

SUMMARY

The UN Migrant Workers Convention

An Instrument to Strengthen
Migrants' Rights in Germany

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for Human Rights



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German Institute for Human Rights

The German Institute for Human Rights contributes to the promotion and the protection of human rights by means of research projects, policy advice, public seminars, expert discussions, lectures, educational programmes and library services. It was founded on March 8, 2001, following an unanimous decision by the German Parliament on December 7, 2000, to establish a national human rights institution (NHRI). The institute is an accredited independent NHRI in compliance with the UN "Paris Principles". One of the key functions of NHRIs is to act as a bridge between the international and national protection system.



Preface

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 – in short the UN Migrant Workers Convention – has not received enough attention in Germany and other target countries of migration.

While migration has become an issue of importance on national, European and global political agendas, a human rights approach to the subject is the exception not the rule. The UN Migrant Workers Convention substantiates and strengthens the human rights obligations enshrined in earlier human rights treaties for migrants.

With the following study, the German Institute for Human Rights seeks to introduce the UN Migrant Workers Convention and to promote its ratification by Germany and other target countries of migration. At the same time, the study analyses gaps in the protection of migrants' human rights in Germany; gaps that need to be closed irrespective of the ratification of the Convention.

We hope this study improves the appreciation of the UN Migrant Workers Convention as part of the international and European human rights of migrants.

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Migration as a Challenge to Human Rights

The global phenomenon of migration has gained added significance in the age of globalisation. Today, about 200 million people live outside their country of citizenship. Germany alone has approximately 6.7 million residents who do not have German citizenship. According to estimates by the UN, Germany is one of the most important host countries.¹ The significance of migration is also made clear by the high priority of the migration debate on the international, European and national agendas. However, it is comparatively rare for the topic to be approached from the perspective of human rights.

Throughout the migration process, starting in their home countries and continuing equally in transit countries and their host state, migrants are frequently confronted with situations which violate their human rights. Thus they are frequently exploited by human traffickers, who make money out of their victims' desire to leave their home countries. Migrants may also be exploited in their host country because they do not know its language and laws or because those laws curtail the rights of migrants. Migrants therefore represent a highly vulnerable group which is in need of special protection from the international community of nations. At the same time, international migration presents a particular challenge for the human rights protection system, which traditionally relies on nation states to serve as guarantors of human rights.

The UN General Assembly responded to these problems in 1990 by adopting the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW). The convention aims to protect migrant workers and their families. Migrant workers are defined as all migrants resident in a country whose citizenship they do not possess and who are working, wish to work, or have previously worked in that country. Thus the protection of the convention encompasses the entire migration process, from before migrants leave their home country through their

stay in the employer state to the time after their return to their country of origin. Accordingly, the convention is addressed to states in their role as states of origin, states of transit and states of employment.

Unlike other UN human rights instruments – ICCPR, ICESCR, CAT, CEDAW and CRC – the ICRMW was ratified only after much hesitation. It was not until 2003, after a ratification campaign supported by NGOs and the UN, that the convention was ratified by enough states to come into force. Even today, this convention has no more than 34 parties, most of whom are states of origin of migrants. The typical host countries have so far failed to ratify the convention, among them Germany and the other member states of the European Union. The German government, which took a critical view of the convention already during its development phase, has declared on several occasions that it does not intend to ratify the convention. The purpose of the present study is to examine the value of the ICRMW and evaluate the consequences of ratification by Germany.

The provisions of the Migrant Workers' Convention

Different levels of protection for regular and irregular migrant workers

The convention for the first time explicitly demands a guarantee of certain fundamental rights for all migrants – even for people living or working in a country illegally.² In determining the level of protection and individual rights, the convention distinguishes between different groups of migrants in general, and regular and irregular migrants in particular. Regular migrants have both a residence and a work permit, while irregular migrants may lack both a residence and a work permit or may have a residence permit but no work permit.

