements to be adopted to supplement the rights protected in the Charter. In particular, the Protocol on the Rights of Women in Africa, 2003 (the "Maputo Protocol") and the African Charter on the Rights and Welfare of the Child, 1990 provide for the specific protection needs of women and children not adequately recognized in the main Charter.¹⁴⁸

The Commission has also established additional mechanisms, including special rapporteurs and working groups, to address particular human rights concerns.

144 Full members are Argentina, Brazil, Paraguay, Uruguay and Venezuela (still pending deliberations) while Associate Members are Chile, Bolivia, Colombia, Ecuador, and Peru. For more information see: www.mercosur.org.uy/index.html.

145 The Andean Community includes Bolivia, Colombia, Ecuador and Peru.

146 At the time of writing, 53 of the 54 Member States of the African Union had ratified the Charter; see: "Ratification Table: African Charter on Human and Peoples' Rights"; African Union; www.achpr.org/instruments/achpr/ratification/.

147 *Celebrating the African Charter at 30: A Guide to the African Human Rights System*; African Commission on Human and Peoples' Rights, Centre for Human Rights, Faculty of Law, Pretoria University; South Africa; 2011; p. 17.

148 *Celebrating the African Charter at 30: A Guide to the African Human Rights System*; African Commission on Human and Peoples' Rights, Centre for Human Rights, Faculty of Law, Pretoria University; South Africa; 2011; pp. 12-15. At the time of writing, 41 Member States had ratified the Charter on the Rights and Welfare of the Child and 28 had ratified the Maputo Protocol.

In 2004, the mandate of the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons was established, which includes research, promotional and advisory functions as well as the undertaking of fact-finding missions and investigations. In 2006, the Commission extended the Special Rapporteur's mandate to cover migration issues.¹⁴⁹

In 1998, the Commission adopted a resolution on the Granting of Affiliate Status to NHRIs. To attain affiliate status, NHRIs of State parties to the Charter must conform to the Paris Principles. NHRIs with affiliate status can participate in public sessions of the Commission. They are also “required to assist the Commission in the promotion of the human rights at the country level” and must report regularly to the Commission on their activities.¹⁵⁰

2.3.2. The Protocol to the Charter establishing an African Court on Human and Peoples' Rights

The Protocol to the Charter establishing an African Court on Human and People's Rights was adopted in 1998.¹⁵¹

The African Court on Human and Peoples' Rights has jurisdiction to hear cases regarding the “interpretation and application” of the African Charter, the Protocol and “any other relevant human rights instrument ratified by the States concerned”.¹⁵²



UN Photo by J Mohr.

149 “Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons”; African Commission on Human and Peoples' Rights; www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/.

150 *Celebrating the African Charter at 30: A Guide to the African Human Rights System*; African Commission on Human and Peoples' Rights, Centre for Human Rights, Faculty of Law, Pretoria University; South Africa; 2011; pp. 41-42. This document also contains a list of NHRIs with affiliate status.

151 At the time of writing, 26 Member States of the AU had ratified the Protocol: Algeria, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda; see “About the Court: A Brief History”; www.african-court.org/en/index.php/about-the-court/brief-history.

152 See: “About the Court: A Brief History”; www.african-court.org/en/index.php/about-the-court/brief-history.

2.4. The Arab human rights system

The Arab Charter on Human Rights, 2004 is the main regional human rights instrument adopted by the League of Arab States (LAS). At October 2009, 10 of the 22 LAS Member States had ratified the Charter.¹⁵³

The first Arab Charter on Human Rights was adopted in 1994. However, on the recommendation of the Arab Commission on Human Rights, the Charter was substantially revised and, following ratification by seven Member States, the 2004 version came into force in 2008.

The Charter provided for the establishment of the Arab Human Rights Committee to oversee the implementation of the Charter, which was first formed in 2009. It also provided for the protection of certain collective rights, including the right to self-determination (article 2(1)), and for individual rights.

In addition, the Charter also established the Committee's supervisory functions through a system of periodic reporting by States parties.

The application of several important Charter rights, however, are restricted to individuals with citizenship, including the right to work (article 34), the right to free basic health-care services and access to medical facilities without discrimination (article 39(1)) and the right to free education at the primary and basic levels (article 41(2)).¹⁵⁴

Significantly, the Charter also recognizes the overriding application of international standards ratified by States parties:

*Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set force in the international and regional human rights instruments which the states parties have adopted or ratified.*¹⁵⁵

3. EMERGING REGIONAL FRAMEWORKS FOR MIGRANT WORKERS IN ASIA

There is currently no Asia-wide regional human rights mechanism. However, at the sub-regional level, there are evolving processes that seek to promote and protect human rights and, specifically, the rights of migrant workers. Migrant workers are high on the policy agenda of many Governments in Asia because of the significant contribution that they make to the economic and social development of countries in the region.

3.1. The Association of Southeast Asian Nations

The Association of Southeast Asian Nations (ASEAN) has taken up the issue of migrant workers' rights in recent years. The ten-member ASEAN¹⁵⁶ has developed a roadmap for an ASEAN community by 2015 which seeks to create a single market characterized by the free movement of capital, goods, services and skilled labour.¹⁵⁷

The ASEAN Charter (2007), which invested the ASEAN Community with its legal and institutional framework, declares that the promotion and protection of human rights and fundamental freedoms is one of its purposes (article 1 (7)). The Charter also provides for the creation of an ASEAN human rights body (article 14), the first regional human rights mechanism in Asia region.

153 *The Arab Charter on Human Rights and the League of Arab States: An Update*; Mervat Rishmawi; Human Rights Law Review; Vol 10:1 (2010); p. 172.

154 *Ibid*; p. 171.

155 Article 43; see the English translation of the Arab Charter on Human Rights, 2004 provided by the University of Minnesota Human Rights Library; www1.umn.edu/humanrts/instrree/loas2005.html.

156 ASEAN member countries are Indonesia, Philippines, Thailand, Malaysia, Singapore, Brunei Darussalam, Cambodia, Vietnam, Laos and Myanmar.

157 See: *Roadmap for an ASEAN Community 2009–2015*; Association of Southeast Asian Nations (ASEAN) Secretariat; 2009.

The ASEAN Intergovernmental Commission on Human Rights is a consultative body established in 2009. Under its Terms of Reference, the main purposes of the Commission include the promotion and protection of human rights and fundamental freedoms (article 1.1) and upholding international human rights standards as set out in the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action and international human rights instruments to which ASEAN Member States are parties (article 1.6).

In undertaking its work, the Commission has a mandate to:

- enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information (article 4.3)
- promote capacity building for the effective implementation of international human rights treaty obligations undertaken by Member States (article 4.4)
- encourage ratification of international human rights instruments (article 4.5)
- obtain information from Member States on the promotion and protection of human rights (article 4.10)
- prepare studies on thematic issues of human rights in ASEAN (article 4.12)

The Commission has declared migrant workers as one of its priority thematic areas.

Each Member State nominates a representative to serve on the Commission. There are also opportunities for NHRIs and civil society organizations to engage with the Commission on the rights of migrant workers. For example, under its Terms of Reference, the Commission can engage in “dialogue and consultation” with civil society organizations and with “other national, regional and international institutions and entities concerned with the promotion and protection of human rights” (articles 4.8 and 4.9).

ASEAN also established the ASEAN Commission on the Protection and Promotion of Rights of Women and Children in 2010, which considers issues relevant to migrant women and children.

3.2. ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

In 2007, the same year that the ASEAN Charter was signed, Member States approved the promulgation of an ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.

The Declaration calls on countries of origin and destination to promote the full potential and dignity of migrant workers; to cooperate to resolve cases of migrant workers who become undocumented due to no fault of their own; and to take into account the fundamental rights of migrant workers and their families already residing in the destination country.

The Declaration also requires ASEAN countries to promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers. It sets out further specific obligations on countries of origin and destination, as well as obligations pertaining to ASEAN.

Though non-binding, the Declaration is considered an important development in protecting the rights of migrant workers in the region and was established after years of lobbying by civil society organizations, including migrant organizations, trade unions and human rights networks.

The Declaration also provides for the development of an ASEAN framework instrument on the protection and promotion of migrant workers.

Member States previously promulgated the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children in 2004.

3.3. South Asian Association for Regional Cooperation

Established in 1985, the South Asian Association for Regional Cooperation (SAARC) is an organization of eight Member States¹⁵⁸ dedicated to economic, technological, social and cultural cooperation and emphasizing collective self reliance.

As the SAARC Charter sets out, the organization aims “to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realise their full potentials”.¹⁵⁹

There is currently no regional instrument specific to migrant workers in South Asia. However, SAARC approved two instruments in 2002: the SAARC Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution; and the SAARC Convention for the Promotion of Welfare of Children.

There is also an initiative to establish a SAARC Task Force on Labour Migration by civil society groups.

KEY POINTS: CHAPTER 5

- **Regional human rights mechanisms have been established in Africa, the Americas, the Arab States, Europe and South-East Asia.**
- **Promotion and protection of the rights of migrant workers at the regional level can involve “soft law” or legally binding instruments.**
- **Regional human rights courts have been established in Africa, the Americas and Europe, which can receive and rule on individual complaints. A number of judgments have addressed the rights of migrant workers and members of their families.**



FURTHER READING

Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers; Professional Training Series No. 9; OHCHR, in cooperation with the International Bar Association; 2003; see Chapter 3: “The Major Regional Human Rights Instruments and the Mechanisms for their Implementation”

Migration and Human Rights: The United Nations Convention on Migrant Worker Rights; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pecoud (ed), United Nations Educational, Scientific and Cultural Organization / Cambridge University Press; 2009

Migration without Borders: Essays on the Free Movement of People; Paul de Guchteneire and Antoine Pecoud (ed), United Nations Educational, Scientific and Cultural Organization / Berghahn Books; 2007

“Regional Cooperation on Labour Rights and Migrant Workers’ Rights: South America Compared”; Sonja Schröder, Maria Cristina Macovei and Phillipe de Lombaerde, article prepared for *Revista Educación Superior y Sociedad*; August 2010



¹⁵⁸ South Asian Association for Regional Cooperation (SAARC) Member States include Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

¹⁵⁹ 1985; article 1(b).

Part II

NHRIs in action



Chapter 6: Promoting reform of law, policy and practice

Chapter 7: Investigating allegations of human rights violations

Chapter 8: Protecting the rights of migrants in detention

Chapter 9: Conducting public inquiries into
systemic patterns of human rights violations

Chapter 10: Undertaking education, training and research

Chapter 11: Engaging with international and regional mechanisms

Introduction to Part II

The core international human rights treaties set out the principle that human rights and fundamental freedoms belong to all people, regardless of their migration status. However, for many migrant workers, there can be a vast gap between principle and reality.

Migrant workers in all parts of the globe commonly experience discrimination, exploitation and ill-treatment at the hands of public officials, employers and others.

Independent NHRIs can play a pivotal role in assisting States, government departments, law enforcement agencies, corporations, employers, private recruitment agencies and others to understand and meet their human rights obligations to migrant workers and members of their families.

While no two NHRIs are the same, they commonly have mandates that allow them to:

- **monitor and advise the State** to assist it to meet its international and domestic human rights commitments
- **receive, investigate and resolve complaints** of human rights violations
- **raise awareness and provide human rights education** for all parts of the community
- **engage with the international and regional human rights systems.**

The Paris Principles¹⁶⁰ set out the minimum international standards required for NHRIs to effectively fulfil their role.

Part II of this Guide describes a range of practical actions that NHRIs can take to promote and protect the rights of migrant workers and members of their families, whether they operate in countries of origin, transit or destination. It also features case studies of activities undertaken by NHRIs in the Asia Pacific region, many of which involve partnerships with a range of national and regional stakeholders.

Cooperating for practical change

NHRIs can serve as a critical link between migrant communities, civil society, the State and the international human rights system.

They can also bring together a broad range of stakeholders to build awareness, cooperation and capacity to address the serious and complex human rights violations experienced by migrant workers, undocumented workers and migrants in an irregular situation, including people who have been smuggled or trafficked across borders.

Collaboration is a fundamental principle of any attempt to generate positive action to advance the rights of migrant workers.

The Paris Principles highlight the important role played by civil society and recommend that NHRIs should:

*... develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.*¹⁶¹

¹⁶⁰ Principles relating to the Status of National Institutions (General Assembly Resolution 48/134); see: www.asiapacificforum.net/members/international-standards.

¹⁶¹ Paris Principles; "Methods of Operation"; para. (g).

NHRIs can undertake a range of education, capacity building, advocacy and other programmes with NGOs working with and on behalf of migrant workers, including migrant organizations and associations of migrant workers.

The Kandy Declaration and Program of Action¹⁶² provides a detailed framework for partnerships and collaboration between NHRIs and NGOs in the Asia Pacific region.

NHRIs should also seek to also develop constructive partnerships with other stakeholders who can take action to address the human rights issues facing migrant workers, including the Government, the parliament, the judiciary, public and private sector employers, trade unions, professional associations, legal aid services, social service providers, consulates, the media and others.

Migrant workers can experience human rights violations at all stages of their journey – prior to departure, in transit, in their country of destination and on return home. In many cases, their pre-departure experiences can leave them vulnerable to exploitation and abuse when they arrive in another country.

Given the transnational dimension of these issues, NHRIs should seek to develop cooperative relationships with stakeholders, especially NHRIs, in other labour-sending and labour-receiving countries to undertake research, share information and exchange expertise.

These relationships can be formalised through Memoranda of Understanding, which set out broad areas of cooperation and institutional exchange, or they can involve cooperation to address specific and urgent instances of human rights violations.

Some NHRIs in the Asia Pacific have designated one or more staff members within their institution to act as “focal points” on the rights of migrant workers.

At a regional level, through the coordination of the APF, “focal point” officers exchange information and expertise on good practices of NHRIs in promoting and protecting the rights of migrant workers. Their valuable contributions have directly informed the development of this manual.

¹⁶² The Kandy Declaration and Program of Action was adopted in July 1999 at the conclusion of the Workshop on National Institutions and Non-Governmental Organisations: Working in Partnership, held in Kandy, Sri Lanka; see: www.asiapacificforum.net/working-with-others/ngos.

Chapter 6:

Promoting reform of law, policy and practice

KEY QUESTIONS

- What are some of the key human rights issues facing migrant workers?
- What type of reforms to law, policy and practice can NHRIs promote to better protect the rights of migrant workers?
- How can NHRIs engage with different stakeholders to develop and promote effective policy and practice?



BASIS FOR NHRI INVOLVEMENT

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:

- (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without any referral, opinions, recommendations, proposals and reports on any matters concerning the protection and promotion of human rights. The national institution may decide to publicize them. These opinions, recommendations, proposals and reports as well as any prerogative of the national institution, shall relate to the following areas:
 - (i) Any legislative or administrative provisions, as well as provisions relating to the judicial organization, intended to preserve and extend the protection of human rights. In that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights. It shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
 - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
 - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;
- (b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
- (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation.



1. INTRODUCTION

In recent years, labour migration has become a priority issue for many States around the globe.

While States have the sovereign right to determine and enforce their migration and labour policies, it is imperative that they respect and uphold the fundamental human rights of all migrant workers living within their borders, regardless of their migration status.

However, migrant workers, especially those engaged in low-skill jobs or poorly regulated sectors of employment, can be vulnerable to discrimination, exploitation and abuse. Undocumented workers and migrants in an irregular situation can live and work at the very margins of basic protections and safety.

In some cases, the working conditions that some migrants experience can amount to forced labour or, in the case of people trafficked across borders, slavery.

A country's legal framework should provide the foundation for ensuring that the human rights of all people within its jurisdiction are promoted and protected.

However, in some cases, the domestic laws enacted by States can discriminate against migrants and limit their access to justice, especially migrants in an irregular situation.

NHRIs can contribute to a strong and effective legal framework by promoting the ratification of relevant international human rights standards, especially the International Convention on the Protection of All Migrant Workers and Members of their Families ("the Convention on Migrant Workers").

They can also monitor and promote compliance with the human rights treaties that the State has ratified, review existing national legislation and propose amendments or recommend that new laws be enacted to properly promote and protect the rights of migrant workers.

In addition, NHRIs can engage with a broad range of stakeholders – including government departments, law enforcement agencies, business and employer organizations, labour recruitment agencies, professional associations, trade unions, NGOs, migrant organizations and others – to develop migration, labour, social and industry-specific policies that meet international standards and provide effective safeguards for migrant workers and members of their families.

In this way, NHRIs can play "an important role in ensuring efficient domestic legal protection of all migrants, including access to justice, non-discrimination and equal treatment, including full and effective protection in all areas of society".¹⁶³

2. KEY ISSUES FOR LAW AND POLICY REFORM

NHRIs declare they will:

Engage in legislative advocacy to facilitate the review of domestic legislation regarding the rights of migrants in order to ensure its conformity with international standards and obligations with respect to the protection of human rights, especially in relation to non-discrimination.

Zacatecas Declaration¹⁶⁴

In recent years, NHRIs from all regions of the world have met together on a number of occasions to share information and identify common goals for advancing the rights of migrant workers.

¹⁶³ Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 15.

¹⁶⁴ Zacatecas Declaration; International Workshop of National Institutions for the Promotion and Protection of Human Rights: Causes, Effects and Consequences of the Migratory Phenomenon and Human Rights Protection; Zacatecas, Mexico; 14–15 October 2004; para. 7.

These gatherings have highlighted a range of priority areas for legislative and policy reform to ensure that migrant workers, undocumented workers and migrants in an irregular situation are not excluded from national human rights protection systems.

As the Seoul Statement notes:

*Migration policies of States need to be reoriented toward enabling protection of all migrant workers in order that they can contribute more effectively to society and the economy.*¹⁶⁵

The reforms NHRIs have agreed to advocate for are based on international human rights standards and the principles of equality and non-discrimination. They include:

- strengthening national policies on the employment of migrant workers, including improved oversight and regulation of the activities of recruitment agencies, in conformity with international human rights standards
- establishing minimum standards on working conditions and workplace policies, including safety and health, overtime and irregular hours, fair and adequate pay, clear information regarding work duties, reducing language barriers, respect for cultural and religious beliefs in the assignment of work duties and schedules, job termination and forceful dismissal
- increasing penalties for violations of national labour and employment laws, or recruitment policies
- establishing minimum standards for the living conditions associated with employer-supplied housing for migrant workers, and their families, where appropriate, including requirements for the provision of basic amenities, such as shelter, running water, heat and lighting
- securing the application of domestic labour and employment laws to migrant workers in a manner equal to that of the national labour force, including the provision of medical services, participation in the national pension system, worker's accident and disability compensation, the right to join and form unions and the right to legal remedies for unpaid wages
- enhancing the right to change employer, especially in cases of exploitative or otherwise unjust working conditions
- promoting the right of asylum seekers to support themselves through temporary employment or other adequate means of livelihood while awaiting determination of their status
- ensuring the decriminalization of victims of smuggling and trafficking.¹⁶⁶

NHRIs should also “contribute to creating, in reception countries, the conditions for family reunification of migrant workers and the free education of the children of migrants, in accordance with international human rights standards”¹⁶⁷, such as the Convention on the Rights of the Child (see articles 10 and 28) and the International Covenant on Economic, Social and Cultural Rights (see article 13).

There are a range of other areas where UN human rights treaty bodies, special procedure mandate holders, international organizations, trade unions and civil society groups have recommended the reform of laws, policies and practices to better promote and protect the rights of migrant workers.

For example, public information campaigns and pre-departure orientation programmes are important strategies that can provide migrant workers, and those considering migrating for work, with reliable information that can assist them in making educated decisions.

These programmes are particularly important to assist groups of migrant workers who are especially vulnerable to discrimination and exploitation, such as low-skilled workers and female domestic workers.

165 Seoul Statement; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 10.

166 Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; paras. 30–39.

167 Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 42.

Special attention needs should be given to the circumstances of their recruitment and the vulnerabilities they can face in destination countries.

In some cases, migrant workers may enjoy only limited protection under anti-discrimination laws and access to the justice system may also be restricted in practice. For instance, maternity protection for women migrant workers “is often non-existent and they are frequently dismissed and repatriated when pregnant”.¹⁶⁸

Social security and social welfare programs, including access to health care¹⁶⁹, education and housing, are commonly not available to migrant workers and members of their families on the same basis as other residents. In addition, migrant workers returning to their countries of origin may lose their right to social security because of their absence.

A refusal by accrediting bodies to recognize overseas skills and qualifications means many migrant workers can be locked into low-skill employment and unable to access more suitable and productive work opportunities. This can have a direct effect on their earning potential and the remittances they can send back to their families.

Certain practices can greatly increase the vulnerability of migrant workers. For example:

*In some countries, employers keep the passports and travel documents of migrant workers, thus effectively depriving them of the liberty to travel at will ... Both male and female migrant workers are, in certain contexts, subject to these risks, but female migrants in certain occupations, especially those engaged in domestic service, are more vulnerable to gross violations of their rights.*¹⁷⁰

NHRIs should also pay specific attention to the living and working conditions of migrants in an irregular situation who are “particularly vulnerable to exploitation because they generally cannot, or are hesitant to, avail themselves of the protection of authorities. Hence, employers are more likely to take advantage of them, paying them low wages or making them work long hours, sometimes under dangerous conditions.”¹⁷¹

3. ADVOCATING FOR THE ADOPTION OF INTERNATIONAL TREATIES

... it is also vital that all countries move toward ratifying the Convention on the Protection of the Rights of all Migrant Workers and their Families to ensure that national and regional policies are consistent with international standards. Countries of origin, transit and destination all have significant obligations toward the protection of rights of all migrants.

Seoul Statement¹⁷²

An effective and durable framework for protecting the rights of migrant workers will draw on clearly articulated legal norms and principles.

The Convention on Migrant Workers outlines the practical steps that States should take to prevent violations, provide adequate redress and rehabilitation where required and create a stronger human rights culture within the country. NHRIs can support the development of an effective legal framework by advocating that their Government ratify the Convention.

168 *In Search of Decent Work – Migrant Worker’s Rights: A Manual for Trade Unionists*; ILO; 2008; p. 79.

169 The Special Rapporteur on the human rights of migrants has highlighted the importance of States working “to reduce obstacles to health care for migrants by ensuring that access to health services is not conditioned upon one’s immigration status. Access to health services for migrants should also be ensured while in detention. In this regard, States should work to remove legal and other impediments such as the “obligation to denounce” or similar provisions in their national laws which impede the enjoyment of access to health by migrants.” See: the report of the Special Rapporteur on the Human Rights of Migrants; UN Human Rights Council; A/HRC/14/30; p. 20.

170 International Migration and Development: Report of the Secretary-General; UN General Assembly; A/60/871; p 71.

171 *Ibid*; p. 71.

172 Seoul Statement; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 2.

However, some Governments are reluctant to ratify the Convention on Migrant Workers. As the OHCHR has stated:

*The low level of ratification reflects persistent fears or misunderstandings among States, particularly destination States, about losing control of migration. This has been exacerbated by an alarming and visible rise in xenophobic rhetoric in national political discourse in some countries.*¹⁷³

The International Steering Committee for the Global Campaign for Ratification of the Convention on Rights of Migrants¹⁷⁴ also notes that:

*A number of arguments have been raised to challenge the value of the Convention, even to actively discourage consideration of ratification by concerned countries. They range from asserting inadequacies in the content and scope of the Convention to posing costs and constraints of application.*¹⁷⁵

The Steering Committee suggests that these arguments fall into four main categories: arguments on the utility and scope of the Convention; arguments on respecting State prerogatives; arguments on the role and rights of migrants relative to nationals; and arguments on the consequences of implementing the Convention.¹⁷⁶



Photo by the National Human Rights Commission of Malaysia.

173 OHCHR Report 2010; OHCHR; Thematic Priorities, Migration; p. 47.

174 Members of the Steering Committee include December 18, Fédération internationale des ligues des droits de l'Homme, Migrant Forum in Asia, Human Rights Watch, Migrants Rights International, International Catholic Migration Commission, Office of the High Commissioner for Human Rights, International Labour Organization, Public Services International, International Organization for Migration, United Nations Educational, Scientific and Cultural Organization, World Council of Churches and Amnesty International (observer).

175 *Guide on Ratification: The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*; International Steering Committee for the Global Campaign for Ratification of the Convention on Rights of Migrants ; 2010; p. 29.

176 Ibid; pp. 29-33. The Steering Committee examines the arguments that fall under these themes and provides responses to each. The publication also includes a list of 12 reasons to ratify the Convention on Migrant Workers and the two ILO conventions relating to migrant workers (C-97 and C-143); p. 7.

The Santa Cruz Declaration recommends that NHRIs analyse the specific reasons behind their Government's non-ratification, "including misconceptions and other obstacles", and develop clear responses to counter these concerns. It also suggests that NHRIs can bolster their advocacy efforts by working in partnership with civil society organizations.¹⁷⁷

A comprehensive strategy to promote ratification of the Convention could include measures such as:

- lobbying the Government, at both the parliamentary and departmental levels
- making formal recommendations to the Government, through annual reports, to governmental or parliamentary inquiries or through other reporting processes
- raising public awareness and building community support through campaigns, conferences and media advocacy
- delivering human rights training programmes
- providing advice on policy and legislative development
- engaging with the international human rights system, including the UN treaty bodies and the Universal Periodic Review, and making recommendations through the reporting processes available to NHRIs.

CASE STUDY

The Human Rights Commission of Malaysia (SUHAKAM) has encouraged ratification of the Convention on Migrant Workers and core ILO conventions through various outreach activities with the Government, as well as in recommendations made in its annual reports, special reports related to migrant workers and press statements.

SUHAKAM has also drawn attention to law and policy reform issues regarding migrant workers in meetings with parliamentary and governmental bodies, such as the Parliamentary Caucus on Human Rights, the Department of Immigration and the Ministry of Home Affairs. It has also coordinated larger meetings to foster improved communication between government departments on these issues.

In addition, SUHAKAM has organized a number of roundtable discussions to bring together relevant government agencies and civil society organizations to discuss issues related to the rights of migrant workers.



In addition to the Convention on Migrant Workers, there are a number of other key international human rights standards that can enhance the protection of the rights of migrant workers, as well as individuals who have been smuggled or trafficked across borders.

NHRIs should review whether their Government has ratified the:

- ILO Migration for Employment Convention, 1949 (C-97)
- ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (C-143)
- ILO Domestic Workers Convention, 2011 (C-189)
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

¹⁷⁷ Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; paras. 25–26.

- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.
- United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery.

The core international human rights treaties are additional tools that NHRIs can draw on to address human rights violations and discrimination experienced by migrant workers, especially:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Optional Protocol to the Convention against Torture
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities.¹⁷⁸

NHRIs should identify whether their Government has ratified these human rights treaties and, if so, whether it has entered reservations¹⁷⁹ in relation to particular provisions. They can lobby their Government to respect, protect and fulfil these core human rights standards or, where relevant, to remove reservations.

NHRIs should also review their Government's position on any relevant regional treaties and make recommendations to promote compliance with the human rights standards that have been established.

For example, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers places obligations on countries of origin and destination in the ASEAN region to take specific steps to promote the full potential and dignity of migrant workers.

NHRIs in ASEAN countries can work to promote awareness and adherence to the standards set out in the Declaration. For example, they can monitor its implementation in practice, draw the attention of Government and other stakeholders to areas of non-compliance and provide recommendations for reform of relevant laws and policy, as well as areas of operational practice that can be improved.

4. PROMOTING REFORMS TO DOMESTIC LAW AND POLICY

The participating NHRIs agreed to commit themselves to:

Play a role in the development of national legislation aiming at the protection of the rights of migrants and refugees, and call upon states to harmonize their national legislation with international human rights standards ...

Rabat Declaration¹⁸⁰

¹⁷⁸ Even if not domestically implemented, international standards can have an indirect impact on domestic law, as the norms and standards can be used by the judiciary in construing ambiguous provisions of legislation. NHRIs can play a strategic role in advising the court (i.e. as *amicus curiae* or "friend of the court") of relevant and applicable human rights standards.

¹⁷⁹ A reservation is defined as "a unilateral statement... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State": Vienna Convention on the Law of Treaties, 1969; 1155 UNTS 331; article 2(1)(d). Note also that article 19 of the Vienna Convention provides that a State may make a reservation unless it is prohibited by the treaty or it is incompatible with the object and purpose of that treaty.

¹⁸⁰ Rabat Declaration on Migration and Human Rights; 3rd Arab-European NHRIs' Dialogue on Migration and Human Rights; Rabat, Morocco; 6–8 May 2008.

When a State ratifies an international human rights treaty, it is obliged to implement the treaty's obligations into its domestic laws and policies and to ensure greater conformity between State practices and its laws and policies.

An important role of NHRIs is to assess whether national laws, policies and practices comply with the requirements set out in the treaty. When this is not the case, NHRIs can use their advisory mandate to recommend and advocate for the necessary reforms.

In countries with a monist system¹⁸¹ – where international obligations directly form part of the national legal framework – NHRIs should monitor the situation to assess whether these obligations are respected in practice.

This can include:

- reviewing the impact of draft legislation and policies that impact on the rights of migrant workers
- undertaking a systematic review of all laws, policies and practices concerning the rights of migrant workers, for example as part of a public inquiry (see Chapter 9)
- analysing the impact of Government and private sector / industry-specific policies on the rights of migrant workers
- collecting information regarding the practices and operating procedures of labour recruitment agencies
- undertaking research projects and community consultations to gather up-to-date data about the human rights issues and concerns facing migrant workers
- reviewing the number and type of complaints lodged with the NHRI regarding the rights of migrant workers in order to identify systemic issues
- drawing attention to and monitoring the implementation of recommendations made by international human rights mechanisms, such as the UN human rights treaty bodies, special mandate holders or through the Universal Periodic Review.

Information and data collected by NHRIs about human rights can identify emerging issues, demonstrate areas of progress and help prioritize areas for action.

Based on their human rights analysis, NHRIs can make recommendations to the Government about specific steps to bolster legislative protections for migrant workers that meet international standards, as well as practical reforms that can be made to relevant policies.

NHRIs can offer technical advice to assist the Government implement proposed changes, such as providing comments on draft legislation, working with government departments to incorporate human rights standards into their operational policies and conducting training sessions for public officials to ensure that policies can be effectively translated into practice “on the ground”.

If a State has not ratified a particular treaty, such as the Convention on Migrant Workers, NHRIs can still make recommendations to the Government to introduce, strengthen or implement national laws and policies that meet international standards or best practice in the prevention of human rights violations, including those by corporations.¹⁸²

181 The domestic protection afforded by international human rights treaties is determined by the legal and political system of each State. States are generally divided into two categories: “monist”, where treaties are directly incorporated into domestic law upon the State becoming a party; and “dualist”, where the passage of implementing legislation is required to incorporate international treaty obligations into domestic law. See: *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed); Sarah Joseph, Jenny Schultz and Melissa Castan; 2004; p. 14.

182 Edinburgh Declaration; 10th International Conference of National Institutions for the Promotion and Protection of Human Rights; Edinburgh, Scotland; 8–10 October 2010; para. 13 (A) III.

NHRIs should seek to promote awareness with the Government about “the impact of business enterprises on the realisation of human rights, and the relevant State obligations with regard to the promotion and protection of human rights in their own jurisdiction and extra-territorially.”¹⁸³

In 2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights¹⁸⁴, which aim to support implementation of the “respect, protect and remedy” framework developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

Under this framework, States have a duty to protect against human rights violations “within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”¹⁸⁵

In order to meet their duty to “protect”, the Special Representative noted that States should:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;*
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;*
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;*
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.*¹⁸⁶

The Special Representative also stated that NHRIs that comply with the Paris Principles “have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced”.¹⁸⁷

5. ENGAGING STAKEHOLDERS IN THE POLICY-MAKING PROCESS

The approach that NHRIs follow when providing legislative and policy advice to the Government and other stakeholders can have a significant bearing on their ability to influence positive change.

While the Paris Principles require NHRIs to operate independently in all aspects of their work, they are also encouraged to foster dialogue and work cooperatively with the Government, civil society organizations and other groups.

In providing advice on laws and policies to promote and protect the rights of migrant workers, NHRIs should seek to gather information and perspectives from a range of stakeholders, including parliamentarians, government departments, the judiciary, academia, business groups, public and private sector employers, labour recruitment agencies, trade unions and relevant NGOs.

A human rights-based approach also requires that migrant workers and migrant organizations will make a direct contribution to the development of laws and policies that affect them.

183 Ibid; para. 13 (A) (II).

184 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises; UN Human Rights Council; A/HRC/17/31. The principles were endorsed on 16 June 2011; see: Human rights and transnational corporations and other business enterprises; A/HRC/RES/17/4; para. 1.

185 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises; UN Human Rights Council; A/HRC/17/31; p. 6.

186 Ibid; p. 8.

187 Ibid; pp. 8-9.

NHRIs should seek to develop effective strategies that engage and empower migrant workers to share their experiences and suggestions for addressing discrimination and human rights violations. This may, for instance, involve the NHRI providing information about laws and policies in accessible and plain language formats, which are then translated into the languages of migrant workers in the country.

The goal of the NHRI should be to ensure that migrant workers can genuinely participate in discussion of the issues and have their perspectives and suggestions heard by decision-makers.

By collecting and synthesizing input from a range of stakeholders, NHRIs are well placed to develop practical recommendations that respond to current and emerging issues of concern.

A collaborative approach is also more likely to lead to implementation of these recommendations, especially if other stakeholders support and advocate for the proposed reforms.

While cooperation with the Government is encouraged, “NHRIs should be mindful of their official position within state structures and communicate their recommendations confidently and with the expectation that the executive part of government ... should implement them.”¹⁸⁸

CASE STUDY

According to the **National Human Rights Commission of Korea**, there were approximately 17,000 undocumented migrant children living in Korea in 2010.

However, legislative and policy restrictions mean that many undocumented migrant children are often denied access to public and private health care services. For example, the Ministry of Health and Welfare provides a healthcare financial assistance programme for vulnerable groups, including migrant workers, but requires migrant children to prove the current and previous employment status of their parents.

Further, the Immigration Control Act requires public officials, including health care workers in public institutions, to notify the Korean Immigration Service when they identify undocumented migrants.

As such, the children of undocumented migrant workers are reluctant to access health care services for fear of detection and deportation.

In 2011, the Commission recommended that the Ministry of Health and Welfare revise its application procedure to ensure that undocumented migrant children are confident to access health services when they need them. It also recommended that the number of health care services available to migrant children be extended and that they be provided through a greater number of facilities in the country.

In addition, the Commission issued a recommendation to the Ministry of Justice that health care staff in public facilities be exempted from the duty of notification. The Ministry has since adopted the recommendation and has extended this policy to school teachers and some other government officials.¹⁸⁹



188 *National Human Rights Institutions: Recommendations for Effective Protection and Promotion of Human Rights*; Amnesty International; 2001; Recommendation 3.7.

189 “Comprehensive Measures to Ensure Access to Health Services for Undocumented Migrant Children”; 7 December 2011; National Human Rights Commission of Korea.

5.1. Working with business and industry

NHRIs should seek to establish relationships with the business and industry sector to promote greater understanding of their human rights obligations, including their responsibility to respect the rights of migrant workers within their employment.

The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises has highlighted the important role that NHRIs can play to provide guidance on human rights to business groups and other non-State actors:

*Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by ... migrant workers and their families.*¹⁹⁰

CASE STUDY

In 2007, the Government of New Zealand introduced the Recognised Season Employment (RSE) scheme to address labour demands in the fruit picking sector and to provide viable employment opportunities for Pacific Islander migrants.

However, following consultations with employers, migrant workers and other stakeholders, the **Human Rights Commission of New Zealand** identified a number of ongoing problems, including “accommodation, particularly costs and overcrowding; lack of awareness and understanding of rights and obligations, fears of adverse consequences of complaining; and unfavourable reactions from the host community”.¹⁹¹

The Commission has developed recommendations, which it presented to the Department of Labour in 2011, that aim to support the Government and employers meet their human rights obligations in relation to workers under the RSE scheme, and migrant workers more broadly, including to:

- provide information on employment law and human rights in relation to employment for both migrant employers and migrant employees in community languages and in multiple formats to ensure accessibility
- publicize good practice guidelines and minimum legal standards for RSE employers
- monitor the working conditions of migrant workers, including those employed under the RSE scheme, with a view to taking remedial action when poor practice is identified
- encourage the development of codes of practice in partnership with industry groups, in particular dairying and viticulture, to ensure fairness for migrant employees in particular and to guide employers on best practice in general.¹⁹²



190 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises; UN Human Rights Council; A/HRC/17/31; p. 8.

191 *Tracking Equality at Work*; New Zealand Human Rights Commission; 2011; pp. 59-60.

192 *Ibid*; p. 61.

In its report on *Human Rights, Corporate Accountability and Government Responsibility*,¹⁹³ the Asia Pacific Forum's Advisory Council of Jurists outlined a number of steps that NHRIs can take to assist employers comply with their human rights obligations, such as providing industry-specific information resources, developing industry-specific training and advocating for human rights compliance to be included in corporate business plans.

The report also recommended that NHRIs foster “dialogue between government, corporations and other business enterprises and civil society, including human rights defenders and trade unions”.¹⁹⁴

5.2. Working with migrant worker recruitment agencies

Many migrant workers seek to access employment opportunities in overseas labour markets through recruitment agencies. In a number of countries, the Government operates labour recruitment agencies. However, given the rapidly changing global labour market, there has been a strong growth in the number of private recruitment agencies operating in recent years.

Private recruitment agencies commonly provide a range of services to prospective migrant workers, such as conducting interviews, testing skills and qualifications, arranging medical tests, coordinating employment contracts, organising tickets and travel documents, providing pre-departure training and orientation and assisting with departure and deployment.

Migrant workers, particularly women and low-skilled workers, can be especially vulnerable to exploitation and human rights violations in the recruitment and deployment phase. For example, they may be given misleading information, some may not receive a legal employment contract that sets out and protects their rights, while others may be forced to pay exorbitant recruitment fees and face severe indebtedness over long periods of time. Some individuals can find themselves in situations that amount to bonded labour.

As the ILO has noted:

*Such situations point to a need for better official oversight of recruitment agencies and their practices. Moreover, the establishment of more legally regulated agencies could make informal systems that are outside the law less attractive to workers and employers.*¹⁹⁵

A number of the UN human rights mechanisms have made similar recommendations in relation to private recruitment agencies. Following a visit to Indonesia, the Special Rapporteur on the human rights of migrants stated:

*The Government should increase the transparency and monitoring of private recruitment companies, including regulation and capping of recruitment fees, maintenance of publicly available registers of recruitment agencies, a system of regular and unannounced inspections, and imposition of substantial penalties for violations.*¹⁹⁶

NHRIs can play an important role in advocating that the Government develop legislation to regulate the activities of private recruitment agencies and establish effective oversight mechanisms to ensure that the rights of workers are protected in practice.

193 ACJ Reference on Human Rights, Corporate Accountability and Government Responsibility (Part 1 – Report); Advisory Council of Jurists; 13th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions; Kuala Lumpur, Malaysia; 27–31 July 2008.

194 Ibid; p. 17.

195 *Forced Labour: Facts and Figures – The Cost of Coercion: Regional Perspectives: ASIA*; Report I (B); International Labour Conference, 98th Session; ILO; 2009.

196 Addendum to the report of the Special Rapporteur on the Human Rights of Migrants, Mission to Indonesia; UN Human Rights Council; A/HRC/4/24/Add.3; p. 16.

This can be complemented by developing policy proposals for implementation by the Government which promote informed decision-making among prospective migrant workers, ensure migrant workers receive certified contracts that comply with human rights standards and require adequate pre-departure training and support.¹⁹⁷

NHRIs can also work directly with private recruitment agencies to assist them understand and comply with their human rights obligations to prospective migrant workers, as well as to encourage them to adopt good practice in their operations.

For example, recruitment agencies in a number of Asian countries have signed the Covenant of Ethical Conduct and Good Practices, under which they commit “to information campaigns for migrant workers and employers, to social security and insurance programmes that benefit migrant workers and to the establishment of resource and welfare centers in labour-receiving countries”.¹⁹⁸

5.3. Contributing to bilateral agreements

As the overall number of people crossing borders to live and work continues to rise, Governments are increasingly working together to share information and manage labour flows.

However, as NHRIs have noted:

*... it is vital that the discourses around migration, including in forums such as the Global Forum on Migration and Development, are reoriented to ensure that they are more than just a negotiation between countries of origin and destination on the most effective global arrangements to meet market demands for supply of human resources. Such discourses lead to commoditization of migrant workers and pave the way for a range of human rights violations.*¹⁹⁹

Bilateral agreements between Governments can help address questions and concerns between labour-sending and labour-receiving countries about the relevant legal and policy frameworks in each country regarding migrants, labour regulation, market-based development strategies and human rights.

*NHRIs can consider using their advisory mandate to advocate for the inclusion or integration of human rights norms in bilateral agreements involving their Government. However, as some human rights groups have noted, the inclusion of these standards can have unintended consequences that should first be considered.*²⁰⁰

197 The Global Migration Group identifies policy suggestions to promote good practice in the selection and recruitment of migrant workers. See: *Mainstreaming Migration into Development Planning: A Handbook for Policy-makers and Practitioners*; 2010; pp. 67-68.

198 Submission of Migrant Forum in Asia to the Day of General Discussion on Migrant Domestic Workers, held by the Committee on Migrant Workers, 14 October 2009; p. 5. The Covenant of Ethical Conduct and Good Practices (2005) was developed with the assistance of the United Nations Agency for Gender Equality and the Empowerment of Women (UNIFEM) (East and South-East Asia Region).

199 Seoul Statement; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 7.

200 “While these often represent an improvement over existing frameworks, the uneven bargaining power between labor-sending and labor-receiving governments means that such agreements are generally weak and fail to guarantee key protections. Bilateral agreements or negotiations may also actually promote unhealthy competition. For example, if one country establishes stronger protections for its nationals through a bilateral agreement, employers and recruiters from the host country may simply seek workers from countries without such protections.”: *Recommendations to Governments of the Colombo Process*; Migrant Forum in Asia, Human Rights Watch and Caram Asia; 19 April 2011; pp. 3-4. See also the General Assembly President’s Summary of the Informal Thematic Debate on International Migration and Development (convened 19 May 2011); Initiatives of the President of the 65th session, General Assembly; p. 4.

