

# AMNESTY INTERNATIONAL

## Questions and Answers

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### Q&A: the Migrant Workers Convention

#### What is a migrant worker?

According to the International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention) a migrant worker is “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”. “Family members” of migrant workers are defined by the Migrant Workers Convention as spouses or common law partners and minor dependent, unmarried children. Their rights are also protected by the Migrant Workers Convention.

#### Who are irregular migrant workers? Why are they irregular?

An irregular migrant worker is someone without legal permission to remain in a host or transit country. The Migrant Workers Convention protects the rights of irregular as well as regular<sup>1</sup> migrants. Not all irregular migrants enter or stay in a country without authorization or documentation since some are trafficked into a country to work with false documents provided by traffickers. Some have permission to work in the host country but *become* irregular. This may occur inadvertently and sometimes the reasons for the change of status may be arbitrary and unfair. During the course of a single journey, a migrant may slip in and out of irregularity according to government policies and visa regulations.

#### Why do migrant workers’ and their families need to be protected?

As a group, migrant workers and their families can be vulnerable to human rights violations arising specifically from their status as non-nationals.

**Rights frequently denied to migrant workers and their families include:** freedom of movement and residence; the right to life and to physical and mental integrity especially during transit; the right to privacy; freedom from arbitrary detention and collective expulsion without access to due process; arbitrary confiscation of identity documents; denial of equal access to education, adequate housing and standards of living and health care; freedom from abuses of their rights to work and rights at work, bonded and slave labour and abuses arising from smuggling and trafficking. Migrant workers are often over-represented in dangerous, degrading and dirty work; are frequently denied their rights to freedom of association, expression and religion; and face being denied the right to family life or unity. The Migrant Workers Convention recognises this and seeks to protect these rights.

#### How did the Migrant Workers Convention come about?

The Migrant Workers Convention came into force on 1 July 2003 after years of discussion of migrants’ rights since the early 1970s within the international community. A Working Group, established in 1980, finalised the Convention in 1990. On 18 December 1990, the Migrant Workers Convention was adopted by the General Assembly and opened for signature to all Member States of the United Nations. It currently has 37 States Parties<sup>2</sup>.

<sup>1</sup> According to the Migrant Workers Convention a documented or regular migrant is one who is “authorised to enter, to stay and engage in a remunerated activity in the State of employment” (article 5).

<sup>2</sup> See the link to States Parties :

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty24.asp> .

**In 1997, Filipino and other Asian migrant organizations began marking 18 December as the International Day of Solidarity with Migrants. Subsequently, in response to calls from NGOs and other civil society actors, on 4 December 2000, the UN General Assembly declared it International Migrants Day. December 18 is an opportunity for campaigners to draw attention to the need for increased protection of migrant workers' rights. Each year the international community can celebrate contributions made by millions of migrants to economies around the world including in their countries of origins whom they often support by sending remittances home. (See link to AI's work on migrant workers' rights at <http://web.amnesty.org/pages/refugees-index-eng>)**

### **What is the Migrant Workers Convention and what does it do?**

The Migrant Workers Convention is one of the core international human rights treaties. It is the first international instrument to provide specific recognition of the fundamental human rights of all migrant workers and members of their families. It aims to unify the international legal standards of protection for migrant workers and members of their families and protects the rights of *all* migrants including those who are in an irregular situation. It safeguards against discriminatory treatment, and expands the non-discrimination provisions found in other international human rights instruments, as it also prohibits discrimination on the basis of additional grounds, such nationality and economic position.

### **Is it the only instrument that protects and promotes the rights of migrants?**

No, their rights are protected under various international human rights treaties. International labour and refugee law, and where appropriate international humanitarian and criminal law, also protect migrant workers' rights.

The six core international human rights treaties are not related specifically to migrant workers, as they apply to other categories of people. The International Convention for the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant for Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provide general standards that apply to *all* human beings regardless of their status or circumstance. The Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provide protection to children and women respectively, including migrant children and migrant women. In addition there are a number of instruments of the International Labour Organization (ILO) that protect the labour rights of migrant workers. International labour law (including the eight conventions identified by the Governing Body of the ILO as fundamental) does not in general make distinctions between workers based on nationality or legal status. In addition, ILO Conventions No. 97 of 1949 and No. 143 of 1975 provide specific protection to the labour rights of migrant workers.

Other specific international standards that could provide protection include the two Protocols to the UN Convention against Transnational Organised Crime, which relate to the trafficking and smuggling of persons.<sup>3</sup> Migrants around the world are often stateless or at risk of arbitrary deprivation of nationality: they would be protected by the provisions of the 1954 Stateless Persons Convention and the 1961 Statelessness Convention. Relevant regional standards include the 2005 Council of Europe Convention against Trafficking in Human Beings.

