

Social Security and Rights of Migrants under International Law: A Summary

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Abstract

Migrants experience those encounters that are perilous to them and their legal status. They often face problems due to mental pressures to earn and survive; separation from families; restrictions faced by them in host countries; and abuse of human rights. They do not stand a chance or opportunity to raise their voice against any violation of rights as they don't have many and they are too nervous about it. Irregular migrants have deeper issues. The COVID-19 pandemic continues to unfold worldwide, with direct effects on peoples' health and deepening socio-economic impacts. Migrants are one of the worst affected groups. Often it is asked that rights they enjoy? This Paper examines the rights to which migrants are entitled. Under international instruments that are universally applicable and can rescue this disadvantaged lot.

1. Introduction

Disparity in economies all over the world is the biggest reason for increase in migration. In the last few decades, the growing pace of economic globalization has increased the rate of economic migration in the world.¹ International Labour Organisation defines migrants as “all international migrants who are currently employed or unemployed and seeking employment in their present country of residence.”² The place of residence is not necessarily the place of citizenship. In words of Dr. Baljinder Kaur, “*Migration is shift from a place of residence to another place for some length of time or permanently including different types of voluntary movements and migrants*”.³ As per data available for up till January 2020 there were approximately 272 million migrants around the world, roughly half of them are women workers.⁴

During the Covid pandemic the States all over the world struggled to protect the nationals and provide adequate means of livelihood. This brought the migrants from across the borders to the threshold and the

¹ Baljinder Kaur, J.M. Singh, B.R. Garg, Jasdev Singh and Satwinder Singh “Causes and Impact of Labour Migration: A Case Study of Punjab Agriculture” Agricultural Economics Research Review Vol. 24 (Conference Number) 2011 pp 459-466

² ILO Global Estimates on Migrant Workers: Results and Methodology (2015)

³ *Ibid* at 1

⁴ <https://www.weforum.org/agenda/2020/01/iom-global-migration-report-international-migrants>

2020/#:~:text=There%20are%20an%20estimated%20272,conflict%2C%20violence%20and%20climate%20change.

need to see their needs as that of a human resurfaces.⁵ Most of the national laws prioritize the needs of their own citizens especially when redistribution of national resources is concerned. But human rights cannot be abridged as they are inalienable and universal in application. Following is an analysis of protection of migrants under international law which defend this vulnerable group seldom through obligatory norms and sometimes through non-binding provisions.

1. Modes of Migration

Regular⁶ or irregular⁷ migrants are subjected to the municipal law of the country to which they migrate referred to as the 'host' country. Needless to put forth, that they are 'outsiders' and a vulnerable group in terms of their rights and protection against exploitation. Even though they contribute immensely to the economies of the 'host' countries and a valuable work force, especially the skilled workers, they face inadequate social protection.

2. Protection of Rights of Migrants under International Human Rights Instruments

Human Rights are inalienable rights of a human. Migrants are protected under Human Rights regime and many other provisions which are specific to their status.⁸ Their rights are additionally protected under labour rights regime. The key principles of human rights - universality, indivisibility, inalienability, equality and non-discrimination give the migrant workers necessary protection in any part of the world.

a. International Human Rights Instruments

The universality principle of UDHR entitles all human beings to all rights of declaration without any discrimination.⁹ The inherent right to life is protected under ICCPR and each individual is protected against torture or to cruel, inhuman or degrading treatment or punishment.¹⁰ Article 8 protects individuals from slavery. This is particularly important because migrants are most abused as domestic servants. Another very important protection is afforded against imprisonment merely on the ground of inability to fulfill a contractual obligation as many migrants particularly the irregular ones often face threat of imprisonment on different grounds.¹¹

⁵ <https://migrationdataportal.org/themes/migration-data-relevant-covid-19-pandemic>

⁶ Migrants with appropriate visa and lawful entry including those facing persecution in their native country.

⁷ See article 3(b) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime; General Assembly Resolution 55/25 of 15 November 2000. These are migrants who have entered the host country illegally. They lack legal status and include those who have lost the right to remain in the host country. They may be victims of trafficking and smuggling as well.

⁸ Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing The United Nations Convention against Transnational Organized Crime, 2000; Migration for Employment Conventipn, 1949; Migrant Workers Convention, 1975; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.

⁹ Article 1 and 2 of Universal Declaration of Human Rights (1948)

¹⁰ Article 6 and 7 of International Covenant on Civil and Political Rights.

¹¹ Article 11 *Ibid*. Freedom of religion is assured under Article 18.