CASE STUDY

In 2009, the **Philippines Commission on Human Rights** issued a comment²⁰¹ on a proposed shift in the Government's policy on overseas Filipino employment towards a more "aggressive" approach to marketing the benefits of Filipino migrant workers. The Commission raised concerns that "proper safeguards" must be "sought and institutionalised" in order to protect Filipino migrant workers and their families, in line with the Convention on Migrant Workers which the Philippines had ratified.

In its comment, the Commission referred to its previous efforts to draw the attention of the UN Committee on Migrant Workers to the shift in Government policy during the treaty reporting process, as well as to the treaty body's request that the Government ensure the protection of the rights of migrant workers.

The Commission also highlighted the role of the State in providing the domestic conditions that would allow Filipinos to exercise a real choice with regards to undertaking overseas employment.²⁰²

The Commission recommended revisions to draft legislation that accompanied the change in Government policy. It called on the Government to meet its self-declared commitments, made at the Second Global Forum on Migration and Development, to encourage other states to ratify the Convention on Migrant Workers. In addition, the Commission recommended that the Government ensure that its bilateral agreements on labour issues comply with the Convention and other relevant human rights standards.



5.4. Cooperating with NHRIs in other countries

There is a growing practice among NHRIs to exchange information and share their expertise in order to better promote and protect the rights of migrant workers at each stage of their journey.²⁰³

NHRIs in labour-receiving countries note that it is essential to understand the human rights context in the labour-sending country, as many issues arise before migrant workers depart their home country.

This can include, for example, whether migrant workers have been provided with reliable information about the destination country and their future employers, whether they are able to register their contractual agreement or even secure a written contract, and whether their departure and intentions are known and understood by their Government.

Where appropriate, NHRIs in relevant sending, transit and receiving States can develop joint plans of action to respond to identified areas of concern. They should also seek to do so in cooperation with civil society.²⁰⁴

201 OFW Liberalization Act of 2007: Comment from the Commission on Human Rights; Commission on Human Rights of the Philippines; 2009.

202 There are NHRI guidelines on this point. For example: the Seoul Guidelines states that NHRIs should undertake actions in relation to migrant workers for "...enhancing the right to change employer, especially in cases of exploitative or otherwise unjust working conditions"; para. 35. Further, the ILO Employment Policy Convention, 1964 (C-122) requires Member States to develop a policy framework "as a major goal" to promote "full, productive, and freely chosen work": article 1 (1).

203 For example, through establishing Memoranda of Understanding with other NHRIs or through the joint activities of the South East Asia National Human Rights Institutions Forum (SEANF) and the APF.

204 Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 21.

Some NHRIs have developed an ongoing relationship of information-exchange and practical support through formal Memoranda of Understanding. In other instances, cooperation between NHRIs can relate to a specific event or issue, such as sharing information in relation to suspected cases of human trafficking.

CASE STUDY

Jordan is a destination country for migrant workers from different parts of the Asia Pacific region, including Indonesia and the Philippines.

In 2009, the Jordan National Centre for Human Rights entered into separate Memoranda of Understanding with the National Human Rights Commission of Indonesia and with the Philippines Commission on Human Rights.

The MoUs commit the respective institutions to conduct “mutual projects that enhance the respect of human rights in both countries”, prioritising cooperation on migrant workers and domestic workers.

Specifically, the MoUs set out the objective of “mitigating, if not completely eradicating, violations against the rights of workers and to find the means to eliminate the infringements on human rights.” Some of the strategies outlined in the agreements include:

- **disseminating information on labour and migrant workers’ rights**
- **exchanging studies, education and information materials produced by both NHRIs, as well sharing expertise in the development of education programmes**
- **engaging the services and cooperation of all relevant foreign affairs ministries/departments and embassies, where needed, to protect and promote the rights of migrants and domestic workers.**



6. PROMOTING INTER-AGENCY COORDINATION AMONG GOVERNMENT DEPARTMENTS

During their journey from one country to another, settling in and taking up employment, migrant workers and members of their families will come into contact with a broad range of government departments and other agencies of the State.

They may, for example, engage with officials from departments of immigration, labour, social welfare, education, housing and health. Undocumented migrants and migrants in an irregular situation may also have contact with police, detaining authorities and the justice system.

In order to better promote and protect the rights of migrant workers, NHRIs have noted the importance of establishing clear lines of communication between relevant government agencies so that policies can be developed and services delivered in a more coordinated and effective manner.

NHRIs can support this process by:

- establishing a regular dialogue with relevant government departments and other agencies of the State
- holding conferences and other forums that bring together public officials to discuss issues of shared concern and develop policy solutions
- advocating for and advising on comprehensive policy approaches and appropriate inter-agency responsibilities.

NHRIs can also develop education and training programmes for government departments to build greater understanding of the human rights issues that migrant workers face and to identify ways in which their agencies can work more effectively with members of different migrant communities.

7. DEVELOPING NATIONAL HUMAN RIGHTS PLANS OF ACTION

NHRIs declare they will:

Promote the adoption of national plans of action and ensure that they take into account the rights of migrant workers, and call upon Governments to ensure that national institutions take their rightful place in the policy-making process in relation to migration.

Zacatecas Declaration²⁰⁵

Delivering improved human rights protection for migrant workers requires the commitment and collaboration of a range of actors, across governmental, civil society and private sector bodies.

A National Human Rights Plan of Action²⁰⁶ (National Action Plan) is an important tool that can help establish a roadmap for realising positive change over time for migrant workers and members of their families, as well as other vulnerable groups within a country.

The aim of the National Action Plan is to develop a “comprehensive and pragmatic programme of activities aimed at progressively bringing about improvements”²⁰⁷ to the human rights situation of a country.

A broad range of stakeholders will be involved in the process of drafting and implementing the National Action Plan, including Government ministers, parliamentarians, government departments, law enforcement agencies, civil society organizations, the judiciary, trade unions, professional associations, business groups, employers, NGOs, academics and others.

NHRIs should obviously play a significant role in developing the National Action Plan by providing independent information, analysis and recommendations.

In addition to drawing on their monitoring and complaints data related to migrant workers and migrants in irregular situations, NHRIs can compile all relevant recommendations and comments made to the State through the UPR process, by UN treaty bodies and special procedures, the ILO and other international organizations.

They can identify and highlight examples of good practice developed in other similar labour-sending or labour-receiving countries, as well as advocate for the inclusion of corporate human rights compliance in the National Action Plan.²⁰⁸

It is crucial that representative members of vulnerable groups participate in the process of developing the National Action Plan. NHRIs should take proactive steps to ensure that the perspectives and concerns of migrant communities are heard, acknowledged and taken into consideration.

²⁰⁵ Zacatecas Declaration; International Workshop of National Institutions for the Promotion and Protection of Human Rights: Causes, Effects and Consequences of the Migratory Phenomenon and Human Rights Protection; Zacatecas, Mexico; 14–15 October 2004; para. 23.

²⁰⁶ The Vienna Declaration and Programme of Action, adopted in June 1993 at the World Conference on Human Rights, recommends that States consider the desirability of drawing up a national action plan identifying steps whereby States would improve the promotion and protection of human rights: A/CONF.157/23; part II, para. 71.

²⁰⁷ *Handbook on National Human Rights Plans of Action*; Professional Training Series No. 10; OHCHR; 2002; p. 9.

²⁰⁸ *ACJ Reference on Human Rights, Corporate Accountability and Government Responsibility (Part 1 – Report)*; Advisory Council of Jurists; 13th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions; Kuala Lumpur, Malaysia; 27–31 July 2008; p. 16.

The final National Action Plan will normally include a range of broad objectives and practical activities to strengthen:

- the national legal framework
- civil and political rights
- economic, social and cultural rights
- the rights of vulnerable groups
- human rights education
- the work of NHRIs and civil society.

Actions to promote and protect the rights of migrant workers and migrants in an irregular situation can be included under many of these thematic areas.

Alternatively, recommendations made to the State through the UPR can be used to guide the development and structure of the National Action Plan, including its key priority areas. The regular reporting process required under the UPR can also inform the establishment of a monitoring programme to assess progress towards achieving the objectives of the National Action Plan.

Once the National Action Plan has been finalized:

... [t]he role of NHRIs should be essentially to monitor implementation, to provide expertise and to make recommendations to government regarding appropriate action. This general point notwithstanding, there may be areas in which an NHRI itself will be the implementing body for one or more areas of the plan, such as human rights education for the general public ... Where the activity of NHRIs under the plan goes beyond their normal functions, government should ensure that adequate resources are made available.²⁰⁹

In undertaking its independent monitoring role, the NHRI can remind the Government and other stakeholders of the specific obligations they have made to advance the rights of migrant workers. They can also provide advice when required to support the effective implementation of those commitments.

As most National Action Plans will be implemented over a specific timeframe – for example, five years – NHRIs can play an important role in evaluating the effectiveness of the plan and identifying areas where progress has been made, as well as highlighting areas where further work or new strategies should be undertaken in the subsequent National Action Plan.

NHRIs should also seek to ensure that the National Action Plan supports and supplements their country's national action plan/strategy on human rights education, developed as part of the UN World Programme for Human Rights Education.²¹⁰

While the first phase of the World Programme (2005–2009) promoted human rights education in the primary and secondary school system, the second phase (2010–2014) focuses on higher education and on human rights training programmes for teachers and educators, civil servants, law enforcement officials and military personnel.

As important contributors to the development and implementation of national action plans on human rights education, NHRIs should ensure that training programmes for these different target groups address the rights of migrant workers and the practical ways that these groups can promote and protect their rights through their day-to-day work.

209 *Handbook on National Human Rights Plans of Action*; Professional Training Series No. 10; OHCHR; 2002; p. 51.

210 Information on the World Programme for Human Rights Education, along with examples of country-level strategies, can be found at: www2.ohchr.org/english/issues/education/training/programme.htm.

CASE STUDY

Nepal's National Human Rights Action Plan²¹¹ notes that the “trend of seeking employment outside the country has been increasing”,²¹² with 230,000 Nepalese leaving the country to find work in overseas labour markets in the five-year period before the plan was prepared. “However, many people who work abroad face unsafe labour conditions,” it states. One of the priority goals of the plan is to “help labourers working abroad to achieve and enjoy international labour rights” by addressing the following issues of concern:

- lack of information and awareness regarding foreign employment
- lack of government mechanisms to control and regularize foreign employment
- inadequate monitoring and care of labourers migrating for work
- exploitation of labourers working abroad
- absence of procedures for supervising migrant labourers to work in the agriculture and industrial sector.

The National Human Rights Action Plan states that the **National Human Rights Commission of Nepal** “will play the key role in the independent monitoring of the implementation of the NHRAP”.²¹³



KEY POINTS: CHAPTER 6

- NHRIs can promote the ratification of relevant international human rights standards, especially the International Convention on the Protection of All Migrant Workers and Members of their Families.
- NHRIs can make recommendations to the Government to bolster legislative protections for migrant workers that meet international standards, as well as propose practical reforms to migration, labour and social policies and programmes.
- NHRIs should seek to work cooperatively with a broad range of stakeholders – including government departments, employers, private recruitment agencies, trade unions, NGOs and NHRIs in other countries – to develop and promote good practice models for working with migrant workers.
- NHRIs should ensure that migrant workers are able to genuinely contribute to the development of laws, policies and practices that affect them.
- NHRIs should ensure that practical steps to promote and protect the rights of migrant workers are included in their country's National Human Rights Plan of Action.



211 National Human Rights Action Plan, Government of Nepal; April 2004. An index of national human rights plans of action is available at: www2.ohchr.org/english/issues/plan_actions/index.htm.

212 National Human Rights Action Plan, Government of Nepal; April 2004; see Part 2, Chapter 2 (2.2.10), ‘Labour and Employment’.

213 Ibid; Part 3, Chapter 2 (3.2.3), “Role of the National Human Rights Commission”.

FURTHER READING

Guide on Ratification: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; International Steering Committee for the Global Campaign for Ratification of the Convention on Rights of Migrants; 2010

Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement; ILO; 2007

Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework; OHCHR; 2011

Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination; Organization for Security and Co-operation in Europe, International Organization for Migration and the International Labour Office; 2006

Handbook on National Human Rights Plans of Action; Professional Training Series No. 10; OHCHR; 2002

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International Labour Migration: A Rights-based Approach; ILO; 2010

Mainstreaming Migration into Development Planning: A Handbook for Policy-makers and Practitioners; Global Migration Group; 2010

Migration and Human Rights: The United Nations Convention on Migrant Worker Rights; Ryszard Cholewinski, Paul de Guchteneire and Antoine Pecoud, UNESCO and Cambridge University Press; 2009

Migration and International Human Rights Law; Practitioner’s Guide No. 6; International Commission of Jurists; 2011

Rights on the Line: Human Rights Watch Work on Abuses against Migrants in 2010; Human Rights Watch; 2010

The Corporate Responsibility to Respect Human Rights: An Interpretive Guide; OHCHR; 2011



Chapter 7:

Investigating allegations of human rights violations

KEY QUESTIONS

- What steps can NHRIs take to ensure that migrant workers are able to make complaints of human rights violations?
- What evidence should NHRIs collect when investigating allegations of human rights violations against migrant workers? How should interviews with migrant workers be conducted?
- How can NHRIs seek to address systemic human rights violations against migrant workers and members of their families?



BASIS FOR NHRI INVOLVEMENT

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:

- (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
 - (ii) Any situation of violation of human rights which it decides to take up;
 - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;



- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;**
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;**
- (d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.**

1. INTRODUCTION

Migrant workers and members of their families can face serious violations of their human rights at every stage of their journey – before departure, in transit, during their residence and employment in another country and on return to their home country.

This can include ill-treatment by immigration or law enforcement authorities, a lack of basic workplace rights and protections, irregular or unpaid wages, long hours of work, poor safety standards, sub-standard accommodation and limited access to social security in the destination country and on their return home.

Migrant workers can also experience threats and intimidation from their employers, confiscation of their passports and visas, sexual assault, rape and, in some cases, even death. Vulnerable individuals, especially women and children, can become victims of human trafficking and find themselves trapped in highly abusive and exploitative situations.

Migrant workers and members of their families can also face systemic discrimination in countries of transit and destination, where national laws or policies provide them with limited access to public services – such as health and education – or unequal protection before the law.

These problems can be further compounded for undocumented workers and migrants in an irregular situation who fear that accessing government services will draw attention to their migration status and potentially lead to their detention or deportation.

In international fora, NHRIs have agreed that the protection and promotion of the rights of migrants must be a priority issue within their individual institutions.²¹⁴ They can play a critical role to ensure that effective domestic legal protections are available to all migrants, regardless of their status, “including access to justice, non-discrimination and equal treatment, including full and effective protection in all areas of society”.²¹⁵

A fundamental part of this role is to investigate allegations of human rights violations against migrant workers and members of their families. Most NHRIs have a mandate that allows them to investigate complaints lodged by an individual or on behalf of an affected individual. Some are also able to initiate suo motu investigations of issues that are brought to their attention.

Depending on the powers set out in their establishing legislation, NHRIs can resolve complaints by issuing legally enforceable orders to the parties involved, through mediation or conciliation, by seeking redress on behalf of complaints through courts and tribunals or by referring complaints to other competent complaint handling bodies.

214 Zacatecas Declaration; International Workshop of National Institutions for the Promotion and Protection of Human Rights: Causes, Effects and Consequences of the Migratory Phenomenon and Human Rights Protection; Zacatecas, Mexico; 14–15 October 2004; see para. 1, which also states that “for that purpose/to that end [NHRIs will] identify focal points for this area within their institution”.

215 Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 15.

NHRIs can also initiate inquiries into systemic patterns of abuse or human rights violations faced by migrant workers and their families. Given the broad and structural nature of the violations that migrant workers commonly experience, these inquiries should consider and address their economic, social and cultural rights, as well as their civil and political rights.²¹⁶

In addition, NHRIs should pay special attention to protecting the rights of victims of trafficking and smuggling, including promoting their access to justice and other necessary support services.²¹⁷ As the UN Committee against Torture noted in its report to Indonesia, following its country visit in 2008:

*The State party should also create adequate conditions for victims [of trafficking] to exercise their right to make complaints, conduct prompt, impartial and effective investigation into all allegations of trafficking and ensure that perpetrators are brought to justice and punished with penalties appropriate to the nature of their crimes.*²¹⁸



UN Photo by Jean Pierre Laffont.

216 Ibid; para. 41.

217 Ibid; para. 30: "NHRIs should protect the rights of victims of trafficking and smuggling, especially women and children, including by providing legal assistance or taking legal action to defend the rights of smuggled and trafficked persons' rights"; and para. 31: "NHRIs should protect trafficked persons, especially women and children, from harm, threats or intimidation by traffickers and associated persons."

218 Concluding observations of the Committee against Torture: Indonesia; UN Committee Against Torture; CAT/C/IDN/CO/2; pp. 8-9.

2. THE COMPLAINT HANDLING FUNCTION OF NHRIs

NHRIs in Asia are encouraged to take action in the following areas for the purpose of promoting and protecting the human rights of migrants:

Providing effective remedies such as complaints-filing, counselling, investigation, etc., regarding human rights violations against migrants, in particular, irregular and undocumented workers, victims of trafficking, smuggling and sexual abuse.

Seoul Guidelines (2008)²¹⁹

Investigating allegations of human rights violations is a core function of NHRIs. It is also one that can help NHRIs to achieve a number of important goals.

Firstly, an effective complaint handling mechanism can promote access to justice and provide practical redress for individuals who have been treated unlawfully.

Secondly, receiving and resolving complaints can have a powerful educative effect and promote greater understanding of national and international human rights standards within the Government, detaining authorities, the corporate sector and the broader community.

The process for investigating and resolving complaints of human rights violations will vary between NHRIs and reflect the powers set out in their establishing legislation. For example, NHRIs may be empowered to:

- initiate investigations on their own motion (i.e. *suo moto*) into human rights violations
- consider individual complaints and make recommendations for redress and remedies to appropriate authorities
- refer cases to relevant authorities, including government departments, the parliament, the judiciary and prosecuting authorities
- seek redress or remedies on behalf of complainants through courts and tribunals
- advise courts and tribunals as *amicus curiae* or by intervening in relevant cases
- issue legally enforceable orders and binding decisions, including the payment of compensation to victims by respondents
- appear before regional bodies, such as human rights courts (for NHRIs outside the Asia Pacific region).²²⁰

3. PROVIDING AN ACCESSIBLE COMPLAINT HANDLING SYSTEM

NHRIs should develop methods to encourage complaints from groups particularly vulnerable to human rights violations, including migrant workers.²²¹

An immediate challenge is to build general awareness among migrant communities about the NHRI; what it is, what it does and, specifically, its role to receive and investigate allegations of human rights violations against any individual in the country, regardless of their migration status.

NHRIs may also need to respond to the understandable caution that some migrant workers, especially undocumented workers and migrants in an irregular situation, may have in relation to lodging or supporting a complaint with an official institution of the State. As part of their engagement and communication with migrant workers, NHRIs should emphasize the fact that they are established by law as independent institutions.

219 Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 21.

220 *Toolkit for Collaborating with National Human Rights Institutions*; United Nations Development Programme and the Office of the High Commissioner for Human Rights; 2010; p. 32.

221 *National Human Rights Institutions: Best Practice*; Commonwealth Secretariat; 2001; p. 21 and p. 35.

Given the diversity of their national backgrounds, languages and places of work, communicating effectively with migrant workers can pose significant challenges. Therefore, it is important that NHRIs develop targeted outreach strategies in collaboration with other groups, such as NGOs, trade unions and migrant organizations. This could include, for example, developing joint programmes to provide information and legal assistance to migrants immediately upon their arrival in the country.²²²

To encourage and facilitate complaints, NHRIs should also clearly communicate:

- the type of human rights violations that they are able to investigate, as set out in the Constitution and/or national laws
- how individuals can submit a complaint, including the time period for bringing a complaint
- how complaints will be investigated, based on the principles of natural justice and procedural fairness.

NHRIs may also need to develop communication strategies to promote understanding of their complaint handling function and procedures with relevant government departments, law enforcement agencies, detaining authorities, public and private sector employers, the business community²²³ and other groups that may be potential respondents to complaints made by migrant workers.

Similarly, NHRIs can communicate with migrant organizations, NGOs, trade unions and others about their potential role to bring complaints on behalf of migrant workers who have experienced discrimination or human rights violations.

CASE STUDY

The National Human Rights Commission of Korea translates all its complaint forms into the main languages of migrant worker communities in South Korea. Staff members also distribute information brochures in multiple languages on the Commission, its complaint handling function and the rights of migrant workers in the suburbs and communities where migrant workers live. The Commission undertakes its awareness raising work in partnership with migrant associations and migrant communities. It has also established partnerships with translation agencies, so that professional translators can be available to provide interpretation services when migrant workers seek to make a complaint.



To be effective, NHRIs need to ensure that their institutions and their complaint mechanisms are accessible to all members of the community, including migrant workers and members of their families.

Firstly, NHRIs must be physically accessible. It is not uncommon for NHRIs to have just one office, located in the country's capital or one of its major cities. However, migrant workers may not live or work in close proximity to the NHRI. In addition, they may also not be able to visit the NHRI because of the nature of their work commitments.

222 Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 40, which states that: “NHRIs should encourage the provision of practical and legal assistance to migrants upon arrival, including by facilitating the establishment of offices in border towns. NHRIs should monitor expulsion procedures.”

223 Edinburgh Declaration; 10th International Conference of National Institutions for the Promotion and Protection of Human Rights; Edinburgh, Scotland; 8–10 October 2010; Section C (I), which states that NHRIs with complaint handling functions could consider: “Promoting within the community and the business sector an awareness of their respective roles in monitoring and receiving complaints of human rights violations by business entities, as well as other remedies.”

It is vital that the ability of NHRIs to receive and investigate complaints is not hindered by their geographic location or hours of operation. For example, NHRIs can develop alternative systems to receive and investigate complaints without the need for a person to physically attend an office. In the Asia Pacific region, the National Human Rights Commission of India has developed an online complaints submission and registration system, which is linked to its website.

NHRIs can also consider establishing a small office or deploying officers to key border towns to establish relationships with migrant workers on their arrival, to provide them with information and to collect reports about their experiences.

This approach allows the NHRI to directly assist migrants who may have experienced human rights violations prior to their departure or during the journey to the destination country. The NHRI may, for example, be able to collaborate with NHRIs and other stakeholders in countries of origin and transit to investigate specific issues raised by migrants that they interview.

NHRIs must also develop complaint handling procedures that respond to the specific needs and circumstances of migrant workers. For example, NHRIs should not require that a complainant have a permanent address in order to lodge a complaint. More broadly, best practice requires that:

*NHRIs endeavour to ensure that migrant workers and refugees be accorded due process and be treated with dignity, despite their potentially transient status. NHRIs should actively build their capacity to provide for the needs of such transient individuals.*²²⁴

This could involve, for example, providing advice or complaints information to migrant workers via email, social media or through a free-call telephone number. NHRIs may also consider establishing a 24-hour focal point contact to respond to urgent concerns or threats faced by migrant workers.

Other steps that NHRIs can take to provide an accessible complaint handling mechanism include ensuring that:

- lodging a complaint is free of charge
- there is capacity to receive both oral and written complaints
- complaint forms are translated into multiple languages
- interpreters are used
- its complaint handling processes are not unnecessarily formal.²²⁵

4. INVESTIGATING AND RESOLVING COMPLAINTS FROM INDIVIDUALS

An independent, impartial complaint handling mechanism can have a genuine and positive impact in resolving human rights violations and discrimination experienced by migrant workers and members of their families.

NHRIs typically have a mandate to receive and investigate complaints of human rights violations made by an individual or another person or organization acting on their behalf. In addition, a number of NHRIs are also empowered to undertake investigations on their own motion (*"suo moto"*) into particular human rights issues that come to their attention.

As migrant workers and members of their families can be reluctant to bring complaints to an official body, or may be unaware of its existence, NHRIs that have the authority to establish *suo motu* investigations should be proactive about using this function.

224 *National Human Rights Institutions: Best Practice*; Commonwealth Secretariat; 2001; p. 35.

225 *A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*; United Nations Centre for Human Rights; Professional Training Series No. 4; 1995; pp. 30-31.

While individual NHRIs will have different procedures for receiving and resolving complaints, effective investigations require that an institution has adequate legal powers, properly trained staff and a strong commitment to addressing the issues raised by complainants.

NHRIs should clearly communicate their procedure for receiving, investigating and resolving human rights complaints, including the time period for bringing a complaint. These should be set out in publicly-available documents. This ensures that all parties to a complaint understand the process that will be followed by the NHRI. It also helps promote public confidence in the institution.

In addition, NHRIs should clearly inform complainants of their rights and potential remedies. They should also seek to support those who may have been victims of human rights violations through the complaint process, by providing information and assistance when it is required.

This is particularly important for migrants who can experience language or literacy barriers, as well as anxiety about engaging in the legal system of another country.

If the NHRI rejects a complaint, it is crucial that the complainant is provided with clear reasons for the decision and what other options exist to resolve the complaint.²²⁶

4.1. Collecting evidence

To undertake effective investigations, NHRIs must gather as much evidence as possible concerning the complaint.

The majority of evidence will come from interviews conducted with the person lodging the complaint and the respondent. In addition, these interviews may identify other sources of evidence to cross-check the allegations that have been made. For example, testimonial evidence – such as interviews, statements or affidavits – may also be collected from witnesses, consular officials, relevant professionals or experts.

Depending on the nature of the complaint, NHRIs may also collect:

- medical records or photographs of injuries that were alleged to have been sustained
- official records, for example from a workplace or place of detention
- responses provided by relevant authorities
- reports of on-site visits undertaken by the NHRI, for example to a workplace or a place of detention.

In addition, NHRIs should collect and review information on the situation facing migrant workers in the country from a range of public sources, including decisions in relevant court cases; reports prepared by national and international NGOs; reports of UN agencies, human rights treaty bodies or special procedure mandate holders; and media reports.

Information should be formally recorded using a standard format so that NHRIs can analyse and cross-check complaints of a similar nature to identify systemic patterns of human rights violations.²²⁷

226 Detailed information about effective complaint investigation procedures is included in *National Human Rights Institutions: History Principles, Roles and Responsibilities*; Professional Training Series 4 (Rev.1); OHCHR; 2010.

227 *Preventing Torture: An Operational Guide for National Human Rights Institutions*; Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights; 2010; p. 41.



APF Photo by Michael Power.

4.2. Conducting interviews

Interviews commonly provide the bulk of evidence collected by NHRIs during an investigation. Therefore, it is crucial that NHRI staff have a clear understanding of the purpose of the interviews they conduct, as well as the necessary skills to prepare, introduce and conduct interviews with different groups of people.

An interview allows the NHRI interviewer to:

- gather many different pieces of information from a single interviewee
- respond to information that the interviewee provides
- cross-check information already collected
- assess whether the interviewee is credible
- provide the interviewee with the opportunity to tell their story.²²⁸

This last point is particularly important for victims of human rights violations, such as migrant workers, who can feel frightened, isolated and disempowered by the situations they have experienced. The interview provides an opportunity for them to talk to someone in a position of authority, tell their story and be heard. They should be encouraged to talk at their own pace and in their own words, without being rushed or interrupted. While the primary purpose of the interview is to collect information, this process can also help to strengthen and empower victims.

Interviews should be well structured, professional and have a clear purpose. Open-ended and non-leading questions should be prepared that seek to gather information on the “who”, “what”, “when”, “where”, “why” and “how” of the complaint.

228 Ibid; p. 43.

The interviewer should try to put the person at ease. As far as possible, the interview should be conducted in a place where the person feels safe and provides them with privacy. It is especially important that victims of human rights violations do not perceive the interview as an interrogation.

The interviewer should start the interview by introducing himself or herself, the role of the NHRI, what information will be collected and how the information will be used and stored. The issue of confidentiality (see below) should also be discussed before the interview begins and the interviewer should ensure that the interviewee provides his or her informed consent to the manner in which the information will be used.

NHRIs should ensure that the services of a translator are available to those individuals who require one. Interviewers should remember to direct their questions to the interviewee and listen to their answers to avoid the tendency to talk “through” the interpreter. In addition, to ensure the confidentiality of the interview process, the translator should be required to sign a confidentiality statement, possibly in front of the interviewee.

Furthermore, the NHRI should take into consideration the cultural background, gender and age of the interviewee. For example, there may be situations where it is only appropriate for a male or a female officer from the NHRI to conduct the interview. Interviewing a child may also require assistance or direction from someone with specialized skills in this area.

Interviewers should use interview techniques that build rapport with the victim or witness and encourage an open and full exchange. They should have good listening skills, patience, objectivity, empathy and an ability to reformulate the information that is shared with them.²²⁹ They should also seek to avoid using complex or technical language.

The interviewer should take summary notes during the interview and share these with person at the conclusion of the interview. In addition, the interviewer should reiterate how the information will be used and ensure the person understands and agrees. Some NHRIs may “ask the witness to sign the notes as an affirmation of agreement with them. In all cases, however, the investigator should date and sign the notes to establish it as evidence.”²³⁰

Detailed information about preparing and conducting interviews is available in *Preventing Torture: An Operational Guide for National Human Rights Institutions*.²³¹

4.3. Confidentiality and security

NHRIs should be mindful that victims and witnesses may be reluctant to give evidence to support a complaint for fear of retaliation or reprisals against them.

To protect victims and witnesses, NHRIs should seek to maintain their confidentiality as far as possible throughout the investigation process.²³² The OHCHR notes that:

*Various steps can be taken to ensure this: the interviewee’s name can be suppressed from the investigative report; the interviewee’s identity can be withheld from the respondent if there is a real threat to a witness or a party. Again, the investigator needs to balance these measures against the right of the respondents to know the case against them.*²³³

229 Ibid; p. 47.

230 *National Human Rights Institutions: History, Principles, Roles and Responsibilities*; Professional Training Series No. 4 (Rev. 1); Office of the United Nations High Commissioner for Human Rights; 2010; p. 87.

231 Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights; 2010; see Chapter 5.

232 *National Human Rights Institutions: Best Practice*; Commonwealth Secretariat; 2001; p. 21.

233 *National Human Rights Institutions: History, Principles, Roles and Responsibilities*; Professional Training Series No. 4 (Rev. 1); Office of the United Nations High Commissioner for Human Rights; 2010; p. 87.

Other practical measures that NHRIs can take to protect a victim or a witness who agrees to make a statement, include:

- interviewing the person in a place where he or she feels safe or, if in a place of detention, where surveillance is minimal
- asking what security precautions the person believes should be taken at the start and end of the interview
- providing a way for the person to remain in contact with the NHRI following the interview
- never referring explicitly during interviews to statements made by others and never revealing the identity of witnesses
- in places of detention, conducting a follow-up visit shortly after the interview and meeting with the detainee.²³⁴

4.4. Developing recommendations

After assessing the evidence collected during the investigation, the NHRI will usually prepare an investigation report that outlines the facts and the evidence, identifies the relevant human rights provisions, analyses the evidence and sets out a conclusion and recommendations.

If there is a finding that discrimination or a human rights violation has occurred, the NHRI – often involving the collegial body of NHRI members – will determine what steps should be taken to resolve the matter.

The OHCHR suggests that, in principle, these recommendations should seek to “make the victim whole; ensure the perpetrator faces suitable action; [and] prevent further similar violations”.²³⁵

Making the victim whole “means to return the victim to the situation that he or she would have been in had there been no human rights violation”²³⁶ and can include measures such as an order to stop the violation, an order for compensation or an order for the respondent to take steps “to mitigate the damage”.²³⁷

To improve human rights standards in the future, the NHRI could, for example, make recommendations that aim to improve certain workplace conditions or practices in a particular place of employment or across an industry. The NHRI could also recommend reforms to the policies and practices of agencies that recruit migrant workers or make recommendations regarding the supervision of their activities.

If the investigation highlights a lack of appropriate laws or government policies, or if existing laws and policies are not being implemented in practice, the NHRI may recommend that steps be taken to address such gaps.

The Paris Principles give NHRIs the authority to publicize their recommendations and decisions, which can help generate community discussion and shape public opinion. This is particularly important if the complaint is the result of broader, systemic issues.

However, as far as possible, publication of the NHRI’s findings and recommendations should take into consideration the parties’ needs for confidentiality.²³⁸

234 *Preventing Torture: An Operational Guide for National Human Rights Institutions*; Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights; 2010; p. 45.

235 *National Human Rights Institutions: History, Principles, Roles and Responsibilities*; Professional Training Series No. 4 (Rev. 1); Office of the United Nations High Commissioner for Human Rights; 2010; p. 89.

236 *Ibid*; p. 90.

237 *Ibid*; p. 90.

238 *Ibid*; pp. 91-92.



APF Photo by Michael Power.

5. ALTERNATIVE DISPUTE RESOLUTION

Some NHRIs seek to resolve complaints by using alternative dispute resolution processes, such as mediation or conciliation.

This approach, which is usually less adversarial than formal investigations, allows the parties to a complaint to talk through the issues and settle the matter on mutually agreeable terms.

An officer of the NHRI will generally act as a facilitator to provide information about the relevant laws and human rights standards, help ensure that each party is heard, maintain an equal power balance between the parties and support the discussions so that an agreed solution can be reached.

In many countries, NHRIs have successfully used alternative dispute resolution to address complaints related to employment issues, access to goods and services and discriminatory laws and policies.

Where a mutually acceptable solution can be reached, the NHRI will record the outcome in a settlement agreement. The terms of the agreement should “be consistent with international and national human rights law, should resolve the grievances of the parties, and should be sustainable ... Settlement agreements that result from conciliation should be in the public interest”.²³⁹

Outcomes will vary depending on the nature of the complaint. However, they can include an apology, reinstatement to employment, compensation for lost wages, changes to workplace, industry or government policies, or a requirement for human rights training involving the respondent organization.

Alternative dispute resolution can also be a very effective tool for bringing about sustained changes in attitudes and behaviour.

²³⁹ Ibid; p. 95.

There are, however, instances when alternative dispute resolution would not be suitable, such as complaints that involve gross violations of human rights or where there is a significant disparity in the power relationship between the parties.

Some NHRIs report high rates of success using alternative dispute resolution. However, it is important to note that not all complaints will be able to be resolved through conciliation or mediation, especially if there is resistance or refusal on the part of the respondent to engage in the process.

In these instances, NHRIs should advise the complainant of alternative mechanisms that may be used to resolve the matter, such as initiating court proceedings.

6. PROMOTING LINKS TO LEGAL SERVICES AND ALTERNATIVE COMPLAINT MECHANISMS

NHRIs should consider, in contributing to the promotion of the role of the judiciary in promoting and protecting human rights, the following actions:

Promoting equal access to justice and assisting victims seeking redress with information on the law and the legal system, particularly in relation to marginalized or vulnerable groups as well as migrants.

Nairobi Declaration²⁴⁰

NHRIs will not be in a position to address all the issues or complaints that migrant workers bring to them.

For example, some migration- or employment-related complaints may not fall within the jurisdiction of the NHRI. Alternatively, some complaints may involve criminal behaviour that the NHRI does not have the authority to investigate.

Regardless of whether a migrant worker's complaint falls within its jurisdiction, NHRIs should seek to provide the individual with the information that he or she needs to seek redress or resolve an issue.

This may involve referring the individual to the appropriate complaint handling body and providing a description of the steps involved in making a complaint with that body. It could also include helping him or her to access legal aid services,²⁴¹ facilitating contact with the relevant consulate or linking the person to counselling, health or other support services.

In some circumstances, when all domestic options for resolving a complaint have been exhausted, individuals may be able to lodge complaints of human rights violations through the individual complaints mechanisms of the UN (see Chapter 11 for more information).

Providing migrant workers with reliable information is an important contribution that NHRIs can make to help promote their access to justice.

However, it requires that NHRIs have a good corporate understanding of the issues facing migrant workers, practical strategies to promote and protect their human rights and established contacts with a broad range of stakeholders and service providers.

In the Asia Pacific region, a number of NHRIs have designated one or more staff members to act as "focal point" officers responsible for implementing a programme of action to promote and protect the rights of migrant workers.

²⁴⁰ Nairobi Declaration; 9th International Conference of National Institutions for the Promotion and Protection of Human Rights; Nairobi, Kenya; 21–24 October 2008; para. 33.

²⁴¹ Ibid; para. 33 encourages NHRIs to support "the establishment of legal aid centres that provide out-reach services and enhance access to justice, especially for people living in poverty, and other vulnerable groups" and find "appropriate means of cooperating with such centres, in particular to ensure that human rights are thoroughly integrated into the provision of legal aid".

7. CROSS-BORDER CO-OPERATION TO RESOLVE COMPLAINTS

NHRIs declare they will:

Encourage the creation of mechanisms for communication and coordination between human rights institutions in order to exchange information on specific cases or general problems relating to violations of the fundamental rights of undocumented migrants as well as migrant workers, which will enhance cooperation and facilitate possible intervention by these institutions, in accordance with their mandates.

Zacatecas Declaration²⁴²

For a significant number of migrant workers, especially undocumented workers and migrants in an irregular situation, exploitation and human rights violations can occur before they have departed their home country. They can also occur during the course of their journey and after they arrive in the destination country.

Seeking redress for violations they may have experienced clearly poses significant challenges, especially when they occur in countries that have different migration, labour and legal frameworks.

NHRIs in countries of origin, transit and destination have highlighted the importance of developing better coordination among themselves to share information, identify emerging trends and monitor the complaints of their nationals, including the possibility of harmonizing or creating linked complaint handling mechanisms.²⁴³

In urgent situations, NHRIs may also be able to cooperate with each other – and sometimes in partnership with NGOs or trade unions – to conduct transnational investigations into individual complaints of violations, especially when those individuals are far removed from the protection of their country of origin.

CASE STUDY

In 2003, the **National Human Rights Commission of Mongolia** requested assistance from the **Human Rights Commission of Malaysia** to investigate the cases of four trafficked Mongolian women who had been detained under the Malaysian legal system which criminalizes irregular entry and work in Malaysia and at that time did not distinguish between “illegal migrants” and trafficked persons.



²⁴² Zacatecas Declaration; International Workshop of National Institutions for the Promotion and Protection of Human Rights: Causes, Effects and Consequences of the Migratory Phenomenon and Human Rights Protection; Zacatecas, Mexico; 14–15 October 2004; para. 11.

²⁴³ *Appeal from the Jakarta Process on the Human Rights of Migrants to the UN High-Level Dialogue on Migration and Development*; New York, United States; 14–15 September 2006; para. 2.1: “Full protection of the human rights of migrant workers requires proper legal instruments that will guarantee such protection of rights ... National human rights institutions, in countries of origin as well as destination, should take a leadership role in this endeavour, including by developing a cross-border complaints mechanism and by conducting regular reporting on the human rights of all migrants.”

CASE STUDY

Although New Zealand is not a party to the International Convention on the Protection of All Migrant Workers and Members of their Families, the **Human Rights Commission of New Zealand** does monitor the circumstances of specific categories of migrant workers included in the Convention, including ‘seafarers’.

In 2010, the Commission became aware of significant claims of labour and human rights abuses involving Indonesia seafarers who were working aboard a Korean-owned vessel before this vessel sunk off the coast of New Zealand. It contacted the **National Human Rights Commission of Indonesia** (Komnas Ham) for assistance and advice on the capacity of Komnas Ham to protect those nationals from punishment or retribution by “recruitment/manning agencies” on their return. It also raised the matter with the **National Human Rights Commission of Korea** (NHRCK).

In November 2011, the Commission also presented a submission to the Ministerial Inquiry into Foreign Charter Vessels in which it strongly supported fair and decent conditions for the crews of foreign charter vessels. The Commission used its submission to promote the use of the Ruggie Principles²⁴⁴ on business and human rights, adopted by the UN General Assembly. The Commission’s recommendations were informed by discussions with Komnas Ham, the NHRCK and the Chair of the ASEAN Intergovernmental Human Rights Commission.



8. MONITORING AND INVESTIGATING SYSTEMIC VIOLATIONS AGAINST MIGRANT WORKERS

NHRIs should, where relevant, monitor, investigate and initiate complaints to protect the rights of migrant workers. As part of ongoing monitoring efforts, include a migration related section, including regarding the impact on development, in their annual reports. Special reports are encouraged where appropriate.

Santa Cruz Declaration²⁴⁵

NHRIs have a responsibility to regularly monitor the human rights circumstances of all migrant workers, including undocumented workers and migrants in an irregular situation.

To ensure that there is a consistent focus on these issues, an NHRI might assign responsibility for this monitoring work to a specific member or department within the NHRI.²⁴⁶ It might also assign one or more staff members as “focal point” officers on the rights of migrant workers, with clear duties in relation to monitoring and outreach activities.²⁴⁷

²⁴⁴ The Guiding Principles on Business and Human Rights rest on three pillars: the duty of the State to protect against human rights abuses; corporate responsibility to respect human rights; and greater access for victims to effective remedy.

²⁴⁵ Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 29.

²⁴⁶ For example, the New Zealand Human Rights Commission has a dedicated Equal Employment Opportunity Commissioner. One of the Commission’s key activities in this area is the “operation of a timely, accessible and impartial dispute resolution service to answer questions and resolve complaints of unlawful discrimination and harassment in the workplace”.

²⁴⁷ For example, the National Human Rights Committee of Qatar undertakes a number of inspection visits each month to places of employment of migrant workers and workers’ residences “to observe their situations or to play an intermediary role between them and [their] employer”; see the NHRC’s report to the 15th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions; Bali, Indonesia; 3–5 August 2010; p. 4.

Alternatively, when the NHRI is undertaking human rights monitoring on a specific thematic area – such as the right to health – the institution should consult with migrant workers and collect data on the specific issues and barriers they face. This information should be highlighted in reports prepared by the NHRI.²⁴⁸

NHRIs should also regularly monitor the media and be proactive in responding to allegations of human rights violations highlighted in these reports. NHRIs that have the authority to establish *suo motu* investigations should promptly follow up on the matters that come to their attention with the relevant authorities.