Campaigners and advocates looking to protect and promote the human rights of migrants should, therefore, look in the first instance to the circumstances of the individual and decide

<sup>3</sup> While these "Palermo Protocols" are not human rights instruments as such, both contain a "savings clause" which ensures that the provisions of the Protocols do not affect rights, obligations and responsibilities under international humanitarian, human rights and refugee law. This provision also requires that the provisions of the Protocols be interpreted and applied in a way that is not discriminatory to persons on the ground that they are smuggled migrants or victims of trafficking in persons.

which of the tools provided by the framework of international, regional and national standards of protection and applicable in their countries are most suited to the migrant's particular situation.

**If it is not the only instrument protecting migrant workers' rights why is the Migrant Workers Convention necessary?**

Although the Migrant Workers Convention creates very few *new* rights, it elaborates and specifies how established human rights standards apply specifically to migrant workers and their families. It should be seen in the same way as the CRC and CEDAW, which consolidate the human rights of two specific groups – children and women respectively. Like children and women, migrant workers and their families, as a group, are at risk of human rights violations as a result of their membership of this group. The Migrant Workers Convention reinforces rights for migrants that are applicable to all human beings including the right to life (article 9); freedom from torture and cruel, inhumane or degrading treatment or punishment (article 10); freedom of opinion and expression (article 13); and recognition as a person before the law (article 24). It reaffirms the migrants' right to consular assistance if arrested or detained (article 16).

The Migrant Workers Convention is unique because it is the only instrument requiring governments to take the necessary measures to ensure that migrant workers and their families are informed by the host State, State of transit or origin, of their rights as contained in the Convention. Also, it allows migrant workers and their families to make individual and formal complaints via an established procedure when they believe their rights have been violated (article 77). In September 2007, Guatemala became the first State Party to make a declaration under article 77 which enables the UN Committee on Migrant Workers, a body of independent experts that monitors the implementation of the Migrant Workers Convention by States Parties, to receive such complaints<sup>4</sup>. Another new right under the Migrant Workers Convention is the right to be informed of the conditions of admission into the territory of a State in a language the migrant worker understands (article 33).

Also, under the Migrant Workers Convention, countries of origin have a responsibility to provide information and appropriate assistance prior to departure, and adequate consular and other services in the country of destination "in order to meet the social, cultural and other needs" of migrant workers and their families (article 65).

**Who does it protect? Does it protect the human rights of all migrant workers?**

Yes, it seeks to prevent and eliminate the exploitation of *all* migrant workers and members of their families throughout the entire migration cycle, from their country of origin to transit, arrival and stay in the country of destination, and eventual return to the country of origin.

**Important fundamental rights provided for all include, for example, the right to leave any State and to enter their State of origin (article 8); a prohibition on forced or compulsory labour (article 11); protection against the arbitrary deprivation of property (article 15); and the right to liberty and security of the person (article 16).**

**Additional rights are provided for regular migrant workers in the host State (Part IV). They include freedom of movement and residence within the State of employment (article 39), the right to vote and be elected in their country of origin (article 41). Other additional provisions granted to regular migrant workers include the right to transfer earnings from the State of employment, as well as a provision that attempts to de-link authorisation of residence from the permission to work, in order to prevent abuse by employers (article 49).**

**Does the Migrant Workers Convention protect the rights of other non-citizens like asylum seekers, refugees and stateless people?**

<sup>4</sup> The article can only come into force when nine more countries also make this declaration.

No, the rights of non-citizens like asylum seekers, refugees and stateless people are already protected in international law by specific instruments such as the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons. However, that does not mean that refugees and asylum seekers do not need protection of their rights at work, for example, since many of them work. However, in this case their rights are guaranteed by other international instruments<sup>5</sup>.

**Does the Migrant Workers Convention encourage irregular migration? Does it establish a right to regularisation?**

The Migrant Workers Convention does *not* advocate irregular migration (article 34) nor does it oblige States to regularise the status of irregular migrants (article 35). Rather it seeks to safeguard certain core rights of irregular migrants who are particularly vulnerable to human rights abuses as a result of their lack of status. Regardless of their status every migrant worker and every member of his or her family has “the right to recognition everywhere as a person before the law” (article 24)<sup>6</sup>. At the same time, the Migrant Workers Convention recognises that irregular migration is inherently undesirable and has a negative impact on the human rights of those migrants<sup>7</sup>. Therefore, it aims to reduce irregular migration obliging States Parties, including transit States, to “collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation” (article 68(1)). It calls for sanctions, where necessary, on employers who hire irregular workers and article 69 obliges States to take appropriate measures to ensure that the situation of irregular migration in its territory does not persist.

**How does it address the specific vulnerabilities of migrants?**

Migrants often face abuse of their rights, because, for example, they lack attachment to the host country or employment, or the specific employment sectors. The Migrant Workers Convention, therefore, aims to protect migrant workers against the particular circumstances in which they may find themselves including, for example arbitrary detention and expulsion from the host or transit country. It ensures consular access in article 16(7) in the case of detention and in article 23 in all other cases, particularly where the authorities are contemplating expulsion. This is an essential safeguard of due process.