ICCPR works on the principle of non-discrimination¹² and the rights enshrined thereunder are non-derogable. The General Comment No.15 of Human Rights Committee is significant. It states that “*the covenant does not recognize the right of aliens to enter or reside in the territory of a State party*”, but continues by stating that “*however, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant*”.¹³

International Covenant on Economic, Social and Cultural Rights (ICESCR) extend to all persons, without discrimination, regardless of legal status or documentation. It is based on the principle of non-discrimination¹⁴ and extends protection to people having ‘other status’ than nationals.¹⁵ ICCPR provides protection in terms of right to work¹⁶, right of everyone to the enjoyment of just and favourable conditions of work, which includes minimum wages, equal pay for equal work, safe and healthy working conditions etc.¹⁷, right to form trade unions and carry out collective bargaining¹⁸ and right to an adequate standard of living.¹⁹

International Convention on the Elimination of Racial Discrimination, 1966 (CERD) states “*human rights are, in principle, to be enjoyed by all persons*”.²⁰ Legislative guarantees under CERD are available to non-citizens regardless of their immigration status.²¹

The States are further urged to design or reinforce, promote and implement effective legislative and administrative policies, as well as other preventive measures while giving special attention to those engaged in domestic work and persons who are victims of trafficking. It insists on focus on gender issues and prohibits promotion of false images of migrant workers in order to prevent the spread of xenophobic sentiments among the public.²²

The specific human rights instruments treaties that uphold non-discrimination includes International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), Convention on the Rights of People with Disabilities etc. these instruments have made a significant contribution to the realization of rights of migrants.

¹² Article 2(1) of ICCPR.

¹³ Paragraphs 5 and 6’ General Comment 15 of Human Rights Committee.

¹⁴ Article 2(2) of International Covenant on Economic, Social and Cultural Rights

¹⁵ General Comment 20 of Committee on Economic, Social and Cultural Rights

¹⁶ Article 6, ICCPR.

¹⁷ Article 7, *Ibid.*

¹⁸ Article 8, *Ibid.*

¹⁹ Article 11, *Ibid.*

²⁰ Paragraph 3 of General Recommendation No. 30: Discrimination against Non Citizens,

²¹ Paragraph 7, *Ibid.*

²² See sections 31, 67, 81, 144(e), 182, 184 and 196, Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance; Durban, South Africa 2001

b. Labour Specific Provisions and Protection of Migrants under International Labour Organisation (ILO)

Since its inception International Labour Organisation has embarked upon the journey to secure rights of labour across the globe and recognizes such rights of the migrants as well.²³ Stressing upon universality of rights to unemployed and migrant workers the ILO outlines four principles²⁴ of

- (i) freedom of association and the effective recognition of the right to collective bargaining,
- (ii) the elimination of forced or compulsory labour,
- (iii) the abolition of child labour and
- (iv) the elimination of discrimination in respect of employment and occupation.

Migration for Employment Convention, 1939 was adopted by ILO supplemented by two non-binding conventions.²⁵ One limitation of the 1949 convention was that it applied only to documented or lawful migrants and benefits like equality in treatment,; social security; employment taxes and access to justice and working conditions. It obligated the state to regulate conditions to facilitate migrant employment.²⁶ It was 1975 convention that focused on controlling irregular migration by combating human trafficking and illegal employment. Covering issues of migration in abusive conditions, illegal employment of migrants, punishing organisers of such movements the convention was more readily accepted and ratified. It enunciated principles of equality of treatment between irregular and regular migrants and widened the scope of rights. It also had a unique provision for family reunification and the definition of the migrant workers family is extended to include the migrant worker's 'dependent' parents and spouse, a more gender-neutral term, which was not there in the 1949 convention. However as these conventions were binding in nature they had very few ratifications. That was a compelling circumstance which led to formulation of non-binding provisions to safeguard the interests of migrants.

The most elaborate concord on migrants' right is The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 hereinafter referred to as The Migrant Convention, 1990.²⁷ Some of the salient provisions are as under²⁸:

1. Right to leave any state including their state of origin (Article 8);²⁹

²³ Preamble of ILO includes 'protection of the interests of workers employed in countries other than their own'.

²⁴ ILO Declaration on Fundamental Rights and Principles at work, 1998. See also The Declaration of Philadelphia (10 May 1944) restated the traditional objectives of ILO

²⁵ Also known as C-97 the, it was revised and adopted in 1949 post World War II. See also Migrant (Supplementary Provisions) Convention, 1975 also known as C-175.