In undertaking this monitoring work, NHRIs may identify systemic patterns of human rights violations or discrimination experienced by migrant workers and members of their families.

Similarly, the NHRI may receive a significant number of complaints from migrant workers on the same issue, such as exploitative workplace practices within a particular industry or discriminatory treatment when seeking to access education or health services.

Rather than handling a number of individual complaints on a case-by-case basis, the NHRI may seek to “join up” individual complaints on a similar issue in order to develop recommendations that address the systemic nature of the issues being raised.

The NHRI may also seek to initiate its own inquiry to assess the scope and impact of the human rights violations alleged to have occurred, identify their underlying causes and develop recommendations that promote practical and lasting change.



UN Photo by Louise Gubb.

248 For example, the Human Rights Commission of the Maldives published a *Rapid Assessment on Housing in the Maldives* (2008) and a *Rapid Assessment of the Employment Situation in the Maldives* (2009). Both reports identified systemic human rights violations experienced by migrant workers residing in the country.

Depending on the nature of the issues under consideration, the NHRI could establish a public inquiry or it could collect information and evidence from parties on a confidential basis.

Whichever approach the NHRI adopts, it is essential that the inquiry's objectives and methods of operation are clearly communicated with all relevant stakeholders. The inquiry should be based on the principle of procedural fairness.

As with the process for handling individual complaints, collecting evidence is fundamental to an effective inquiry. For inquiries into systemic issues, this could include:

- collecting and reviewing documentation from relevant government departments, private sector bodies and civil society organizations
- analysing legislation and government policies against national and international human rights standards, as well as recommendations made to the State by the UN human rights treaty bodies, the special procedures and through the Universal Periodic Review
- undertaking visits to particular sites where violations are alleged to have occurred (e.g. ports and border crossings, places of detention, individual workplaces and employer-provided accommodation)
- conducting interviews with relevant individuals and organizations, which may include victims, witnesses, respondent organizations, government departments, trade unions, NGOs, migrant organizations and experts in the field.

In some circumstances the NHRI may be required to use its legal authority to compel cooperation of parties in the inquiry process. The NHRI may also receive information or conduct interviews with victims or witnesses on a confidential basis, in order to avoid the potential for reprisals or victimization.

Based on the findings of the inquiry, the NHRI should develop recommendations that seek to provide redress for the human rights violations that were found to have occurred. They should be “broad enough to ensure that the violations stop, that similar violations do not occur, that sanctions are applied where this is warranted and that victims are “made whole” where this is possible and appropriate”.²⁴⁹

NHRIs should hold the Government and government agencies accountable for grave violations of human rights, including threats to life, physical integrity and the human dignity of migrants while they are attempting to cross borders or while at the hands of the authorities.²⁵⁰

The findings and recommendations of the inquiry can be included in the annual report of the NHRI or in a standalone inquiry report presented to the parliament. The inquiry report can be made public to build community understanding of the issues facing migrant workers and to generate discussion and support for the recommendations.

NHRIs should strongly advocate for the full implementation of their recommendations and monitor the steps taken by the Government, business entities²⁵¹ and other relevant parties to comply with human rights standards, particularly as they apply to migrant workers.

More information on establishing and undertaking public inquiries is included in Chapter 9.

249 *National Human Rights Institutions: History, Principles, Roles and Responsibilities*; Professional Training Series No. 4 (Rev. 1); Office of the United Nations High Commissioner for Human Rights; 2010; p. 96.

250 Rabat Declaration on Migration and Human Rights; 3rd Arab-European NHRIs' Dialogue on Migration and Human Rights; Rabat, Morocco; 6–8 May 2008.

251 Edinburgh Declaration; 10th International Conference of National Institutions for the Promotion and Protection of Human Rights; Edinburgh, Scotland; 8–10 October 2010; Section C 'Complaints Handling', para. IV: “NHRIs with complaint handling functions could consider [u]ttilising their complaints mechanisms, and the outcomes of complaints and inquiries, to monitor on-going practices of business entities.”

CASE STUDY

In 2011, the **National Human Rights Committee of Qatar** concluded a national research study examining the conditions of unskilled labourers in the construction sector. The study included the perspectives of migrant workers and employers and evaluated the legal and policy frameworks for labour and migration in Qatar. It also examined the benefits and disadvantages of the sponsorship (*kafala*) system used in Qatar and other countries in the Middle East.

The study found that the wages and living conditions of workers in the construction sector were far from fair and adequate, with the Committee using its findings to recommend that the Government “harmonize Labor Law and the sponsorship system, by reducing some of the powers granted to the sponsor”. It also recommended that the Government consider substituting the current sponsorship system with an alternative version that incorporates the views of migrant workers and employers.

The Committee made a number of other broad recommendations, including to:

- raise the wages of expatriate workers, in view of the price levels in the State and the nature and difficulty of work, as well as the risks of injury at the workplace
- improve safety conditions in the workplace
- require employers to provide meals, water, toilets and shady rest areas for workers
- inspect companies and ensure they provide adequate housing for workers, as well as medical services
- raise the awareness of workers regarding their rights and labour laws, as well as organizations they can approach when the need arises.



Photo by Richard Messenger.

KEY POINTS: CHAPTER 7

- NHRIs can support migrant workers to make complaints of human rights violations by developing outreach programmes that explain the NHRI's investigation role and its independence from the State; by providing information in multiple languages; by ensuring the complaints process is free and informal; and by ensuring that translators are available.
- When investigating allegations of human rights violations, NHRIs should collect testimonial evidence (such as interviews and statements), documentary evidence (such as employment, medical or detention-related records) and, where relevant, physical evidence.
- NHRIs can resolve complaints by issuing legally enforceable orders to the parties involved, through mediation or conciliation, by seeking redress on behalf of complaints through courts and tribunals or by referring complaints to other competent complaint handling bodies.
- NHRIs can also initiate inquiries into systemic patterns of human rights violations faced by migrant workers and members of their families.
- In urgent situations, NHRIs can cooperate with each other – and sometimes in partnership with NGOs or trade unions – to conduct transnational investigations into individual complaints of human rights violations against migrant workers.



FURTHER READING

National Human Rights Institutions: History, Principles, Roles and Responsibilities; Professional Training Series No. 4 (Rev. 1); OHCHR; 2010

Preventing Torture: An Operational Guide for National Human Rights Institutions; Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights; 2010

National Human Rights Institutions: Best Practice; Commonwealth Secretariat; 2001

Training Manual on Human Rights Monitoring; Professional Training Series No. 7; OHCHR; 2001

Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Professional Training Series No. 8; OHCHR; 2001



Chapter 8:

Protecting the rights of migrants in detention

KEY QUESTIONS

- What steps can NHRIs take to protect the rights of migrants in detention?
- What are the different types of monitoring visits? What is the value of these visits for the protection of migrants in detention?
- How is the preventive system of detention monitoring relevant to asylum seekers, refugees and migrants?



BASIS FOR NHRI INVOLVEMENT

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:

- (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without any referral, opinions, recommendations, proposals and reports on any matters concerning the protection and promotion of human rights. The national institution may decide to publicize them. These opinions, recommendations, proposals and reports as well as any prerogative of the national institution, shall relate to the following areas:
 - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;
- (b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
- (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation.
- (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;
- (g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.



Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations.

1. INTRODUCTION

There has been a growing trend among countries in all regions of the world to detain migrants who are in breach of their visa conditions, have an irregular status in the country or who have arrived in an irregular way, including those seeking asylum.²⁵²

According to the International Detention Coalition: “Migrants, refugees, stateless persons and asylum seekers, in particular, are increasingly detained for long periods, in conditions below international standards, often with little or no access to asylum procedures and with no right to challenge their detention.”²⁵³

They are commonly held in immigration detention facilities, holding centres at airports and other points of entry to a country, prisons, police stations and other places of detention. They may be detained on arrival, pending a determination of their migration status or claim for asylum or while awaiting deportation from the country.

Time spent in detention, or detention-like conditions, can vary significantly, from days to weeks and sometimes months and even years. Numerous reports and studies, including those prepared by NHRIs, have documented ill-treatment and serious human rights violations against migrants held in detention, as well as the severe negative impact of detention on their mental health and well-being. In some cases, this has resulted in suicides and acts of self-harm by detainees.

The traumatic impact of detention on children, who can often be held in facilities with unrelated adults, can be particularly severe and long-lasting. Unaccompanied minors are especially vulnerable to abuse while in detention.

In 2010, the Global Migration Group adopted a statement calling for States to review the situation of migrants in an irregular situation as they often face “prolonged detention or ill-treatment”.²⁵⁴ In addition, the UN Secretary-General has urged Member States to end the criminalization of irregular migrants and to explore adequate alternatives to detention, particularly for children.²⁵⁵

As a central part of a strong national human rights protection system, NHRIs can play a key role in protecting the rights of all persons deprived of their liberty, including refugees, asylum seekers and migrants.

252 The Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, in his final report to the Human Rights Council focused on the criminalization of migrants and noted: “[m]igrants were and still are particularly vulnerable to detention, or to restriction of their freedom of movement, including deprivation of their liberty, usually through enforced confinement, either in the receiving country or during transit (by land or sea)”. See: UN Human Rights Council; A/HRC/17/33; paras. 18-19. This trend has also been recognized previously by the extension of the UN Working Group on Arbitrary Detention’s mandate by the Human Rights Commission “in its Resolution 1997/50 to cover the issue of administrative custody of asylum-seekers and immigrants”: report of the Working Group on Arbitrary Detention, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development; UN Human Rights Council; A/HRC/16/47; p. 4.

253 Submission to the Committee on Migrant Workers: Day of General Discussion on the rights of migrant workers in an irregular situation and members of their families, Monday 19 September 2011; International Detention Coalition; p. 3.

254 Statement of the Global Migration Group on the Human Rights of Migrants in an Irregular Situation; Global Migration Group; 30 September 2010.

255 “Past Trends Towards Increasing ‘Criminalization’ of Irregular Migration Continue; Migrants Face Racism, Abuse, Appalling Housing Conditions, Third Committee Told”; GA/SHC/3986; 22 October 2010.

This can include making public recommendations to strengthen a country's legal framework, including advocating that the Government ratify the Optional Protocol to the Convention against Torture; monitoring places of detention where migrants are held; recommending alternatives to detention for migrants in an irregular situation; promoting their access to justice and legal services; training public officials; and raising public awareness of the issues facing migrants in detention.

Every person who is deprived of their liberty is placed in situation of vulnerability. However, some individuals face greater risk of human rights violations because of their particular characteristics and/or situational factors.²⁵⁶

It is therefore important that NHRIs pay particular attention to the needs of vulnerable groups of migrants in detention, including children, women, older people, people with disabilities, people who have been trafficked for the purpose of sexual exploitation and people who have experienced torture in their country of origin.

To work effectively in this area, NHRIs should seek to develop partnerships with individuals and organizations with specialized skills and understanding of the migration and refugee sector.

2. STRENGTHENING THE NATIONAL LEGAL FRAMEWORK

NHRIs shall advocate for a human rights approach to migration and migration management. NHRIs underline that each State is responsible to guarantee respect for the human rights and fundamental freedoms of all persons regardless of their migration status.

Santa Cruz Declaration²⁵⁷

It is the sovereign right of each country to determine and enforce their policies on migration. However, in an increasingly globalized international community, States also have a legal and moral obligation to respect the human rights of all people within their jurisdiction, regardless of their migration status.

The International Commission of Jurists notes that:

*International standards establish that, in immigration control, detention should be the exception rather than the rule, and should be a measure of last resort, to be imposed only where other less restrictive alternatives, such as reporting requirements or restrictions on residence, are not feasible in the individual case.*²⁵⁸

NHRIs have a clear mandate to ensure that their State's laws and policies regarding the treatment and management of migrants, especially those in an irregular situation, comply with international human rights standards and international customary law.

Refugees, asylum seekers, undocumented workers and persons who have been smuggled or trafficked across borders are commonly held in administrative detention while awaiting deportation or a determination of their migration status. This places already vulnerable individuals in situations of additional risk and anxiety.

Therefore, NHRIs have a particular responsibility to ensure that the legal framework governing the detention of migrants can and does protect their rights in practice.

²⁵⁶ *Protecting asylum-seekers, refugees and migrants in detention*; APT Position Paper; Association for the Prevention of Torture; 2012; p. 1.

²⁵⁷ Santa Cruz Declaration; Eighth International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 14.

²⁵⁸ *Migration and International Human Rights Law*; Practitioner's Guide No. 6; International Commission of Jurists; 2011; p. 147.

NHRIs can contribute to the development of an effective legal framework by:

- encouraging the State to ratify relevant international human rights treaties
- making recommendations to reform laws and policies in order to improve the legal protection available to migrants and increase their access to justice
- ensuring that immigration laws do not allow for the return of migrants to countries where they may face persecution, torture and other forms of ill-treatment
- promoting alternatives to administrative detention for migrants in an irregular situation
- proposing changes to detention policies and procedures that enhance the safety, dignity and welfare of all migrants deprived of their liberty.

NHRIs can use the information they collect from monitoring places of detention,²⁵⁹ as well as analysing all relevant migration laws and policies, to develop informed recommendations for consideration by the Government.

2.1. Promoting ratification of international treaties

International human rights law sets out clear standards for the treatment of people deprived of their liberty, including migrants in an irregular situation, asylum seekers and refugees.

The **Convention relating to the Status of Refugees 1951** (Refugee Convention) and its 1967 Protocol provide the basis for the international community's refugee protection system.

Article 1 of the Convention defines a refugee as someone who is “outside his or her country of nationality or habitual residence; has a well founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion; and is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution”.

The Convention sets out the rights and responsibilities of refugees, as well as the legal obligations of States to protect the rights of refugees and those seeking asylum.

The principle of “non-refoulement”, set out in article 33, is a key provision of the Convention and obliges a State to not forcibly return an individual to a country where he or she may be at risk of persecution.

Other rights included in the Convention include:

- the right not to be expelled, except under certain strictly defined conditions (article 32)
- exemption from penalties for illegal entry into the territory of a contracting State (article 31)
- the right to work (article 17)
- the right to housing (article 21)
- the right to education (article 22)
- the right to public relief and assistance (article 23)
- the right to freedom of religion and free access to courts (articles 4 and 16)
- freedom of movement within the territory (article 26)
- the right to be issued identity and travel documents (articles 27 and 28).²⁶⁰

259 The Global Detention Project has developed a typology for research on places of immigration detention. See: *Immigration Detention and Proportionality*; Michael Flynn, Global Detention Project Working Paper No. 4; 2011.

260 The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: *Signing on could make all the difference*; Office of the United Nations High Commissioner for Refugees; 2001; p. 5.

The **International Convention on the Protection of the Rights of All Migrant Workers and their Families** provides a clear outline of the human rights that should be afforded to all migrant workers, including those in an irregular situation, by law enforcement agencies and detaining authorities.

These include rights on arrest, such as the right to be informed of the charges in a language they understand; the right to communicate with consular or diplomatic officials; the right to be brought promptly before a court; and the right to the assistance of an interpreter in order to understand the trial proceedings.

The Convention also notes that it “shall not be the general rule that while awaiting trial they shall be detained in custody”.²⁶¹ If a migrant worker is deprived of liberty, he or she has the right to have the lawfulness of their detention reviewed by a court²⁶² and those “who have been victims of unlawful arrest or detention shall have an enforceable right to compensation”.²⁶³

Article 20 of the Convention also notes that a migrant worker shall not be imprisoned because of a failure to fulfil a contractual obligation.

While held in detention, migrant workers and members of their families “shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.”²⁶⁴



UN Photo by Eric Kanalstein.

261 International Convention on the Protection of the Rights of All Migrant Workers and their Families; article 16(6).

262 Ibid; article 16(8).

263 Ibid; article 16(9).

264 Ibid; article 17(1).

As far as possible, accused migrants deprived of their liberty while awaiting trial, or those detained on migration-related provisions, should be separated from convicted persons and young people should be separated from adults.

The Convention prohibits torture or cruel, inhuman or degrading treatment or punishment against migrant workers and members of their families.²⁶⁵

Article 22 of the Convention also provides that:

Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

In addition, an order for expulsion must be made by “the competent authority in accordance with the law”.²⁶⁶ Except where a final decision is made by a judicial authority, the individual has the right to have his or her case reviewed by the competent authority, “unless compelling reasons of national security require otherwise”.²⁶⁷

The **International Covenant on Civil and Political Rights**, adopted in 1966, sets out many of the core human rights obligations that a State has to “all individuals within its territory and subject to its jurisdiction ... without distinction of any kind”.²⁶⁸

In relation to the arrest and detention of individuals, the Covenant provides that:

- no one shall be subjected to arbitrary arrest or detention (article 9)
- people deprived of their liberty shall be treated with humanity and respect for their inherent dignity (article 10)
- no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7)
- no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation (article 11)
- everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and shall be free to leave any country (article 12)
- an alien lawfully in the territory of a State may only be expelled in accordance with the law, be allowed to argue against expulsion, have the case reviewed and be represented before a competent authority (article 13)
- all persons shall be equal before the courts and tribunals, have the right to be presumed innocent until proven guilty, have a right to a fair and public hearing and have free assistance of an interpreter in order to understand the court proceedings (article 14).

The impact of detention on migrant children, refugee children or those seeking asylum can be particularly severe. The **Convention on the Rights of the Child** requires that the arrest, detention or imprisonment of a child “shall be used only as a measure of last resort and for the shortest appropriate period of time” and that “every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”.²⁶⁹

More broadly, article 3 of the Convention places on obligation on States that “the best interests of the child shall be a primary consideration” in all actions and decisions concerning children, “whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”.

²⁶⁵ International Convention on the Protection of the Rights of All Migrant Workers and their Families; article 10.

²⁶⁶ Ibid; article 22(2).

²⁶⁷ Ibid; article 22(4).

²⁶⁸ International Covenant on Civil and Political Rights; article 2(1).

²⁶⁹ Convention on the Rights of the Child; article 37.

A fundamental human right is that no person should be subjected to torture and ill-treatment. The principal human rights treaty dealing with torture – the **Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment** – clearly sets out an absolute prohibition against torture and ill-treatment.²⁷⁰ This applies to all persons within the jurisdiction or control of the State party.

Like the Refugee Convention, it also includes the principle of “non-refoulement” (article 3), which is a critical provision that seeks to protect refugees and asylum seekers from potential danger. Under this article, States are obliged to not expel, return or extradite a person to another State if there are “substantial grounds” for believing that the person would be in danger of being subjected to torture.

The **Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment** (OPCAT), which entered into force in 2006, reinforces the obligation on States to prevent torture and ill-treatment. However, the OPCAT breaks new ground by establishing a system of regular and unannounced visits to all places where persons are deprived of their liberty to be carried out by independent national and international bodies. It is an innovative instrument that can contribute to the protection of migrants in detention.

Under the OPCAT, these monitoring bodies are authorized to visit any place where people are deprived of their liberty, such as prisons, police cells, pre-trial detention, juvenile detention, administrative detention, military detention, medical institutions and mental health facilities, detention centres for migrants and asylum-seekers, temporary detention points in ports or airports, border checkpoints, means of transport and to monitor the entire deportation process, including overseas escorts.

NHRIs may be designated as a country’s national preventive mechanism (NPM) under the OPCAT and be responsible for undertaking preventive visits to places of detention.²⁷¹

Collectively, these treaties provide the standards and methodologies that can contribute to the development of an effective national legal framework to protect the rights of vulnerable individuals and groups of people within the jurisdiction of the State, especially those deprived of their liberty.

As part of their advisory mandate, NHRIs can encourage their State to ratify and implement these international human rights treaties, as well as other relevant international and regional standards regarding the rights of refugees and asylum seekers and the treatment of people deprived of their liberty.²⁷²

2.2. Proposing reforms to laws and policies

NHRIs have a responsibility to monitor the extent to which the international human rights commitments that their Government has made, along with their obligations under international customary law, are reflected in national laws, policies and practice.

Where there is a “protection gap”, NHRIs can make recommendations to the Government to enact new laws, to amend existing or draft legislation or to reform policies and guidelines so they conform with human rights norms.

NHRIs can also play a role in developing a legal framework that recognizes and respects the rights of migrants who enter a country under different circumstances.

270 Article 1 of the Convention against Torture defines torture using three cumulative elements: the intentional infliction of severe mental or physical pain; with the direct or indirect involvement of a public official; for a specific purpose. Actions which fall short of the definition of torture, because they lack one or more of these criteria, may still constitute cruel, inhuman or degrading treatment under article 16 of the Convention.

271 At May 2012, two NHRIs in the Asia Pacific region were designated and operating as the country’s NPM. The Human Rights Commission of the Maldives acts as that country’s sole NPM, while the New Zealand Human Rights Commission plays the coordinating role in a multi-agency NPM that includes five independent monitoring bodies.

272 Relevant international standards include the 1963 Vienna Convention on Consular Relations; the UN Standard Minimum Rules on the Treatment of Prisoners; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules); and, regarding asylum seekers, the UNHCR Revised Guidelines on Detention of Asylum Seekers.

For example, individuals and families who have fled persecution and are seeking asylum in another country, along with those who have been trafficked across national borders, should not be criminalized for entering a country in an irregular fashion.

As the Special Rapporteur on the human rights of migrants has noted:

*... it is important that irregular migration be seen as an administrative offence and irregular migrants processed on an individual basis. Where possible, detention should be used only as a last resort and in general irregular migrants should not be treated as criminals. The often erratic and unlawful detention of migrants is contributing to the broader phenomenon of the criminalization of irregular migration.*²⁷³

Migrants who do come into contact with law enforcement agencies, detaining authorities and the judicial system commonly face significant challenges and barriers. These can include little or no understanding of their legal rights or the legal process of the country, language barriers, limited resources and difficulties in securing legal services and other support.

Furthermore, migrants may not be informed of their right to communicate with consular officials when arrested or detained and they may have little or no right to challenge the lawfulness of their detention.

NHRIs can advocate for changes to national laws and policies that promote access to justice and due process for all migrants, based on international human rights standards and the principle of non-discrimination:

*States should take measures to review their national laws applicable to the detention of migrants to ensure that they are harmonized with international human rights norms that prohibit inhumane treatment and ensure due process. States should take measures to ensure that detention of irregular migrants is not arbitrary and that there is a national legal framework to govern detention procedures and conditions.*²⁷⁴

The “[g]rounds for detention must be clearly and exhaustively defined and the legality of detention must be open for challenge before a court and regular review within fixed time limits”.²⁷⁵

In addition, it is vital that migrants have access to information in a language they understand “regarding the nature of their detention, the reasons for it, the process for reviewing or challenging the decision to detain. It should also be presented in a form that takes account of the individual’s level of education.”²⁷⁶

In cooperation with others – such as consular services, NGOs and civil society groups – NHRIs can also develop strategies and recommendations to facilitate access to legal aid and other services that promote the equality of migrants before the law.²⁷⁷

The detention of migrants should not be arbitrary, unnecessary or disproportionate. It should be used as a last resort and for the shortest period of time and “alternatives to detention shall be sought whenever possible, all of which particularly concern the deprivation of liberty applied to asylum-seekers, refugees and irregular migrants”.²⁷⁸

Numerous studies have highlighted the serious, negative impact of prolonged administrative detention on migrants. Being detained for an unspecified time can have profound, long-term effects on the mental

273 Report of the Special Rapporteur on the human rights of migrants; UN Human Rights Council; A/HRC/7/12; p. 17.

274 Ibid; p. 21.

275 Report of the Working Group on Arbitrary Detention; UN Human Rights Council; A/HRC/10/21; p. 23.

276 *Migration and International Human Rights Law*; Practitioner’s Guide No. 6; International Commission of Jurists; 2011; p. 151.

277 The Special Rapporteur on the independence of judges and lawyers has noted: “It is commonplace for such persons to be deprived of access to the courts, owing to their administrative situation. This vulnerability is particularly distressing for asylum-seekers, for whom access to justice is crucial if they are to avoid irreversible prejudice such as a violation of the principle of non-refoulement. It is reasonable and mandatory to provide not only free legal aid, but also interpretation, and at times forensic psychological or medical, services. However, according to recent research, access to justice free of charge is made subject to conditions that make it unattainable in practice.” UN Human Rights Council; A/HRC/8/4; p. 24.

278 Report of the Working Group on Arbitrary Detention; UN Human Rights Council; A/HRC/10/21; p. 25.

health of detainees. This can be compounded by overcrowding, poor physical conditions of detention and limited access to appropriate health services.

NHRIs can research and advocate for alternative approaches to the administrative detention of refugees, asylum seekers and migrants in an irregular situation, “such as supervised release, release on bail, designated residence or regular reporting to authorities”.²⁷⁹

Drawing on international research and case studies from different parts of the globe, the International Detention Coalition has identified a range of benefits in limiting the application of detention and prioritizing community-based management options, including that:

- the costs of community-based management options are less than detention options
- rates of voluntary return and independent departure are increased
- the possibility of wrongful detention and litigation is reduced
- overcrowding of detention facilities and the use of long-term detention are reduced
- the health and welfare of migrants is improved.²⁸⁰

In addition, community-based management options can assist States in their duty to respect, protect and fulfil the human rights of migrants.

CASE STUDY

The **Australian Human Rights Commission** regularly monitors all immigration detention centres in the country. Over the last decade, the Commission’s reports have highlighted the serious impact that prolonged and indefinite detention has on the mental health of detainees, particularly those who have experienced torture and trauma.

These concerns escalated in 2010–11, with evidence of the deteriorating mental health of many detainees. This included high rates of self-harm, a number of suicides and serious unrest in immigration detention facilities.

The Commission has consistently advocated for the use of community-based alternatives, which are “cheaper, more effective and more humane than holding asylum seekers and refugees in closed detention facilities for extended periods. This approach is also consistent with Australia’s international human rights obligations.”²⁸¹

In June 2011, the Australian Government transferred a significant number of families and unaccompanied children from immigration detention facilities to community-based detention.

While welcoming the change in policy, the Commission noted that more than 4,500 asylum seekers and refugees were still held in immigration detention facilities across Australia. It continued to recommend that immigration detention be used as a last resort and for the shortest practicable time.



279 Report of the Working Group on Arbitrary Detention; UN Human Rights Council; A/HRC/7/4; p. 25.

280 *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*; International Detention Coalition; 2011; p. 9.

281 *Annual Report 2010–11*; Australian Human Rights Commission; 2011; p. 36.

In addition, NHRIs should monitor the forced deportation of migrants to ensure their safety, dignity and protection, especially in instances where an individual is potentially being deported to country where he or she is at risk of torture or ill-treatment.

The Association for the Prevention of Torture notes that:

*Forced deportation is a moment where detainees are particularly vulnerable and exposed to the risk of ill-treatment and torture. There is serious ongoing human rights concern worldwide where refoulement, excessive use of force and even loss of life are increasingly common.*²⁸²

NHRIs that have been designated as an NPM under the OPCAT have a particular responsibility in this regard.

NHRIs can also make recommendations to the Government that forced deportation only be used as a last resort, that the State respect the fundamental principle of “non-refoulement” and that any deportation only proceed “following a fair and efficient process which guarantees that all the legal safeguards have been applied”.²⁸³

3. MONITORING PLACES OF DETENTION

NHRIs should monitor their Governments’ obligation to respect, protect and fulfil the rights of all people in detention, especially vulnerable or marginalised groups.

Nairobi Declaration²⁸⁴

Independent monitoring of places of detention is a crucial element of a comprehensive programme of action that NHRIs can take to promote and protect the rights of migrants deprived of their liberty.

Good practice has shown that the mere fact that independent bodies can enter places of detention, at any time, has a strong deterrent effect and sheds light on conditions and treatment in detention. It can also be instrumental in pressing and assisting the relevant authorities to address and improve conditions of detention and the treatment of detainees.²⁸⁵

Monitoring work can be undertaken when NHRIs investigate individual complaints or allegations of ill-treatment. It can also form part of a preventive strategy to improve conditions of detention and the treatment of detainees.

Some NHRIs have established a regular programme of visits to immigration detention facilities and other places of detention where migrants are held.

As noted previously, some NHRIs have been designated as their country’s NPM and have specific authority to conduct regular and unannounced “preventive” visits to all places of detention in the country.

There are certain powers that NHRIs require in order to effectively undertake preventive monitoring of detention facilities. These powers, set out in the OPCAT, include:

- access to all types of places where persons are deprived of their liberty
- access to all facilities within the place of detention
- access to all necessary records and information
- access to all persons deprived of their liberty and to any other person
- liberty to choose the persons to interview and the location where the interview is carried out
- the ability to interview detainees in private.

282 *National Preventive Mechanisms: Monitoring the Forced Deportation Flights of Migrants*; OPCAT Briefing Series; Association for the Prevention of Torture; 2012; p. 1.

283 *Ibid*; p. 2.

284 Nairobi Declaration; 9th International Conference of National Institutions for the Promotion and Protection of Human Rights; Nairobi, Kenya; 21–24 October 2008; para. 42.

285 *Protecting asylum-seekers, refugees and migrants in detention*; APT Position Paper; Association for the Prevention of Torture; 2012.

When some of these powers are not granted, NHRIs should carefully weigh up the advantages and disadvantages of engaging in preventive monitoring activities. It is especially important that NHRIs are given the authority to conduct interviews with detainees in private.²⁸⁶

Preventive visits are different in their purpose and methodology to those conducted with the aim of investigating or documenting individual complaints made by detainees.

The focus of these visits is to analyse the systemic issues in relation to the place of detention and assess all aspects related to the deprivation of liberty. The aim is to identify the risk factors and causes of those aspects of detention which could lead to the ill-treatment of detainees or other human rights violations, as well as provide recommendations to implement or reinforce protective strategies.²⁸⁷

NHRIs that undertake preventive monitoring should seek to build an ongoing and constructive dialogue with the relevant authorities, providing concrete recommendations to improve the detention system over the long term and then monitoring progress to implement these recommendations. In this way, prevention is an ongoing – rather than a one-off – process.

NHRIs should also ensure there are proper accountability mechanisms in place, as well as respect for international human rights norms and standards and national law, in privately-run places of immigration detention.²⁸⁸

3.1. Undertaking visits to places of detention

Advice and recommendations for NHRIs conducting preventive visits to places of detention is provided in *Preventing Torture: An Operational Guide for National Human Rights Institutions*. It includes practical information on:

- preparing for the visit, defining the objectives and assigning responsibilities among the visiting team
- undertaking the visit, interviewing detainees (including interviewing women and children), touring the premises, checking the registers and engaging with the person in charge of the facility and other staff members
- follow-up after the visit:
 - preparing a report for the detaining authority based on the findings of the visit
 - drafting recommendations
 - other reports (thematic, annual)
 - follow-up visits.²⁸⁹



A basic principle of all monitoring work is to ‘do no harm’. Migrants deprived of their liberty are particularly vulnerable, and poorly planned visits – or visits that do not follow appropriate principles and methodology – can potentially do more harm than good.²⁹⁰

The Association for the Prevention of Torture recommends that NPMs and other monitoring bodies conducting preventive visits to places of detention where migrants are detained include in their teams:

286 *Preventing Torture: An Operational Guide for National Human Rights Institutions*; Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights; 2010; p. 83.

287 *Ibid*; p. 84.

288 *The Privatization of Immigration Detention: Towards a Global View*; Michael Flynn and Cecilia Cannon, Global Detention Project Working Paper No. 1; 2009.

289 *Preventing Torture: An Operational Guide for National Human Rights Institutions*; Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights; 2010; see Chapter 8.

290 *Monitoring places of detention: A practical guide*; Association for the Prevention of Torture; 2004; p. 27.

*... a physician or qualified health professional as their participation is necessary to assess the particular sensitive health issues. They should also consider hiring interpreters when relevant to conduct private interviews with migrants in detention.*²⁹¹

Furthermore, it is critical that all members of the monitoring team respect the confidentiality of information provided by detainees during private interviews. This includes interpreters²⁹² who may be required to assist members of the visiting team to conduct interviews with migrants. No information should be released without the direct and informed consent of the detainee.²⁹³

Following the visit, the NHRI should prepare a short visit report for the detaining authority, which identifies particular areas of concern, an analysis of the problems and practical recommendations that can be implemented by the detaining authority.

The report forms part of an ongoing and cooperative dialogue with the detaining authority, based on the overall goal of delivering measurable improvements over time in relation to the treatment of detainees and the conditions of detention.

3.2. Reforming detention policies and procedures

Where migrants, asylum seekers and refugees are deprived of their liberty, international law places specific obligations on States to safeguard their rights and dignity.

States must ensure that they are held in appropriate places of detention, that the conditions of detention are acceptable and they have access to appropriate social and medical services. In addition, detainees must also be protected from violence.²⁹⁴

However, the reality for many migrants, asylum seekers and refugees is that they are often held for extended periods of time in overcrowded facilities, in poor conditions, with limited access to appropriate health services and little or no access to asylum procedures.

Under international human rights law, detaining migrants for extended periods in locations such as prisons or police holding cells would generally be considered inappropriate and has the potential to lead to human rights violations that can amount to cruel, inhuman or degrading treatment.

Based on their monitoring function, NHRIs can make specific recommendations to reform detention policies and procedures to comply with international norms and to reflect the non-criminal status and needs of asylum seekers, refugees and migrants in an irregular situation.

In addition, the needs of vulnerable groups of migrants should be considered and appropriate safeguards put in place to ensure their safety and protection while in detention, including children, women, older people, people with disabilities, victims of trafficking and survivors of torture.

NHRIs can use their advisory mandate to recommend reforms that promote and protect the rights, safety, dignity and well-being of detainees, including:

- separating migrants from convicted criminals, migrant women from unrelated men, and migrant children from unrelated adults
- addressing conditions of detention which amount to ill-treatment of detainees, including overcrowding, inadequate food, poor sanitation, poor ventilation and poor heating
- providing appropriate medical care and support to meet the individual health needs of detainees

291 *Protecting asylum-seekers, refugees and migrants in detention*; APT Position Paper; Association for the Prevention of Torture; 2012; p. 2.

292 *Detention Monitoring Briefing No. 3: Using Interpreters in Detention Monitoring*; Association for the Prevention of Torture; 2009.

293 Specific information about interviewing people in places of detention is provided in Chapter 5 of *Preventing Torture: An Operational Guide for National Human Rights Institutions*; Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights; 2010.

294 *Migration and International Human Rights Law*; Practitioner's Guide No. 6; International Commission of Jurists; 2011; p. 164.

- ensuring migrant children held in detention can continue their education
- ensuring detainees can observe their cultural and religious practices.

NHRIs should also promote reforms to ensure effective safeguards are in place to prevent torture and ill-treatment, including “prompt access to a lawyer, the ability to challenge detention, a medical examination by an independent physician and the ability to contact family or consular representatives”.²⁹⁵

NHRIs “should work with their Government to ensure that those in detention have the opportunity to complain about violations of their rights, including to the NHRI (for example through face-to-face complaints, complaint boxes or on-site human rights counselling services), and, where a violation is found, that detainees have access to a remedy and compensation”.²⁹⁶

Recommendations for the reform of detention policies and procedures can be directed to the authorities of specific facilities. However, through its monitoring activities, the NHRI may identify systemic issues and develop recommendations for reform across all detention facilities.

NHRIs should engage directly with the relevant ministries or authorities to advocate for the adoption of necessary reforms. In addition, these recommendations could be included in thematic or annual reports prepared by the NHRI for the parliament.

3.3. Investigating complaints of torture, ill-treatment or human rights violations

NHRIs should promptly investigate and document any allegations of human rights violations involving detainees that are brought to their attention. These allegations may come to the NHRI from the detainee, a friend or relative of a detainee or during the course of its monitoring work.

NHRIs should seek to collect all available evidence in relation to the complaint, beginning with an interview with the victim. This should be conducted in private, although an interpreter may also be required to be present.

Following the interview, it is necessary to cross-check the information collected and to assess the reliability of the allegations made.²⁹⁷ To help make this assessment, it is important to consider:

- if the testimony is convincing and internally consistent
- if the testimony corresponds to known patterns of human rights violations or is consistent with information from other independent sources
- if other testimonies, such as those from detainees in the same facility, corroborate the victim’s statement
- other physical, medical or administrative evidence corroborates the victim’s statement
- the response to the allegations provided by detaining authority.²⁹⁸

All information collected during the investigation should be stored securely. As an additional precaution, NHRIs should consider identifying files by numbers, rather than by names, with the corresponding list of names filed separately from the substantive records.²⁹⁹

295 *Protecting asylum-seekers, refugees and migrants in detention*; APT Position Paper; Association for the Prevention of Torture; 2012; p. 2.

296 Nairobi Declaration; 9th International Conference of National Institutions for the Promotion and Protection of Human Rights; Nairobi, Kenya; 21–24 October 2008; para. 41.

297 In relation to allegations of torture, complete accuracy is seldom expected of torture victims. See *Kisoki v. Sweden*, Committee against Torture, Communication 41/1996, views adopted on 8 May 1996.

298 *Preventing Torture: An Operational Guide for National Human Rights Institutions*; Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights; 2010; p. 41.

299 *Ibid*; p. 37.

If there is a finding that a human rights violation has occurred, the NHRI should propose recommendations that provide appropriate redress for the victim, including sanctions against those responsible for the violations and establishing measures to prevent future violations from occurring.

NHRIs that have the mandate to do so can also take steps to halt further violations from taking place by taking injunctive action; for example, to secure the release of migrant children detained with unrelated adults or to prevent the forced deportation of migrants.

Specific information about investigating allegations of human rights violations in places of detention is provided in Chapter 4 of *Preventing Torture: An Operational Guide for National Human Rights Institutions*.

3.4. Undertaking inquiries into systemic human rights violations

In undertaking its complaint handling and monitoring functions, the NHRI may identify systemic patterns of violations against migrants in an irregular situation that result from both the operation of national laws and policies, and the system and conditions of administrative detention.

Rather than handling a number of individual complaints on a case-by-case basis, the NHRI may seek to initiate its own inquiry to assess the scope and impact of the human rights violations, to identify the underlying causes and to develop recommendations that promote practical and durable change.

Depending on the nature of the issues under consideration, the NHRI could establish a public inquiry or it could collect information and evidence from relevant stakeholders on a confidential basis.

Whichever approach the NHRI adopts, it is essential that the inquiry's objectives and methods of operation are clearly communicated with all parties. The inquiry should be based on the principle of procedural fairness.

By drawing on relevant international human rights standards, NHRIs can propose an integrated set of recommendations to promote the civil, political, economic, social and cultural rights of migrants in detention.

Two NHRIs in the Asia Pacific region have previously undertaken public inquiries into issues related to human rights and detention.

In 2004, the Australian Human Rights Commission released the report of its two-year National Inquiry into Children in Immigration Detention,³⁰⁰ while the National Human Rights Commission of Mongolia released the report of its public inquiry on torture in 2006.³⁰¹

More information on establishing and conducting public inquiries is included in Chapter 9.

4. TRAINING AND SUPPORTING PUBLIC OFFICIALS

NHRIs should assist in developing guidelines and/or training for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of migrants, and in the inspection of immigration detention centres.

Santa Cruz Declaration³⁰²

Providing professional training programmes and practical support for public officials involved in the arrest and detention of migrants is an important contribution that NHRIs can make to assist the State to meet its human rights obligations.

300 *A Last Resort? The National Inquiry into Children in Immigration Detention*; Australian Human Rights Commission; 2004.

301 *2006 Annual Report*; National Human Rights Commission of Mongolia.

302 Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 39.

These training programmes should have the goal of building greater understanding of national and international human rights standards and developing enhanced operational skills.

This could, for example, include developing strategies or guidelines to assist public officials respond more effectively to the individual circumstances of migrants, such as those who have been smuggled or trafficked across borders and those who are seeking asylum in the country.

Some public officials – such as law enforcement officials and prison guards – have specific and direct obligations to ensure that human rights standards are respected in their day-to-day work.

NHRIs can contribute to the development and delivery of professional training programmes in a number of ways, including:

- reviewing and revising existing training materials
- developing new training tools or information resources
- delivering training programs directly to public officials.

To ensure that training programmes are relevant and effective, it is imperative that NHRIs establish and maintain a cooperative and collaborative approach to training with the relevant authorities.

In instances where training programmes are likely to meet with significant resistance, it may be preferable for NHRIs to develop the course content and resources and have the programme facilitated by trainers with direct expertise in the field.

In addition, NHRIs can convene seminars and workshops where NHRIs, public officials, civil society organizations and others can discuss emerging issues and share examples of good operational practice.

CASE STUDY

In November 2009, the Human Rights Commission of Malaysia joined with the International Detention Coalition, the International Committee of the Red Cross and the UN High Commissioner for Refugees to organize a workshop on “Working with Detained Migrants and Refugees”. The workshop was attended by about 30 representatives from various government agencies, including the Immigration Department, the Prison Department, the National Security Council and the Ministry of Home Affairs. The workshop focused on detention law and standards, international good practices and protection for individuals with special needs, and the provision of healthcare and other basic amenities in places of detention.



NHRIs can also consider developing other information and advisory strategies to assist migration, law enforcement and consular officials in their work with migrants.

For example, the Zacatecas Declaration recommends that NHRIs encourage:

*... where relevant, the establishment of regional information databases of countries of origin, routes and points of crossing and places of detention of migrants, with a view to reinforcing the work of institutions responsible for migration and consular offices.*³⁰³

303 Zacatecas Declaration; International Workshop of National Institutions for the Promotion and Protection of Human Rights: Causes, Effects and Consequences of the Migratory Phenomenon and Human Rights Protection; Zacatecas, Mexico; 14–15 October 2004; para. 12.

It also notes that NHRIs can work “where possible, with consular services to ensure that migrants, both regular and irregular, are treated according to human rights principles and standards.”³⁰⁴

More information on developing training programmes and resources for public officials is included in Chapter 10.

5. BUILDING COMMUNITY AWARENESS AND SUPPORT

As a growing number of Governments around the world have sought to curb irregular migration by introducing tighter border control measures, there has been a corresponding hardening of community attitudes towards asylum seekers, refugees and migrants in an irregular situation within many of these countries.