Where the rights of all migrants – including irregular migrants – are concerned, the Migrant Workers' Convention confines itself to defining a minimum of human rights. This applies especially to economic, social and cultural rights. Thus the ICRMW, unlike the ICESCR, does not include the right to work. The right to health too is narrowly circumscribed and is restricted to measures which are urgently necessary for the preservation of life or the avoidance of irreparable harm to the migrant's health. In contrast, ICESCR calls on States parties to guarantee a broad spectrum of preventive, curative and palliative health care for all residents of its sovereign territory.

¹ See Global Commission on International Migration (GCIM) (2005), 83.

² The protection of the Migrant Workers' Convention does not extend to refugees.

In the case of migrants who are legal residents, the convention defines additional rights, especially to access to social services provided by the state. In granting these rights, the convention distinguishes between different types of legal residence, granting full equality only to those migrants who are permanent residents of their host country. All other migrants are entitled to limited social services depending on the purpose and length of their stay.

Emphasis on state's duty to inform

It should be emphasised that the ICRMW obliges States parties to provide comprehensive information to migrants about their rights and the prerequisites for their admission into and residence in the host states. The migrants' corresponding rights to information acknowledge the special situation of migrants, many of whom live in countries whose culture, language and legislation is foreign to them. By establishing the duty to inform, the convention acknowledges the experiences of older human rights conventions. These agreements tacitly assumed that their content would be publicised by the States parties, and therefore did not include the duty to inform.³ However, the monitoring committees have repeatedly noted that migrants are insufficiently aware of their rights as enshrined in these conventions.

No obligation to legalise residence

The Migrant Workers' Convention does not call for irregular migrants to be given right of residence. Rather, it limits itself to defining a minimum of human rights for these persons for the duration of their stay. States parties, therefore, remain entitled to deport irregular migrants. Additionally, the ICRMW contains no specifications about which persons may enter a country in order to work. The States parties thus retain the right to decide whom to admit into their territory. The convention is limited to regulations which govern the status of migrants during the process of migration and for the duration of their stay in the State party.

Germany's existing human rights obligations

Germany has already ratified several international human rights conventions which protect the rights of migrants. For example, the rights entrenched by the core human

rights conventions of the United Nations apply to all residents of States parties. The only exceptions are so-called citizens' rights which are explicitly restricted to holders of citizenship.

Similarly, the ILO conventions which contain the core labour standards apply equally to migrants, independently of their residential status, and to citizens. The same applies to the European Convention on Human Rights and the European Social Charter, although the latter protects only migrants whose home countries have also ratified the Charter.

Thus, even though migrants are already protected by other instruments ratified by Germany, it is obvious that the reports regularly submitted by the German government to the committees monitoring the UN human rights conventions only partially reflect the actual human rights situation of migrants. The special situation of migrants is not addressed in the reports. This gives cause for concern because an examination of the living situation of migrants in Germany shows that there are practical gaps in the protection of their rights in this country. This applies particularly to the human rights of people living in Germany as illegal immigrants. This study highlights the gaps in human rights protection by focusing on rights in work, that is labour rights including working conditions, the right to health and the right to education.

Problems protecting the human rights of migrants in Germany

Rights in work

Despite the high standards regarding labour rights as stipulated by German laws, migrants have considerable problems when they attempt to enforce these rights. Illegal migrants living in Germany frequently face exploitative working conditions with virtually no way of invoking state help. This is seen most strikingly in the employment conditions of construction workers, in the sex trade, and in private households, which predominantly employ women as domestic help and child-minders and to care for elderly persons. In jobs like these, illegal migrants are sometimes cheated of their wages or paid only a fraction of what they are due. They may also be forced to work under unacceptable conditions.

³ This applies in particular to the ICCPR, the ICESCR and the CEDAW. CAT acknowledges the duty to inform and specifically demands that it must be publicised among police and prison officials (Article 10). CRC too calls on States parties to publicise the rights of children (Article 42).

Under German law, illegal migrants have the right to receive adequate wages for their work and to work under decent conditions. Nevertheless, illegal migrants very rarely receive state assistance in asserting their claims against their employers, especially before the labour courts, because they are unaware of their rights or are afraid of being deported if the appeal makes the immigration authorities aware of their presence in Germany. Employers frequently use the migrants' ignorance and fear of deportation as a means of exploiting their labour. Additionally, the authorities which are responsible for curbing the illicit job market – and which, therefore, inspect the workplaces of illegal migrants – do not see it as their duty to inform the migrants they encounter there about their rights. Rather, they focus on policing and prosecuting illicit labour.