Migrants have the right to liberty and freedom from arbitrary detention. If held on administrative charges they should not be held with convicted criminals or persons detained pending trial (article 17 (3)). The Migrant Workers Convention also addresses one of the major sources of vulnerability of migrant workers by making the confiscation and destruction of their documents unlawful, except if done by a public official authorized by law (article 21).

Another important aspect of the Migrant Workers Convention is that it provides improved protection, than that provided in other human rights treaties, against arbitrary and collective expulsion. It includes an absolute prohibition on collective expulsion of both regular and irregular migrants (article 22). Safeguards in article 22 include that a decision to expel must be reached in accordance with the law and that a right of appeal against expulsion before a judicial body must be available. Other guarantees include that migrants should have “reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her”. In relation to migrants in a regular situation, States should take into account “humanitarian considerations and ... the length of time that” the migrant has already resided in the host country (article 56(3)). The Migrant Workers Convention also

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<sup>5</sup> See for example the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons.

<sup>6</sup> Article 6 of the UDHR provides that everyone has the right to recognition everywhere as a person before the law. This right is echoed in article 16 of the ICCPR, and article 5 of ICERD.

<sup>7</sup> The preamble notes that “the human problems involved in migration are even more serious in the case of irregular migration and ... 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...”

prohibits the use of expulsion as a way 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” (article 56(2)).

**How does the Migrant Workers Convention protect the right to work and the rights at work of migrant workers? Do migrant workers have the same rights as nationals at work?**

The Migrant Workers Convention gives a relatively detailed elaboration of the labour rights of migrant workers who often experience discrimination and abuse in entering the labour market, and while at work. They may have identity documents confiscated or retained by employers, work in dangerous or unhygienic conditions, receive inadequate pay, be subject to indentured, bonded or slave-like labour, illegal confinement, denial of or restrictions on the right to association such as forming and joining trade unions and being included in collective bargaining agreements, and physical or psychological threats or abuse by employers.

**According to the Migrant Workers Convention, labour rights apply to all migrant workers, regardless of their status including the right to be free of slavery or servitude and a prohibition on forced or compulsory labour (article 11). They must have equality of treatment with nationals in pay, working conditions, including overtime, hours, weekly rest and termination of employment. In particular, the Convention makes it unlawful for employers to discriminate between migrant workers and native workers in private employment contracts (article 25 (2)).**

**All migrant workers have the right to transfer any savings and earnings from the State of employment at the end of their stay in that state (article 32). In the case of regular migrants, States are urged to facilitate the remittance of earnings and savings to the migrant’s country of origin (article 47).**

**All migrant workers have the right to join trade unions (article 26), while regular migrant workers can also form trade unions and other associations in order to protect their economic, social and cultural rights (article 40).**

**Regular migrant workers are entitled to the same treatment as nationals (without prejudice to the terms of their authorization of residence or their permission to work) in respect to protection against dismissal, access to unemployment benefits and public work schemes (article 54).**

**Article 66 protects workers from abuse at the hands of unlicensed recruitment agents in the migration process, in stipulating that only officially sanctioned agencies should be allowed to recruit migrant workers for employment.**

**What other economic, social and cultural rights are protected by the Migrant Workers Convention?**

All migrant workers and their families are entitled to economic, social and cultural (ESC) rights in line with their rights to full development of the human personality and to fulfil their potential as human beings. Violations of ESC rights are both a cause and a consequence of migration and can have a direct affect on the ability of migrants to integrate into the country of destination.

**The ESC rights guaranteed in the Migrant Workers Convention include: the right of migrant workers’ children, regardless of status, to have access to education (article 30); children of regular migrant workers have equal access with nationals to schooling and services (article 43); host States are encouraged to facilitate cultural integration of children through the provision of education in their mother tongue. All migrants, regardless of status, are entitled to emergency medical care (article 28). Regular migrant workers and their families are also entitled to housing, including social housing schemes, and protection against exploitation in respect of rent (article 43, 1 d). With members of their**

**families, regular migrants are entitled to social and health services in the country of destination (articles 43(1e) and 45(1c)).**

**All migrant workers, regardless of their status, are entitled to social security benefits on an equal basis with nationals of the State of employment. Where migrants are unable to receive certain benefits, on account of applicable national legislation, the Convention encourages the state to reimburse 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 27).**

**What does it say about family unity for migrants?**

There is no *right* to family unity or reunification under the Convention but States Parties are encouraged to facilitate family reunification and protect family unity as the “natural and fundamental group unit of society [which] is entitled to protection by society and the State.”

If a regular migrant dies or gets divorced, the State of employment should look favourably at applications to remain from the family members of that migrant worker who are already in the State, “taking due account” of the length of their stay in the State. This can be vital to protecting the rights of spouses of migrant workers, who find themselves with no legal right to remain in the territory of the employing State following divorce or bereavement, and yet who are unable or unwilling to return to their country of origin.

**To read more on AI’s work on migrants’ rights visit the web page at : <http://web.amnesty.org/pages/refugees-index-eng>**