The UN High Commissioner for Human Rights has noted that the “association of irregular migration with criminality promotes the stigmatization of migrants and encourages a climate of xenophobia and hostility against them”.³⁰⁵

While legislative and policy measures are critical steps that can safeguard the rights of migrant workers in detention, awareness-raising initiatives are also vital in shifting public sentiment and promoting positive change.

For example, NHRIs can counter negative stereotypes by fostering greater understanding of the factors that lead people to cross borders and by sharing the stories and experiences of migrants who have been detained.

They can also join regional or international campaigns to promote and protect the rights of especially vulnerable migrants, such as the campaign to end the immigration detention of children launched by the International Detention Coalition at the UN Human Rights Council in March 2012.³⁰⁶

Based on their own monitoring work, NHRIs can expose unsatisfactory conditions in detention and human rights violations against detainees. They can advocate instead for alternative approaches based on respect for the dignity and fundamental rights of each person.

An effective community education campaign will be based on a clear communication strategy, with a specific objective, a clear and simple message, the main methods of communication and the timeframe for the campaign.

The campaign might seek to engage the general public or specific sectors within the community, such as doctors, lawyers, mental health practitioners, teachers, students or faith groups. It can involve, for example, using mainstream media, social media, theatre, the arts or other channels.

Community education campaigns are most effective when there are a number of partner organizations involved. This can significantly increase the scope, reach and impact of the campaign.

In addition to raising public awareness, NHRIs can also develop education programmes to inform migrants in detention of their rights, the role of the NHRI and how they can seek advice or lodge a complaint.

NHRIs should develop and distribute resources that are accessible and relevant to the different migrant communities held in detention.

More information on building public awareness and understanding is included in Chapter 10.

304 Ibid; see para. 13.

305 Panel discussion on immigration-related detention held during the 12th session of the Human Rights Council, 14 September – 2 October 2009, Geneva; see: www.ohchr.org/EN/NEWSEVENTS/Pages/MigrationPanel.aspx.

306 More information on the campaign to end the immigration detention of children is available at: <http://idcoalition.org/children/>.



APF Photo by Michael Power.

KEY POINTS: CHAPTER 8

- NHRIs can promote ratification of relevant international human rights treaties to protect the rights of migrants in detention, as well as reform of national laws and detention procedures.
- NHRIs can research and advocate for alternative approaches to the administrative detention of refugees, asylum seekers and migrants in an irregular situation.
- NHRIs can undertake regular, preventive visits to places where migrants are detained to analyse and assess their treatment and the conditions of their detention. They can also make recommendations to safeguard the rights of migrant detainees, based on national and international standards.
- NHRIs should promptly investigate and document any allegations of human rights violations involving detainees that are brought to their attention.
- Training public officials is an important way in which NHRIs can contribute to the prevention of torture and ill-treatment in places of detention.



FURTHER READING

There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention; International Detention Coalition; 2011

Detention Monitoring Briefing No. 1: Making Effective Recommendations; Association for the Prevention of Torture; 2008

Detention Monitoring Briefing No. 2: The Selection of Persons to Interview in the Context of Preventive Detention Monitoring; Association for the Prevention of Torture; 2009

Detention Monitoring Briefing No. 3: Using Interpreters in Detention Monitoring; Association for the Prevention of Torture; 2009

Legal Framework and Standards Relating to the Detention of Refugees, Asylum Seekers and Migrants; International Detention Coalition; 2011

Migration and Detention: Mapping the International Legal Terrain; Isabel Ricupero and Michael Flynn; Global Detention Project; 2009

Migration and International Human Rights Law; Practitioner's Guide No. 6; International Commission of Jurists; 2011

Migration-related Detention: A Research Guide on Human Rights Standards Relevant to the Detention of Migrants, Asylum-seekers and Refugees; Amnesty International; 2007

Monitoring Immigration Detention in South Africa; Lawyers for Human Rights; 2008

Preventing Torture: An Operational Guide for National Human Rights Institutions; Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights; 2010

Protecting asylum-seekers, refugees and migrants in detention; APT Position Paper; Association for the Prevention of Torture; 2012



Chapter 9:

Conducting public inquiries into systemic patterns of human rights violations

KEY QUESTIONS

- In what circumstances should NHRIs consider conducting a public inquiry into human rights violations involving migrant workers and members of their families?
- What steps are involved in establishing and conducting a public inquiry?
- What evidence should be collected during the course of the public inquiry? How can NHRIs support migrant workers to contribute to the inquiry process?



BASIS FOR NHRI INVOLVEMENT

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:

- (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matter concerning the promotion and protection of human rights. The national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
 - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
- (g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Methods of operation

Within the framework of its operation, the national institution shall:

- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;



1. INTRODUCTION

A public inquiry – sometimes referred to as a “national inquiry” – is a comprehensive and focused inquiry that examines a systemic human rights problem in detail.

As the name implies, these inquiries are carried out in public and draw together a number of the core functions of an NHRI, including research, investigation, policy development and raising public awareness.

A major strength of the public inquiry model is that it allows NHRIs to go beyond the investigation of individual complaints. By gathering information and evidence from a variety of sources – including victims, experts and, possibly, perpetrators – an NHRI can identify the underlying factors that contribute to systemic patterns of human rights violations and propose recommendations for positive change.

Because the inquiry process is public, it can also help to introduce, expose and explain a complex human rights issue to the broader community and build understanding and support for the findings and recommendations made by the NHRI.

The NHRI can develop recommendations that are wide-ranging and addressed to the Government, private sector bodies, the judiciary, NGOs, trade unions, professional associations, academic institutions and other civil society bodies. They can also be directed to individuals who are in a position to influence or effect positive human rights changes within the community.

Given the systemic nature of human rights issues that migrant workers face, especially undocumented workers and migrants in an irregular situation, a public inquiry provides a comprehensive tool for analysing and addressing the structural nature of the problems they experience.

By drawing on relevant international human rights standards – including those set out in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and relevant ILO conventions – NHRIs can propose an integrated set of recommendations to promote the civil, political, economic, social and cultural rights of migrant workers and members of their families.

More detailed information on establishing and running public inquiries is available in the *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation*, jointly published by the APF and the Raoul Wallenberg Institute in 2012. The following information summarizes a number of the key themes and issues presented in the manual.

2. DECIDING WHETHER TO HOLD A PUBLIC INQUIRY

NHRIs in Asia are encouraged to take action in the following areas for the purpose of promoting and protecting the human rights of migrants:

Development and strengthening of remedies to address human rights violations committed against migrants, especially undocumented and irregular migrants.

Seoul Declaration³⁰⁷

NHRIs have a responsibility to engage with serious human rights violations that occur within the country, to identify the factors contributing to those violations and to develop practical and effective solutions. If they fail to do so, the credibility of the NHRI and public confidence in the institution can be undermined.³⁰⁸

A public inquiry can be a powerful tool to draw attention to systemic patterns of discrimination or violations and generate positive change. It can also be a particularly useful model if an NHRI is unable to adequately address a particular human rights issue through its other monitoring, advisory or complaints processes.

307 Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 62.

308 *National Human Rights Institutions: Recommendations for Effective Protection and Promotion of Human Rights*; Amnesty International; 2001; pp. 11–12.

In recent years, NHRIs in the Asia Pacific region have undertaken public inquiries on a broad range of issues including: mental health and human rights; freedom from torture; forcible removal of indigenous children from their families; access to public transport for persons with disabilities; the right to health; and the right to food.

However, NHRIs should give close consideration to a range of factors before deciding whether it is appropriate to establish a public inquiry to examine the issue and whether such an inquiry would be likely to generate the systemic change required.

The dimension of the issue

Public inquiries are able to address human rights violations that affect a significant number of people within a country. They can consider both contemporary and historical issues. Some of the human rights issues concerning migrant workers, especially undocumented workers and migrants in an irregular situation, have a transnational dimension, as violations can occur in countries of origin, transit and destination. This can place some issues beyond the scope, jurisdiction or capacity of the NHRI to investigate. However, if resources allow, NHRIs can consider establishing transnational inquiries and gathering evidence from stakeholders in relevant countries, possibly in cooperation with the NHRIs in those countries. NHRIs in different countries can also consider establishing joint inquiries into human rights issues of shared concern, such as human trafficking.

The complexity of the issue

Public inquiries are most effective when they engage a broad range of stakeholders to examine a specific issue in detail and from a variety of perspectives. Depending on the inquiry subject, NHRIs can collect evidence from, and make recommendations to, a wide range of individuals and organizations who share responsibility for promoting and protecting the rights of migrant workers, including government departments, law enforcement agencies, immigration detention authorities, private and public sector employers, business groups, professional associations and accreditation bodies, private recruitment agencies, trade unions and NGOs. The inquiry can and should consider steps to promote the civil, political, economic, social and cultural rights of migrant workers, which require responses and action from many different stakeholders.

The nature of the human rights issue

A public inquiry is an effective way to examine, explain and propose solutions to a serious, systemic human rights issue. By collecting evidence from a variety of sources, the inquiry process can develop understanding among stakeholders and the broader community on the nature of the problem, its human rights dimensions, the need to address it and how this can best be done. By building public awareness and support, the inquiry can generate political pressure to implement practical solutions that ensure greater fairness and dignity for migrant workers and members of their families. To achieve these goals, it is essential that the inquiry is conducted in public. Some issues are particularly sensitive and, as a result, key stakeholders may only be willing or able to provide evidence on a confidential basis. If this is the case, it may not be appropriate to try and address the issue through a public inquiry.

The capacity of the NHRI

Undertaking a public inquiry requires a significant financial commitment by the NHRI, as well as an inquiry team of NHRI members and staff with the expertise to liaise with stakeholders, collect evidence, undertake research, engage the media, write the inquiry report and advocate for the inquiry's recommendations. The decision to conduct a public inquiry must be based on a realistic assessment of the resources, both financial and human, that will be required over the course of the inquiry and during the follow-up stage. A poorly planned or executed inquiry can seriously undermine the credibility of NHRI, especially among victims, witnesses and other key stakeholders who have supported the inquiry and given evidence. Some organizations or individuals may attempt to block access to relevant information or refuse to

give evidence to the inquiry. Therefore, the NHRI should have the legal authority to conduct a full and thorough investigation and collect all necessary evidence.

The likelihood of effectiveness

The NHRI must consider whether there is a realistic prospect that progress can be made to address the human rights issues that the inquiry proposes to consider. The inquiry should be able to provide recommendations that provide redress for past violations, as well as propose practical strategies to prevent future violations. In coming to this assessment, NHRIs should take a broad and long-term view of the situation. If resources and political will to implement the inquiry's recommendations are not present in the short-term, these may be forthcoming at a future time, especially if the NHRI is a strong and consistent advocate on the issue and has the support of civil society organizations and other stakeholders.

Table 9.1: Criteria for deciding whether to conduct a national human rights inquiry³⁰⁹

Developed by the Australian Human Rights Commission and the Uganda Human Rights Commission in 2000 and expanded at a workshop in Kampala, Uganda, in 2003.

Criteria related to the Commission as an institution
<ul style="list-style-type: none"> • Whether the Commission has the necessary public credibility (including independence) • Whether the Commission is the appropriate body or the only body responsible for the subject matter • Whether the Commission is able to manage public expectations • Whether the Commission can accommodate a variety of interests and views on a topic
Criteria related to the significance of the topic
<ul style="list-style-type: none"> • Whether there are strong community stakeholders for the topic • Whether requests have been received for the inquiry from the relevant sector • Whether the topic is ground-breaking or has already been well-covered • Whether the public agrees generally that the topic is a relevant one • Whether the subject can sustain public interest • Whether the topic would attract widespread public empathy or, alternatively, would be controversial
Criteria related to the Commission's resources
<ul style="list-style-type: none"> • Whether any previous inquiries were successful or, if unsuccessful, whether the problems can be overcome • Whether Commission resources are adequate (includes financial and human resources) • Whether the Commission has the expertise or can obtain it • Whether resources can be committed to evaluation and follow-up • Whether the Commission could work in partnership with another body
Criteria relating to the potential effectiveness of an inquiry on this topic
<ul style="list-style-type: none"> • Whether other strategies would be as effective • Whether the Commission will be able to come up with implementable recommendations – the report should not be a mere academic treatise • Whether it is likely that the inquiry's recommendations will be implemented

309 *Public Inquiry Planning Model Guidelines for Commonwealth Human Rights Commissions; Workshop for Commonwealth Human Rights Commissions (sponsored by the British Council); Kampala, Uganda; 25–27 February 2003.*

Criteria related to the suitability of the topic for an inquiry

- Whether the core evidence can be given in public
- Whether witnesses can be identified and will be available
- Whether the basic data are available.
- Whether the Commission can protect and support vulnerable witnesses and their families
- Whether the topic may open the Commission to a risk of retaliation

3. ESTABLISHING THE INQUIRY

NHRIs hereby agree ... to consider the practical functions they can fulfil in promoting enhanced protection against corporate-related human rights abuse:

Examining the conditions of access to justice for all, including through conducting public enquiries, with particular reference to indigent, vulnerable and marginalized groups, affected by the business corporations and the private sector.

Edinburgh Declaration³¹⁰

Choosing the issue for the public inquiry is one of the most important decisions that the NHRI will make. While all human rights issues are important, the NHRI should seek to select an issue:

- that is objectively significant in the country, considering the numbers of people affected, the severity of the violations or the widespread nature of the violations
- that has the potential to build broad, long-term public understanding and support for change
- where there is an active, engaged civil society that will collaborate with the inquiry, provide information, contribute to hearings and advocate for the recommendations.

The inquiry should seek to break new ground. It should not cover issues that have been the subject of previous inquiries, undertaken either by the NHRI or other bodies.

A public inquiry on the rights of migrant workers could canvass any one of a number of topics, such as the human rights impact of migration laws and policies, including the administrative detention of migrants in an irregular situation; the operation, regulation and workplace conditions of certain industries; or laws, policies and practices that limit access to education, housing and health services for migrant workers and members of their families.

While some issues may be apparent from reviewing its complaints data and monitoring activities, NHRIs should **consult directly with communities of migrant workers** to better understand the issues that have the greatest impact on their ability to live and work with dignity and safety. The feedback that migrant workers and their representatives provide should be taken into account when the NHRI finalizes the subject for its public inquiry and develops its terms of reference.

These consultations also provide an opportunity to explain to migrant workers what a national inquiry is, how it will operate, what it will seek to achieve and how they can participate in the process.

For many migrant workers, a public inquiry may be their first and only opportunity to tell their stories and seek a remedy for human rights violations they have experienced. However, some may feel intimidated about taking part in a formal, “legal” process and some may face barriers around language and literacy.

³¹⁰ Edinburgh Declaration; 10th International Conference of National Institutions for the Promotion and Protection of Human Rights; Edinburgh, Scotland; 8–10 October 2010; Section B: Monitoring, Part II.

Others may fear deportation, loss of employment or other reprisals if they give evidence to the inquiry, especially if their right to work in the host country is linked to a single employer.³¹¹

Therefore, the NHRI may need to consider what processes or safeguards should be put in place to facilitate the genuine participation of migrant workers, along with other witnesses who may put themselves at personal risk by providing information to the inquiry.

NHRIs should **identify and consult with other stakeholders** – such as trade unions, relevant NGOs and service providers, government departments, employers and business groups, law enforcement agencies, academics and experts in the field – to gain their views and perspectives on the issue. Some will be supportive of the inquiry's aims; others may be quite hostile. By taking the time to understand their different viewpoints, the NHRI can develop strategies to minimize potential risks to the inquiry and facilitate the constructive engagement of all key stakeholders.

The NHRI should then **prepare a background or scoping paper**, which sets out an overview of the issue to be addressed by the inquiry, the relevant national and international human rights standards, how the inquiry will be undertaken, the views of relevant stakeholders and the financial and human resources that will be required to undertake the inquiry. This paper will provide the basis for the NHRI to determine whether or not to proceed with the inquiry.

Developing **clear objectives and good terms of reference** for the inquiry is another key part of the inquiry planning process. These set out what the NHRI aims to achieve and clearly outlines what the inquiry will examine and report on.

Finally, the NHRI should **appoint Inquiry Commissioners and staff** with the necessary skills and experience to undertake the research, collect the evidence, lead the public hearings, engage the media, analyse the evidence and draft the inquiry report and its recommendations. All members of the inquiry team should have a strong understanding of the complex issues affecting migrant workers and migrant communities in the country.

4. UNDERTAKING THE INQUIRY

To generate media interest and maximise public awareness, the NHRI should **officially launch the public inquiry**. A launch provides an opportunity to draw community attention to the issues that the inquiry will canvass and how it will proceed. A public launch can also promote the role of the NHRI to a wider audience.

In addition, a **targeted communication strategy** should be developed so that information about the inquiry – including options to participate – is available to migrant workers from different national, ethnic and language backgrounds.

The NHRI should ensure that information about the inquiry – both in printed formats and on its website – is available in appropriate languages and accessible formats. NHRIs can consider other strategies to promote the inquiry, such as preparing community service announcements for radio and television; participating in popular radio or television programs; placing posters in workplaces, with service providers or at airports and border crossings; and using social media channels, such as Facebook.

Sharing information about the inquiry through informal community networks is another effective tool to raise awareness of the inquiry and encourage participation among migrant workers. This is more likely to occur if NHRIs have invested the time to establish good relationships with migrant organizations and relevant NGOs.

A free-call information line should also be established to provide information about the inquiry to all stakeholders.

³¹¹ The ILO Director-General noted this challenge in a report to the 100th Conference of the ILO: "Equality at work: The continuing challenge – Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work"; Report I(B); p. 36, Box 2.12.

Collecting research and evidence is critical to the success of the public inquiry. Some information may already exist and can be easily gathered, such as reports of NGOs, trade unions or international organizations. National statistics and data can also be sourced from relevant government departments. Recommendations made by UN human rights treaty bodies, the special procedures and other international human rights mechanisms are also crucial sources of information.

All relevant national laws and regulations should be compiled, as well as international and regional human rights standards and accompanying jurisprudence, to provide a clear framework for identifying the responsibilities of the State and other stakeholders, as well as their compliance with those standards.

NHRIs should identify those individuals with specific information or expertise in relation to the inquiry topic. They should be invited to provide information to the inquiry in written, documentary or oral form, either during the public hearing stage or as part of a formal submission.

To build community awareness and understanding, the inquiry should **foreground the stories and experiences of migrant workers**, whose voices are seldom heard in broader public discussions.

NHRIs should consider the most appropriate ways to hear and collect the perspectives of migrant workers, for example through community dialogues, small group discussions or individual interviews.

Inquiry Commissioners and staff should seek to put in place accessible and culturally appropriate strategies for collecting information and evidence from migrant workers. If potential contributors to the inquiry are held in prison or immigration detention facilities, the NHRI should follow its standard practice of interviewing detainees in private.

The NHRI should seek, as far as financially possible, to organize meetings that involve migrant workers in the cities and towns where they live and work. Depending on the subject of the inquiry, it may also involve visiting those areas where migrants enter and depart the country, as well as places of detentions where migrants are held.

If the inquiry subject raises issues that are transnational in nature – such as the treatment of nationals living and working in other countries – the NHRI may need to visit or collect relevant information from that country. This should involve close cooperation with the NHRI and relevant civil society organizations in that country.

Holding public hearings distinguishes a public inquiry from all other methodologies used by NHRIs. They are essential to the inquiry successfully meeting its objectives.

The inquiry team should plan the public hearings carefully to ensure that it can hear from all relevant stakeholders and experts, if necessary through the careful selection of witnesses at each hearing. The individual situation of each witness should be taken into account, so that the hearings can proceed as smoothly as possible and are respectful of those who give evidence.

As the name implies, the hearings should generally be open to the public, including the media, representatives of NGOs, trade unions, migrant organizations and other stakeholders.

Evidence presented to the inquiry should be recorded in written, audio or video format. There should also be an **efficient information management system** to file and retrieve evidence and information collected throughout the inquiry process.

CASE STUDY

In 2004, the **Australian Human Rights Commission** published *A last resort?*, the report of its national inquiry into children in immigration detention. The inquiry was established to examine whether laws requiring the detention of asylum-seeking children and their treatment in immigration detention met Australia's obligations under international law.

The Commission visited all immigration detention facilities in Australia; organized 29 focus groups with over 200 children, parents and other former detainees; held 61 public hearings and 24 confidential sessions; and received 346 submissions.



5. DEVELOPING EFFECTIVE RECOMMENDATIONS

A key outcome of all public inquiries is to develop effective recommendations that will help redress past violations of human rights and prevent future ones from occurring.

Recommendations should be based on the information and evidence collected by the inquiry; they should meet the inquiry's terms of reference; and they should promote compliance with national and international human rights standards.

NHRIs can direct recommendations to any organization or individual with a role to play in addressing the violations or improving human rights compliance. The recommendations should indicate clearly who is to do what, when and, if possible, how. In a number of instances, they will also propose reforms to laws, policies and practices that affect migrant workers and members of their families.

There is no "right" number of recommendations. There should be as many as are required to properly address the issues raised by the inquiry. In general, however, an inquiry that makes a relatively succinct set of prioritized recommendations is more likely to achieve a positive result than one that produces a long list of non-prioritized actions.

6. PREPARING AND RELEASING THE INQUIRY REPORT

The inquiry report is an opportunity for the NHRI to build public understanding of the human rights violations experienced by migrant workers. It should tell a clear, evidence-based and persuasive story that generates broad community support for change and, more specifically, for implementing the inquiry's recommendations.

The report should be developed with these goals in mind and with a strong focus on the stories and experiences of migrant workers. As far as possible, it should be developed and drafted as the inquiry proceeds so that pertinent information, evidence and case studies can be included along the way.

This also means the report can be launched relatively soon after the inquiry process has been completed and while media and community interest is still high.

To ensure factual accuracy, the NHRI can consider providing a draft report to the relevant authorities for their comments before the final report is prepared.

While the final report must meet statutory or other requirements for official reports to the parliament, the NHRI can also develop alternative reports to communicate the inquiry's key findings and recommendations with different audiences. These can include, for example, concise plain language summary reports (in multiple languages), audio reports (in multiple languages) and video reports.

It is particularly crucial that the NHRI communicates its findings and recommendations to the migrant workers and migrant organizations that took part in the inquiry.

The release of the report should be planned well in advance. The goal should be to generate strong publicity of the inquiry's findings and build pressure for implementation of its recommendations.

While there will most likely be a public event or media conference to launch the report, the NHRI should also organize other activities – such as workshops, conferences, online discussions and social media forums – to raise awareness of the report with those stakeholders who can join the NHRI in advocating for implementation of the inquiry's recommendations.

CASE STUDY

In 2005 the National Human Rights Commission of Mongolia conducted a national inquiry into torture. It interviewed hundreds of officials and surveyed almost 1400 detainees. It undertook monitoring visits to places of detention and concluded that torture was widely practised.

The Commission actively promoted implementation of its report. As a result, the report was debated for over two days in the Mongolian Parliament, resulting in a parliamentary resolution on 15 June 2006 that made significant commitments to a process of reform of law and practice. On 30 October 2006, the Supreme Court of Mongolia issued a resolution on responding to torture and compensation for victims.

The report was widely debated and generated strong public pressure for an end to torture. It led to a broad programme, at all levels of government and in the community, aimed at ending the practice throughout Mongolia.



7. FOLLOW-UP AND EVALUATION

The release of the inquiry report marks an important stage in the life of the inquiry.

At this point, the focus of the NHRI will shift to promoting and building support for the inquiry's recommendations among those organizations and individuals responsible for their implementation.

It should develop an ongoing strategy to monitor and report on progress in implementing the recommendations, both where progress has been made and where implementation is lacking. This could be included in the annual report of the NHRI or in a standalone report, possibly issued on an annual basis to coincide with the release of the inquiry report.

It is highly likely that some stakeholders will resist implementing the inquiry's recommendations. Therefore the NHRI should seek to develop and maintain support for the inquiry's recommendations among NGOs, trade unions, migrant organizations and the broader community.

By working in partnership and advocating for the same outcomes, there is a greater opportunity to build and sustain the necessary political pressure to bring about positive, concrete changes.

In addition, the NHRI should put in place strategies to evaluate how effective the inquiry has been in meeting its objectives. Evaluation processes should be incorporated in the inquiry's strategy from the start and be undertaken while the inquiry is underway and at its conclusion.

The NHRI should also conduct a major evaluation some time after the inquiry's completion.

KEY POINTS: CHAPTER 9

- A public inquiry provides a comprehensive approach for analysing, investigating and developing recommendations that address the systemic human rights violations that migrant workers experience.
- Before deciding whether to conduct a public inquiry, NHRIs should consider the dimension, nature and complexity of the human rights issue, the capacity of the NHRI to undertake the inquiry and the likelihood of it generating positive changes to law, policy and practice.
- Collecting research and evidence is critical to the success of the inquiry. Public hearings involving a broad range of stakeholders, including migrant workers, are an essential part of this process. The inquiry should foreground the stories and experiences of migrant workers.
- Recommendations should respond directly to the evidence collected by the inquiry. They should meet the inquiry's terms of reference and promote compliance with national and international human rights standards.
- The NHRI should develop an ongoing strategy to monitor and report on progress in implementing the inquiry's recommendations. A comprehensive evaluation of the inquiry should also be conducted.



FURTHER READING

Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation; Asia Pacific Forum of National Human Rights Institutions and the Raoul Wallenberg Institute; 2012

National Human Rights Institutions in the Asia Pacific Region; Brian Burdekin assisted by Jason Naum; the Raoul Wallenberg Institute Human Rights Library; 2007

Going Public: Strategies for an Effective National Inquiry (DVD); Asia Pacific Forum of National Human Rights Institutions; 2008



Chapter 10:

Undertaking education, training and research

KEY QUESTIONS

- What information do migrant workers require before they leave their home country and on arrival in the destination country?
- How can NHRIs promote compliance with national and international human rights standards relating to migrant workers among employers, public officials and professional groups?
- What activities can help build public awareness of the human rights issues facing migrant workers and promote social inclusion?
- How can research guide and inform the work of NHRIs to promote and protect the rights of migrant workers?



BASIS FOR NHRI INVOLVEMENT

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:

- (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;
- (g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.



1. INTRODUCTION

Promoting understanding and awareness of human rights is a core function of NHRIs and a fundamental element of the Paris Principles. NHRIs have a responsibility to initiate programmes that engage the general public, as well as specific groups within the community.

Human rights education is a critical tool that NHRIs can use to prevent and respond to a number of human rights violations that migrant workers face.

An important first step is to ensure that migrant workers have the information they need to effectively safeguard their rights. This process starts in their home country, before their journey begins, by ensuring that individuals and families are able to make educated decisions about migration options and that they understand the risks associated with irregular migration to different countries.

NHRIs can also work in partnership with other stakeholders to develop information and outreach programmes for individuals who may be vulnerable to trafficking, especially women and girls.

Once in the destination country, NHRIs should provide migrant workers with clear and accurate information about their rights and responsibilities, including complaint mechanisms and avenues for support if their rights are breached.

NHRIs are also well placed to assist the State with its obligation to undertake human rights promotion and education, which is set out in a number of international treaties.³¹²

This can include developing education and training programmes for public officials who have direct engagement with migrant workers, including migrants in an irregular situation.

The aim of these programmes should be to support individual officials and the organizations in which they work to move “beyond knowledge into action”,³¹³ providing them with operational skills and strategies to comply with national and international human rights standards.

NHRIs should also engage with business and employers, including private recruitment agencies, to equip them with the information, advice and resources they require to ensure respect for the rights of migrant workers in practice.

In addition, NHRIs can “encourage States to ensure appropriate broad-based dialogue at the national level ... regarding the rights of migrants.”³¹⁴ This is particularly important because migrant workers and members of their families can face prejudice, discrimination and hostility in the countries where they live and work.

As the Seoul Statement notes:

*The non-recognition of cultural difference and plurality, and demands for assimilation, can result in significant human rights violations. Prejudice and ignorance often fuel intolerance and acts of hate toward migrants. While legislative and policy measures are important to counter-act such attitudes, education and awareness-building to change attitudes are vital to achieving inclusion and acceptance.*³¹⁵

By raising public awareness of the social, cultural and economic contributions that migrant workers make to the community, as well as the human rights violations they face, NHRIs can play an important role in helping shift community attitudes.

NHRIs can draw attention to the rights of migrant workers in their annual reports and other thematic reports and publications; by holding conferences, workshops and seminars that engage different stakeholders; and through public awareness campaigns. Engaging the media is crucial to the success of these efforts.

Research projects can provide NHRIs with a vital source of information on issues facing migrant workers and enhance their advisory, advocacy and awareness programmes.

Consistent with a human rights-based approach,³¹⁶ research projects and public education campaigns should be guided by input from migrant workers and accurately reflect their concerns and experiences.

312 For example, the International Covenant on Economic, Social and Cultural Rights (article 13), the Convention on the Rights of the Child (article 29), the Convention on the Elimination of All Forms of Discrimination against Women (article 10) and the International Convention on the Elimination of All Forms of Racial Discrimination (article 7).

313 *National Human Rights Institutions: History, Principles, Roles and Responsibilities*; Professional Training Series No. 4 (Rev. 1); Office of the United Nations High Commissioner for Human Rights (OHCHR); 2010; p. 57.

314 Zacatecas Declaration; International Workshop of National Institutions for the Promotion and Protection of Human Rights: Causes, Effects and Consequences of the Migratory Phenomenon and Human Rights Protection; Zacatecas, Mexico; 14–15 October 2004; para. 10.

315 Seoul Statement; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 17.

316 *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*; United Nations Development Group; 2003.



UN Photo by Jawad Jalali.

2. INFORMING AND EMPOWERING MIGRANT WORKERS

NHRIs in Asia are encouraged to take action in the following areas for the purpose of promoting and protecting the human rights of migrants:

Educating migrants on their rights at the time of pre-departure in the country of origin and at post-arrival in the country of destination.

Seoul Guidelines³¹⁷

While millions of people move across national borders each year to live and work, many migrants are unaware of the practical, legal, social and economic consequences involved in relocating to another country. This lack of awareness can put migrant workers and members of their families in positions of increased vulnerability and risk.

Reliable and accessible information is a critical tool for protecting migrant workers from abuse and exploitation and for preventing irregular migration and trafficking.

The information needs of migrants will vary, however, depending on where they are in migration process.

Some types of information will be more critical before a person has made the choice to migrate, allowing him or her to make an educated decision about the type of living and employment conditions that can be expected in a particular country.

³¹⁷ Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 26.

For example, those who are considering whether to migrate for work might require information on job opportunities in destination countries, the required skills or training, the recruitment process, the positive and negative experiences of other migrant workers and the risks associated with irregular migration.

NHRIs can work in partnership with government departments, business and industry peak bodies, private recruitment agencies and civil society organizations to develop broad-based public education campaigns that provide migrant workers with clear and accurate information.

This information can be presented in a range of formats and use a variety of communication channels, based on a strategic analysis of who the campaign is aiming to reach, the most effective ways to reach them and the key information to be conveyed.

Possible elements of an effective public education campaign can include talk-back discussions on popular radio programmes, publishing short videos to YouTube or other social media websites and making plain language brochures available in a variety of community-based locations.

Posters, billboard advertisements and public service announcements for radio and television could promote a free-call information service where people can ask questions and get advice. In addition, a popular television drama could be encouraged to incorporate discussion of the issues into their scripts. Street theatre is another effective way to communicate key messages and engage directly with different groups in the community.

The campaign should include clear and specific outcomes. These provide an objective basis against which to evaluate its success in reaching the target audiences and communicating the key information. It also provides a valuable source of data that can be used when developing subsequent campaigns.

NHRIs should also consider the need to develop targeted information and resources to reach individuals, particularly women and girls, who may be vulnerable to trafficking.

2.1. Pre-departure information programmes

Before they leave to take up employment in another country, migrant workers require current and reliable information about living and working in the destination country, including in relation to:

- passports and travel documents
- visa requirements and work permits
- medical clearances
- working conditions
- labour, immigration and criminal laws
- culture and customs
- contact details for organizations that can provide support when required.

While pre-departure orientation programmes for migrant workers may be mandated under the national laws of labour-sending countries, information and training is not always provided or sufficiently detailed to equip migrant workers for their experience of living and working in a foreign country.

NHRIs can work in partnership with other key stakeholders – including government agencies, trade unions, NGOs and labour recruitment agencies – to develop strategies that ensure migrant workers have access to the information they need before they depart.

Information should be easy-to-understand and provided in languages and formats that are accessible to migrant workers, including those with a disability. For example, to overcome barriers of literacy, information could be produced in a DVD format. A pocket card of key contact details, including consular support, could also be provided.

A significant number of women who migrate for work can be employed in settings that leave them vulnerable to discrimination, abuse and exploitation. Pre-departure orientation programmes should seek to include a gender focus that recognizes the particular circumstances of women migrant workers and provides them with targeted information and advice.

2.2. On-arrival information programmes

It is critical that NHRIs in destination countries develop – either by themselves or in partnership with government agencies, trade unions, NGOs or other groups – information programmes and resources for newly-arrived migrant workers.

While key information should be provided to migrant workers in their home countries prior to departure, on-arrival information programmes help to ensure that all arriving migrant workers have a common understanding of their rights and responsibilities.

The programme should provide or reinforce essential information around working conditions; the right to join trade unions; access to social, health and education services; local immigration and criminal laws and penalties; rights on arrest; avenues for lodging complaints of human rights violations and how complaints are resolved; and contact details for organizations that can provide support, advice and assistance.

Information can be presented during specific outreach programmes with migrant workers and also provided in handbooks, brochures and online. This information should be available in the languages of all migrant communities in the country and provided in formats that are accessible to them.

Migrant workers should also have ongoing access to advice and information, for instance through a free-call service operated by the NHRI or a partner organization.

In addition, NHRIs should consult with migrant workers who have been in the country for a period of time to seek their advice on the development and delivery of effective information resources and outreach programmes.

2.3. Introducing the NHRI and its role

It is important that NHRIs promote who they are and what they do to the community, especially those groups who are vulnerable to human rights violations. It is particularly important that NHRIs communicate this information to migrant workers, who often arrive in the country with little or no knowledge of those bodies or organizations that can help protect their rights.

Migrant workers may have concerns about approaching an organization that they perceive to be a government agency, especially if they are seeking to make a complaint. It is therefore important that the NHRI clearly communicate with migrant workers that it is an independent and impartial body, established by law with a legal mandate to promote and protect the rights of all people in the country, regardless of their migration status.

To ensure that they are accessible to migrant workers, NHRIs should provide key information in a range of languages and identify the most effective ways to communicate with culturally and linguistically diverse migrant communities.

NHRIs could also establish a free-call information service for people seeking information about their rights or to make a complaint, as well as access to translation services when they are required.

3. ENGAGING AND INFORMING BUSINESS AND EMPLOYERS

NHRIs hereby agree ... to consider the practical functions they can fulfil in promoting enhanced protection against corporate-related human rights abuse:

Providing guidance to business on how to integrate human rights into their everyday business to translate human rights principles and into a language that business can relate to, fostering corporate cultures respectful of human rights.

Edinburgh Declaration³¹⁸

Migrant workers can face serious cases of discrimination, harassment and human rights violations in connection with their employment.

These can include a lack of basic workplace rights and protections, irregular or unpaid wages, long hours of work, poor safety standards, sub-standard accommodation and no rest days or holidays. They can also experience threats and intimidation, confiscation of their passports, sexual assault and rape.

Employers, private recruitment agencies and sub-contractors have a legal responsibility to operate in accordance with national laws and standards and to ensure that the rights of migrant workers are respected in practice.

NHRIs can assist business and employers to comply with their responsibilities by providing information and advice, as well as promoting examples of good employer practice.

This could include providing industry-specific information on, among other things, recruitment practices; workplace health and safety requirements; wages, rest days, annual leave and overtime; workers' rights of association; preventing harassment and vilification, including sexual harassment; and termination of contracts.

NHRIs can also work with industry peak bodies, employer associations and individual employers to develop codes of conduct in relation to the rights of migrant workers, as well as model contracts for migrant workers which are industry-specific and take into account relevant national contract laws.³¹⁹

By developing respectful partnerships with business and employers, and engaging in regular dialogue with them, NHRIs can develop a better understanding of their perspectives and the different strategies that can be implemented to strengthen and improve the employment circumstances of migrant workers.

NHRIs should seek input and feedback from business and employers to determine whether the resources they develop are relevant and useful. This can include collecting examples of good practice developed by employers and their flow-on benefits, such as improved productivity, morale or profitability.

In addition, resources published by the NHRI that are supported or endorsed by an employer association are likely to have greater credibility and relevance to individual employers within the industry.

Employers should also be reminded about the consequences of failing to provide a safe workplace or to meet other legal responsibilities to their employees, including the right of migrant workers to lodge complaints with the NHRI or other competent bodies.

The NHRI should describe its procedure for investigating and resolving complaints, as well as the type of recommendations it can make if it finds that an employer has discriminated against or violated the rights of an employee.

318 Edinburgh Declaration; 10th International Conference of National Institutions for the Promotion and Protection of Human Rights; Edinburgh, Scotland; 8–10 October 2010; para. 13 (A) IV.

319 Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 36.

CASE STUDY

Between November 2008 and May 2010, the **New Zealand Human Rights Commission** carried out a national public outreach project to hear from employers, employees and job-seekers on “what constitutes good work and what makes for decent workplaces” in New Zealand.

More than 3,000 participants took part in the National Conversation about Work³²⁰, which, among other subjects, drew attention to issues faced by migrant workers in the country. The Commission has used this information to develop a series of initiatives that aim to improve the circumstances of migrant workers, including practical strategies for employers and other stakeholders.

In addition, the Commission has built on the findings from the National Conversation about Work – along with analysis of its complaint data, other Commission research and baseline employment data provided by Statistics New Zealand – to develop a set of benchmarks or indicators to measure equality and participation in the workforce.

The Commission’s *Tracking Equality at Work*³²¹ report outlines a set of 20 indicators of “equality at work” and details how employers, the Government and employees can use and implement them.

A number of strategies have been developed to engage business and employers and generate discussion of the new framework, including an online forum – “NEON”, the National Equal Opportunities Network³²² – established by the Commission and the Equal Employment Opportunities Trust.



4. PROFESSIONAL TRAINING FOR PUBLIC OFFICIALS

NHRIs should assist in developing guidelines and/or training for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of migrants, and in the inspection of immigration detention centres.

Santa Cruz Declaration³²³

Human rights violations can often occur because of a lack of knowledge or awareness of accepted human rights standards. They can be the result of intentional or unintentional acts or failures to act (“omissions”):

*In either case, human rights education and the inculcation of human rights values can promote change in behaviour without the need for punitive sanctions. Successful human rights promotion can therefore help prevent human rights violations from occurring in the first place.*³²⁴

Developing professional training programmes for public officials is a critical role that NHRIs can undertake to assist the State meet its human rights responsibilities towards migrant workers and members of their families.

320 *What Next? National Conversation About Work*; New Zealand Human Rights Commission; 2010.

321 *Tracking Equality at Work*; New Zealand Human Rights Commission; 2011.

322 See: www.neon.org.nz.

323 Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 39.

324 *National Human Rights Institutions: History, Principles, Roles and Responsibilities*; Professional Training Series No. 4 (Rev. 1); OHCHR; 2010; p. 57.

This could include integrating general information about human rights standards – and, specifically, those relevant to the rights of migrant workers – into professional training programmes for:

- immigration officials
- labour inspectors or regulators
- law enforcement officials, such as police and border guards
- prison and immigration detention centre officials.

These training programmes should have the goal of building greater understanding of national and international human rights standards and developing enhanced operational skills and strategies.

They are also practical ways in which NHRIs can advance the objectives of the World Programme for Human Rights Education.³²⁵

NHRIs can contribute to the development and delivery of professional training programmes by:

- reviewing and revising existing training materials
- developing new training tools or information resources
- delivering training programs directly to public officials
- acting as key resource persons in training delivered by partner organizations.

To ensure that training programmes are relevant and effective, it is imperative that NHRIs develop a collaborative approach to training with the relevant authorities.

NHRIs should start by seeking the agreement and support of the relevant institution, as endorsement by the organization's leadership is pivotal in encouraging institutional and operational change. If there is little or no cooperation, "ongoing negotiations may be necessary, with the organization and with Government leaders, to build support".³²⁶

NHRIs should also be aware that some public officials may perceive training from NHRI representatives as an "outside interference" in how they do their job, delivered by people with little direct understanding of the daily operational challenges they face.

Where training programmes are likely to meet with a high degree of resistance, it may be preferable for NHRIs to develop the course content and resources and have the programme delivered by trainers with direct expertise in the field.

Alternatively, NHRIs can establish a 'training of trainers' programme to equip relevant public officials with the information, skills, strategies and methodology to train others within their organizations to integrate human rights principles in their day-to-day operations. This approach may also be a more cost effective training model for NHRIs as, in theory, it allows them to reach more individuals across a broader range of institutions.

In developing and delivering effective training and education programmes, NHRIs should closely consider the following principles.³²⁷

- **Needs assessment:** The content, structure and methodology of the training programme should be tailored to the meet the identified needs of the organization.

325 The World Programme for Human Rights Education aims to advance the implementation of human rights education programmes in all sectors. It was established by the General Assembly's Resolution 59/113 (10 December 2004) and is structured in consecutive phases, in order to further focus national human rights education efforts on specific sectors/issues. The first phase (2005–2009) focused on human rights education in the primary and secondary school systems. The second phase (2010–2014) focuses on human rights education for higher education and human rights training programmes for teachers and educators, civil servants, law enforcement officials and military personnel. See: www2.ohchr.org/english/issues/education/training/programme.htm.

326 *National Human Rights Institutions: History, Principles, Roles and Responsibilities*; Professional Training Series No. 4 (Rev. 1); OHCHR; 2010; p. 64

327 *Preventing Torture: An Operational Guide for National Human Rights Institutions*; Asia Pacific Forum of National Human Rights Institutions, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights; 2010; p. 59.

- **Selection of participants:** Training must be available for all officials with responsibilities to protect the rights of migrant workers.
- **Objectives:** Training should have a practical focus to assist officials in their daily work and help them respond to the operational challenges they face.
- **Evaluation:** Monitoring the impact of training should be integrated into all stages of the training process.

Effective evaluation is crucial to the continuous improvement of the professional training programmes developed and delivered by NHRIs.