Germany is obliged by international human rights law to protect the rights in work of all people living in the country. To ensure the observance of human rights in practice, it is necessary to ensure that all residents of Germany, including illegal migrants, are aware of their rights and able to claim them.

The right to health

When illegal migrants try to assert their right to health in Germany, they face strong de-facto access restrictions. These people are particularly at risk when they are ill, injured or pregnant and unable to pay for medical care. In general, illegal migrants can only access the state-run healthcare system if they reveal their identity. When they do so, however, state healthcare institutions are obliged to report their illegal status to the immigration authorities, which then take steps to remove them from the country. As illegal migrants are afraid of discovery, they avoid making contact with the state authorities. Today, the healthcare these people receive is primarily provided by non-governmental and church organisations. However, these organisations are unable to provide comprehensive healthcare throughout the country, both because of a lack of funds and because the presence of non-governmental organisations is usually limited to metropolitan regions. Germany thus has a duty to reduce the barriers that prevent illegal migrants from gaining access to state healthcare.

The right to education

Finally, there is insufficient protection for the right to education in the case of children living in Germany

illegally. There are two main reasons for this. In some German states, the right to go to school is limited to people who are regular residents of the state. The definition of "regular residence" does not explicitly cover children with no official residential status, with the result that the law is uncertain on this issue. Additionally, it is unclear whether teachers and headmasters must notify the immigration authorities when a child with no residential status comes into their schools. Here, too, illegal migrants have reason to be concerned that sending their child to school will alert the immigration authorities to their presence and result in their being deported. Some illegal migrants currently succeed in sending their children to elementary school by providing false information or with the support of the teachers at the school. In contrast, it appears to be impossible for their children to receive post-elementary schooling.

According to international law, however, Germany is obliged to ensure that all children living in Germany are able to go to school. It must be made clear by law in all the states, therefore, that all children have the right to go to school and that schools are not obligated to report to the immigration authorities.

These three examples show that there are gaps in the protection of the human rights of migrants. Germany is obligated to secure the human rights of all people living in the country. However, this is made impossible by the close links between social law and police law, as illegal migrants are unable to assert or receive their rights if making contact with official institutions puts them at risk of being expelled or deported.

Reservations against ratification

Ratification of the ICRMW by Germany could help to draw more attention to the situation of migrants living in Germany and to identify and eliminate existing deficits in human rights protection. The German government rejects ratification because of fears that the convention would place excessive restrictions on the government's migration and employment policies. Additionally, there is a perception that it would become impossible to take adequate countermeasures against illegal migration once the convention has been ratified.

In fact, however, the ICRMW does not regulate the prerequisites for immigration, residence or employ-

⁴ E.g. articles 35, 68 of the convention.

ment, all of which issues are left to the sovereignty of the States parties. This is explicitly stated in article 79 of the convention. Additionally, the convention stresses in several places that the States parties are still called on to prevent clandestine and illegal migration as well as the employment of illegal migrants.⁴

What the Migrant Workers' Convention does address are the rights of migrants who reside in any given country. The definitions of these rights show that this convention has a narrower scope in the protection of certain human rights than other human rights agreements, most notably ICESCR.

Additionally, the convention does not stipulate the right to family reunification, even though this right has already been recognised by some international instruments⁵ and is derived in part from the right to respect for family life.⁶ The ICRMW merely calls on States parties to facilitate family reunification. In general, the ICRMW does not stipulate any rights that were not previously acknowledged under international law, either by the UN or the ILO. Germany itself has already recognised these rights in the context of the UN and the ILO.

Significance of the ICRMW

Specification of obligations regarding migrants

Like international conventions which apply only to certain groups of people, such as CEDAW, the ICRMW stipulates the obligations of States parties to protect the human rights of migrants on an international level. This clarifying function was precisely what the authors of the convention aimed to achieve, and it also resulted in the explicit formulation of general human rights principles. In particular, the general prohibition of discrimination is more clearly defined in the context of rights in work and of the participation in social rights.