²⁶ It included general protection provisions to fight misleading propaganda, facilitate departure, journey and reception, maintenance of appropriate medical attention, the right of migrants to transfer earnings and savings, prohibits expulsion of migrant workers admitted on a permanent basis in the event of incapacity of work.

²⁷ The convention in its preamble recognizes that "the human problems involved in migration are even more serious in the case of irregular migration".

²⁸ Part III of the Migrant Convention, 1990

²⁹ Also Article 12(2) of the ICCPR.

2. Right not to be held in slavery or servitude; or required to perform forced or compulsory labour (Article 11)
3. Right not to be arbitrarily deprived of property and in case of appropriation, right to adequate compensation. (Article 15)
4. Right to liberty and security of person. (Article 16)
5. Right of free and fair trial (Article 18)
6. Right to equal treatment with regard to remuneration, other conditions and terms of employment, and social security (Article 25 & Article 27);
7. Right to join and take part in meetings and activities of trades unions, the right to join any trade union and the right to seek aid and assistance from any trade union (Article 26);

Some other rights that are included are Right to life, Right to freedom of speech and opinion, Right to privacy and Right to information.³⁰ A close analysis of these provisions suggests that most of these rights are the ones already enunciated in human rights instruments because States deliberately chose not to apply specific provisions securing rights of migrant workers.

Regular or lawful migrants enjoy additional set of rights given as under³¹:

1. Right to form associations and trade unions (Article 40);
2. Right to liberty of movement in the territory of the State of employment and freedom to choose their residence there (Article 39);
3. 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);
4. Right to equal treatment with nationals in relation to access to education institutions, vocational training, housing, and social and health services and access to and participation in cultural life etc. (Article 43);
5. 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 (Article 47);
6. Right to seek alternative employment in case of termination of work contract prior to expiration of the work permit (Article 51);
7. Right to freely choose their remunerated activity after 5 years of residence in the host country (Article 52);
8. Right to equality of treatment with citizens in respect of protection against dismissal, employment benefits, and access to public work schemes intended to combat unemployment

³⁰ Article 8; Article 13; Article 14; and Article 33 of The Migrant Convention, 1990

³¹ Part IV of Migrant Convention, 1990

(Article 54);

9. Right to redress in case of violation of the terms of the employment contract (Article 54);
10. Right against collective expulsion and in case of expulsion, it should be done case by case and that too according to the national laws (Article 56).

Both host state and state of origin are obligated to protect the migrant worker across borders. In case of any violation of rights and need of workers the Host States are obligated to provide for consular access.³² Similarly the state of origin of migrant is to regulate recruitment of migrants overseas.³³ States are also required to facilitate return and resettlement of the migrants.³⁴ And even though the convention does not expressly talk about right of reunification of migrants with their families but urges the state to facilitate such unification on humanitarian ground.³⁵

A very important and strong provision of Inter-state cooperation under Part IV of the convention allows states to collaborate to prevent and eliminate irregular migration and to punish traffickers, smugglers and those who exploit migrant workers including employers.³⁶

The convention calls for reviewing the implementation of different obligations under it and there by establishes a Committee consisting of 14 experts. Reporting mechanism of after one year upon entering into the treaty and thereafter after five years (05) enables the review. This is similar to human rights treaty body mechanism which makes the state answerable and accountable. The Committee has the power to make General Comments to broaden the scope of provisions. States Complaint mechanism also keeps a check on violations as the Committee has been vested with the power to recommend accordingly.³⁷

3. Regional Mechanisms For Protection of Migrants

The European Social Charter, 1961 (ESC) was introduced as a very significant mechanism that protects rights of children, women and migrants. The revised European Social Charter of 1996 embodying the Protocols thereafter is comprehensive and reiterates the underlying principles.³⁸ Article 19³⁹ gives the

³² Article 65 *Ibid.*

³³ Article 66 *Ibid.*

³⁴ Article 67 *Ibid.*

³⁵ Article 44 *Ibid.*

³⁶ Art 68; Art 68(1) and 68(2) *Ibid.*

³⁷ Article 72

³⁸ See Also treaties like European Convention on Human Rights 1950, European Social Charter 1960 and Revised Charter 1996, American Convention on Human Rights 1969, African Charter on Human and Peoples' Rights 1981.

³⁹ **Article 19 –The right of migrant workers and their families to protection and assistance**

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake:

1 to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;

2 to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;

right of migrant workers and their families to protection and assistance; at the same time it facilitates reunification.⁴⁰ and Article 27 provides the right of workers with family responsibilities to equal opportunity and treatment.