Post-course evaluations – which can include surveys, questionnaires and interviews with participants – provide NHRIs with a clear understanding of what participants have learned from the course.

In addition, NHRIs can also consider undertaking a broader review of the operation of the organization which has received training to identify whether there have been tangible changes in operational practice and institutional culture.

CASE STUDY

At the invitation of the Immigration Academy of Malaysia, the **Human Rights Commission of Malaysia** has conducted several training sessions for immigration officers, who play a significant role in the regulation of migrant workers in Malaysia and especially in the operation of immigration detention centres. These training sessions focus on human rights standards in general and also on the rights of detainees.



APF Photo by Michael Power.

5. ENGAGING PROFESSIONAL GROUPS AND CIVIL SOCIETY

In addition to working with public officials, NHRIs can share their knowledge and expertise with a range of professional groups and civil society organizations to build their capacity to recognize and respond to the human rights challenges that migrant workers face.

For example, NHRIs can develop information resources, provide training or hold workshops, seminars and conferences for representatives of trade unions, NGOs and professional associations of teachers, health professionals and lawyers, among others.

The broad purpose should be to share information, research or analysis on human rights issues related to migrant workers that can assist these groups to work more effectively with and on behalf of migrant communities.

Depending on the audience, these programmes could address topics such as international human rights and labour standards; national or regional case law relating to migrant workers; new or proposed reforms to relevant national laws and policies; trends in complaint data received by the NHRI; findings from research undertaken by the NHRI or a partner organization; or recommendations made to the State by the UN human rights treaty bodies, the special procedures or through the Universal Periodic Review.

NHRIs can also work with the judiciary to ensure they have the necessary knowledge to apply human rights principles in cases that come before them. If their mandate allows, NHRIs can perform this role by intervening in selected cases or acting as *amicus curiae* to draw attention to pertinent human rights issues that are not likely to be raised by other parties to the proceedings.

This can be a particularly useful approach where a case would clarify a disputed interpretation of the law; where it has significant ramifications beyond the parties to the proceedings; or where it may affect the human rights of a significant number of people.

Alternatively, NHRIs may consider organizing study tours or convening human rights seminars for judges on a specific topic or aspect of the law. These sessions are likely to be more effective and have a greater degree of engagement if they are led by a respected member of judiciary, with support and organization provided by the NHRI.

In addition, NHRIs can prepare articles on relevant topics for publication in professional legal journals.

The media plays a key role in educating the public about human rights standards and raising awareness about human rights issues and violations. However, inaccurate reporting can reinforce negative community attitudes and stereotypes about minority groups, including migrants and migrant workers.

NHRIs can work with journalists and media outlets to build their capacity to report accurately on human rights issues and to report on issues from a human rights perspective. As with all relationships established by the NHRI, this interaction should be positive, constructive and respect the professional independence of journalists.

NHRIs can provide the media with information, reports, research and personal stories that can counter stereotypes of migrants and migrant workers and highlight the positive contribution they make to the community. They can also draw attention to the human rights violations that migrant workers face and the factors that contribute to those violations.³²⁸

NHRIs should have members and staff who are experienced and confident in working with journalists, such as giving interviews and responding to requests for information. Not only does this help ensure accurate reporting of the issue, it can also help build positive community awareness about the role of the NHRI.

³²⁸ Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 38.

6. BUILDING COMMUNITY AWARENESS AND UNDERSTANDING

NHRIs play a vital role in promoting a society dedicated to diversity as a positive potential for ensuring a cohesive and peaceful society, for innovation and growth, and building on the fundamental principles of equality and mutual respect.

Santa Cruz Declaration³²⁹

Migrant workers and their families can often confront attitudes of prejudice and xenophobia in their host country.

As the UN High Commissioner for Human Rights states:

*The protection of migrants is an urgent and growing human rights challenge. Governments have obligations to ensure that xenophobic violence, racism and related intolerance against migrants and their communities have no place in their societies.*³³⁰

Negative stereotypes and community attitudes about migrant workers and members of their families – for example, that they take jobs off nationals, create unemployment or are a drain on government resources – can also be closely linked with discriminatory laws and practices, which limit their access to basic public services.

These negative stereotypes can then be reinforced by inaccurate media reporting and commentary.

While legislative and policy reform can put in place practical steps to safeguard the rights of migrant workers, education and awareness-raising initiatives are vital strategies that can promote respect and social inclusion.

NHRIs can play a pivotal role in countering negative stereotypes about migrant workers, promoting the contribution they make to the country and its economy and drawing attention to the discrimination and human rights violations they face.

While these messages should be incorporated into their regular human rights promotion work – for example, through interviews with the media and public speaking engagements – NHRIs can also develop broad-based public education campaigns on a specific issue or theme relevant to migrant workers, such as the right to decent work or freedom from violence.

All public education campaigns should be built around a simple, powerful and positive message. While the campaign will set out or frame a “problem”, it must also propose a vision for the community and describe practical actions that individuals can take to help make this vision a reality.

An effective campaign will be based on a detailed communication strategy, which should specify the campaign’s objectives; the target audience; the main methods of communication; the campaign’s key message; and the actions that people can take to demonstrate their support. The NHRI should also identify the financial and human resources that will be required and the timeframe for the campaign.

Consistent with a human rights-based approach, the public education campaign should be guided by consultations with migrant workers and accurately reflect their concerns and experiences.

Community education campaigns are most effective when there are a number of partner organizations involved. This can increase the size and scope of the campaign, along with the number of people it can reach.

To engage the community on the subject, it may be valuable to invite key public figures, opinion leaders, employers and others to support and lead the campaign. Presenting the personal stories of migrant workers can also be a powerful tool in challenging stereotypes and building understanding.

329 Ibid; para. 16.

330 “Migration and Human Rights”; OHCHR; see www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx.

There are a number of strategies that NHRIs can use to promote raise awareness of the issues and generate community discussion. Some common initiatives include:

- holding a media conference to release new research or a report on the rights of migrant workers
- preparing public service announcements for radio and television that address common stereotypes or misconceptions
- hosting sporting or cultural events that bring together different community groups
- using social media – such as Facebook, YouTube and Twitter – to share the stories or experiences of migrant workers
- distributing posters, brochures and plain language resources
- holding a photographic or art exhibition
- hosting community forums.

Once the campaign has been completed, the NHRI should undertake a formal evaluation to assess whether it met its objectives. This could include collecting and analysing quantitative data (for example, the amount of media coverage generated by the campaign), as well as qualitative data (for example, the tone and accuracy of media coverage).

This evaluation will provide valuable baseline data that can inform future communication programmes and campaigns.

7. UNDERTAKING RESEARCH ON THE RIGHTS OF MIGRANT WORKERS

NHRIs should conduct and encourage research on the real situation of Indigenous and minority migrants and other migrants. This may include the development of disaggregated data, by sex and ethnic groups, and accurate statistics and policy suggestions to reflect diversity and enable the participation of minority groups, internally displaced persons and Indigenous communities in policy and consultative processes on issues affecting them to ensure that their needs are better met.

Santa Cruz Declaration³³¹

As the UN Committee on Migrant Workers has noted, “reliable, quality information is indispensable to understand the situation of migrant workers in the State party, to assess the implementation of the Convention and to develop adequate policies and programmes”.³³²

In partnership with the Government, NGOs and civil society partners, NHRIs can contribute towards developing an accurate picture of the demographics of migrant workers in the country, as well as the spectrum of human rights issues that they face.

For example, NHRIs can analyse their complaints or inquiry data to identify patterns of human rights violations experienced by migrant workers and whether certain groups of migrant workers may be especially vulnerable. Information collected through other regular monitoring activities – such as visits to places of detention – can also be reviewed to identify systemic issues.

As part of their mandate, NHRIs can undertake research projects to examine human rights issues related to a particular theme³³³ or in relation to specific communities, such as migrant workers and members of their families.

331 Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 44.

332 Concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: The Philippines; CMW/C/PHL/CO/1; para. 20.

333 For example, the Edinburgh Declaration encourages NHRIs to conduct research “to assess the impacts of business operations on the realization human rights of communities”: 10th International Conference of National Institutions for the Promotion and Protection of Human Rights; Edinburgh, Scotland; 8–10 October 2010; para. 13 (A) V.

CASE STUDY

In 2002, following advocacy by the **National Human Rights Commission of India**, the Government signed the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention Against Transnational Organized Crime.

The Commission used the definition of trafficking included in the Protocol to guide a major action research project into the issue, which was undertaken in collaboration with UNIFEM and the Institute of Social Sciences, New Delhi, between 2002 and 2004.

A primary goal of the research was to examine the trends and dimensions of trafficking in women and children in India from a human rights paradigm. It looked at both the “push” and “pull” factors that contribute to the prevalence of trafficking, including the process of migration. In addition, interviews were conducted with over 4,000 people.

The study “laid bare the multi-dimensional nature of the problem, loopholes in the law, gaps in law enforcement, involvement of organized mafia and the agonies of the victims. It also revealed that India serves as a source, transit and destination where thousands of women and children are exploited day in and day out.”³³⁴

For example, the report found that a large number of children are trafficked not only for the sex “trade” but also for other forms of exploitation, such as domestic and industrial labour, begging, illegal adoptions, trading in human organs and entertainment purposes like circus work and camel racing.



NHRIs may undertake research on their own if they have the necessary internal resources and capacity. However, they can also conduct research in partnership with academic institutions or other organizations with relevant expertise, including international organizations working in the area of migration.

An effective research project should aim to contribute new knowledge to a current “information gap” and identify potential areas for legislative, policy or other reform. It can also provide important baseline data against which progress can be measured.

NHRIs should adopt a human rights-based approach when developing the goals and methodology for their research. They should consult directly with migrant workers to seek their input into the design and implementation of the project and also ensure that migrant workers are active participants at each stage of the research process.

In addition, NHRIs should consult with all other stakeholders who will be involved in the project, such as industry bodies, individual employers, government departments, trade unions and NGOs. A research project that has specific, achievable goals, a clear methodology and which is seen to “add value” is more likely to enjoy a high degree of engagement and participation from all parties.

The strategies that NHRIs use to collect the primary data will vary depending on the nature of the research project and the different stakeholders they are engaging. However, common methods for collecting data include:

- surveys or questionnaires
- in-depth interviews with individuals
- community meetings
- small group discussions.

334 A Report on Trafficking in Women and Children in India 2002–2003; National Human Rights Commission, UNIFEM and the Institute of Social Sciences; 2004; p. ii.

In addition, NHRIs can use their institution's website or social media sites to call for submissions and gather additional information, comments or personal experiences.

They can also supplement the information they collect by drawing on relevant sources of secondary data, such as national statistics, data held by government departments or law enforcement agencies and reports of NGOs, trade unions or inter-governmental bodies.

CASE STUDY

A study by the National Human Rights Committee of Qatar into the conditions of unskilled labourers in the construction sector drew on interviews with employers and migrant workers, as well as a survey tool completed by over 1,110 workers.

One-third of the workers surveyed said that they never received their wages on time. The study also found that the living quarters, toilets and other amenities provided for migrant workers did not comply with standard regulations on health and hygiene.

A central part of the research was to ask migrant workers and sponsors for their views on the current sponsorship ("kafala") system of recruitment in Qatar.

Consultations with migrant workers also revealed other areas for policy review, such as the fact that they were unlikely to initiate a complaint to the authorities or the National Human Rights Committee about their workplace circumstances.



During the course of their research and monitoring work, NHRIs may identify areas where government departments or other public or private sector bodies could improve their data collection systems.

For example, the Human Rights Commission of Malaysia (SUHAKAM) has highlighted the importance of government agencies developing efficient processes for collecting, disaggregating and sharing data on the status of migrant workers in the country.³³⁵

SUHAKAM noted that accurate quantitative and qualitative data is crucial for developing effective policies and mechanisms that address the human rights violations experienced by migrant workers, including through bilateral arrangements with other States.³³⁶

Given the transnational nature of the human rights violations that migrant workers face, NHRIs can also consider undertaking joint research projects to identify and understand the nature and causes of the violations that occur within their respective countries, either as labour-sending or a labour-receiving countries.

Joint research projects can provide comprehensive and comparative data on transnational and regional labour migration issues. It can also form the basis for common policy and advocacy positions that NHRIs can advocate with their Governments and in regional and international fora.

335 See: *SUHAKAM's Findings on Migrant Workers*; Human Rights Commission of Malaysia; 2009.

336 According to SUHAKAM, "some embassies are not aware of the numbers of their citizen workers in Malaysia, thus, it is recommended that Government-to-Government mechanisms be set up since the key to achieving a mutual understanding is that both sending and receiving countries acknowledge the ongoing problem that needs to be solved." See: *SUHAKAM's Findings on Migrant Workers* (2009), p. 8.

CASE STUDY

In 2004, the **NHRIs of Indonesia, Malaysia, the Philippines and Thailand**, founding members of the South East Asia National Human Rights Institutions Forum (SEANF), began a study on the situation of migrant workers in their respective countries.

The research, which was led by the Human Rights Commission of Malaysia, sought to identify the nature of human rights violations experienced by migrant workers, as well as the root causes of these problems. A key objective was to develop measures to mitigate the problems that were identified.

The latest iteration of the study was published in 2010 and its findings have been used to develop a Position Paper for the SEANF on the subject, especially with regards to the implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.

The four NHRIs have also used the research findings to engage with government and civil society stakeholders in their respective countries, as well as to engage jointly with regional bodies, such as the ASEAN Intergovernmental Commission on Human Rights and the ASEAN Committee on Migrant Workers.



KEY POINTS: CHAPTER 10

- Migrant workers require up-to-date and reliable information about living and working in the destination country, before they leave and on-arrival. Information should be easy-to-understand, provided in different languages and available in accessible formats.
- NHRIs can contribute to professional training for public officials by reviewing and revising existing training materials; developing new training tools or resources; and directly delivering training programmes. These programmes should be developed in collaboration with the relevant authorities.
- NHRIs can also provide training and advice to business and employers, professional groups and civil society organizations to build their capacity to recognize and respond to the human rights challenges that migrant workers face.
- Public education campaigns undertaken by NHRIs, often in partnership with other stakeholders, can help countering prejudice and negative community attitudes to migrant workers.
- Accurate quantitative and qualitative research data is essential for NHRIs to develop effective policies and recommendations that address the human rights violations experienced by migrant workers. NHRIs should adopt a human rights-based approach when developing and undertaking their research.



FURTHER READING

A 12-Point Guide for Good Practice in the Training and Education for Human Rights of Government Officials; Amnesty International; 1998

Evaluating Human Rights Training Activities: A handbook for human rights educators, Professional Training Series No. 18, OHCHR, in cooperation with Equitas – International Centre for Human Rights Education; 2011

Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police; Professional Training Series No. 5; OHCHR; 1997

Human Rights and Law Enforcement: A Trainer's Guide on Human Rights for the Police; Professional Training Series No. 5/Add. 2; OHCHR; 2002

Human Rights in the Administration of Justice: A Manual of Human Rights for Judges, Prosecutors and Lawyers; Professional Training Series No. 9; OHCHR, in cooperation with the International Bar Association; 2003

Human Rights Training: A Manual on Human Rights Training Methodology; Professional Training Series No. 6; OHCHR; 2000

National Human Rights Institutions: History, Principles, Roles and Responsibilities; Professional Training Series No. 4 (Rev. 1); Office of the United Nations High Commissioner for Human Rights; 2010

The Corporate Responsibility to Respect Human Rights: An Interpretive Guide; OHCHR; 2011

Training of Trainers: Designing and Delivering Effective Human Rights Education; Equitas – International Centre for Human Rights Education; 2007

Training Package for Prison Officials. Human Rights and Prisons: A Manual on Human Rights Training for Prison Officials; Professional Training Series No. 11; OHCHR; 2005

World Migration Report 2011: Communicating Effectively About Migration; International Organization for Migration; 2011



Chapter 11:

Engaging with international and regional mechanisms

KEY QUESTIONS

- How can NHRIs engage strategically with the UN treaty bodies to highlight issues of concern to migrant workers?
- What opportunities exist for NHRIs to interact with the UN Human Rights Council, in particular the Universal Periodic Review and the special procedures?
- What individual complaint mechanisms exist at the international and the regional level?
- What other international and regional bodies and mechanisms can NHRIs engage with to promote and protect the rights of migrant workers?



BASIS FOR NHRI INVOLVEMENT

Paris Principles

Competence and responsibilities

3. A national institution shall, inter alia, have the following responsibilities:

- (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence.
- (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights system.



1. INTRODUCTION

Migration is a global phenomenon which is shaped by a complex set of economic, social and political factors.

While the rights of migrant workers and members of their families are ultimately realized at the national level in countries of origin, transit and destination, it is essential that they are grounded in a normative framework that articulates and protects the full range of their civil, political, economic, social and cultural rights.

As the Seoul Statement notes:

*International human rights law, particularly international human rights treaties, declarations, and standards set by treaty bodies and the work of special procedures, must be the fundamental starting point for addressing the challenges of the future, including the challenge of securing the protection of dignity and justice for all in the context of migration and its social and cultural impacts.*³³⁷

NHRIs can serve as a critical link between migrant communities, civil society, the State and the international human rights system.

They can use the mechanisms of the Human Rights Council, including the Universal Periodic Review process and the special procedures, to draw attention to human rights violations experienced by migrant workers within their respective countries and to identify practical recommendations that can be made to their State.



UN Photo by Paulo Filgueiras.

³³⁷ Seoul Statement; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 15.

NHRIs can also engage directly with the UN human rights treaty bodies through the treaty reporting cycle, providing credible and independent information about the status of migrant workers in their country to assist the treaty body in its review of the State and when making its concluding observations and recommendations.

In addition, NHRIs can seek to enhance their cooperation and engagement with international organizations and other bodies that focus on the rights of migrant workers, such as the International Labour Organization and the Global Forum on Migration and Development.

The global body representing NHRIs – the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights – also aims to support the effectiveness of individual institutions by sharing experiences and examples of good practice, especially in relation to addressing human rights violations that occur in connection to business activity.

In addition, there are opportunities for NHRIs to engage with regional mechanisms and to build practical partnerships with other NHRIs and civil society groups to monitor and advocate for the rights of migrant workers and members of their families.

ENGAGING WITH THE INTERNATIONAL HUMAN RIGHTS SYSTEM

2. UN HUMAN RIGHTS TREATY BODIES

Each of the nine core UN human rights treaties has its own treaty body that promotes and monitors the performance of treaty obligations by States parties.³³⁸ In addition, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has its own treaty committee – the Subcommittee on the Prevention of Torture – that carries out the responsibilities given to it in the Optional Protocol.

In all cases but one, the treaty itself establishes the treaty monitoring body. The exception is the Committee on Economic, Social and Cultural Rights, which was established by a decision of the United Nations Economic, Social and Cultural Council.³³⁹

The functions of the individual treaty bodies vary but, in general, they:

- receive periodic reports from States parties and examine the States parties on the basis of those reports
- issue guidance to States parties on the interpretation and implementation of the treaty
- receive and give advisory opinions on individual complaints of violation of the treaty, where the State party has accepted the jurisdiction of the committee
- hold general discussion days on themes arising under the treaty.

The Committee on Migrant Workers is the most authoritative treaty body for providing practical guidance on actions that States can take to respect, protect and fulfil the human rights of migrant workers and members of their families

Even if their State is not a party to the Convention – it is one of the two least ratified core human rights treaties – NHRIs can still draw on the recommendations and general comments of the Committee to identify areas for legislative and policy reform to advance the rights of migrant workers in their country.

338 See the table on page 27.

339 The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the International Covenant on Economic, Social and Cultural Rights.

2.1. Role of NHRIs

NHRIs can be of great assistance to the treaty bodies in the performance of their functions. For example, they can provide treaty bodies with independent and credible information on issues regarding migrant workers. They can monitor their State's compliance with the recommendations of the treaty bodies and they can advocate that their Government implement its international obligations.³⁴⁰

NHRIs can also raise awareness of individual complaint procedures and support their use by victims of human rights violations, especially in cases that address important questions of international law and help build jurisprudence.

Each treaty body has its own rules and approach. The status granted to NHRIs and the nature and scope of their participation in the work of the treaty bodies varies between each.³⁴¹

Three committees have issued general comments on NHRIs: the Committee on the Rights of the Child,³⁴² the Committee on Economic, Social and Cultural Rights³⁴³ and the Committee on the Elimination of Racial Discrimination.³⁴⁴ The Committee on the Elimination of Racial Discrimination³⁴⁵ and the Committee against Torture³⁴⁶ have also incorporated NHRIs into their working methods and rules of procedure.

Functions of the treaty body	Role of the NHRI
Examine the performance of States parties	<ul style="list-style-type: none"> • Contribute to the development of the State report • Contribute to the list of issues • Submit parallel reports • Participate in the session • Promote the concluding observations and the recommendations
Interpret the treaty	<ul style="list-style-type: none"> • Propose general comment or general recommendation • Make submissions on draft texts
Individual complaints	<ul style="list-style-type: none"> • Provide assistance to complainant (depending on NHRI mandate)
Inquiries	<ul style="list-style-type: none"> • Submit information
Early warning or urgent action	<ul style="list-style-type: none"> • Submit information
Follow-up	<ul style="list-style-type: none"> • Monitoring • Submit information

340 Marrakech Statement on Strengthening the Relationship Between NHRIs and the Human Rights Treaty Body System; Marrakech, Morocco; 2010; paras. 5 and 17.

341 Information Note: National Human Rights Institutions (NHRIs) Interaction with the UN Treaty Body System; OHCHR; 2011; p. 5; see: <http://nhri.ohchr.org/EN/IHRS/TreatyBodies/Pages/default.aspx>.

342 General Comment No. 2; Committee on the Rights of the Child; 2002.

343 General Comment No. 10; Committee on Economic, Social and Cultural Rights; 1998.

344 General Comment No. 17; Committee on the Elimination of Racial Discrimination; 1993.

345 See the Working Methods – www2.ohchr.org/english/bodies/cerd/workingmethods.htm#B – and the Rules of Procedure of the Committee on the Elimination of Racial Discrimination; CERD/C/35/Rev.3; Rule 81.

346 Rules of Procedure; Committee against Torture; CAT/C/3/Rev.5; Rules 63 and 73.

3. NHRIs AND THE TREATY BODY REPORTING PROCEDURE

NHRIs declare they will:

Take a more active role in the United Nations treaty body reporting process and request the respective treaty bodies to take into account issues relating to migrants in considering States parties' reports and to engage directly with national institutions on this subject

Zacatecas Declaration³⁴⁷

The most important function of the treaty bodies is to monitor the compliance of States parties with their obligations under the respective human rights treaties. Each treaty establishes a reporting procedure which requires States parties to regularly present a report on their compliance with, and implementation of, their treaty obligations.³⁴⁸

Some treaty bodies have pre-session meetings during which they adopt a list of questions that the State will be required to answer. The report is then examined during a public session of the treaty body, involving a delegation of the State party, which considers the information provided by the State party and information received from other sources, including NHRIs and NGOs.

Based on this process, treaty bodies adopt concluding observations, which refer to the positive aspects of the State's implementation and areas where they recommend the State to take further action.



APF Photo by Benjamin Lee.

³⁴⁷ Zacatecas Declaration; International Workshop of National Institutions for the Promotion and Protection of Human Rights: Causes, Effects and Consequences of the Migratory Phenomenon and Human Rights Protection; Zacatecas, Mexico; 14–15 October 2004; para. 6.

³⁴⁸ The OHCHR has been working towards harmonized reporting guidelines for all committees: the Reporting Guidelines for All Committees (HRI/MC/2004/3), the revised version of the guidelines (HRI/MC/2005/3) and further information about the reform process are available at: www2.ohchr.org/english/bodies/treaty/CCD.htm.

The role of NHRIs in the reporting procedure will differ from one treaty body to another. However, as a minimum, NHRIs can:

- contribute to the preparation of the State report
- submit their own independent report on the State's compliance with, and implementation of, the treaty, including a specific focus on the rights of migrant workers
- attend the session when the State reports to the treaty body.

3.1. Preparation and submission of the State report

The preparation of the State report is the responsibility of the Government. However, NHRIs can and should “contribute” to the State report “with due respect for their independence”.³⁴⁹

Increasingly treaty bodies expect that NHRIs will be consulted in the preparation of reports by States parties. However, NHRIs should refrain from preparing a report on behalf of the State and contribute in an advisory capacity only.

Where required, NHRIs can also discuss the reporting process with their Government and help ensure that the State's report is submitted on time.

After receiving the State report, the treaty body may set the date for its dialogue with the State and a timetable for other preliminary steps of the reporting process, including the deadline for the submission of other information and preparing the list of issues and questions.

The NHRI should be aware of this timetable so that it can participate effectively at each step. The Geneva Representative of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) can assist NHRIs in sourcing this information and can facilitate their participation in the reporting process.³⁵⁰

3.2. Preparation and submission of parallel reports

Treaty bodies rely on information provided by other sources in order to develop a fuller picture of the State's compliance with its treaty obligations and to prepare for the dialogue with the State.

UN agencies and NGOs can provide useful information. As independent national bodies, NHRIs can provide reliable, factual information and credible views. Treaty bodies encourage NHRIs to contribute their information and analysis, consistent with their responsibility under the Paris Principles to “cooperate with the United Nations and any other organization in the United Nations system”.³⁵¹

Usually the NHRI will provide its information after the State report has been submitted, which allows it to respond to the matters raised in the State report. The information presented by the NHRI in its “parallel report” enables the treaty body to make a direct comparison between what the State says and what the NHRI says.

The report should be balanced and consider both positive and negative developments. If the Government has taken constructive steps to respect, protect and fulfil the rights of migrant workers and members of their families, these should be acknowledged.

If the NHRI does not have the capacity to prepare a comprehensive parallel report, it should as a minimum address the issues it sees as being the most important or relevant to its own work.

349 Principles relating to the the Status of National Institutions (Paris Principles); para. 3(d).

350 Contact details for the ICC Geneva Representative are available at: <http://nhri.ohchr.org/EN/Contact/Pages/default.aspx>.

351 Paris Principles; para. 3(e).

Parallel reports can also suggest questions and issues that the treaty body can raise in discussion with the State, as well as propose recommendations that the treaty body could consider making to the State in its concluding observations.

CASE STUDY

In its parallel report to the Committee on the Elimination of Racial Discrimination in 2011, the **Human Rights Commission of the Maldives** drew attention to the experiences of the growing migrant worker population in the country, which numbers around a third of the total population of the Maldives.

The Commission noted that all or most migrant workers were forced to live and work under harsh conditions. It also found that there was a clear pattern of differential treatment with respect to migrants workers held in State-managed places of detention.

In addition, the report said that “[h]ostility and reported cases of ill-treatment faced by migrant workers are increasing” and that the “negative attitudes faced, at times, by migrant workers from locals are a noticeable concern”.³⁵²

The report proposed a number of recommendations, including developing specific laws to counter racism and discrimination; the need to conduct research and collect data; bolstering training for public officials; revising existing complaint mechanisms; and delivering community education.



3.3. Other pre-session contributions by NHRIs

Depending on the treaty body, NHRIs will have other opportunities to contribute to the reporting procedure before the treaty body holds its dialogue with the State.

These can include:

- contributing to the preparation of the list of issues and questions sent to the State before the dialogue
- meeting informally with the treaty body prior to the dialogue with the State to provide additional information.

The website of each treaty body provides specific information about its working methods and the participation opportunities for NHRIs and NGOs in the reporting procedure.

³⁵² Shadow Report under ICERD in Response to the Maldives Government's Report under the Convention; Human Rights Commission of the Maldives; July 2011; p. 4.

CASE STUDY

In 2009, the **Commission on Human Rights of the Philippines** participated in the treaty reporting process of the 10th Session of the Committee on Migrant Workers, developing its contributions in partnership with the Center for Migrant Advocacy. Ultimately, both the Commission and the partner NGO provided separate reports to the Committee. The Commission submitted a targeted response to the list of issues³⁵³ developed after the initial consideration of the State report.

In its submission, the Commission highlighted its concerns about the inadequacy of existing protections for Filipino migrant workers and their families in relevant domestic law, overseas systems and international bilateral and multilateral agreements signed by the Philippines. The Commission's report elaborated on these concerns with regards to two changes in State policy topical at that time. In particular, it drew attention to a Presidential directive to the Philippines Overseas Employment Agency to reorient its activities away from regulation and towards the “aggressive” pursuit of market-based approaches to increase Filipino labour migration. Secondly, the Commission pointed to the State's “Total Travel Ban to Nigeria” as it applied to migrant workers' rights “to work and reunite with their families”, underscoring that “weak coordination among government agencies dealing with Filipino migrant workers” had had a negative impact on rights protection.



The Commission called on the Committee to make reference in its concluding observations to the Government's responsibility to ensure that such a travel ban only be imposed on the basis of “reasonable and objective criteria”. Moreover, it called for “the possibility of identifying the specific role of and engagement with NHRIs, as an independent and vital partner in the protection and promotion of human rights, in the treaty reporting and implementation process of CMW”.

On a related issue, the Commission also advocated for the Committee to make a recommendation to the State to amend the draft Charter of the Commission – at that time being considered by the Congress of the Philippines, the national legislature – to specifically elaborate the Commission's role with respect to migrant workers (pursuant to its mandate for the protection of Filipinos residing abroad).

3.4. Interactive dialogue with the State

A key element of the monitoring process is the interactive dialogue that the treaty body holds with the State party. The dialogue seeks to enable the treaty body to better understand the country situation and the challenges the State may face in fully implementing its treaty obligations.

This exchange, based on the State's report and information provided by the NHRI and other sources, also assists the treaty body to arrive at conclusions about the State's performance and to develop recommendations for the State.

The interactive dialogue is a public process that NHRI and NGO representatives may attend. Some treaty bodies – such as the Committee on Migrant Workers, the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights – allow NHRIs to make a statement during the official examination of their State's report, if the State delegation has no objections.

353 Response to the List of Issues on CMW; Commission on Human Rights of the Philippines; 2009.

There are also informal opportunities available to NHRIs who attend the interactive dialogue. For example, they can have discussions with members of the treaty body during scheduled breaks in the session and at other times. They can also organize side-events during lunch breaks and at other times to meet with and brief treaty body members.

3.5. Implementation and follow-up

Following the interactive dialogue with the State – and after considering the State report and information provided by the NHRI and other sources – the treaty body will prepare and release its concluding observations and recommendations.

They will generally address many of the issues that the NHRI raised with the treaty body. They also provide an indication of human rights priorities for the attention of the State and the NHRI.

NHRIs have a key role to play in the follow-up to the reporting process. For example, they can translate, publish and disseminate the concluding observations and recommendations adopted by the treaty body to:

- Government ministers and senior officials
- parliamentarians
- the media
- human rights NGOs
- relevant community organizations
- relevant academics and other experts.

The NHRI should also promote and monitor implementation of the treaty body's recommendations. For example, it can build community support for their implementation and advocate with the Government and the Parliament. It can also monitor implementation through its ordinary programme of work and report to the treaty body on the results of its monitoring.

4. TREATY BODY COMPLAINTS MECHANISMS

There are currently five Committees/treaty bodies³⁵⁴ that can receive and consider individual complaints. While the Convention on Migrant Workers provides for individual communications to be considered by the Committee on Migrant Workers, this mechanism will only come into effect when ten States parties have made the necessary declaration under article 77 of the Convention.³⁵⁵

Individual complaints may only be brought against States that have recognized the competence of the treaty body to consider complaints from individuals. Depending on the treaty concerned, this will be through becoming a party to an Optional Protocol or making a declaration under the relevant article of the treaty.

The Committee against Torture and the Committee on the Elimination of Discrimination Against Women can initiate their own inquiries “if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a State party.”³⁵⁶

In addition, several human rights treaties³⁵⁷ contain provisions that “allow for State parties to complain to the relevant treaty body about alleged violations of the treaty by another State party.”³⁵⁸ It should, however, be noted that these procedures for bringing inter-State complaints have never been used.

354 The Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of Persons with Disabilities.

355 At May 2012, two States – Mexico and Guatemala – had accepted this procedure.

356 “Human Rights Bodies – Complaints Procedures”; OHCHR; see: www2.ohchr.org/english/bodies/petitions/index.htm.

357 The Convention on Migrant Workers; the Convention against Torture; the Convention on the Elimination of All Forms of Racial Discrimination; and the International Covenant on Civil and Political Rights.

358 “Human Rights Bodies – Complaints Procedures”; OHCHR; see: www2.ohchr.org/english/bodies/petitions/index.htm.

4.1. Process for bringing and resolving individual complaints

Anyone can lodge a complaint with a treaty body against a State that satisfies the following conditions:

- the State must recognize the competence of the treaty body
- it must be brought by the person whose rights have been violated or on his or her behalf
- domestic remedies must be exhausted.

There is no formal time limit for filing a complaint. However, it is preferable that it is submitted as soon as possible. In urgent situations, the treaty body may request the State to grant “interim measures” to prevent “irreparable harm”.

Complaints are considered on the basis of written information supplied by the complainant, or his or her representative, and the State in closed meetings. The treaty body’s decisions on individual complaints are included in their annual reports. If a violation is found, the State is requested to provide an effective remedy and respond to the treaty body within a set deadline. The remedy recommended will depend on the violations found.

While not legally binding, courts in some countries have shown a willingness to refer to findings of treaty bodies to assist with treaty interpretation.³⁵⁹ At the very least, the State has a good faith obligation to implement the treaty body’s findings and grant appropriate remedies.

The treaty body actively encourages State parties to implement its decision, including through the State party reporting process. The Human Rights Council, through the Universal Periodic Review process, also encourages the State to implement the decision.

Although some States do not comply with the decisions of the treaty bodies, a significant number have granted a variety of remedies to complainants, including providing compensation, stopping the deportation of individuals, granting residence permits and amending laws and policies which were held to contravene the treaties.

These decisions also influence the development of international standards by creating a body of quasi-judicial interpretations of the treaties.

4.2. Role of NHRIs

If a State has not recognized the individual complaints procedure of a treaty, NHRIs should recommend that their Government accept the treaty body’s competence to receive individual complaints.

This could include recommending that the State:

- make a declaration under article 22 of Convention against Torture
- make a declaration under article 14 of the Convention on the Elimination of All Forms of Racial Discrimination
- make a declaration under article 77 of the Convention on Migrant Workers
- ratify the First Optional Protocol to the International Covenant on Civil and Political Rights
- ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
- ratify the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

359 See, for example, *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70; para. 148. The Full Court of the Federal Court of Australia noted that “[a]lthough the views of the [Human Rights] Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects by performing functions that include reporting, receiving reports, conciliating and considering claims that a State Party is not fulfilling its obligations ... The conclusion that it is appropriate for a court to have regard to the views of such a body concerning the construction of a treaty is also supported by the observations of Kirby J in *Johnson v Johnson* (2000) 201 CLR 488 at 501-502, and of Katz J in *Commonwealth v Hamilton* (2000) 108 FCR 378 at 387, citing some observations of Black CJ in *Commonwealth v Bradley* (1999) 95 FCR 218 at 237.”

If the State recognizes the individual complaints procedure of a treaty, NHRIs can raise public awareness about this provision and can consider assisting individuals to submit complaints. Depending on their mandate, they may also be able to submit cases to treaty bodies on behalf of individuals.

NHRIs can disseminate decisions of treaty bodies concerning individual complaints, as well as follow up on these decisions and advocate to the Government for their implementation.

The decisions of the treaty bodies also provide an important source of jurisprudence that NHRIs can draw on in their regular programme of work and use to advocate for legislative and policy reform.

5. GENERAL COMMENTS OF THE TREATY BODIES

The core human rights treaties are usually drafted in general terms. This can make the task of interpreting and applying the treaty in a domestic context challenging for States parties.

An important function of the treaty bodies is to assist States parties by providing general comments or general recommendations.³⁶⁰ While the views of the treaty bodies are not binding, they are highly influential.

NHRIs can benefit from the development of general comments because of the assistance these statements provide in understanding and applying the terms of the treaty domestically.

They can directly assist NHRIs in their work to promote and monitor the human rights performance of the State and add authority to the views of the NHRI when it provides advice to the Government on implementing its treaty obligations.

In 2010, the Committee on Migrant Workers adopted General Comment No. 1 on Migrant Domestic Workers.³⁶¹

6. UNIVERSAL PERIODIC REVIEW

The Universal Periodic Review (UPR) is a unique process which reviews the human rights records of all UN Member States.

When the General Assembly established the Human Rights Council, the newly-formed Council was mandated to “undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States”.³⁶²

The aim of the UPR is to improve the human rights situation in all countries and address human rights violations wherever they occur.

The UPR has six objectives:

- the improvement of the human rights situation on the ground
- the fulfilment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State
- the enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned

360 The Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee against Torture, the Committee on the Rights of the Child, the Committee on Migrant Workers and the Committee on the Rights of Persons with Disabilities issue general comments. The Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women issue general recommendations. The Committee on Enforced Disappearances has only recently been established and has foreshadowed that it will issue general comments in future. All the general comments and general recommendations are published together annually in UN document HRI/GEN/1/Rev.9 (Vol. II); (current at March 2012).

361 CMW/C/GC/1.

362 General Assembly Resolution 60/251; para. 5(e).

- the sharing of best practice among States and other stakeholders
- support for cooperation in the promotion and protection of human rights
- the encouragement of full cooperation and engagement with the Council, other human rights bodies and OHCHR.³⁶³

The review provides an opportunity for all States to highlight the steps they have taken to improve the human rights situation in their countries and to overcome challenges to the enjoyment of human rights.

Between late 2007 and 2011, the Human Rights Council reviewed the human rights performance of all 192 Member States. In 2010 and 2011, towards the end of the first cycle of State reviews, the Council reviewed the modes and modalities of the UPR process and, with minor amendments, decided to commence the second cycle in June 2012.³⁶⁴

The second cycle of the UPR, which will involve 193 Member States,³⁶⁵ will be four and a half years in length and conclude at the end of 2016. Subsequent cycles will also be four and a half years in length.

Issues relating to the rights of migrants were raised on a regular basis during sessions 1–8 of the first cycle of the UPR:

- A total of 15 States posed advance questions on the issue while 77 States made recommendations.
- Out of 3,533 advance questions in sessions 1 to 8, 78 questions concerned migrants.
- Out of 12,385 recommendations in total, 472 focused on migrants.³⁶⁶

6.1. Basis of the review

The UPR is to review the “fulfilment by each State of its human rights obligations and commitments based on human rights treaties and other instruments that they have ratified”.³⁶⁷

It is based on obligations arising from:

- the United Nations Charter
- the Universal Declaration of Human Rights
- the human rights treaties to which the State is a party
- voluntary pledges and commitments made by the State, including those undertaken when presenting its candidatures for election to the Human Rights Council³⁶⁸
- applicable international humanitarian law.³⁶⁹

The second and subsequent cycles of the UPR will also examine the implementation of recommendations accepted by the State under previous reviews, as well as developments in the human rights situation in the State.³⁷⁰

363 HRC Resolution 5/1; part I.B.2; para. 4.

364 HRC Resolution 16/21, as supplemented by HRC Resolution 17/119.

365 On 14 July 2011, the General Assembly admitted the Republic of South Sudan as the 193rd member of the United Nations.

366 See: www.upr-info.org/IMG/pdf/issue_analysis_migrants.pdf.

367 General Assembly Resolution 60/251; para. 5(e).

368 HRC Resolution 5/1; part I.A; para. 1.

369 HRC Resolution 5/1; part I.A; para. 2.

370 HRC Resolution 16/21; part I.C.1; para. 6.

6.2. Role of NHRIs

The UPR provides an important opportunity for NHRIs to draw attention to key human rights issues and developments before a major international forum, including other States, UN agencies, human rights NGOs and other NHRIs.

By engaging strategically in the UPR process, NHRIs can promote recommendations to bolster human rights protections in their respective countries and which support their domestic work, including in relation to the promotion and protection of the rights of migrant workers.

NHRIs can contribute to each stage of the UPR process. Many played an active and effective role in the first cycle of State reviews.

OHCHR has prepared an information note for NHRIs on their participation in the UPR.³⁷¹

CASE STUDY

In 2010, the NHRIs of Australia, Afghanistan, India, Indonesia, Jordan, Malaysia, New Zealand, the Philippines, the Republic of Korea and Sri Lanka met together to share their experiences of participating in the UPR and to explore ways to improve the contribution of NHRIs to the UPR process.

A major outcome of the workshop was the development of a UPR Good Practice Compilation,³⁷² which aims to inform NHRIs of the many participation and contribution opportunities available to them at each stage of the UPR process. Specifically, the compilation discusses:

- **contribution opportunities in advance of country reviews**
- **contribution opportunities at the UPR working group**
- **contribution opportunities immediately after the UPR working group**
- **contribution opportunities at the Human Rights Council**
- **contribution opportunities after the review and in preparation for future reviews.**



6.3. Documentation for the review process

The review of a State is based upon three documents:

- information prepared by the State concerned, not exceeding 20 pages
- a compilation prepared by OHCHR of the information contained in the reports and official documents of relevant UN bodies and agencies, not exceeding ten pages
- a summary prepared by OHCHR of “[a]dditional, credible and reliable information provided by other relevant stakeholders”, not exceeding ten pages.³⁷³

The preparation of the State report is the Government’s responsibility and the NHRI should not undertake this task on behalf of the Government. The Government is encouraged, however, to prepare the State report through a broad consultation process at the national level with all relevant stakeholders.³⁷⁴ NHRIs can encourage their Government to organize national consultations and “can take steps to ensure

371 See: www.ohchr.org/EN/HRBodies/UPR/Pages/NoteNHRIS.aspx.

372 Asia Pacific Forum of National Human Rights Institutions; 2010; see: www.asiapacificforum.net/working-with-others/un/human-rights-council/upr.

373 HRC Resolution 5/1; part I.D; para. 15.

374 HRC Resolution 5/1; part I.D; para. 15(a).

that such consultation captures the diversity of experiences in the country”,³⁷⁵ particularly in relation to marginalized groups, such as migrant workers, indigenous peoples and others.

NHRIs can also encourage their Government to disseminate a draft of the State report for public comment, including comment by the NHRI.