Establishing a reporting procedure

The convention also establishes a procedure for the States parties to submit regular reports to a special committee. The States parties must report to this committee about the implementation of migrants' rights. That this can play a crucial role in ensuring human rights has been shown by the successful work of specialised organs like CEDAW or the Committee on the Rights of the Child in fostering understanding for women's and children's human rights on the one hand

and the striking deficiencies in the situation of migrants in Germany's present state reporting on the other.

Distinguishing between different types of migrants

The ICRMW also plays an important role in defining different groups of migrants more clearly. Migrants in general form a very heterogeneous group. The convention takes this fact into account and draws adequate distinctions between the different groups of migrants. Distinctions are made not only between the two large groups of regular and irregular migrants, but also between self-employed migrants, frontier workers, and project-tied workers.

Emphasis on duty to inform

Finally, the ICRMW gains independent significance because it stipulates a number of ways in which the states are obliged to provide information about migrants' rights. This takes into account the fact that migrants, and especially migrants confronted with a foreign language and culture, are frequently unaware of or insufficiently familiar with their rights.⁷ At the same time, the convention acknowledges that migration always involves more than one country. All States parties, independently of their status as states of origin, transit or destination, are therefore obliged to inform migrants about their rights at every stage in the migration process.⁸ Additionally, States are required to cooperate with one another.

Core recommendations

Ratification of the ICRMW and support for ratification of the convention in the European Union

Germany should ratify the ICRMW. This would help to draw more attention to the special situation of migrants in Germany and thus to improve the sometimes precarious human rights status of migrants living in Germany. Additionally, ratification by Germany – a so-called host country – would strengthen the UN human rights system. Germany should also campaign for the ratification of the convention within the European Union. This would reinforce the human rights component of EU policies on migrants and diminish unjustified reservations against the convention.

⁵ In particular, the European Convention on the Legal Status of Migrant Workers of 1977, article 12, paragraph 1.

⁶ E.g. the ECHR, which, although not conceding a general right to family reunification, has assumed the right to family reunification under article 8 of the EHRC in individual cases in a combination of special circumstances. See the verdict on *Sen vs. Netherlands* of 21 December 2001.

⁷ Article 37, article 65 paragraph 1 lit d.

⁸ Article 33 of the convention.

Incorporation of the human rights of migrants in existing reporting procedures

Independently of ratification of the convention, the assertion of migrants' human rights should be systematically incorporated into all state reports that deal with human rights. In particular, the existing "blind spot" in the reporting of the situation of illegal residents of Germany must be eliminated. Non-governmental organisations too are advised to include information about the situation of various migrant groups in their alternative reports.

Duties of all authorities to provide information for migrants

Independently of ratification of the convention, all authorities should provide comprehensive information to migrants about their rights, regardless of the migrants' legal immigration status. This applies both to migrants who want to enter Germany and to migrants who already live in Germany or who have lived in Germany in the past. The police authorities in particular should inform the migrants they encounter when policing illicit labour about the rights they have with regard to their employers.

Separation of social security functions from police functions

Independently of the ratification of the convention, public authorities which perform social security functions should be exempt from performing police duties.

In particular, all public authorities which provide healthcare and education should be exempt from the obligation to provide information about the migrant to the immigration authorities.

Clarification of the rights to education for children living in Germany illegally

Independently of ratification of the convention, the German states should guarantee access to elementary and secondary schools for all children, regardless of their immigration status. In some German states this requires the clarification by law that even children living in Germany illegally are required by law to attend school, and consequently that they have the right to go to school. All German states must ensure that schools are not obligated to provide data about illegal immigrant children to the immigration authorities.

Formation of a central non-governmental advisory and documentation office

The non-governmental organisations which advise migrants should set up a central advisory and documentation office which should operate in conjunction with either the welfare associations or the trade unions and employers. This office should support non-governmental organisations in counselling migrants. Additionally, it should gather documentation on cases involving the violation of migrants' human rights. This office should also serve as a means for making the interests of migrants known to policymakers.