The European Committee of Social Rights (ECSR) receives complaints under the Charter. The Committee has expressed concern about the treatment of children in an irregular migration situation, whether they be accompanied or not, and asylum seeking children, in particular their access to appropriate and safe accommodation. ECSR has recognized that prohibition from forced labour like slavery has become *jus cogens* and no derogation is allowed therefrom.⁴¹ Forced Labour has been described by the court as an act done under physical or mental constraint against the free will of a worker.⁴² While protecting the rights of the migrant workers The Courts also declared that State has its compulsions and cannot be forced to take non-nationals or families of migrants.⁴³ States should strike a fair balance between an individual's right and that of the community as whole.⁴⁴

Another set of rights are given in The European Convention on the Legal Status of Migrant Workers 1977 which ensures non-discrimination with respect to the nationals of the State. equality in treatment in housing, education, social security measures, social and medical assistance, in providing vocational training, the use of employment services etc. are the key features of the Convention. Similarly The European Convention on Social Security (1972) also facilitates access to social security measures for the migrant workers and their families. Lawful migrants are entitled to social and medical assistance at par with the nationals.⁴⁵

4. Conclusions

The above discussion leaves no doubt that a concerted effort has been made at world level to strengthen and accomplish equality, non-discrimination and fair treatment for migrant workers. The numbers are ever growing but Leila Ezzarqui has expressed concern that *“it is apparent that many [States] are yet to fully grasp the implications of these statistics and to develop clear policies on how to manage and*

3 to promote co operation, as appropriate, between social services, public and private, in emigration and immigration countries;

4 to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters: a. remuneration and other employment and working conditions; b. membership of trade unions and enjoyment of the benefits of collective bargaining; c. accommodation;

5 to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;

6 to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;

7 to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;

8 to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;

9 to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire;

10 to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply.

⁴⁰ Article 8 *Ibid*. It does not guarantee to bring up family in country of choice. Unless there is insurmountable obstacle to bring up ones family in the country of origin, reunification in host country cannot be claimed as a matter of right. See *ECtHR, Benamar and Others v Netherlands*, 5 April, 2005.

⁴¹ *ECtHR, Siliadin v France*, 26 July, 2005; Paragraph 82.

⁴² *ECtHR, Rantsev v Cyprus and Russia*, 7 January, 2010; Paragraph 276

⁴³ *ECtHR, Gul v Switzerland*, 19 February, 1996; Paragraph 38.

⁴⁴ *ECtHR, Tuquabo-Tekle and Others v Netherlands*, 1 December, 2005; Paragraph 42.

⁴⁵ European Convention on Social and Medical Assistance (1953)

accommodate this migration.”⁴⁶ Fifteen years later the World Migration Report, 2020 remarks how we are still struggling with development and enforcement of policies. While mentioning the “Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations” the report mentions that Office of the High Commissioner for Human Rights (OHCHR) calls out to “develop national policies and programmes to improve national responses that address the needs of migrants in situations of vulnerability”.⁴⁷

Despite the fact that migrants are an ever growing numbers; the States are dependent upon the labour force of migrants; there are ample universal provisions chartering out the rights of migrants and duties of states; and some regional mechanisms particularly the ESC embodies the complaint mechanism, the Migrant Convention has seen very few ratifications. Lesser ratifications mean that lesser States are bound by the provisions. Municipal Law and its enforcement is a priority when it come to the internal matters of a State. States are making best use of the lawful as well as unlawful migrants in terms of labour, cashing upon the needs and desire of the migrants to be in the host states. It is easier to allow them to stay without recognizing their rights. One major reason is the lack of awareness about the convention. As mentioned, nationals supersede migrants and law and policy are not in there favour. Not to mention the complexity of provisions. It also requires the signatory states to bring about a sea change in the existing system which is an additional burden on the economy. Lack of political will tops the list as an excuse to disregard the Convention.

For now the States may choose to snub the matter as one not related to the nationals but the manner in which globalization is expanding its wings and States are increasingly becoming dependent on the skilled labour of migrants, resort to these provision for want of uniformity and ease is just around the corner.

⁴⁶ Leila Ezzarqui “Alliance of Civilization”, Research Paper on Migration Conducted by, Senior Research Officer, Alliance of Civilizations Secretariat, United Nations, New York (2005)

⁴⁷ World Migration Report, 2020