In addition, NHRIs should also develop their own report based on “[a]dditional, credible and reliable information”. In the first UPR cycle, the NHRI information was usually integrated with information provided by NGOs and “other relevant stakeholders”.

In the second and subsequent cycles, however, the “summary of the information provided by other relevant stakeholders should contain, where appropriate, a separate section for contributions by the national human rights institution of the State under review that is accredited in full compliance with the Paris Principles”.³⁷⁶

OHCHR provides technical guidance to NHRIs on preparing and submitting information³⁷⁷ and publishes on its website the date for submitting reports and other information for the State under review.³⁷⁸

In preparing for the UPR, NHRIs can also:

- encourage the use of existing research, studies and reports, including its own reports, in the preparation of UPR reports by the State, the NHRI and NGOs
- consider providing opportunities for public contribution to and participation in the preparation of its own UPR report. This could include consultation with other national mechanisms, including state, provincial and local human rights bodies, as well as specialized domestic institutions
- share a draft of its UPR report with national NGOs and other interested stakeholders for comment and, where appropriate, seek expressions of support for the content of the NHRI submission
- where appropriate, address issues of international humanitarian law in its UPR report
- broadly disseminate its UPR report to: national actors and organizations, including parliamentarians, governmental bodies and departments, civil society actors and other interested stakeholders; other NHRIs; member and observer States in the Human Rights Council; regional organizations; and relevant international and UN agencies, bodies and mechanisms.³⁷⁹

CASE STUDY

In 2008, the **Human Rights Commission of Malaysia (SUHAKAM)** submitted a stakeholder’s report³⁸⁰ to Malaysia’s Universal Periodic Review. The report noted that the Government had not ratified the Convention on Migrant Workers, along with relevant ILO conventions. It also stated that many migrant workers “face discrimination at various levels and denial of basic rights”.³⁸¹ In addition, SUHAKAM raised concerns that the status of refugees and asylum seekers was not recognized at law and that, under national immigration legislation, persons found to be undocumented workers faced detention and trial.



375 *UPR Good Practice Compilation*; Asia Pacific Forum of National Human Rights Institutions; 2010; para. 3.

376 HRC Resolution 16/21; part I.C.1; para. 9.

377 Universal Periodic Review: information and guidelines for relevant stakeholders’ written submissions; OHCHR; see: www.ohchr.org/Documents/HRBodies/UPR/TechnicalGuideEN.pdf.

378 See: www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx.

379 *UPR Good Practice Compilation*; Asia Pacific Forum of National Human Rights Institutions; 2010; paras. 4 and 6-9.

380 Report for the Universal Periodic Review (UPR) on Malaysia, 4th Session, February 2009 from the Human Rights Commission of Malaysia (SUHAKAM).

381 *Ibid*; para. 25.

6.4. Review of the State

Based on the documentation provided, the human rights situation of the State is reviewed during a three-hour session of a UPR Working Group of the Human Rights Council, consisting of all 47 member States.

The review takes the form of an “interactive dialogue” with the State delegation and is only open to member and observer States of the Council. The review is facilitated by a group of three rapporteurs, known as “the troika”.

The State can anticipate recommendations by offering voluntary commitments in its opening statement. These are promises of actions it will take to increase its compliance with international human rights law. An NHRI can encourage its State to develop and make good voluntary commitments in the opening statement.

“A status” NHRIs can attend the interactive dialogue but they are not permitted to speak. However, there are a range of actions that NHRIs can take before and at the interactive dialogue, including to:

- produce, and make available to States and other relevant stakeholders, a briefing paper on its State’s review, which could include a list of proposed questions and recommendations that States may wish to present during the country’s review
- with the assistance of the Geneva representative of the ICC, meet with key UN officials, State missions and international NGOs in Geneva to discuss its State’s review
- if an “A-status” institution, host a briefing or similar parallel events at the Working Group session at which the State will be examined.³⁸²

Following the interactive dialogue, a report is prepared by the troika and discussed in a half-hour session of the Working Group.

The Working Group report on each State under review includes a summary of the proceedings; conclusions; recommendations made by individual States in the dialogue; and voluntary commitments made by the State under review.³⁸³

The Working Group does not debate the recommendations made by individual States and it does not adopt its own recommendations. Accordingly, the report simply includes all the recommendations put forward by individual States.

Following the session of the UPR Working Group, and prior to the adoption of the State report at the plenary session of the Human Rights Council, NHRIs can:

- conduct an audit of recommendations presented by States during the UPR Working Group to ensure their consistency with international human rights law and, where appropriate, international humanitarian law and report on the results of that audit
- advise the Government of the UPR recommendations that it supports, and encourage the Government to accept these recommendations and develop a plan for their implementation with specific concrete targets and strategies
- prepare a short briefing paper for States and other interested stakeholders which provides an assessment of the Working Group report and recommendations.³⁸⁴

382 *UPR Good Practice Compilation*; Asia Pacific Forum of National Human Rights Institutions; 2010; paras. 11 and 13-14.

383 HRC Resolution 5/1; Part I.E; para. 26.

384 *UPR Good Practice Compilation*; Asia Pacific Forum of National Human Rights Institutions; 2010; paras. 16-18.

6.5. Plenary debate and adoption of the report

The UPR Working Group report on each State under review is considered and adopted at a regular session of the Human Rights Council soon after the completion of the UPR Working Group session.

The State under review speaks first during the one-hour plenary meeting. It is expected to respond to the recommendations in the Working Group report either before or during the plenary debate.³⁸⁵

The “A status” NHRI of the State under review has special status. It is “entitled to intervene immediately after the State under review during the adoption of the outcome of the review by the Council plenary”.³⁸⁶

Other “A status” NHRIs are also permitted to make oral statements during the discussion, if time allows. However, statements must be directed towards the draft report, not the interactive dialogue with the State under review.

6.6. Implementation and follow-up

Implementation of recommendations is the principal objective of the UPR process. States are expected to act on the recommendations they accept and to consider further those that they have not accepted.

In the second cycle of the UPR, States are required to report on their follow-up and implementation of recommendations accepted from the first cycle.³⁸⁷ In subsequent cycles, they will be required to report on follow-up and implementation of recommendations in all past review reports. In addition, they are requested to provide the Human Rights Council with a mid-cycle report on implementation.³⁸⁸

As a key national stakeholder, NHRIs are uniquely placed to follow up on the implementation of recommendations made through the UPR process. For example, following the completion of the UPR process for its State, NHRIs can:

- work to raise awareness of the review process and its outcomes in Government and parliamentary fora, as well as in the broader community
- use UPR outcomes, as appropriate, to inform and to drive its national activities; where appropriate, an NHRI can also use UPR recommendations rejected by its Government to inform its own national activities
- encourage its Government to use UPR outcomes to inform the development of national strategies, policies and priorities, including a National Human Rights Action Plan
- where appropriate, assist its Government to develop concrete, targeted, and time-bound strategies to implement and achieve UPR outcomes
- monitor and report on the Government’s implementation of UPR outcomes
- adopt the practice of encouraging and assisting its Government to report periodically on the implementation of UPR outcomes at Human Rights Council sessions in the standing agenda item on the UPR
- if an “A status” institution, adopt the practice of reporting periodically on its State’s implementation of UPR outcomes at future HRC sessions in the standing agenda item on the UPR; where unable to attend, an NHRI could consider preparing an oral statement that could be delivered on its behalf by the ICC Representative in Geneva
- incorporate relevant UPR outcomes into parallel reports that it prepares for the UN human rights treaty bodies and in briefings for special procedures, and incorporate treaty body and special procedure recommendations into its reports in future UPR cycles.³⁸⁹

385 A compiled list of recommendations that each State has accepted or rejected is available at www.upr-info.org.

386 HRC Resolution 16/21; part I.C.2; para. 13.

387 HRC Resolution 16/21; part I.C.1; para. 6.

388 HRC Resolution 16/21; part I.E; para. 18.

389 *UPR Good Practice Compilation*; Asia Pacific Forum of National Human Rights Institutions; 2010; paras. 24-31.

7. SPECIAL PROCEDURES

The fact-finding and investigatory mechanisms of the Human Rights Council are known collectively as the special procedures.³⁹⁰ They include Special Rapporteurs, Independent Experts, Special Representatives of the Secretary-General and working groups mandated by the Human Rights Council with the aim of documenting human rights violations on particular themes or country situations.

The strength of the special procedures lies in their independence. Mandate holders are human rights experts appointed in an individual capacity.

Although their mandates vary, most special procedures:

- undertake studies, through which they contribute to the development of international human rights law
- investigate situations of human rights violation arising under the mandate
- undertake country visits
- receive and consider complaints from victims of human rights violations and intervene with States on their behalf
- issue urgent action requests
- promote the mandate
- report to the Human Rights Council and to other intergovernmental bodies on their findings, conclusions and recommendations.

7.1. Special procedures and the rights of migrant workers

The Special Rapporteur on the human rights of migrants³⁹¹ is the primary special procedure for promoting and protecting the rights of migrant workers.

The mandate was created in 1999 by the former Commission on Human Rights and covers all countries, irrespective of whether a State has ratified the Convention on Migrant Workers.

A central function of the Special Rapporteur is to “examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, recognizing the particular vulnerability of women, children and those undocumented or in an irregular situation”.³⁹²

In September 2008, the Human Rights Council requested the Special Rapporteur to pay special attention to cases of arbitrary detention of migrants, particularly involving migrant children and adolescents. It also encouraged the Special Rapporteur “to continue to examine ways and means of overcoming obstacles to the full and effective protection of the human rights of migrants, including national and international efforts to combat the trafficking of persons and smuggling of migrants, in order to achieve a better comprehension of the phenomena and to avoid practices that could violate the human rights of migrants”.³⁹³

Other special procedures that can consider and provide recommendations in relation to the rights of migrant workers, as well as undocumented workers and migrants in an irregular situation, include the:

- Working Group on **Arbitrary Detention**
- Special Rapporteur on **trafficking in persons**, especially in women and children

390 The special procedures created under the former Commission on Human Rights have been assumed by the Human Rights Council. Their role was so important that, when establishing the Human Rights Council, the General Assembly decided that the Human Rights Council should “maintain the system of special procedures” and “review and, where necessary, improve and rationalize”: Resolution 60/251; para. 6.

391 For detailed information, visit: www2.ohchr.org/english/issues/migration/rapporteur/.

392 See: www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx.

393 HRC Resolution 9/5; para. 4 (f).

- Special Rapporteur on **contemporary forms of racism**, racial discrimination, xenophobia and related intolerance
- Independent Expert on **minority issues**
- Special Rapporteur on **contemporary forms of slavery**, including its causes and consequences
- Special Rapporteur on **torture** and other cruel, inhuman or degrading treatment or punishment
- Special Rapporteur on the rights to **freedom of peaceful assembly and of association**
- Special Rapporteur on **freedom of religion or belief**
- Special Rapporteur on **adequate housing** as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context
- Special Rapporteur on the **right to education**
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of **physical and mental health**
- Independent Expert in the field of **cultural rights**
- Special Rapporteur on **violence against women**, its causes and consequences
- Working Group on the issue of **discrimination against women** in law and in practice
- Working Group on **transnational corporations and other business enterprises**.

CASE STUDY

In June 2011, the Human Rights Council unanimously endorsed the **Guiding Principles on Business and Human Rights**.³⁹⁴ The Guiding Principles are based on the “protect, respect and remedy” framework, which outlines the duty of the State to protect against human rights abuses involving transnational corporations and other businesses; the responsibility of corporations to respect all human rights; and the need for access to effective remedies where rights have been violated.

To support States, businesses, civil society and other relevant stakeholders implement the Guiding Principles, the Council established the **Working Group on transnational corporations and other business enterprises**.³⁹⁵

In addition, the Council has established a Forum on business and human rights, under the guidance of the Working Group, to discuss trends and challenges in the implementation of the Guiding Principles and to promote dialogue and cooperation on issues linked to business and human rights. The Forum will meet for two days every year and be open to a broad range of stakeholders, including NHRIs.³⁹⁶

In 2011, the Council noted the “... the important role of national human rights institutions established in accordance with the Paris Principles in relation to business and human rights, and encourages national human rights institutions to further develop their capacity to fulfil that role effectively, including with the support of the Office of the High Commissioner and in addressing all relevant actors”.³⁹⁷



394 *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*; OHCHR; 2011.

395 The Working Group was established by HRC Resolution 17/4.

396 More information about the role of the Working Group and the Forum on Business and Human Rights is available at: www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx.

397 HRC Resolution 17/4; para. 10.

7.2. Country visits

One of the most important functions of the special procedures is to conduct country visits.

A country visit by a special rapporteur or working group is one of the most effective means for bringing a human rights situation to international attention. It can also be a very effective way in which an NHRI can build international support for action to address a particular issue.

A country visit cannot be carried out without the approval of the particular State. Therefore, NHRIs should encourage their Government to issue a standing invitation to all the special procedures or to invite specific special procedures, such as the Special Rapporteur on the human rights of migrants, to visit the country to examine an issue of particular concern.³⁹⁸

During a country visit, the special rapporteur or working group will usually meet with the Government, government officials, the NHRI, local NGOs and others with particular expertise to hear their views on the issue. They will also meet with victims and others directly affected by the situation. After the visit, the special procedure will prepare a report, including findings and recommendations, for the Human Rights Council. The report is then discussed in an interactive dialogue with the State, during a plenary session of the Human Rights Council.

A special rapporteur or working group making a country visit generally has limited knowledge of the country-specific issues. As such, they rely on the advice and information provided by local experts. The NHRI can support and advise the special rapporteur or working group before, during and after the visit. This can include providing current, credible information on the issue, as well as suggesting specific individuals and organizations to meet with during the visit.

When the report of the visit is discussed by the Human Rights Council, the “A-status” NHRI of the country visited can speak immediately after the State concerned has responded to the report.³⁹⁹

CASE STUDY

In its parallel report⁴⁰⁰ to the Committee against Torture, the National Human Rights Commission of Indonesia (Komnas HAM) reported on human rights violations against migrant workers relevant to article 16 of the Convention against Torture.⁴⁰¹ Komnas HAM noted that little progress had been made in addressing the issues raised in the report of Special Rapporteur on the human rights of migrants, following his visit to Indonesia in December 2006. It observed that migrant workers, especially women, are often ill-treated during departure, transit, in their places of work and on return. It also highlighted serious concerns about the treatment of migrant workers at the International Soekarno-Hatta Airport, the departure and arrival gateway for migrant workers, and underlined “the call of migrant workers for the Government to close this terminal since many acts of enforced payment, ill-treatment, fraud, and sexual harassment occurred in this terminal”.



398 As at December 2011, 90 States had extended standing invitations to the special procedures.

399 HRC Resolution 16/21; part II.B; para. 28.

400 Comments of the National Human Rights Commission of Indonesia on Indonesia's compliance with the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment; April 2008.

401 Article 16 states: “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

The NHRI can also promote awareness of the report and its findings, advocate for implementation of the report's recommendations and, finally, monitor and report on implementation to the special procedure, the UPR and any relevant treaty bodies.

Between 2000 and the end of 2011, the Special Rapporteur on the human rights of migrants undertook 22 country visits, including visits to the Asia Pacific countries of the Philippines (2002), Indonesia (2006), South Korea (2006) and Japan (2010).

7.3. Studies

Another principal function of the thematic mandates is to prepare studies on specific human rights issues to develop further international understanding and law on the issue.

The issue may involve a particular aspect of the interpretation of the right; the application of the right to a particular area of activity; the implementation of the right; assessing State accountability in relation to obligations under the right; or any other matter arising under the mandate.

For example, the Special Rapporteur on the human rights of migrants presented a thematic report on immigration detention to the 20th Session of the Human Rights Council (June 2012).⁴⁰²

These studies can be of great value to NHRIs as they plan and undertake their regular programme of work.

NHRIs can also contribute to the studies. For example, NHRIs can draw the attention of the special procedure to "gaps" in law or understanding of law and make proposals for studies. They can provide comments and information during the course of particular studies and "A status" NHRIs can participate in discussions of studies by the Human Rights Council.

7.4. Communications

Some special procedures, including the Special Rapporteur on the human rights of migrants, can establish a dialogue with Governments to address specific allegations of human rights violations that fall within their mandates.

The dialogue "can relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring ... Communications may deal with individual cases, general trends and patterns of human rights violations occurring in a particular country, cases affecting a particular group or community, or the content of draft or existing legislation considered to be not fully compatible with international human rights standards."⁴⁰³

For example, the Special Rapporteur on the human rights of migrants receives and responds to complaints (known as "communications") that fall into two main categories:

- information regarding individual cases of alleged violations of the human rights of migrants
- information regarding general situations concerning the human rights of migrants in a specific country.⁴⁰⁴

Based on these communications, the Special Rapporteur begins a dialogue with the Government concerned, "with a view to clarifying the allegations raised and to preventing or, as necessary, investigating alleged violations of the human rights of migrants".⁴⁰⁵

This can involve "letters of allegation", which include requests for information and cooperation from the Government, and "urgent appeals", which raise serious and time-sensitive matters.

402 A/HRC/20/24.

403 "Communications"; OHCHR: see: www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx.

404 "Communications/Submitting information to the Special Rapporteur"; OHCHR: see: www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Communications.aspx.

405 Ibid.

It is important to note that, unlike other UN human rights mechanisms, it is not necessary for an alleged victim of human rights violations to exhaust all domestic remedies before submitting a complaint to the Special Rapporteur or the other special procedures that can receive complaints.

NHRIs can raise awareness about the complaints procedure at the national level and with groups of migrant workers vulnerable to exploitation and violations of their human rights. They can also help individuals to prepare and submit a complaint to the Special Rapporteur that meets the required criteria.⁴⁰⁶

8. HUMAN RIGHTS COUNCIL COMPLAINT PROCEDURE

The Human Rights Council provides a complaints procedure to address consistent patterns of gross and reliably attested violations of all human rights, which occur in any part of the world and under any circumstances.

Economic and Social Council Resolution 1503 from 1970 provides the basis for the procedure, which is confidential in nature. It also requires a complainant to exhaust all domestic remedies before lodging a complaint with the Human Rights Council. The complaint procedure does not result in an individual judgement or an individual remedy, rather it aims instead to address systemic patterns of human rights violation.

The complaint procedure establishes two distinct working groups: the Working Group on Communications and the Working Group on Situations.

The Working Group on Communications, composed of five independent experts, is given the role to assess the admissibility and the merits of communications it receives. All admissible communications and recommendations are transmitted to the Working Group on Situations.

The Working Group on Situations is composed of five members appointed by regional groups from members States of the Human Rights Council. It presents the Council with a report on consistent patterns of gross and reliably attested violations of human rights and makes recommendations on the course of action to take. The Council examines reports of the Working Group on Situations in a confidential manner and then takes a decision concerning each situation brought to its attention.

NHRIs can raise awareness at the national level about the complaints procedure, how it works, possible outcomes and the fact that it is a confidential process. NHRIs can also submit information when they have evidence of consistent patterns of human rights violations against migrant workers.

ENGAGING WITH INTERNATIONAL ORGANIZATIONS AND PROCESSES

9. INTERNATIONAL LABOUR ORGANIZATION

Founded in 1919, the International Labour Organization (ILO) is responsible for developing and overseeing international labour standards. Since its establishment, it has adopted a broad range of conventions and recommendations⁴⁰⁷ that promote “decent work for all”.

It is the only “tripartite” United Nations agency, promoting dialogue and cooperation between representatives of Governments, employers’ organizations and workers’ organizations and the joint development of policies and programmes.

⁴⁰⁶ Information on submitting complaints to the special procedures generally is available at: www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx. Information about submitting communications to the Special Rapporteur on the human rights of migrants is available at: www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Communications.aspx.

⁴⁰⁷ For information and to access the texts of the ILO conventions and recommendations, visit: www.ilo.org/global/standards/lang-en/index.htm.

9.1. International Labour Conference

The ILO organizes the International Labour Conference, held in June every year in Geneva, Switzerland. The Conference discusses a range of social and labour issues and adopts international labour standards. It also makes decisions on the ILO's general policy, work programme and budget.

Each ILO member State is represented by a delegation consisting of two Government delegates, an employer delegate and a worker delegate. Employer and worker delegates "are nominated in agreement with the most representative national organizations of employers and workers."⁴⁰⁸

NHRIs are not entitled to attend the ILO Conference in an independent capacity. However, they may be invited to attend as part of the Government delegation.

NHRIs can also consider presenting a human rights-based analysis and recommendations on the issues to be addressed by the ILO Conference to the delegates of the Government, employer organizations and worker organizations who will represent the State during the discussions.

CASE STUDY

In 2011, the **National Human Rights Committee of Qatar** attended the 100th Session of the International Labour Conference as part of the Government delegation, as NHRIs do not have independent participation rights with the ILO.

In a report prepared for the 100th Session on implementation of the ILO Declaration on Fundamental Principles and Rights at Work, the ILO Director-General referred to concerns expressed by the National Human Rights Committee that the sponsorship ("kafala") system operating in Qatar had led to "arbitrary practices by sponsors, including the non-payment of wages, withholding workers' passports, lack of adequate accommodation, involuntary long hours of work, and sexual harassment."⁴⁰⁹

The report noted that, in 2009, the ILO Committee of Experts on the Application of Conventions and Recommendations "expressed concern regarding the possibility for employers under the sponsorship system to exert disproportionate power on migrant workers, leading to discrimination against them on the basis of race, sex, religion and national extraction with respect to their conditions of work, and has called for information concerning actions taken to address reform of the sponsorship system and for an investigation on the extent of the discriminatory impact on migrant workers resulting from the sponsorship system."



408 "International Labour Conference"; ILO; see: www.ilo.org/global/about-the-ilo/how-the-ilo-works/international-labour-conference/lang--en/index.htm.

409 *Equality at work: The continuing challenge – Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*; Report I(B); p 36.



UN photo by Jean-Marc Ferré.

9.2. ILO complaints procedure

The ILO Constitution establishes two grievance mechanisms for asserting that a member State is not fulfilling its obligations under a particular ILO convention: the complaints procedure and the representation procedure.

The **complaints procedure** allows for the consideration of complaints against a member State by another member State of the same convention, a delegate to the International Labour Conference (of member States) or the ILO Governing Body. A Commission of Inquiry may be formed to investigate the allegation.

NHRIs may be in a position to lobby and assist their Government to make use of these functions.

The **representation procedure** allows employers' and workers' organizations to make representations to the ILO Governing Body that a member State has in some way failed to observe its obligations under an ILO convention. A three-member committee may be set up to review the allegation and the response of the member State, both of which may be published if the Governing Body determines that the State's response was unsatisfactory.

Independently, the Committee on Freedom of Association also receives complaints regarding violations of freedom of association from employers' and workers' organizations against States, regardless of whether the State has ratified the relevant conventions. The Committee may issue a report and make recommendations to the State if it decides there has been a violation. Since its inception in 1951, the Committee has reviewed more than 2,300 complaints.

NHRIs can raise awareness of the ILO's complaints provisions among civil society, in particular employers' and workers' organizations. They may also be in a position to provide independent and credible information that can be included in a complaint to the ILO Governing Body or the Committee on Freedom of Association.

9.3. Training and capacity building

The International Training Centre of the ILO provides training, learning and capacity development services for representatives of Governments, employers' organizations, workers' organizations and other national and international partners. The centre is based in Turin, Italy.

Labour migration is one of the key training topics delivered by the Centre, as part of its Social Protection Programme. The aim of the programme is to build the capacity of policy makers, practitioners and other partners "to design and manage appropriate protection policies and mechanisms for workers in the formal and informal economies, for their families and for vulnerable populations".⁴¹⁰

NHRIs can participate in training and capacity building workshops offered through the ILO and other international organizations to enhance their understanding of the complex forces that influence international labour migration, to discuss integrated policy options to improve human rights protection for migrant workers and to identify good practice models from different parts of the globe.

10. GLOBAL FORUM ON MIGRATION AND DEVELOPMENT

The Global Forum on Migration and Development (GFMD), an initiative of UN Member States, is currently the "largest and most comprehensive global platform for dialogue and cooperation on international migration and development".⁴¹¹

It is a voluntary, non-binding and informal Government-led process that provides opportunities for stakeholders to share national, regional and global experiences and to develop practical responses.

The GFMD engages with the UN through the Special Representative of the Secretary General on International Migration and Development and the Global Migration Group.⁴¹²

The first session of the GFMD was held in 2007 and meetings have been held on an annual basis since then. UN agencies and other international and regional bodies are invited as observers.

The GFMD encourages the input of civil society organizations and seeks to foster constructive dialogue between Governments and civil society to promote greater policy coherence around migration and development.

As part of the annual sessions, Civil Society Days are organized prior to the Government meeting. A statement from civil society is generally presented at the start of the Government meeting to help inform the discussions.

If invited to attend the Civil Society Days, NHRIs can contribute their independent information and analysis of the human rights issues facing migrant workers and members of their families. Prior to the annual session, they can also seek to provide their Government's representative with a human rights-

410 "Social Protection": International Training Centre of the ILO; see: www.itcilo.org/en/the-centre/areas-of-expertise/social-protection.

411 "GMFD at a glance"; Global Forum on Migration and Development; see: www.gfmd.org/en/at-a-glance.

412 The members of the Global Migration Group include: International Labour Organization (ILO); International Organization for Migration (IOM); Office of the United Nations High Commissioner for Human Rights (OHCHR); United Nations Conference on Trade and Development (UNCTAD); United Nations Department of Economic and Social Affairs (UNDESA); United Nations Development Programme (UNDP); United Nations Educational, Scientific and Cultural Organization (UNESCO); United Nations Population Fund (UNFPA); Office of the United Nations High Commissioner for Refugees (UNHCR); United Nations Children's Fund (UNICEF); United Nations Institute for Training and Research (UNITAR); United Nations Office on Drugs and Crime (UNODC); United Nations Regional Commissions; United Nations Entity for Gender Equality and the Empowerment of Women (UN Women); World Bank; and the World Health Organization (WHO).

based analysis of the issues that will be discussed, along with relevant proposals or recommendations, to inform their State's contribution to the meeting.

As the Seoul Statement notes:

*It is vital that the discourses around migration, including in forums such as the Global Forum on Migration and Development, are reoriented to ensure that they are more than just a negotiation between countries of origin and destination on the most effective global arrangements to meet market demands for supply of human resources. Such discourses lead to commoditization of migrant workers and pave the way for a range of human rights violations.*⁴¹³

The 2008 session of the GFMD – held in Manila, the Philippines – emphasized the human face of migration and protection of the rights of migrants' rights.⁴¹⁴ It also introduced, for the first time, the concept of "shared responsibility" of Governments and other concerned actors in protecting and empowering migrants and their families.

As a direct outcome of the meeting in Manila, the GFMD established a thematic ad hoc Working Group on Protecting and Empowering Migrants for Development.

11. INTERNATIONAL COORDINATING COMMITTEE OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) is the representative body of NHRIs from all parts of the globe. Its aim is to assist in the establishment and strengthening of independent NHRIs which meet the international standards set out in the Paris Principles.

Established in 1993, the ICC is comprised of nearly 100 member NHRIs drawn from all four regions: Africa, the Americas, Asia Pacific and Europe.

Among its main activities, the ICC:

- coordinates a peer-review accreditation process to support compliance with the Paris Principles
- assists NHRIs to engage with the UN Human Rights Council and its treaty bodies
- encourages cooperation and sharing of good practice between NHRIs
- promotes the work and contribution of NHRIs within the UN system and with States and other international agencies.

11.1. ICC Conference

The ICC hosts an International Conference every two years that brings together representatives from NHRIs, Governments, UN agencies, international organizations and civil society.

The purpose of the International Conference is to develop and strengthen cooperation among NHRIs and other stakeholders, to discuss human rights issues and to ensure their follow-up at the national level.

Each International Conference concentrates on a particular theme, such as "NHRIs and the administration of justice" (2008), "Upholding human rights during conflict and countering terrorism" (2004) and "NHRIs and racial discrimination" (2002).

⁴¹³ Seoul Statement; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 7.

⁴¹⁴ Meeting papers from the 2008 session of the GFMD are available at: www.gfmd.org/en/documents-library/manila-2008.html.

“Migration: the role of NHRIs” was the focus of the 8th ICC Conference, held in Santa Cruz, Bolivia, in 2006. It concluded with the Santa Cruz Declaration, which identified a range of practical strategies that NHRIs could adopt to promote and protect the rights of migrants, including migrant workers, refugees and asylum seekers and people smuggled or trafficked across borders.

The 10th International Conference, held in Edinburgh, Scotland in 2010, examined the theme of “Business and Human Rights”. Delegates discussed the role of NHRIs to engage with Governments, transnational corporations and national private and public sector employers to promote respect for human rights and to curb abuses against vulnerable individuals and groups, including migrant workers, which occur in connection with business operations.

The Edinburgh Declaration, adopted at the conclusion of the conference, recommended that NHRIs undertake greater national and international monitoring of corporate compliance with human rights law; promote access to justice for victims; provide advice to business, Governments and affected communities; establish multi-stakeholder partnerships to promote dialogue and awareness of human rights issues; undertake research, education and promotion; and share knowledge and expertise with other NHRIs.

The Edinburgh Declaration also called on NHRIs “to renew efforts to work collaboratively with NGOs and civil society ... including through sharing knowledge and expertise and institutionalising exchanges and interactions.”⁴¹⁵

The outcomes of the 10th International Conference have been used to inform the ongoing work of the ICC Working Group on Business and Human Rights.

11.2. ICC Working Group on Business and Human Rights

The ICC Working Group on Business and Human Rights, established in 2009, is the first thematic working group of the ICC. It aims to promote capacity building, strategic collaboration, advocacy and outreach by NHRIs in the area of business and human rights, through:

- promoting integration of human rights and business issues into NHRI strategies and programmes, nationally, regionally and internationally
- building capacity within NHRIs on business and human rights, through skills development and sharing of tools and best practices
- facilitating the participation of NHRIs in the development of relevant legal and policy frameworks
- supporting NHRI outreach to business and human rights stakeholders.⁴¹⁶

The ICC Working Group notes that NHRIs are currently undertaking a broad range of activities in relation to the impact of business on the human rights of individuals, groups and communities, including in relation to migrant workers, trafficking, child labour and discrimination in employment.

Between 2009 and 2011, the ICC Working Group engaged with the mandate of the former UN Special Representative to the Secretary General on human rights and transnational corporations and other business enterprises to promote understanding and awareness of the important role that NHRIs can play in securing implementation of human rights at national level.

As a result of this advocacy, the Guiding Principles on Business and Human Rights, prepared by the Special Representative and endorsed by the UN Human Rights Council in June 2011, explicitly recognize the role of NHRIs with regard to all three limbs of the “protect, respect, remedy” framework.

415 Edinburgh Declaration; 10th International Conference of National Institutions for the Promotion and Protection of Human Rights; Edinburgh, Scotland; 8–10 October 2010; para. 21.

416 “Business and Human Rights”; ICC; see: <http://nhri.ohchr.org/EN/Themes/BusinessHR/Pages/default.aspx>.

ENGAGING WITH REGIONAL MECHANISMS AND FORUMS

12. REGIONAL COMPLAINTS MECHANISMS

NHRIs in Asia are encouraged to take action in the following areas for the purpose of promoting and protecting the human rights of migrants:

Monitoring and participation in the regional standard-setting and institution-building processes related to the human rights of migrants.

Seoul Guidelines⁴¹⁷

Two regional systems for the protection of human rights – the African and the Inter-American systems – have adopted a two-body mechanism for the examination of individual complaints, consisting of a Commission and a Court. In Europe, individuals can bring complaints to the European Court of Human Rights.

The Commissions are quasi-judicial bodies, with the power to issue decisions and recommendations. The Courts have the power to issue legally enforceable judgments.

NHRIs can make use of regional complaints mechanisms in a number of ways. They can assist individuals to submit complaints or they can file cases directly. They can also present *amicus curiae* briefs, if they have the mandate to do so. In addition, NHRIs can seek affiliated or accredited status before regional mechanisms to present evidence and advocate their views.

NHRIs also have a role to raise public awareness of the outcome of complaints at the national level and to disseminate case law to legal and judicial stakeholders. In addition, NHRIs should closely monitor the implementation of the decisions and judgements by the authorities.

It should be noted that the Asia Pacific does not have a region-wide intergovernmental system to monitor, promote and protect human rights, nor does it have a regional Court that can hear complaints of human rights violations.

Further information about the African, European and Inter-American systems is available in Chapter 5.

13. MECHANISMS IN THE ASEAN REGION

In January 2007 the ASEAN Heads of State⁴¹⁸ adopted the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.

The ASEAN Declaration calls on countries of origin and destination to promote the full potential and dignity of migrant workers; to cooperate to resolve cases of migrant workers who become undocumented due to no fault of their own; and to take into account the fundamental rights of migrant workers and their families already residing in the destination country.

The Declaration also requires ASEAN countries to promote fair and appropriate employment protection, payment of wages and adequate access to decent working and living conditions for migrant workers. It sets out further specific obligations on countries of origin and destination.

Though non-binding, the Declaration is considered an important development in protecting the rights of migrant workers in the region and was established after years of lobbying by civil society organizations, including migrant organizations, trade unions and human rights networks.

⁴¹⁷ Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia; International Conference on Human Rights of Migrants and Multicultural Society; Seoul, Korea; 10–12 November 2008; para. 72.

⁴¹⁸ The Association of South East Asian Nations (ASEAN) is made up of ten member countries: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

An ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers was established at the same time as the Declaration.

NHRIs in the ASEAN region can seek to promote awareness and adherence to the standards set out in the Declaration. They can monitor its implementation in practice, draw the attention of Government and other stakeholders to areas of non-compliance and provide independent information and analysis to the ASEAN Committee.

NHRIs in the region can also seek to raise issues concerning the rights of migrant workers, as well as migrants in an irregular situation and people who have been trafficked, with other ASEAN mechanisms, including the recently-established ASEAN Intergovernmental Commission on Human Rights and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children.

14. REGIONAL CONSULTATIVE PROCESSES

Regional Consultative Processes on migration (RCPs) are regional meetings that bring together representatives of Governments, international organizations and, in some cases, NGOs to exchange information and discuss issues of shared concern.

They are informal and non-binding dialogues that can address a broad range of topics, including migration and development, labour migration, social integration of migrants, protection of migrants' rights, smuggling and trafficking in persons, migration and health, and trade and migration.

As the International Organization for Migration notes, "RCPs address the need identified by states for greater inter-state dialogue and cooperation on migration issues, in recognition of the limitations of ad-hoc and bilateral approaches to managing international migration".⁴¹⁹

The first RCP was established in 1985, however, they have grown significantly since 1995 and now operate in virtually all parts of the globe. RCPs also vary greatly in their composition, purpose and organizational frameworks.

The Colombo Process,⁴²⁰ for example, is an RCP on the management of overseas employment and contractual labour for labour-sending countries in Asia. Its membership includes Afghanistan, Bangladesh, China, India, Indonesia, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand and Vietnam.⁴²¹

The dialogue and exchange of information in the Colombo Process is focused around three thematic areas:

- protection of and provision of services to migrant workers, in particular, protecting migrant workers from abusive practices in recruitment and employment, and providing appropriate services to them in terms of pre-departure information, orientation and welfare provisions
- optimizing benefits of organized labour migration
- capacity building, data collection and inter-State cooperation.⁴²²

In addition to the meetings of Member States, the Colombo Process includes training programmes, research studies and the development of resources and handbooks.

NHRIs can provide independent information and advice to the Government on the human rights issues facing migrant workers, either nationals working in overseas countries or migrant workers engaged in the domestic labour market. This analysis can guide and inform the contribution of the State representative to the RCP dialogue and ensure that key human rights issues are discussed and addressed.

419 "Regional Consultative Processes"; International Organization for Migration; see: www.iom.int/jahia/Jahia/policy-research/regional-consultative-processes/lang/en.

420 More information on the Colombo Process is available at: www.colomboprocess.org.

421 The Colombo Process also includes eight Observer States: Bahrain, Italy, Kuwait, Malaysia, Qatar, Republic of Korea, Saudi Arabia and the United Arab Emirates. The International Organization for Migration has provided technical support to the Colombo Process since its inception and serves as its Secretariat.

422 "Objectives"; Colombo Process; see: www.colomboprocess.org/index.php?option=com_content&view=article&id=8&Itemid=34.

15. REGIONAL COLLABORATION BETWEEN NHRIs

NHRIs should work in regional networks to address the regional aspects of migration and development from a human rights perspective and coordinate joint action.

Santa Cruz Declaration⁴²³

Given the complex and transnational nature of human rights issues facing migrant workers, NHRIs have established formal processes to collaborate, to exchange information and technical support and to contribute to regional and international standard-setting processes.

In many instances, this work also involves engaging with national and regional NGOs and civil society organizations.

For example, the **Jakarta Process on the Human Rights of Migrants**⁴²⁴ brought together 13 civil society organizations, two associations of migrant workers and five NHRIs from eight countries in Asia and resulted in a joint appeal to the UN High-Level Dialogue on Migration and Development in 2006.

The **Asia Pacific Forum of National Human Rights Institutions** (APF) ensures there is an ongoing and collaborative focus on the rights of migrant workers among the 18 member NHRIs of the region.

During the 15th Annual Meeting in 2010, the APF agreed to establish “focal points” in interested member institutions to informally exchange their institutional knowledge, skills and expertise on the rights of migrant workers and contribute to the development of this APF training manual on the rights of migrant workers.

In partnership with the Diplomacy Training Program and Migrant Forum Asia, the APF supports an annual capacity building programme⁴²⁵ that brings together representatives from NHRIs, NGOs and trade unions in the Asia Pacific region. A key goal of the programme is to foster partnerships and practical collaboration to promote and protect the rights of migrant workers at the national and regional level.

In addition, the **South East Asia National Human Rights Institutions Forum** (SEANF) – which includes the NHRIs of Indonesia, Malaysia, the Philippines, Thailand and Timor Leste – has made the rights of migrant workers one of its five key areas of joint action and collaboration.

Led by the Human Rights Commission of Malaysia, the SEANF undertook a major research project on “migrant workers and undocumented persons” and examined issues and problems within labour-sending and labour-receiving countries.

Based on this research, the group published a policy paper⁴²⁶ in 2010 which included recommendations to their respective Governments, as well as recommendations to the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.

At the 8th Annual Meeting of the SEANF in 2011, the five member institutions agreed “to advocate for the signing and ratification of the nine (9) core international human rights instruments, particularly the Convention on the Rights of Migrant Workers, which most of our respective governments are not yet a party to”.⁴²⁷

423 Santa Cruz Declaration; 8th International Conference of National Institutions for the Promotion and Protection of Human Rights; Santa Cruz, Republic of Bolivia; 24–26 October 2006; para. 36.

424 More information, including the full text of the joint appeal, is available at: www.jakartaprocess.blogspot.com.au.

425 More Information about the programme is available at: www.asiapacificforum.net/support/training/rights-of-migrant-workers.

426 *Paper on Migrant Workers*; South East Asia National Human Rights Institutions Forum; 2010.

427 Concluding Statement; 8th Annual Meeting of the South East Asia National Human Rights Institutions Forum; 18–19 October 2011; para. 16.

KEY POINTS: CHAPTER 11

NHRIs can contribute to the effective work of international and regional bodies. They can submit independent and credible information, participate in review procedures and follow up on recommendations made to the State.

Engaging constructively with the following mechanisms can positively contribute to the promotion and protection of the rights of migrant workers:

- the UN treaty bodies, in particular the Committee on the Rights of Migrant Workers
- the UN Human Rights Council, in particular the Universal Periodic Review and the special procedures
- international and regional complaints mechanisms
- international labour and migration bodies, in particular the ILO
- international and regional coordinating committees and networks of NHRIs.

**FURTHER READING**

Engagement of National Human Rights Institutions with the Special Procedures; ICC Position Paper Volume IV; March 2007 (Draft)

Engagement of National Human Rights Institutions with the Universal Periodic Review Mechanism; ICC Position Paper Volume III; March 2007 (Draft)

International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions; Asia Pacific Forum of National Human Rights Institutions; 2012

National Human Rights Institutions and the Special Procedures and Universal Periodic Review Mechanism; ICC Position Paper Volume II; September 2006

National Human Rights Institutions and the UN Human Rights Council; ICC Position Paper Volume I; June 2006

The Role of National Human Rights Institutions in the United Nations Treaty Body Process; Amrei Müller and Frauke Seidensticker, German Institute for Human Rights; 2007.

Working with the United Nations Human Rights Programme: A Handbook for Civil Society; OHCHR; 2008



Summary

Chapter 1: The international legal framework on the rights of migrant workers

- Under international law, States have an obligation to respect, protect and fulfil the rights of migrant workers and members of their families. This includes States that are countries of origin, transit and destination for migrant workers.
- The principle of non-discrimination is central to the enjoyment of human rights and applies to everyone, regardless of their status.
- In general, States are obliged to grant migrants the same protection as nationals. Only in exceptional circumstances, and within tightly defined conditions, may differential treatment be justified. However, some human rights treaties do make distinctions in relation to the rights of nationals and non-nationals, as well as the rights of documented and undocumented migrants.

Chapter 2: The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

- The Convention sets out a broad series of rights belonging to all migrant workers and members of their families, irrespective of their migration status. Many of these rights restate those included in the core human rights treaties.
- The Convention includes protections that respond to the specific situations that migrant workers and members of their families can experience, especially those which can leave them vulnerable to exploitation or human rights violations.
- Documented migrant workers and members of their families have specific rights under the Convention, in addition to those which apply to all migrant workers.
- States of origin and destination have specific obligations to respect, protect and fulfil the rights of migrant workers and members of their families.
- The Convention establishes a treaty body to review reports prepared by States on their compliance with the Convention and to make recommendations to encourage further action by States. Individuals will be able bring complaints of human rights violations to the treaty body once a sufficient number of States have accepted this procedure.

Chapter 3: Other UN instruments and mechanisms relevant to the rights of migrant workers

- Even if a State has not ratified the Convention on Migrant Workers, it will be bound by one or more of the other core international human rights treaties it has ratified, which include obligations relevant to the rights of migrant workers.
- The general comments developed by the UN treaty bodies provide States with guidance to interpret and apply particular provisions of the human rights treaties, many of which are relevant to the rights of migrant workers.
- The activities of the UN special procedures – which include receiving and responding to communications, issuing urgent appeals, undertaking country visits and preparing regular reports – can provide practical assistance to promote and protect the rights of migrant workers.
- The mandate of the Special Rapporteur on the human rights of migrants extends to all countries, irrespective of whether a State has ratified the Convention on Migrant Workers.
- Through their participation in the UPR process, States can agree to implement recommendations that improve the living and working conditions of migrant workers and members of their families.

Chapter 4: The International Labour Organization and migrant workers

- All core ILO labour rights – enshrined in the ILO Declaration on Fundamental Principles and Rights at Work – apply equally to all migrant workers, regardless of their migration status.
- The ILO has developed labour standards specifically relating to the rights of migrant workers. Other ILO conventions relevant to migrant workers address the rights of domestic workers, the operation of private employment agencies, illegal recruitment practices and human trafficking.
- The ILO has established a regular system of supervision to monitor implementation of these standards. Complaints can also be brought to the ILO for an alleged failure to uphold labour standards.

Chapter 5: Regional mechanisms for the promotion and protection of the rights of migrant workers

- Regional human rights mechanisms have been established in Africa, the Americas, the Arab States, Europe and South-East Asia.
- Promotion and protection of the rights of migrant workers at the regional level can involve “soft law” or legally binding instruments.
- Regional human rights courts have been established in Africa, the Americas and Europe, which can receive and rule on individual complaints. A number of judgments have addressed the rights of migrant workers and members of their families.

Chapter 6: Promoting reform of law, policy and practice

- NHRIs can promote the ratification of relevant international human rights standards, especially the International Convention on the Protection of All Migrant Workers and Members of their Families.
- NHRIs can make recommendations to the Government to bolster legislative protections for migrant workers that meet international standards, as well as propose practical reforms to migration, labour and social policies and programmes.
- NHRIs should seek to work cooperatively with a broad range of stakeholders – including government departments, employers, private recruitment agencies, trade unions, NGOs and NHRIs in other countries – to develop and promote good practice models for working with migrant workers.
- NHRIs should ensure that migrant workers are able to genuinely contribute to the development of laws, policies and practices that affect them.
- NHRIs should ensure that practical steps to promote and protect the rights of migrant workers are included in their country’s National Human Rights Plan of Action.

Chapter 7: Investigating allegations of human rights violations

- NHRIs can support migrant workers to make complaints of human rights violations by developing outreach programmes that explain the NHRI’s investigation role and its independence from the State; by providing information in multiple languages; by ensuring the complaints process is free and informal; and by ensuring that translators are available.
- When investigating allegations of human rights violations, NHRIs should collect testimonial evidence (such as interviews and statements), documentary evidence (such as employment, medical or detention-related records) and, where relevant, physical evidence.

- NHRIs can resolve complaints by issuing legally enforceable orders to the parties involved, through mediation or conciliation, by seeking redress on behalf of complaints through courts and tribunals or by referring complaints to other competent complaint handling bodies.
- NHRIs can also initiate inquiries into systemic patterns of human rights violations faced by migrant workers and members of their families.
- In urgent situations, NHRIs can cooperate with each other – and sometimes in partnership with NGOs or trade unions – to conduct transnational investigations into individual complaints of human rights violations against migrant workers.

Chapter 8: Protecting the rights of migrants in detention

- NHRIs can promote ratification of relevant international human rights treaties to protect the rights of migrants in detention, as well as reform of national laws and detention procedures.
- NHRIs can research and advocate for alternative approaches to the administrative detention of refugees, asylum seekers and migrants in an irregular situation.
- NHRIs can undertake regular, preventive visits to places where migrants are detained to analyse and assess their treatment and the conditions of their detention. They can also make recommendations to safeguard the rights of migrant detainees, based on national and international standards.
- NHRIs should promptly investigate and document any allegations of human rights violations involving detainees that are brought to their attention.
- Training public officials is an important way in which NHRIs can contribute to the prevention of torture and ill-treatment in places of detention.

Chapter 9: Conducting public inquiries into systemic patterns of human rights violation

- A public inquiry provides a comprehensive approach for analysing, investigating and developing recommendations that address the systemic human rights violations that migrant workers experience.
- Before deciding whether to conduct a public inquiry, NHRIs should consider the dimension, nature and complexity of the human rights issue, the capacity of the NHRI to undertake the inquiry and the likelihood of it generating positive changes to law, policy and practice.
- Collecting research and evidence is critical to the success of the inquiry. Public hearings involving a broad range of stakeholders, including migrant workers, are an essential part of this process. The inquiry should foreground the stories and experiences of migrant workers.
- Recommendations should respond directly to the evidence collected by the inquiry. They should meet the inquiry's terms of reference and promote compliance with national and international human rights standards.
- The NHRI should develop an ongoing strategy to monitor and report on progress in implementing the inquiry's recommendations. A comprehensive evaluation of the inquiry should also be conducted.

Chapter 10: Undertaking education, training and research

- Migrant workers require up-to-date and reliable information about living and working in the destination country, before they leave and on-arrival. Information should be easy-to-understand, provided in different languages and available in accessible formats.
- NHRIs can contribute to professional training for public officials by reviewing and revising existing training materials; developing new training tools or resources; and directly delivering training programmes. These programmes should be developed in collaboration with the relevant authorities.
- NHRIs can also provide training and advice to business and employers, professional groups and civil society organizations to build their capacity to recognize and respond to the human rights challenges that migrant workers face.
- Public education campaigns undertaken by NHRIs, often in partnership with other stakeholders, can help countering prejudice and negative community attitudes to migrant workers.
- Accurate quantitative and qualitative research data is essential for NHRIs to develop effective policies and recommendations that address the human rights violations experienced by migrant workers. NHRIs should adopt a human rights-based approach when developing and undertaking their research.

Chapter 11: Engaging with international and regional mechanisms

NHRIs can contribute to the effective work of international and regional bodies. They can submit independent and credible information, participate in review procedures and follow up on recommendations made to the State.

Engaging constructively with the following mechanisms can positively contribute to the promotion and protection of the rights of migrant workers:

- the UN treaty bodies, in particular the Committee on the Rights of Migrant Workers
- the UN Human Rights Council, in particular the Universal Periodic Review and the special procedures
- international and regional complaints mechanisms
- international labour and migration bodies, in particular the ILO
- international and regional coordinating committees and networks of NHRIs.

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Appendices



Appendix 1: The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Appendix 2: Edinburgh Declaration

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Appendix 5: Santa Cruz Declaration

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Appendix 1:

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

Adopted by General Assembly resolution
45/158 of 18 December 1990

Preamble

The States Parties to the present Convention,

Taking into account the principles embodied in the basic instruments of the United Nations concerning human rights, in particular the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child,

Taking into account also the principles and standards set forth in the relevant instruments elaborated within the framework of the International Labour Organisation, especially the Convention concerning Migration for Employment (No. 97), the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No.143), the Recommendation concerning Migration for Employment (No. 86), the Recommendation concerning Migrant Workers (No.151), the Convention concerning Forced or Compulsory Labour (No. 29) and the Convention concerning Abolition of Forced Labour (No. 105), Reaffirming the importance of the principles contained in the Convention against Discrimination in Education of the United Nations Educational, Scientific and Cultural Organization,

Recalling the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Declaration of the Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Code of Conduct for Law Enforcement Officials, and the Slavery Conventions,

Recalling that one of the objectives of the International Labour Organisation, as stated in its Constitution, is the protection of the interests of workers when employed in countries other than their own, and bearing in mind the expertise and experience of that organization in matters related to migrant workers and members of their families,

Recognizing the importance of the work done in connection with migrant workers and members of their families in various organs of the United Nations, in particular in the Commission on Human Rights and the Commission for Social Development, and in the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization, as well as in other international organizations,

Recognizing also the progress made by certain States on a regional or bilateral basis towards the protection of the rights of migrant workers and members of their families, as well as the importance and usefulness of bilateral and multilateral agreements in this field,

Realizing the importance and extent of the migration phenomenon, which involves millions of people and affects a large number of States in the international community,

Aware of the impact of the flows of migrant workers on States and people concerned, and desiring to establish norms which may contribute to the harmonization of the attitudes of States through the acceptance of basic principles concerning the treatment of migrant workers and members of their families,

Considering the situation of vulnerability in which migrant workers and members of their families frequently find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment,

Convinced that the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection,

Taking into account the fact that migration is often the cause of serious problems for the members of the families of migrant workers as well as for the workers themselves, in particular because of the scattering of the family,

Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights,

Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition,

Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned,

Convinced, therefore, of the need to bring about the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention which could be applied universally,

Have agreed as follows:

Part I: Scope and Definitions

Article 1

1. The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.
2. The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

Article 2

For the purposes of the present Convention:

1. The term “migrant worker” refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

2.

- (a) The term “frontier worker” refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week;
- (b) The term “seasonal worker” refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year;
- (c) The term “seafarer”, which includes a fisherman, refers to a migrant worker employed on board a vessel registered in a State of which he or she is not a national;
- (d) The term “worker on an offshore installation” refers to a migrant worker employed on an offshore installation that is under the jurisdiction of a State of which he or she is not a national;
- (e) The term “itinerant worker” refers to a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation;
- (f) The term “project-tied worker” refers to a migrant worker admitted to a State of employment for a defined period to work solely on a specific project being carried out in that State by his or her employer;
- (g) The term “specified-employment worker” refers to a migrant worker:
 - (i) Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty; or
 - (ii) Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill; or
 - (iii) Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief; and who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work;
- (h) The term “self-employed worker” refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

Article 3

The present Convention shall not apply to:

- (a) Persons sent or employed by international organizations and agencies or persons sent or employed by a State outside its territory to perform official functions, whose admission and status are regulated by general international law or by specific international agreements or conventions;
- (b) Persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes, whose admission and status are regulated by agreement with the State of employment and who, in accordance with that agreement, are not considered migrant workers;
- (c) Persons taking up residence in a State different from their State of origin as investors;
- (d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;
- (e) Students and trainees;
- (f) Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

Article 4

For the purposes of the present Convention the term “members of the family” refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.

Article 5

For the purposes of the present Convention, migrant workers and members of their families:

- (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;
- (b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

Article 6

For the purposes of the present Convention:

- (a) The term “State of origin” means the State of which the person concerned is a national;
- (b) The term “State of employment” means a State where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity, as the case may be;
- (c) The term “State of transit,” means any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence.

Part II: Non-discrimination with Respect to Rights

Article 7

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Part III: Human Rights of All Migrant Workers and Members of their Families

Article 8

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.
2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

Article 9

The right to life of migrant workers and members of their families shall be protected by law.

Article 10

No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 11

1. No migrant worker or member of his or her family shall be held in slavery or servitude.
2. No migrant worker or member of his or her family shall be required to perform forced or compulsory labour.
3. Paragraph 2 of the present article shall not be held to preclude, in States where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.
4. For the purpose of the present article the term “forced or compulsory labour” shall not include:
 - (a) Any work or service not referred to in paragraph 3 of the present article normally required of a person who is under detention in consequence of a lawful order of a court or of a person during conditional release from such detention;
 - (b) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
 - (c) Any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the State concerned.

Article 12

1. Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching.
2. Migrant workers and members of their families shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice.
3. Freedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. States Parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 13

1. Migrant workers and members of their families shall have the right to hold opinions without interference.
2. Migrant workers and members of their families shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.
3. The exercise of the right provided for in paragraph 2 of the present article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputation of others;

- (b) For the protection of the national security of the States concerned or of public order (ordre public) or of public health or morals;
- (c) For the purpose of preventing any propaganda for war;
- (d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Article 14

No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.

Article 15

No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.

Article 16

1. Migrant workers and members of their families shall have the right to liberty and security of person.
2. Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.
3. Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedure established by law.
4. Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.
5. Migrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.
6. Migrant workers and members of their families who are arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should the occasion arise, for the execution of the judgement.
7. When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:
 - (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;
 - (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;

- (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.
- 8. Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.
- 9. Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation.

Article 17

- 1. Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.
- 2. Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
- 3. Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.
- 4. During any period of imprisonment in pursuance of a sentence imposed by a court of law, the essential aim of the treatment of a migrant worker or a member of his or her family shall be his or her reformation and social rehabilitation. Juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status.
- 5. During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.
- 6. Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.
- 7. Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.
- 8. If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

Article 18

- 1. Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- 2. Migrant workers and members of their families who are charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.
- 3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:

- (a) To be informed promptly and in detail in a language they understand of the nature and cause of the charge against them;
 - (b) To have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay;
 - (e) To examine or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
 - (f) To have the free assistance of an interpreter if they cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against themselves or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
 5. Migrant workers and members of their families convicted of a crime shall have the right to their conviction and sentence being reviewed by a higher tribunal according to law.
 6. When a migrant worker or a member of his or her family has, by a final decision, been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to that person.
 7. No migrant worker or member of his or her family shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of the State concerned.

Article 19

1. No migrant worker or member of his or her family shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when the criminal offence was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when it was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, he or she shall benefit thereby.
2. Humanitarian considerations related to the status of a migrant worker, in particular with respect to his or her right of residence or work, should be taken into account in imposing a sentence for a criminal offence committed by a migrant worker or a member of his or her family.

Article 20

1. No migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfil a contractual obligation.
2. No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit.

Article 21

It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.

Article 22

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.
2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.
3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.
4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.
5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.
6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.
7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.
8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.
9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

Article 23

Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.

Article 24

Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law.

Article 25

1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:
 - (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;
 - (b) Other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment.
2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.
3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle 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.

Article 26

1. States Parties recognize the right of migrant workers and members of their families:
 - (a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;
 - (b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;
 - (c) To seek the aid and assistance of any trade union and of any such association as aforesaid.
2. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

Article 27

1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.
2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

Article 28

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

Article 29

Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.

Article 30

Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

Article 31

States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin. 2. States Parties may take appropriate measures to assist and encourage efforts in this respect.

Article 32

Upon the termination of their stay in the State of employment, migrant workers and members of their families shall have the right to transfer their earnings and savings and, in accordance with the applicable legislation of the States concerned, their personal effects and belongings.

Article 33

1. Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning:
 - (a) Their rights arising out of the present Convention;
 - (b) The conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State.
2. States Parties shall take all measures they deem appropriate to disseminate the said information or to ensure that it is provided by employers, trade unions or other appropriate bodies or institutions. As appropriate, they shall co-operate with other States concerned.
3. Such adequate information shall be provided upon request to migrant workers and members of their families, free of charge, and, as far as possible, in a language they are able to understand.

Article 34

Nothing in the present part of the Convention shall have the effect of relieving migrant workers and the members of their families from either the obligation to comply with the laws and regulations of any State of transit and the State of employment or the obligation to respect the cultural identity of the inhabitants of such States.

Article 35

Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable-conditions for international migration as provided in part VI of the present Convention.

Part IV: Other Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation

Article 36

Migrant workers and members of their families who are documented or in a regular situation in the State of employment shall enjoy the rights set forth in the present part of the Convention in addition to those set forth in part III.

Article 37

Before their departure, or at the latest at the time of their admission to the State of employment, migrant workers and members of their families shall have the right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.

Article 38

1. States of employment shall make every effort to authorize migrant workers and members of the families to be temporarily absent without effect upon their authorization to stay or to work, as the case may be. In doing so, States of employment shall take into account the special needs and obligations of migrant workers and members of their families, in particular in their States of origin.
2. Migrant workers and members of their families shall have the right to be fully informed of the terms on which such temporary absences are authorized.

Article 39

1. Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.
2. The rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 40

1. Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.
2. No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

Article 41

1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.
2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

Article 42

1. States Parties shall consider the establishment of procedures or institutions through which account may be taken, both in States of origin and in States of employment, of special needs, aspirations and obligations of migrant workers and members of their families and shall envisage, as appropriate, the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions.
2. States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.
3. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.

Article 43

1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:
 - (a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned;
 - (b) Access to vocational guidance and placement services;
 - (c) Access to vocational training and retraining facilities and institutions;
 - (d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents;
 - (e) Access to social and health services, provided that the requirements for participation in the respective schemes are met;
 - (f) Access to co-operatives and self-managed enterprises, which shall not imply a change of their migration status and shall be subject to the rules and regulations of the bodies concerned;
 - (g) Access to and participation in cultural life.
2. States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorized by the State of employment, meet the appropriate requirements.
3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation.

Article 44

1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.
2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.
3. States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.

Article 45

1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to:
 - (a) Access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned;
 - (b) Access to vocational guidance and training institutions and services, provided that requirements for participation are met;
 - (c) Access to social and health services, provided that requirements for participation in the respective schemes are met;
 - (d) Access to and participation in cultural life.
2. States of employment shall pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language.
3. States of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, States of origin shall collaborate whenever appropriate.
4. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin.

Article 46

Migrant workers and members of their families shall, subject to the applicable legislation of the States concerned, as well as relevant international agreements and the obligations of the States concerned arising out of their participation in customs unions, enjoy exemption from import and export duties and taxes in respect of their personal and household effects as well as the equipment necessary to engage in the remunerated activity for which they were admitted to the State of employment:

- (a) Upon departure from the State of origin or State of habitual residence;
- (b) Upon initial admission to the State of employment;
- (c) Upon final departure from the State of employment;
- (d) Upon final return to the State of origin or State of habitual residence.

Article 47

1. Migrant workers shall have the right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State. Such transfers shall be made in conformity with procedures established by applicable legislation of the State concerned and in conformity with applicable international agreements.
2. States concerned shall take appropriate measures to facilitate such transfers.

Article 48

1. Without prejudice to applicable double taxation agreements, migrant workers and members of their families shall, in the matter of earnings in the State of employment:
 - (a) Not be liable to taxes, duties or charges of any description higher or more onerous than those imposed on nationals in similar circumstances;

- (b) Be entitled to deductions or exemptions from taxes of any description and to any tax allowances applicable to nationals in similar circumstances, including tax allowances for dependent members of their families.
- 2. States Parties shall endeavour to adopt appropriate measures to avoid double taxation of the earnings and savings of migrant workers and members of their families.

Article 49

- 1. Where separate authorizations to reside and to engage in employment are required by national legislation, the States of employment shall issue to migrant workers authorization of residence for at least the same period of time as their authorization to engage in remunerated activity.
- 2. Migrant workers who in the State of employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations.
- 3. In order to allow migrant workers referred to in paragraph 2 of the present article sufficient time to find alternative remunerated activities, the authorization of residence shall not be withdrawn at least for a period corresponding to that during which they may be entitled to unemployment benefits.

Article 50

- 1. In the case of death of a migrant worker or dissolution of marriage, the State of employment shall favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay; the State of employment shall take into account the length of time they have already resided in that State.
- 2. Members of the family to whom such authorization is not granted shall be allowed before departure a reasonable period of time in order to enable them to settle their affairs in the State of employment.
- 3. The provisions of paragraphs 1 and 2 of the present article may not be interpreted as adversely affecting any right to stay and work otherwise granted to such family members by the legislation of the State of employment or by bilateral and multilateral treaties applicable to that State.

Article 51

Migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted. Such migrant workers shall have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work.

Article 52

- 1. Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions.
- 2. For any migrant worker a State of employment may:
 - (a) Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation;
 - (b) Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. However, States Parties concerned shall endeavour to provide for recognition of such qualifications.

3. For migrant workers whose permission to work is limited in time, a State of employment may also:
 - (a) Make the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed two years;
 - (b) Limit access by a migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements. Any such limitation shall cease to apply to a migrant worker who has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years.
4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his or her own account. Account shall be taken of the period during which the worker has already been lawfully in the State of employment.

Article 53

1. Members of a migrant worker's family who have themselves an authorization of residence or admission that is without limit of time or is automatically renewable shall be permitted freely to choose their remunerated activity under the same conditions as are applicable to the said migrant worker in accordance with article 52 of the present Convention.
2. With respect to members of a migrant worker's family who are not permitted freely to choose their remunerated activity, States Parties shall consider favourably granting them priority in obtaining permission to engage in a remunerated activity over other workers who seek admission to the State of employment, subject to applicable bilateral and multilateral agreements.

Article 54

1. Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of:
 - (a) Protection against dismissal;
 - (b) Unemployment benefits;
 - (c) Access to public work schemes intended to combat unemployment;
 - (d) Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 52 of the present Convention.
2. If a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment, on terms provided for in article 18, paragraph 1, of the present Convention.

Article 55

Migrant workers who have been granted permission to engage in a remunerated activity, subject to the conditions attached to such permission, shall be entitled to equality of treatment with nationals of the State of employment in the exercise of that remunerated activity.

Article 56

1. Migrant workers and members of their families referred to in the present part of the Convention may not be expelled from a State of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards established in part III.

2. Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorization of residence and the work permit.
3. In considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.

Part V: Provisions Applicable to Particular Categories of Migrant Workers and Members of their Families

Article 57

The particular categories of migrant workers and members of their families specified in the present part of the Convention who are documented or in a regular situation shall enjoy the rights set forth in part m and, except as modified below, the rights set forth in part IV.

Article 58

1. Frontier workers, as defined in article 2, paragraph 2 (a), of the present Convention, shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment, taking into account that they do not have their habitual residence in that State.
2. States of employment shall consider favourably granting frontier workers the right freely to choose their remunerated activity after a specified period of time. The granting of that right shall not affect their status as frontier workers.

Article 59

1. Seasonal workers, as defined in article 2, paragraph 2 (b), of the present Convention, shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal workers, taking into account the fact that they are present in that State for only part of the year.
2. The State of employment shall, subject to paragraph 1 of the present article, consider granting seasonal workers who have been employed in its territory for a significant period of time the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that State, subject to applicable bilateral and multilateral agreements.

Article 60

Itinerant workers, as defined in article 2, paragraph 2 (A), of the present Convention, shall be entitled to the rights provided for in part IV that can be granted to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status as itinerant workers in that State.

Article 61

1. Project-tied workers, as defined in article 2, paragraph 2 (of the present Convention, and members of their families shall be entitled to the rights provided for in part IV except the provisions of article 43, paragraphs I (b) and (c), article 43, paragraph I (d), as it pertains to social housing schemes, article 45, paragraph I (b), and articles 52 to 55.
2. If a project-tied worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State which has jurisdiction over that employer, on terms provided for in article 18, paragraph 1, of the present Convention.

3. Subject to bilateral or multilateral agreements in force for them, the States Parties concerned shall endeavour to enable project-tied workers to remain adequately protected by the social security systems of their States of origin or habitual residence during their engagement in the project. States Parties concerned shall take appropriate measures with the aim of avoiding any denial of rights or duplication of payments in this respect.
4. Without prejudice to the provisions of article 47 of the present Convention and to relevant bilateral or multilateral agreements, States Parties concerned shall permit payment of the earnings of project-tied workers in their State of origin or habitual residence.

Article 62

1. Specified-employment workers as defined in article 2, paragraph 2 (g), of the present Convention, shall be entitled to the rights provided for in part IV, except the provisions of article 43, paragraphs I (b) and (c), article 43, paragraph I (d), as it pertains to social housing schemes, article 52, and article 54, paragraph 1 (d).
2. Members of the families of specified-employment workers shall be entitled to the rights relating to family members of migrant workers provided for in part IV of the present Convention, except the provisions of article 53.

Article 63

1. Self-employed workers, as defined in article 2, paragraph 2 (h), of the present Convention, shall be entitled to the rights provided for in part IV with the exception of those rights which are exclusively applicable to workers having a contract of employment.
2. Without prejudice to articles 52 and 79 of the present Convention, the termination of the economic activity of the self-employed workers shall not in itself imply the withdrawal of the authorization for them or for the members of their families to stay or to engage in a remunerated activity in the State of employment except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted.

Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families

Article 64

1. Without prejudice to article 79 of the present Convention, the States Parties concerned shall as appropriate consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families.
2. In this respect, due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned.

Article 65

1. States Parties shall maintain appropriate services to deal with questions concerning international migration of workers and members of their families. Their functions shall include, inter alia :
 - (a) The formulation and implementation of policies regarding such migration;
 - (b) An exchange of information, consultation and co-operation with the competent authorities of other States Parties involved in such migration;
 - (c) The provision of appropriate information, particularly to employers, workers and their organizations on policies, laws and regulations relating to migration and employment, on agreements concluded with other States concerning migration and on other relevant matters;

- (d) The provision of information and appropriate assistance to migrant workers and members of their families regarding requisite authorizations and formalities and arrangements for departure, travel, arrival, stay, remunerated activities, exit and return, as well as on conditions of work and life in the State of employment and on customs, currency, tax and other relevant laws and regulations.
- 2. States Parties shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.

Article 66

- 1. Subject to paragraph 2 of the present article, the right to undertake operations with a view to the recruitment of workers for employment in another State shall be restricted to:
 - (a) Public services or bodies of the State in which such operations take place;
 - (b) Public services or bodies of the State of employment on the basis of agreement between the States concerned;
 - (c) A body established by virtue of a bilateral or multilateral agreement.
- 2. Subject to any authorization, approval and supervision by the public authorities of the States Parties concerned as may be established pursuant to the legislation and practice of those States, agencies, prospective employers or persons acting on their behalf may also be permitted to undertake the said operations.

Article 67

- 1. States Parties concerned shall co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation.
- 2. Concerning migrant workers and members of their families in a regular situation, States Parties concerned shall co-operate as appropriate, on terms agreed upon by those States, with a view to promoting adequate economic conditions for their resettlement and to facilitating their durable social and cultural reintegration in the State of origin.

Article 68

- 1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:
 - (a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;
 - (b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;
 - (c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.
- 2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

Article 69

1. States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.
2. Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.

Article 70

States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

Article 71

1. States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families.
2. As regards compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters. Settlement of these matters shall be carried out on the basis of applicable national law in accordance with the provisions of the present Convention and any relevant bilateral or multilateral agreements.

Part VII: Application of the Convention**Article 72**

1.
 - (a) For the purpose of reviewing the application of the present Convention, there shall be established a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as “the Committee”);
 - (b) The Committee shall consist, at the time of entry into force of the present Convention, of ten and, after the entry into force of the Convention for the forty-first State Party, of fourteen experts of high moral standing, impartiality and recognized competence in the field covered by the Convention.
2.
 - (a) Members of the Committee shall be elected by secret ballot by the States Parties from a list of persons nominated by the States Parties, due consideration being given to equitable geographical distribution, including both States of origin and States of employment, and to the representation of the principal legal systems. Each State Party may nominate one person from among its own nationals;
 - (b) Members shall be elected and shall serve in their personal capacity.
3. The initial election shall be held no later than six months after the date of the entry into force of the present Convention and subsequent elections every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to all States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties that have nominated them, and shall submit it to the States Parties not later than one month before the date of the corresponding election, together with the curricula vitae of the persons thus nominated.

4. Elections of members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the States Parties present and voting.
5.
 - (a) The members of the Committee shall serve for a term of four years. However, the terms of five of the members elected in the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting of States Parties;
 - (b) The election of the four additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of the present article, following the entry into force of the Convention for the forty-first State Party. The term of two of the additional members elected on this occasion shall expire at the end of two years; the names of these members shall be chosen by lot by the Chairman of the meeting of States Parties;
 - (c) The members of the Committee shall be eligible for re-election if renominated.
6. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party that nominated the expert shall appoint another expert from among its own nationals for the remaining part of the term. The new appointment is subject to the approval of the Committee.
7. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee.
8. The members of the Committee shall receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide.
9. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 73

1. States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention:
 - (a) Within one year after the entry into force of the Convention for the State Party concerned; (b) Thereafter every five years and whenever the Committee so requests.
2. Reports prepared under the present article shall also indicate factors and difficulties, if any, affecting the implementation of the Convention and shall include information on the characteristics of migration flows in which the State Party concerned is involved.
3. The Committee shall decide any further guidelines applicable to the content of the reports.
4. States Parties shall make their reports widely available to the public in their own countries.

Article 74

1. The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned. This State Party may submit to the Committee observations on any comment made by the Committee in accordance with the present article. The Committee may request supplementary information from States Parties when considering these reports.

2. The Secretary-General of the United Nations shall, in due time before the opening of each regular session of the Committee, transmit to the Director-General of the International Labour Office copies of the reports submitted by States Parties concerned and information relevant to the consideration of these reports, in order to enable the Office to assist the Committee with the expertise the Office may provide regarding those matters dealt with by the present Convention that fall within the sphere of competence of the International Labour Organisation. The Committee shall consider in its deliberations such comments and materials as the Office may provide.
3. The Secretary-General of the United Nations may also, after consultation with the Committee, transmit to other specialized agencies as well as to intergovernmental organizations, copies of such parts of these reports as may fall within their competence.
4. The Committee may invite the specialized agencies and organs of the United Nations, as well as intergovernmental organizations and other concerned bodies to submit, for consideration by the Committee, written information on such matters dealt with in the present Convention as fall within the scope of their activities.
5. The International Labour Office shall be invited by the Committee to appoint representatives to participate, in a consultative capacity, in the meetings of the Committee.
6. The Committee may invite representatives of other specialized agencies and organs of the United Nations, as well as of intergovernmental organizations, to be present and to be heard in its meetings whenever matters falling within their field of competence are considered.
7. The Committee shall present an annual report to the General Assembly of the United Nations on the implementation of the present Convention, containing its own considerations and recommendations, based, in particular, on the examination of the reports and any observations presented by States Parties.
8. The Secretary-General of the United Nations shall transmit the annual reports of the Committee to the States Parties to the present Convention, the Economic and Social Council, the Commission on Human Rights of the United Nations, the Director-General of the International Labour Office and other relevant organizations.

Article 75

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The Committee shall normally meet annually.
4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 76

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

- (a) If a State Party to the present Convention considers that another State Party is not fulfilling its obligations under the present Convention, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;
- (c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged;
- (d) Subject to the provisions of subparagraph (c) of the present paragraph, the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the present Convention;
- (e) The Committee shall hold closed meetings when examining communications under the present article;
- (f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
- (g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;
- (h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:
 - (i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
 - (ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of the present article shall come into force when ten States Parties to the present Convention have made a declaration under paragraph 1 of the present article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 77

1. A State Party to the present Convention may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party. No communication shall be received by the Committee if it concerns a State Party that has not made such a declaration.
2. The Committee shall consider inadmissible any communication under the present article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Convention.
3. The Committee shall not consider any communication from an individual under the present article unless it has ascertained that:
 - (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
 - (b) The individual has exhausted all available domestic remedies; this shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to that individual.
4. Subject to the provisions of paragraph 2 of the present article, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention that has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
5. The Committee shall consider communications received under the present article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
6. The Committee shall hold closed meetings when examining communications under the present article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of the present article shall come into force when ten States Parties to the present Convention have made declarations under paragraph 1 of the present article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by or on behalf of an individual shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 78

The provisions of article 76 of the present Convention shall be applied without prejudice to any procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and the specialized agencies and shall not prevent the States Parties from having recourse to any procedures for settling a dispute in accordance with international agreements in force between them.

Part VIII: General provisions

Article 79

Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.

Article 80

Nothing in the present Convention shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Convention.

Article 81

1. Nothing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of:
 - (a) The law or practice of a State Party; or
 - (b) Any bilateral or multilateral treaty in force for the State Party concerned.
2. Nothing in the present Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act that would impair any of the rights and freedoms as set forth in the present Convention.

Article 82

The rights of migrant workers and members of their families provided for in the present Convention may not be renounced. It shall not be permissible to exert any form of pressure upon migrant workers and members of their families with a view to their relinquishing or foregoing any of the said rights. It shall not be possible to derogate by contract from rights recognized in the present Convention. States Parties shall take appropriate measures to ensure that these principles are respected.

Article 83

Each State Party to the present Convention undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 84

Each State Party undertakes to adopt the legislative and other measures that are necessary to implement the provisions of the present Convention.

Part IX: Final provisions

Article 85

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 86

1. The present Convention shall be open for signature by all States. It is subject to ratification.
2. The present Convention shall be open to accession by any State.
3. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

Article 87

1. The present Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the present Convention after its entry into force, the Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of its own instrument of ratification or accession.

Article 88

A State ratifying or acceding to the present Convention may not exclude the application of any Part of it, or, without prejudice to article 3, exclude any particular category of migrant workers from its application.

Article 89

1. Any State Party may denounce the present Convention, not earlier than five years after the Convention has entered into force for the State concerned, by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of twelve months after the date of the receipt of the notification by the Secretary-General of the United Nations.
3. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
4. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 90

1. After five years from the entry into force of the Convention a request for the revision of the Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting shall be submitted to the General Assembly for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties in accordance with their respective constitutional processes.
3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Convention and any earlier amendment that they have accepted.

Article 91

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of signature, ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 92

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.
3. Any State Party that has made a declaration in accordance with paragraph 2 of the present article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 93

1. The present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

In witness whereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Appendix 2:

Edinburgh Declaration

10th International Conference of National Institutions for the Promotion and Protection of Human Rights Edinburgh, Scotland; 8–10 October 2010

1. The Tenth International Conference of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights was devoted to the role of national human rights institutions (NHRIs) in addressing Business and Human Rights. The Conference took place in Edinburgh, Scotland between October 8 –10, 2010 and was hosted by the Scottish Human Rights Commission (SHRC), in cooperation with the Office of the High Commissioner for Human Rights (OHCHR) and the International Coordinating Committee (ICC) of NHRIs. Participants thanked the SHRC, OHCHR, the Scottish Parliament and the Scottish and UK Governments for their support and dedication to the organisation of the Conference
2. NHRIs expressed their gratitude to SHRC for the excellent organisation and warm hospitality they had enjoyed. They welcomed the statements of the High Commissioner for Human Rights, the Special Representative of the UN Secretary-General on Business and Human Rights, the former High Commissioner of Human Rights and other keynote speakers as well as the interactive and productive discussions which reflected the experience and perspectives of NHRIs from all of the regions. Business representatives, Government representatives' academia and non-governmental organizations from around the world made a valuable contribution at a pre-conference Forum and the International Conference itself which informed the deliberations. The Conference was also enriched by the participation of the Advocate-General for Scotland, UK Government and by the Justice Secretary, Scottish Government.
3. The Tenth International Conference adopted the following Declaration:-

The Tenth International Conference of NHRIs,

4. *Recalling* the inherent dignity, equal and inalienable rights of all human beings, the need for universal and effective recognition of human rights and fundamental freedoms, and to promote social progress and better standards of life in larger freedom, as expressed in the Universal Declaration of Human Rights;
5. *Recalling* the universality, indivisibility, interdependence and interrelatedness of all human rights;
6. *Welcoming* the UN Human Rights Council's continuing engagement with the business and human rights agenda, particularly through the mandate of the UN Secretary-General's Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises; the greater understanding and clarity about the appropriate roles and responsibilities of States and business with regard to human rights and the right of victims to access remedy emanating from the "Protect, Respect, Remedy" Framework;
7. *Welcoming* the proposal by the Special Representative to develop Guiding Principles for implementation of the "Protect, Respect, Remedy" Framework;
8. *Acknowledging* that the responsible operation of business and effective regulation can contribute to promoting respect, protection and fulfilment of human rights and assist in channelling the benefits of business toward this goal and that it is crucial that States create a legal framework to appropriately and effectively regulate the activities of business corporations;

9. *Acknowledging* the need for NHRIs to work collaboratively with NGOs in implementing their mandate sharing knowledge and expertise and welcoming the NGOs Plan of Action presented at the NGO Forum of the 10th International Conference;
10. *Reaffirming* the importance of effective national institutions for the promotion and protection of human rights, vested with competence to promote and protect human rights and enjoying as broad a mandate as possible, in line with the Principles relating to the status of national institutions under UN General Assembly Resolution 48/134 20 December 1993 (Paris Principles);
11. *Emphasising* the important role national human rights institutions can play in addressing corporate-related human rights challenges, both as a body at the international level , at the regional level and individually at the national level;
12. *Welcoming* the thematic areas discussed in the Regional Working groups of the conference: Child labour, human trafficking, privatisation, public procurement, safe and healthy environment, and endorsing the recommendations made in the specific working groups

Hereby agree:

13. To follow up this Biennial Conference by

Encouraging ICC Regional Networks and individual NHRIs to consider the practical functions they can fulfil in promoting enhanced protection against corporate-related human rights abuse, greater accountability and respect for human rights by business actors, access to justice for victims and establishing multi-stakeholder approaches including but not limited to the following initiatives:

A. Promotion/Education/Research

- I. Undertaking workshops on business and human rights in each ICC Region, in coordination with the ICC Working Group on Business and Human Rights and OHCHR inviting participation from relevant stakeholders, including regional stakeholders from government, labour, business and NGOs;
- II. Engaging with their respective governments to promote a greater awareness of the impact of business enterprises on the realisation of human rights, and the relevant State obligations with regard to the promotion and protection of human rights in their own jurisdiction and extra-territorially;
- III. Advocating and advising governments to introduce or strengthen and implement national legislation and regulations that meet international best practice in the prevention of human rights violations by business corporations including labour rights;
- IV. Providing guidance to business on how to integrate human rights into their every day business to translate human rights principles and into a language that business can relate to, fostering corporate cultures respectful of human rights;
- V. Conducting research to assess the impacts of business operations on the realization human rights of communities;
- VI. Creating a database, newsletter, web page to share best practices between all NHRIs on promotion, monitoring cases and other areas;
- VII. Enhancing the capacity of NHRIs in dealing with business and human rights issues, through training and exchange visits;
- VIII. Facilitating dialogue between government, corporations and other business enterprises and civil society, including human rights defenders and trade unions on the above issues;

B. Monitoring

- I. Monitoring and documenting violations of human rights by corporations operating or registered under the domestic jurisdiction;

- II. Examining the conditions of access to justice for all, including through conducting public enquiries, with particular reference to indigent, vulnerable and marginalised groups, affected by the business corporations and the private sector,
- III. Reviewing national human rights actions plans and relevant programmes to ensure human rights based approach to business is included;
- IV. Interacting with international and regional human rights mechanisms to report and monitor the implementation of relevant human rights instruments and standards;

Noting that monitoring may involve a wide range of activities and NHRIs may wish to consider and discuss them within various regional and international meetings.

C. Complaints Handling

NHRIs with complaint handling functions could consider:

- I. Promoting within the community and the business sector an awareness of their respective roles in monitoring and receiving complaints of human rights violations by business entities, as well as other remedies;
- II. Handling complaints related to corporate human right abuse using their quasi-judicial powers, including through conciliation, mediation, and making recommendations or orders to improve the situation;
- III. Co-operating in the development of a database on the regulatory framework and remedies available in their respective jurisdictions;
- IV. Utilising their complaints mechanisms, and the outcomes of complaints and inquiries, to monitor on-going practices of business entities;
- V. Working closely with the judiciary to promote access to justice, and handling cases related to public interest litigation.

D. Mediation and Conciliation

- Mediate between enterprises, trade unions, governments and victims of business-related abuse;
- Assist the victims of business-related abuse to seek redress and compensation;
- Refer cases to the domestic jurisdiction for follow-up

14. NHRIs may further consider:

- Establishing partnerships with organisations in the area of corporate social responsibility including the including the UN Global compact, the media, academia, business organisations, trade unions and national, regional and international organisations.
- Reviewing in each ICC Regional Network national Action Plans on
- Business and Human Rights prepared by each NHRI;
- Creating focal points within their respective organisations on business and human rights;
- Reporting, via Regional Chairs, to the ICC Annual Meeting starting from May 2011 in Geneva on progress towards the development of national action plans.

Adopted on 10 October 2010
Edinburgh

Appendix 3:

Seoul Statement

on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia International Conference on Human Rights of Migrants and Multicultural Society Seoul, Korea; 10–12 November 2008

The International Conference on Human Rights of Migrants and Multicultural Society – *Dignity and Justice for All Migrants* held in Seoul, Korea, 10–12 November 2008, was organized by the National Human Rights Commission of Korea (NHRCK) in consultation with the International Coordinating Committee (ICC) of National Institutions for the Promotion and Protection of Human Rights, the Asia Pacific Forum of National Human Rights Institutions (APF), and the Office of the United Nations High Commissioner for Human Rights (OHCHR) in commemoration of the 60th anniversary of the Universal Declaration of Human Rights.

As 2008 also marks the 60th anniversary of the founding of the Republic of Korea, the NHRCK is proud to have had this opportunity to bring together the participants at this special time. The Conference was devoted to the exchange of information, experiences, and good practices related to the promotion and protection of the rights of migrants in the emerging and established multicultural societies of Asia, including Korea.

The Conference brought together commissioners and senior staff members of eight NHRIs in Asia, human rights experts from Asia, Europe and the Americas, as well representatives from migrant communities and NGOs in Asia. The NHRIs represented included Indonesia, Korea, Malaysia, the Maldives, Mongolia, Nepal, the Philippines and Thailand. The participants held active discussions on issues related to human rights and multicultural society as those topics relate specifically to migrant issues and the challenges faced by NHRIs in developing good practices related to these issues.

These discussions took place in a Panel Format organized under the following topics: International Processes on the Rights of Migrants and NHRIs, Experiences of Migration and Multicultural Policy, Concepts and Policies on Migration and Multicultural Society, Migration and Multicultural Policy in Korea, and Practices and Lessons Learned for NHRIs in Asia. A main outcome of the Conference was the adoption of the *Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia*.

The key issues identified in the course of the deliberations of the Conference are as follows:

1. Migration is a global phenomenon shaped by wider economic, social and political processes. Hence, policy discussions about migration must be located within a normative framework that recognizes the full range of all human rights of all people.
2. Regional and sub-regional cooperation arrangements are vital in promoting human rights in advancing dignity and justice for all migrants. At the same time, it is also vital that all countries move toward ratifying the Convention on the Protection of the Rights of all Migrant Workers and their Families to ensure that national and regional policies are consistent with international standards. Countries of origin, transit and destination all have significant obligations toward the protection of rights of all migrants.

3. In Asia, cross-border mobility and migration have greatly increased. Across the region men, women and children migrate in search of livelihood and opportunities to escape impoverishment and all forms of deprivation. A large number of migrants are extremely vulnerable to human rights violations owing to their irregular status, whether they migrate in connection with employment, marriage or otherwise.
4. While several international forums have addressed the issue of the human rights of migrants, they are ultimately realized at the national level. NHRIs thus have a key role to play with respect to protecting and promoting the rights of migrants not only in terms of filling the domestic protection gaps but also in terms of serving as a critical link between migrant communities, the state and international human rights mechanisms. There have been many processes and initiatives across Asia on this subject but the challenges remain significant. Thus, a renewed commitment is required.
5. Migration gives rise to a range of civil, cultural, economic, political and social rights concerns of particular relevance not only to migrant communities themselves but also to the wider society in countries of origin, transit and destination.
6. Migrant communities; national, regional and international human rights mechanisms; governments and public authorities in countries of origin, transit and destination; private and public sector employers in the formal and non-formal sectors; and civil society organizations are important stakeholders in the process of securing migrant rights.
7. It is vital that the discourses around migration, including in forums such as the Global Forum on Migration and Development, are reoriented to ensure that they are more than just a negotiation between countries of origin and destination on the most effective global arrangements to meet market demands for supply of human resources. Such discourses lead to commoditization of migrant workers and pave the way for a range of human rights violations.
8. Migration as a phenomenon is intricately connected to patterns of economic development and availability of social opportunities in both countries of origin and destination. A very large number of migrant workers, owing to their poverty and disenfranchisement, and the gap in protection in countries of origin and destination, are often not subject to the protection of fair labour standards and are vulnerable to several forms of exploitation.
9. In many countries across Asia, contrary to international law, the immigration status of people tends to result in the denial of basic human rights. In particular, the criminalization of irregular workers including their arrest, detention and deportation without due process is widely prevalent. The situation of women migrants, including those who migrate as a result of transnational marriage, and children deserve particular attention in terms of their special vulnerability to discrimination and violence. Migrant workers are also vulnerable to high levels of discrimination and xenophobia due to prejudices, ignorance and other attitudes intolerant of difference and plurality.
10. Notwithstanding ASEAN initiatives, existing intergovernmental processes within Asia have failed thus far to effectively protect most migrant workers, especially irregular and women domestic workers, as they continue to lie outside of any effective human rights protection system. Migration policies of states need to be reoriented toward enabling protection of all migrant workers in order that they can contribute more effectively to society and the economy.
11. In many Asian countries, irregular migrant workers are criminalized, subjected to prolonged administrative detention and denied due process especially in determining whether they have been victims of human smuggling or trafficking. This makes it near impossible for irregular migrants to access basic health and welfare services.
12. Notwithstanding the near universal ratification of the UN Convention on the Rights of the Child in Asia, the dominant practice in many countries is to keep children of arrested migrants in overcrowded detention centers. The failure of host countries to register and issue birth certificates to the children of migrant workers creates a vicious cycle of stateless children living in a state of limbo.

13. The increasing spread of transnational crime, including the trafficking and smuggling of persons, poses a range of further challenges to migrants who are often victims of such organized crime. Trafficking and smuggling in persons poses significant challenges to states, national and international human rights actors, and civil society organizations.
14. The presence of conflicts and various forms of persecution have resulted in an increased flow of refugees and asylum seekers. Notwithstanding their distinct status in international human rights and humanitarian law, refugees and asylum seekers may face many of the same problems as other migrants do in terms of accessing economic and social opportunities, as well as securing the protection of their civil, cultural and political rights.
15. International human rights law, particularly international human rights treaties, declarations, and standards set by treaty bodies and the work of special procedures, must be the fundamental starting point for addressing the challenges of the future, including the challenge of securing the protection of dignity and justice for all in the context of migration and its social and cultural impacts. These impacts are significant not just in countries of destination but also in countries of origin, which often witness important demographic changes that call for informed and concerted action to protect migrants and their families.
16. There is no “one size fits all” solution for managing the cultural diversity resulting from migration, a highly contested and evolving reality. Human rights and culture are not mutually exclusive. All actors, state and non-state, have a responsibility to give due recognition to all migrants as bearers of both culture and rights. To the extent that culture embodies similarities and difference, all societies embody diversity and pluralism. Cultural change is constant and migration contributes to cultural change and transformation in both countries of origin and destination.
17. Nevertheless, a human rights approach requires recognition of cultural diversity within the context of internationally recognized standards. The non-recognition of cultural difference and plurality, and demands for assimilation, can result in significant human rights violations. Prejudice and ignorance often fuel intolerance and acts of hate toward migrants. While legislative and policy measures are important to counter-act such attitudes, education and awareness-building to change attitudes are vital to achieving inclusion and acceptance.
18. The continued development of national human rights standards and the consistent application of human rights law by the state in a context of competing cultural identities can directly contribute to the expansion of national identity as experienced by local stakeholders. This expanded identity brings within its scope all ethno-cultural groups within the state’s jurisdiction, thereby contributing to the development of social and political cohesion in emerging multicultural societies. This expansion supports policies of cultural, economic and political justice not only between ethno-cultural groups but also within them.
19. A comprehensive, integrated and multi-treaty approach, applying the highest possible standards of human rights for migrant workers, including those in an irregular situation and women migrant domestic workers, is necessary to ensure the effective promotion and protection of the human rights of all migrants.
20. The further development of cooperative arrangements among the peoples, governments and institutions of the Asia-Pacific to protect the rights of all migrants would further advance the realization of the vision of the Universal Declaration of Human Rights. To this end, the Conference adopted the *Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia*.

Appendix 4:

Seoul Guidelines

on the Cooperation of NHRIs for the Promotion and
Protection of Human Rights of Migrants in Asia
International Conference on Human Rights of Migrants
and Multicultural Society
Seoul, Korea; 10–12 November 2008

Preamble

The International Conference on Human Rights of Migrants and Multicultural Society – *Dignity and Justice for All Migrants* held in Seoul, Korea on 10–12 November 2008,

Reaffirming the Universal Declaration of Human Rights which proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Recalling the universal instruments agreed upon by States to safeguard human rights and fundamental freedoms, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), the International Convention on Rights of Persons with Disabilities (ICRPD), relevant International Labour Organization conventions, and regional instruments,

Welcoming the entry into force of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1 July 2003), reaffirming its importance as a baseline for migrant workers' rights, and recognizing the important work of the Committee on Migrant Workers, Welcoming the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,

Recognizing that these instruments establish a framework for the protection of the rights and fundamental freedoms of all human beings,

Recognizing the important role played by the human rights organs of the United Nations, including the guidance and jurisprudence of the treaty bodies, the Human Rights Council, and special procedures including, notably, the Special Rapporteur for the promotion and protection of the human rights of migrants and his visits to Asian countries such as Indonesia, South Korea, and the Philippines,

Reaffirming the Durban Declaration and Programme of Action (DDPA), adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) in Durban, South Africa, September 2001, as a landmark document in global efforts to eradicate racism, racial discrimination, xenophobia and related intolerance,

Welcoming the convening of the Durban Review Conference (DRC) which is to take place in Geneva on 20–24 April 2009, and the establishment of the International Coordinating Committee (ICC) of National Institutions for the Promotion and Protection of Human Rights Working Group on the DRC at the 9th International Conference of National Institutions (ICNI) in Nairobi, Kenya, October 2008,

Recognizing the importance of a human rights-based approach to migration, as well as the full participation of NHRIs, in the Global Forum on Migration and Development process,

Welcoming the timely adoption on 5 November 2008 of General Recommendation No. 26 of the Committee on the Elimination of Discrimination Against Women (CEDAW) on Women Migrant Workers who may be at risk of abuse and discrimination,

Noting that migration can be a positive social force as migrants make valuable contributions to economic growth and development in both home and host countries, including poverty reduction, and as migrants contribute to the vitality of a diverse society and to more enlightened relations among peoples,

Noting also that the situation of migrant workers and their families has become a critical contemporary human rights issue worldwide, particularly in relation to exploitation by traffickers, people smugglers, recruitment agents, and corrupt officials; deaths and injury in transit; discrimination and xenophobia; various forms of exploitation including sexual abuse; subjection to forced labour, slavery, practices akin to slavery; and intolerable working conditions; and inhumane treatment in cases of arrest, detention and deportation,

Recognizing the unique role played by NHRIs in applying international human rights standards at the national level, thereby ensuring their independence and effectiveness in accordance with the Paris Principles, which enables them to contribute to the promotion and protection of migrant rights through dialogue between public authorities and civil society groups at the national level,

Urging therefore the continued enhancement of the role and participation of NHRIs in international human rights mechanisms, such as the Human Rights Council (Universal Periodic Review and Special Procedures) and Human Rights Treaty Bodies, as well as in regional human rights initiatives,

Reaffirming that NHRIs in the Asia-Pacific region should continuously play an active role in protecting and promoting human rights in the region, with special efforts to advocate for a human rights approach to migration and migration management, and to promote the establishment of NHRIs in countries where they are not yet established,

Welcoming the efforts and progress made by the Asia Pacific Forum of National Human Rights Institutions (APF) concerning migration issues, in particular, trafficking of women and children

Welcoming the efforts made by the ASEAN NHRI Forum to contribute to the development and establishment of an intergovernmental human rights body in accordance with the ASEAN Charter, and the contributions of the Civil Society Task-Force on ASEAN Migrant Workers to the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (Cebu 2007),

Recalling the key concerns and issues identified by the Jakarta Process Review related to existing legal, institutional, and policy frameworks in the countries studied which are considered detrimental to the human rights of migrants in an irregular situation and migrant domestic workers,

Expressing solidarity with the Jakarta Process Review – Appeal to the Asia Pacific Forum in its Call for Regional Standard-setting on the Human Rights of Migrants in an Irregular Situation and Migrant Domestic Workers (Kuala Lumpur 2008),

Noting the importance of inter- and intra-regional relationships among NHRIs given the nature of migration and the capacity to share information and support when dealing with migrants and specific migration issues,

Reaffirming the need for increased cooperation and sharing of information and best practices, including the development of specific joint programs and mechanisms, among NHRIs at regional and international levels,

Noting with great interest similar calls for cooperation among NHRIs in other regions, including the creation of mechanisms for communication and coordination between human rights institutions, a call for NHRIs to engage in transnational cooperation and to make use of their networks to communicate on migration issues, and to make recommendations to strengthen cooperation between NHRIs to ensure the promotion and protection of all human rights of migrants,

Welcoming the outcome of the Seoul Conference on Human Rights of Migrants and Multicultural Society (Seoul, 10–12 Nov. 2008) which recognizes the urgent need to develop strategies and action-oriented guidelines to strengthen and promote cooperation among NHRIs in Asia in addressing challenges identified during the Conference,

Recalling the Seoul Commitment to “promote, where relevant, regional cooperation among NHRIs” in order to implement the Seoul Declaration of the 7th International Conference of National Institutions for the Promotion and Protection of Human Rights held in Seoul on 14–17 September 2004,

Welcoming the establishment of the Seoul Process as a framework for cooperation among NHRIs and other stakeholders,

adopts the following guidelines on the cooperation of NHRIs for the promotion and protection of the human rights of migrants in Asia.

Section I: Principal Areas of Action

NHRIs in Asia are encouraged to take action in the following areas for the purpose of promoting and protecting the human rights of migrants:

International Human Rights Mechanisms and Processes

1. Standard-setting on women migrant workers at the international and regional level,
2. Promoting universal ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, particularly among destination countries in Asia,
3. Promoting universal ratification and implementation of all other international UN human rights treaties and ILO conventions relevant to migrant issues,
4. Promoting ratification of the 2nd Palermo Protocol to the UN Convention against Transnational Organized Crime,
5. Ensuring regular reporting on and implementation of the concluding observations and recommendations associated with the human rights treaties above,
6. Encouraging removal of reservations to ratified human rights treaties,
7. Strengthening of cooperation with the Special Rapporteur on the human rights of migrants and other Special Procedures established by the Human Rights Council (HRC)
8. Participating in the Universal Periodic Review (UPR) mechanism and ensuring implementation of its recommendations
9. Participating in the Global Forum on Migration and Development,
10. Enhancing cooperation with the Office of the High Commissioner for Human Rights (OHCHR), particularly with the National Institutions Unit (NIU) and Asia and the Pacific Unit
11. Enhancing cooperation with international organizations, in particular, International Labor Organisation (ILO), UN High Commissioner for Refugees (UNHCR) and International Organisation for Migration (IOM)
12. Institution-building related to the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (January 2007),

National Implementation of International Human Rights Standards

13. Encouraging and supporting establishment of independent NHRIs in conformity with the Principles Relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights (Paris Principles),
14. Strengthening of NHRI mandates with regard to the human rights of migrants,
15. Developing and implementing National Action Plans (NAP) that include the human rights of migrants, and ensuring the implementation of such NAPs,
16. Harmonizing national legislation and policies in conformity with international human rights standards,
17. Improving policy coordination among government agencies in addressing issues of migration based on human rights principles,
18. Enhancing cooperation and collaboration with relevant government agencies,
19. Enhancing cooperation with stakeholders such as NGOs, academia, media and other civil society actors,
20. Ensuring participation of migrants in the policy decision-making process and policy implementation,

Remedies and Services

21. Providing effective remedies such as complaints-filing, counseling, investigation, etc., regarding human rights violations against migrants, in particular, irregular and undocumented workers, victims of trafficking, smuggling and sexual abuse,
22. Providing legal aid or paralegal assistance and services,
23. Promoting and ensuring equal access to education, medical, social security, judicial and legal services for migrants and their family members,

Education, Training, and Awareness-building

24. Developing human rights education and training modules and materials in all appropriate languages,
25. Campaigning for raising public awareness of the human rights of migrants,
26. Educating migrants on their rights at the time of pre-departure in the country of origin and at post-arrival in the country of destination,
27. Educating and training government officers on human rights related to migrants, particularly immigration officers, the police and correctional officers,
28. Promoting a culture of human rights, meaning the promotion of tolerance, respect for cultural diversity, and inter-cultural understanding in order to combat racism, racial discrimination, xenophobia and related intolerance,
29. Carrying out collaborative studies, survey and research on issues related to migrants,

Migrant Workers

30. Improving national policies on employment of foreign laborers and personnel, including company recruitment activities and the activities of recruitment agencies, in conformity with international human rights standards,
31. Establishing a set of minimum standards on working conditions and workplace policies including safety and health, overtime and irregular hours, fair and adequate pay, clear information regarding work duties, the reduction of language barriers, respect for cultural and religious beliefs in the assignment of work duties and schedules, job termination and forceful dismissal,

32. Taking legislative initiatives aimed at greatly increasing the penalty for a violation of national labor and employment laws, or recruitment policies,
33. Establishing a set of minimum standards for the living conditions associated with employer supplied housing for migrant workers, and their families, where appropriate, including requirements for the provision of basic amenities, such as shelter, running water, heat, and lighting,
34. Taking legislative and administrative initiatives aimed at securing the application of domestic labor and employment laws to migrant workers in a manner that is equal to that of the national labor force including the provision of medical services, participation in the national pension system, worker's accident and disability compensation, the right to join and form unions, and the right to legal remedies for unpaid wages,
35. Enhancing the right to change employer, especially in cases of exploitative or otherwise unjust working conditions,
36. Conducting joint research, development, and publication of model contracts for migrant workers which are industry specific and take into account relevant national contract laws,
37. Monitoring the human rights situation of irregular migrant workers during periods of intensified government enforcement of national immigration laws and increased detention and deportation of irregular workers, including amnesty and repatriation actions,
38. Enhancing the right of asylum seekers to support themselves through temporary employment or other adequate means of livelihood while awaiting determination of their status,
39. Ensuring decriminalization of the victims of smuggling and trafficking,

Migrant Women

40. Securing the safety, security and dignity of women migrant workers in their intended workplace before departure from the country of origin, while in transit, and after arrival in the country of destination,
41. Setting minimum standards applicable to the employment and treatment of women domestic workers, including a minimum entitlement to one day of rest per week,
42. Improving national policies regarding international marriage brokerage activities, including specific policies aimed at preventing, identifying, and, where appropriate, prosecuting activities that mislead women into marriage or violate the human dignity of women by inhuman and degrading treatment,

Children of Migrants and Child Migrants

43. Securing the right to education regardless of the immigration status of the children themselves or their parents,
44. Preventing discrimination and prejudice against the children of migrants and international marriages, and child migrants, in schools and in the classroom,
45. Promoting cultural and social integration regarding the children of nationals abroad, and social and educational reintegration of the children of returning migrants,
46. Encouraging birth registration and granting of the appropriate nationality under the laws of both the country of origin and the country of destination, in particular the registration of newborn children of irregular migrants without fear of arrest or detention,
47. Enlarging social service programs that grant financial assistance for child care and medical services regardless of immigration status,
48. Protecting human rights of children of migrants in detention facilities.

Section II: Working Structure

Seoul Process

The Seoul Process, which is a framework for cooperation among NHRIs and other stakeholders with the purpose of implementing the Plan of Action set forth in Section III of these Guidelines, is hereby established in accordance with the following:

49. The National Human Rights Commission of Korea (NHRCK) is appointed as the convener of the Seoul Process,
50. The convener is requested to organize, in cooperation with the APF, the next meeting of the Seoul Process to be held in 2009 (Seoul Process 2009),
51. The convener shall cooperate closely with the Jakarta Process, which focuses on the human rights of migrants in an irregular situation and migrant domestic workers,
52. The APF is requested to provide necessary assistance and support, including financial, for the Seoul Process in relation to the implementation of these Guidelines,
53. The UN Special Rapporteur on the human rights of migrants shall be invited to join the Seoul Process 2009,
54. A focal point within each NHRI shall be created to serve as the primary channel for all cooperative efforts related to the implementation of these Guidelines,
55. Interested NHRIs are encouraged to enter into MOUs on issues of mutual concern regarding the promotion and protection of the human rights of migrants,
56. Interested NHRIs are encouraged to develop staff exchange programs to address issues of mutual concern in relation to the implementation of these Guidelines,
57. A proposal shall be made to the APF Councilors for the creation of a Working Group on Migration as decided at the 8th International Conference of National Institutions for the Promotion and Protection of Human Rights (Santa Cruz, Bolivia, 24–26 Oct. 2006),
58. A proposal shall be made to the APF Councilors to consider taking up the issue of migration as the Advisory Council of Jurists (ACJ) theme of study and recommendation for the year 2009/10.

Section III: Plan of Action

NHRIs in Asia are encouraged to undertake the following actions in coordination with the Seoul Process for the purpose of promoting and protecting the human rights of migrants:

59. Development of mid-term action plans for the implementation of these Guidelines at the regional level,
60. Development of concrete action plans in line with these Guidelines as an integral part of each NHRI's annual work plan from 2009 onwards,
61. Monitoring of the human rights situation of migrants in each country,
62. Development and strengthening of remedies to address human rights violations committed against migrants, especially undocumented and irregular migrants,
63. Taking of joint action, where appropriate, to address issues of mutual concern that require an internationally coordinated response,
64. Production of an annual report on the implementation of these Guidelines,
65. Establishment of joint research projects among NHRIs in Asia on the causes, processes and consequences of international migration,

66. Initiation of an international campaign for the universal ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and other related human rights treaties,
67. Working towards the inclusion of migration initiatives in the National Action Plans (NAP) of the NHRIs' respective governments,
68. Development of training modules and materials related to the human rights of migrants,
69. Initiation and implementation of public human rights campaigns on migrant issues aimed at awareness building,
70. Initiation and implementation of human rights education and training programs for migrants at the time of pre-departure from the country of origin and at post-arrival in the country of destination,
71. Initiation and implementation of human rights training programs for government officers, in particular, law enforcement agencies, including immigration, police and detention facilities,
72. Monitoring and participation in the regional standard-setting and institution- building processes related to the human rights of migrants.

Appendix 5:

Santa Cruz Declaration

8th International Conference of National Institutions for the Promotion and Protection of Human Rights Santa Cruz, Republic of Bolivia; 24–26 October 2006

1. The Eighth International Conference of National Institutions for the Promotion and Protection of Human Rights was devoted to the theme of the role of national human rights institutions (NHRIs) in dealing with migration. The Conference was organized by the Defensor del Pueblo of Bolivia from 24–26 October 2006, in cooperation with the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the International Coordinating Committee (ICC) of NHRIs. The participants thanked the support of the Defensoria del Pueblo, OHCHR, Rights and Democracy, the Special Fund for Ombudsman and NHRIs in Latin America and the Caribbean, the Network of NHRIs of the Americas and the British Council.
2. NHRIs express their gratitude to the Defensoria of Bolivia for its excellent organization of the conference and warm hospitality. They also appreciate the consideration extended to them by the city of Santa Cruz. They welcomed the message of the United Nations High Commissioner for Human Rights and acknowledged the stimulating presentations by the United Nations special rapporteur on the human rights of migrants, the Chair of the Migrant Workers Committee and other keynote speakers as well as the fruitful discussions and deliberations. Nongovernmental organizations (NGO) from around the world made a valuable contribution at a pre-conference forum and by actively participating in the conference itself. The conference was further enriched by the participation of the President of the Republic of Bolivia and the Prefect of the State of Santa Cruz.
3. The Eighth International Conference for NHRIs hereby adopts the following Declaration:

The Eighth International Conference of NHRIs,

4. *Recalling* the universal instruments agreed upon by States to safeguard human rights and fundamental freedoms, particularly the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Their Families, the United Nations Convention against Trans-national Organised Crime and its additional protocols, the relevant International Labour Organization conventions and regional instruments, and other relevant international human rights instruments,
5. *Recognizing* that these instruments make provision for, and require States to, undertake measures to protect the rights of migrants which constitute a platform for a human rights based approach to migration,
6. *Recognizing* the unique role played by NHRIs in the implementation of international human rights standards at the national level, thereby ensuring sustainability of human rights protection,
7. *Welcoming* the guidance and jurisprudence on issues of migration provided by the human rights treaty bodies and special procedures, and in particular the Committee on Migrant Workers, the Special Rapporteur on the human rights of migrants, the Committee on the Elimination of Discrimination against Women, and the Committee on the Elimination Racial Discrimination as well as the judgements and findings of regional organizations and mechanisms,

8. *Stressing* the particular role played by NHRIs as expressed in the Copenhagen and Seoul Declarations adopted by the Sixth and Seventh International Conferences of NHRIs, regarding migration in the context of conflict and terrorism and their commitment in this regard,
9. *Welcoming* the Recommended Principles and Guidelines on Human Rights and Human Trafficking of July 2002 and General Recommendation 30 (2004) of the Committee on the Elimination of Racial Discrimination on the rights of non citizens,
10. *Recognizing* the linkage of international migration, economic growth and development including poverty reduction,
11. *Recalling* that, as practice shows, physical barriers, including walls, endanger fundamental rights such as the right to life,
12. *Welcoming* The Guiding Principles on Internal Displacement drafted by the United Nations General Assembly in 1998,
13. *Urging* therefore the continued enhancement of the role and participation of NHRIs in the international human rights system including in the recently established Human Rights Council,

Declares that:

14. NHRIs shall advocate for a human rights approach to migration and migration management. NHRIs underline that each State is responsible to guarantee respect for the human rights and fundamental freedoms of all persons regardless of their migration status,
15. NHRIs play an important role in ensuring efficient domestic legal protection of all migrants, including access to justice, non-discrimination and equal treatment, including full and effective protection in all areas of society,
16. NHRIs play a vital role in promoting a society dedicated to diversity as a positive potential for ensuring a cohesive and peaceful society, for innovation and growth, and building on the fundamental principles of equality and mutual respect,
17. NHRIs shall examine and raise awareness of the causes of migration, encompassing economic, political, social, cultural, historical, or other factors leading to migration,
18. NHRIs shall engage in cross-country cooperation and use their networks to communicate on migration issues – between neighbouring countries and sending, transit and receiving states. NHRIs would also benefit from strategic partnerships with civil society organisations to implement their advocacy, research, public education, media campaigns and ongoing monitoring and investigation activities,

In order to implement this declaration, NHRIs hereby agree:

19. To establish a Working Group through the ICC to define a concrete plan of action for implementation of this Declaration at the 19th session of the ICC and call on regional groups to do the same,
20. To develop and implement within their institutions a strategy to address the problematics of migration,
21. To develop plans of action among NHRIs of relevant sending, transit and receiving states in cooperation with partners including civil society,
22. To request OHCHR to prepare a study which could also include NHRI best practices in relation to migration,
23. To encourage their States to support the Migrant Worker's Committee and the Special Rapporteur on the human rights of migrants and call for the ratification, and its implementation, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and report back to the next session of the ICC on concrete measures taken in this regard.

General Guidelines

The following are a summation of the main areas whereby NHRIs may intervene to promote and protect the rights of migrants:

Operational provisions

Ratification

24. NHRIs should promote the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families through appropriate means including campaigns, policy advice, conferences and publications on the benefits and the background of the convention,
25. Regarding the large number of governments which are reluctant to ratify the convention, NHRIs should analyze the reasons behind non-ratification including misconceptions and other obstacles, and work on argumentation catalogues to counter these concerns,
26. In an effort to advocate for ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families, NHRIs could benefit from partnership with civil society organizations,

Implementation *de jure* and *de facto*

27. NHRIs should closely monitor the domestic administrative and legislative implementation of international instruments relevant for all migrants application of these rights,
28. NHRIs should encourage the development of a national legal framework for upholding the rights of internally displaced persons, paying special attention to promoting and protecting the rights of internally displaced women, children, the Indigenous Peoples and all vulnerable groups,
29. NHRIs should, where relevant, monitor, investigate and initiate complaints to protect the rights of migrant workers. As part of ongoing monitoring efforts, include a migration related section, including regarding the impact on development, in their annual reports. Special reports are encouraged where appropriate,
30. NHRIs should protect the rights of victims of trafficking and smuggling, especially women and children, including by providing legal assistance or taking legal action to defend the rights of smuggled and trafficked persons' rights,
31. NHRIs should protect trafficked persons, especially women and children, from harm, threats or intimidation by traffickers and associated persons,
32. NHRIs should advocate that national legislation defines the crimes of trafficking and smuggling and their various punishable elements and provide protection of smuggled and trafficked persons, including protection from summary deportation or return if this would pose a security risk to the persons and/or their families,

Cooperation

33. NHRIs should make use of the many options offered by the UN treaty bodies and the treaty reporting cycle to express their concerns regarding migrants in their respective countries,
34. NHRIs should use all mechanisms of the Human Rights Council, particularly its Special Procedures, to protect migrants' rights and advocate increased focus on the rights of migrant workers,
35. NHRIs should use existing regional mechanisms, conventions, regulations and courts,
36. NHRIs should work in regional networks to address the regional aspects of migration and development from a human rights perspective and coordinate joint action,

37. NHRIs should conduct research, identify and exchange best practices associated with migration and development including with respect to the creative and productive use of remittances to support development,

Policy and action oriented approach to implementation

38. NHRIs should launch public campaigns in order to counteract stereotypes of migrants and promote the knowledge and respect of their rights. In relation to the media, NHRIs should promote an understanding of migrants and migrant issues, including the positive impact of migration and diversity, and inform about the danger related to the risk of exploitation,
39. NHRIs should assist in developing guidelines and/or training for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of migrants, and in the inspection of immigration detention centres.
40. NHRIs should encourage the provision of practical and legal assistance to migrants upon arrival, including by facilitating the establishment of offices in border towns. NHRIs should monitor expulsion procedures,
41. NHRIs should focus as much on the economic, social and cultural rights of migrants as on their civil and political rights. NHRIs should encourage governments to adopt policies that regularize the status of migrants and assure their access to social services, including education and health services. They should also help to ensure that the labour rights of migrants, including decent work and full social protection, are protected,
42. Specifically, NHRIs should contribute to creating, in reception countries, the conditions for family reunification of migrant workers and the free education of the children of migrants in accordance with international human rights standards. In addition, NHRIs should pressure States to adopt emergency measures to guarantee the provision of basic services to Indigenous communities and other vulnerable groups that have a lack or no access to such services,
43. NHRIs should include refugees and asylum seekers among the groups requiring special attention. In particular, NHRIs should take an active role in implementing the goals, activities and programmes of the international Protection Agenda promoted by UNHCR and ensure its inclusion in the respective regional agendas of work and/or action plans,
44. NHRIs should conduct and encourage research on the real situation of Indigenous and minority migrants and other migrants. This may include the development of disaggregated data, by sex and ethnic groups, and accurate statistics and policy suggestions to reflect diversity and enable the participation of minority groups, internally displaced persons and Indigenous communities in policy and consultative processes on issues affecting them to ensure that their needs are better met.

Adopted in Santa Cruz
26 October 2006

Appendix 6:

Zacatecas Declaration

International Workshop of National Institutions for the Promotion and Protection of Human Rights: Causes, Effects and Consequences of the Migratory Phenomenon and Human Rights Protection Zacatecas, Mexico; 14–15 October 2004

The International Workshop of National Institutions for the Promotion and Protection of Human Rights: Causes, Effects and Consequences of the Migratory Phenomenon and Human Rights Protection, organized by the National Human Rights Commission of Mexico and the Office of the United Nations High Commissioner for Human Rights with the support of the Human Rights Commission of Zacatecas, was held in Zacatecas, Mexico, on 14 and 15 October 2004.

The Workshop was opened by the Governor of Zacatecas, Ms. Amalia García, and attended by representatives of the Mexican Senate, the government of Zacatecas, and 25 state human rights commissions of Mexico. Seventeen national institutions from Albania, El Salvador, Guatemala, Honduras, India, Mexico, Morocco, New Zealand, Nigeria, Panama, Paraguay, Peru, the Philippines, Spain, Thailand, Ukraine and Venezuela were represented by their Chairs or other senior officials.

The participants in the International Workshop of National Institutions for the Promotion and Protection of Human Rights: Causes, Effects and Consequences of the Migratory Phenomenon and Human Rights Protection

Hereby adopt the following Declaration:

Recalling the universal instruments agreed upon by States to safeguard the human rights and fundamental freedoms of all individuals, including migrants, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, and underlining the contribution they can make to international peace and security, alongside the Charter of the United Nations, as well as the relevant regional instruments,

Reaffirming the universality, indivisibility and interdependence of all rights, civil, political, economic, social and cultural,

Welcoming the entry into force of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and recognizing the important work that its Committee to Protect the Rights of all Migrant Workers and Members of Their Families is mandated to undertake,

Recognizing that the International Convention provides an important baseline for assessing respect for migrant workers' rights,

Recognizing also the unique role played by national institutions in applying international human rights standards at the national level, including as provided for in the Principles relating to the status of national institutions for the promotion and protection of human rights (General Assembly resolution 48/134 of 20 December 1993, annex), regarding the ratification of international human rights instruments, thereby ensuring sustainability of human rights protection,

Noting that the situation of migrant workers and their families has become a critical contemporary human rights issue worldwide, particularly in relation to exploitation by traffickers, people smugglers, recruitment agents and corrupt officials; deaths and injury in transit; discrimination, exploitation, vulnerability and sexual abuse in countries of destination; and treatment in cases of detention, arrest and repatriation,

Recognizing that it is impossible to suppress the desire to migrate by legal means and enforcement, in particular where it results from conflict, unemployment, poverty or oppression,

Noting that migration can also be seen as a positive force and that migrants can make a valuable contribution to economic development, diversity and better relations among peoples.

Noting also the importance of inter- and intra-regional relationships among national institutions, given the nature of migration and their capacity to share information and support each other when dealing with migrants and specific migration issues,

Recognizing the importance of appropriate, complete and current information concerning the status of the rights of migrants, taking note that a number of national institutions have prepared reports containing such information,

Noting the urgent need for a strong global and regional framework for migration that addresses:

- (a) The push factors in countries of origin, including lack of good governance, poverty, civil conflict, unemployment and lack of development;
- (b) Fair and efficient processes to facilitate meeting labour needs in receiving countries;
- (c) Investment in infrastructure, training of personnel and coordination of policy structures to manage migration flows and protect migrant workers; and
- (d) Protecting all the human rights and the dignity of migrants in all circumstances,

Stressing that in order to fulfil their mandates, national institutions require adequate resources and that it is a responsibility of the State to ensure this,

Declare they will:

1. Treat the protection and promotion of migrants' rights as a priority and for that purpose/to that end identify focal points for this area within their institution;
2. Intensify efforts to ensure awareness of the rights of migrants, including through human rights education and awareness-raising campaigns;
3. Undertake measures, together with their Governments, to protect the economic rights of migrant workers, in particular, to promote the establishment of fair tariffs for transferring money earned by migrants from their countries of stay to their home countries;
4. Continue to urge their Governments, particularly those of receiving States, to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;
5. Continue to urge their Governments to ratify the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention;
6. Take a more active role in the United Nations treaty body reporting process and request the respective treaty bodies to take into account issues relating to migrants in considering States parties' reports and to engage directly with national institutions on this subject;
7. Engage in legislative advocacy to facilitate the review of domestic legislation regarding the rights of migrants in order to ensure its conformity with international standards and obligations with respect to the protection of human rights, especially in relation to non-discrimination;
8. Make representations to Governments on legislative proposals, in particular to ensure that the human rights of migrants are not breached by counter-terrorism legislation;

9. Encourage the preparation of status reports concerning the rights of migrants and alleged violations of their rights and include in their annual reports particular reference to the rights of migrants and actions undertaken by the national institution and the Government to ensure the promotion and protection of those rights;
10. Encourage States to ensure appropriate broad-based dialogue at the national level among Government, national and state institutions and civil society based on assessments regarding the rights of migrants inter alia through seminars, workshops and media programmes.
11. Encourage the creation of mechanisms for communication and coordination between human rights institutions in order to exchange information on specific cases or general problems relating to violations of the fundamental rights of undocumented migrants as well as migrant workers, which will enhance cooperation and facilitate possible intervention by these institutions, in accordance with their mandates;
12. Encourage, where relevant, the establishment of regional information databases of countries of origin, routes and points of crossing and places of detention of migrants, with a view to reinforcing the work of institutions responsible for migration and consular offices;
13. Work, where possible, with consular services to ensure that migrants, both regular and irregular, are treated according to human rights principles and standards;
14. Promote programmes and information campaigns on human rights awareness for migrant workers, both prior to departure and after arrival, which can also assist in the reintegration of returning migrants, especially women and children migrants who often face stigmatization upon their return.
15. Identify the most cost-effective mechanisms for providing the best possible assistance to migrants in places of detention and share best practices that can strengthen the overall protection of migrants.
16. Establish regional cooperation between national institutions of the countries with major migratory flows, including joint task forces, the establishment of special modes of communication and advocacy for migrant workers abroad, including for the recognition and protection of their cultural rights.
17. Share research findings regarding migrant workers at home and abroad and call for the assistance of the Office of the United Nations High Commissioner for Human Rights in this regard.
18. Provide training to the administrative, judicial, immigration and security sectors to ensure respect for all the human rights of migrants.
19. Provide support, including legal aid, to migrants, who often have difficulty accessing systems of justice.
20. Ensure that States respect their international human rights obligations, particularly in regard to the non-derogable rights of all migrants.
21. Call for support from the Office of the United Nations High Commissioner for Human Rights in relation to its role in combating the trafficking of persons, in particular women and children, including in addressing the causes thereof as well as the provision of adequate remedies.
22. Address the vulnerability of migrants and their families to HIV/AIDS.
23. Promote the adoption of national plans of action and ensure that they take into account the rights of migrant workers, and call upon Governments to ensure that national institutions take their rightful place in the policy-making process in relation to migration.

24. Strengthen links with civil society, including migrants' organizations, in ensuring that all rights of migrants are respected domestically, regionally and internationally.
25. Engage with the International Labour Organization, which has a critical role to play in the protection and promotion of the rights of migrant workers, and call on the Office of the United Nations High Commissioner for Human Rights to facilitate this process.
26. Agree to return to the conclusions of their discussions, preferably no later than at the meeting of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) in April 2005.

The participants express their gratitude to the National Human Rights Commission of Mexico and the Office of the United Nations High Commissioner for Human Rights for the organization of the Workshop and to the Human Rights Commission of Zacatecas for its support. They extend particular appreciation to the Governor of the State of Zacatecas and other state authorities for their warm hospitality. They note the important contribution of the Mexican Federation of Public Organizations for the Protection of Human Rights and non-governmental organizations.

Adopted in Zacatecas, Mexico
15 October 2004

Appendix 7:

Rabat Declaration on Migration and Human Rights

3rd Arab-European NHRI's Dialogue on Migration and Human Rights
Rabat, Morocco; 6–8 May 2008

Preamble

The Third Arab-European NHRIs' Dialogue on Migration and Human Rights held in Rabat, Morocco, was organised in partnership among the Moroccan Advisory Council on Human Rights, the Danish Institute for Human Rights (DIHR) and the Jordanian National Centre for Human Rights (NCHR) and NHRIs' representatives from Europe and the Arab World including Saudi Arabia, Egypt, Qatar, Tunisia, Algeria, Mauritania, Palestine, Sweden, France, Germany, Norway, Ireland and Greece. Also, representatives from OHCHR in Geneva, the European Union Agency for Fundamental Rights, The Hague Process on Refugees and Migration, the Council of Moroccan Community Living Abroad, Raoul Wallenberg Institute in Sweden, and the Danish Institute for International Studies participated in the dialogue.

During the meeting participants actively engaged in discussions about challenges and gaps between the human rights standards aiming at protecting the rights of migrants and refugees, and the implementation in practice. Fruitful and constructive discussions took place at the meeting in Rabat considering the realities on the ground in terms of respect for migrants and refugees as well as the lack of ratification and implementation of international human rights' standards such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The participants reflected upon particularities of the Arab and the European regions in terms of history, culture and development which give rise to challenges that need to be tackled at various levels in order to reach a mutual understanding and sharing of experiences and best practices, and even worst practices, pertaining to migrants and refugees' rights taking into consideration the differences and status of refugees in the two regions.

Recalling the universality, indivisibility and interdependence of human rights and that the protection of human rights, provided for by international human right law, concern all human beings including migrants and refugees regardless of their legal status; including the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA), International Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention Relating to the Status of Refugees and Protocol Relating to the Status of Refugees, Convention on the Rights of the Child (CRC), Convention Against Torture (CAT), Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC), Convention on the Prevention and Punishment of the Crime of Genocide, Convention on the Rights of Persons with Disabilities and International Convention for the Protection of All Persons from Enforced Disappearance.

Recalling the recommendations of the Arab-European NHRIs' first meeting in the spring of 2007 in Amman, Jordan, on counterterrorism measures, and the second meeting in the fall of 2007 in Copenhagen, Denmark, on Racism, Intolerance and Xenophobia, and the global NHRIs' Meeting in Santa Cruz in 2006 on migration,

Reaffirming that NHRIs in the European and Arab regions, in conformity with the Paris Principles, should continuously strengthen their role as independent bodies and encourage the promotion and protection of human rights, including the rights of migrants and refugees, and, in addition, promote the establishment of NHRIs in countries where they are not yet established.

Underlining that NHRIs have an obligation to promote the development of an open and inclusive society, holding state authorities and governments accountable for ensuring full and equal protection of human rights for all, including migrants and refugees.

Noting that the Arab-European dialogue meeting has identified challenges in regard to migration issues in both regions, including the identification of root causes to migration and asylum-seeking related issues including, but not limited to, causes related to human rights violations such as persecution, poverty and environmental disasters, and/or causes pertaining to better economic opportunities, noting that this might also lead new forms of human rights violations such as trafficking in persons and migrants and domestic workers' rights' violations ending up in slavery-like situations, and/or causes related to hate speech and the perceived threat of migrants to public security, which might lead to some form that prevents them to have access to justice, education, health and social care, security, work, and to live in dignity.

Recognizing that countries in the two regions are progressing, though at different levels, in taking positive measures to protect migrants and refugees' rights at the level of policy making and granting hospitality to large numbers of people on the move, giving access to legal remedies such as legal aid and the filing of complaints, adopting legislation guaranteeing equal labour rights and the right to become members of unions and labour associations, providing access to double citizenship and providing refugees the right to visit their country of origin when travelling on aliens passport, etc.

Declaring that NHRIs from the two regions agree to develop and strengthen regional and cross-regional collaboration aimed at exchanging experiences, good practices and challenges that support NHRIs in their endeavours to promote and protect human rights at the national level.

Recommendations

The participating NHRIs agreed to commit themselves to work towards ensuring the promotion and protection of migrants and refugees' rights at the national, regional and international level. In order to achieve this, the following recommendations are made:

- Urge states, that have not yet done so, to ratify all international UN human rights and relevant ILO conventions, particularly the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC), and Convention Relating to the Status of Refugees and Protocol Relating to the Status of Refugees.
- NHRIs should actively promote all human rights in their work for migrants and refugees.
- Play a role in the development of national legislation aiming at the protection of rights of migrants and refugees, and call upon states to harmonize their national legislation with the international human rights standards, including rights of migrants and refugees and NHRIs' work and efforts toward regularization of the legal status of migrants and refugees.
- NHRIs, in their interaction with the UN human rights system and Treaty Bodies, should, in their respective countries, follow up on the recommendations of the UN Treaty Bodies and special procedures.
- NHRIs should hold state authorities and governments accountable for grave human rights violations, including threats to life, physical integrity and human dignity of migrants while they are attempting to cross borders or while at the hands of the authorities.

- Strengthen cooperation between NHRIs to ensure the promotion and protection of all human rights of migrants and refugees, in particular the right not to be discriminated against, the right to equal opportunities, access to family reunification, the right to health services, social security, access to justice, education, work and training, and the right to be protected against exploitation.
- NHRIs should monitor and report about the situation of migrants and examine the cases of human rights violations and make recommendations to provide remedies for victims.
- Work towards raising awareness and promoting the culture of human rights by various means e.g. through media and internet especially in regard to combating discrimination, racism, xenophobia and hate speech.
- Foster regional dialogue and exchange of best practices by establishing working and advocacy groups consisting of NHRIs from the Arab and European regions.
- NHRIs should promote collaboration with state authorities, civil society, international organizations and intergovernmental bodies and trade unions and all the concerned stakeholders.
- NHRIs should organize public awareness and opinion campaigns to foster a conducive environment for an inclusive society recognizing the value of migrants and refugees
- To ensure continuity, participants have formed two working groups; Group One on Regular and Irregular Migration and Group Two on Labour Markets and Migrant Workers' Rights.



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