

# The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat



UN/DPI Photo

November 2004

International Catholic  
Migration Commission



December 18 vzw



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Produced with financial support from UNESCO, Division of Social Science, Research and Policy, Section on International Migration

With special thanks to William Canny, Secretary General, ICMC

Cover photograph: Eleanor Roosevelt led and chaired the Commission on Human Rights as it drafted the Universal Declaration of Human Rights.

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## List of Acronyms:

CAT:	Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT:	Committee against Torture
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW:	Committee on the Elimination of Discrimination against Women
CERD:	Committee on the Elimination of Racial Discrimination
CESCR:	Committee on Economic, Social and Cultural Rights
CRC:	Convention on the Rights of the Child
CRC:	Committee on the Rights of the Child
GRULAC:	Latin American and Caribbean Group
HCR:	Human Rights Committee
ICCPR:	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
MWC:	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
TMB:	treaty monitoring body
WEOG:	Western European and Other States

*As per United Nations treaty terminology, at times similar acronyms are used both for a given treaty and for the relevant supervisory body*

## The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat<sup>1</sup>

*"International human rights law, international humanitarian law, international refugee law and international criminal law: each chapter of this corpus stands as a fundamental defence against assaults on our common humanity. [...] The very power of these rules lies in the fact that they protect even the most vulnerable, and bind even the most powerful. No one stands so high as to be above the reach of their authority. No one falls so low as to be below the guard of their protection."*

Sergio Vieira de Mello, United Nations General Assembly, November 2002

### Introduction

Whether migrants fall so low so as to be below the guard of protection provided by the ensemble of international human rights treaties is the question at the heart of this research paper. There is a lack of public comprehensive research on whether governments extend the provisions of the international human rights treaties they have ratified to protect the human rights of migrants and not only the rights of their own nationals. To fill this gap, the [International Catholic Migration Commission](#) (ICMC) and [December 18 vzw](#), with support from [UNESCO](#), engaged in a research project to study country specific conclusions and recommendations issued by bodies of experts tasked with supervising the implementation of these conventions.

The research was carried out in Geneva between May and July 2004. The data compiled over the 10-week research period provides some useful initial pointers as to current practice and priorities in the six treaty monitoring bodies (TMB). While irregular migrants make news headlines and occupy centre stage in regional migration management consultative processes, TMB conclusions highlight the existing gap in ensuring non-discrimination and equal treatment with nationals for migrants and members of their families, as provided for in human rights treaties. Migration affects most countries today, yet only half of the TMB conclusions refer to migrant concerns.

This research is part of an on-going strategy to enable civil society and other stakeholders to make better use of international human rights treaties and conventions. In order to better protect the human rights of migrants, States parties need to be prompted to follow up the recommendations of treaty monitoring bodies. As the overall UN human rights treaty monitoring system is currently subject to review, this thematic pilot research provides a "horizontal" case-study across several treaty monitoring bodies which could be useful for United Nations, government and NGOs experts engaged in efforts to rationalize and streamline treaty monitoring and observance. This paper is also constructed so as to offer an

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<sup>1</sup> *In the former Soviet Union, the printing and distribution of secret or banned literature*

additional perspective on migrants' rights and UN human rights treaties for the newly formed [Committee on Migrant Workers](#).

## 1. Framework for the research project

### 1.1. Core international human rights treaties and migrants rights

The implementation of international human rights treaties is essential to ensure respect for the human rights of migrants. The most relevant of such treaties to the rights of migrants, the 1990 [International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families](#) (MWC) entered into force in July 2003. However, only [27 countries have ratified it](#). In the meantime, [116 countries have ratified all six other main human rights treaties](#): the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the International Covenant on Civil and Political Rights (ICCPR, 1966), the Convention on the Elimination of All forms of Racial Discrimination (ICERD, 1965), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), and the Convention on the Rights of the Child (CRC, 1989). Together with the MWC, these seven conventions are known as the “core international human rights treaties” All of them contain strong non-discriminatory clauses ensuring applicability of many provisions to migrants.

When a country ratifies one of these treaties, it assumes a legal obligation to implement the rights recognized in that treaty. But this is only the first step, because recognition of rights on paper is not sufficient to guarantee that they will be enjoyed in practice. State parties thus incur an additional obligation to submit regular reports to the monitoring committee set up under that treaty on how the rights are being implemented. Governments collect relevant information from their relevant ministries and administrative units in order to draft the initial and subsequent periodic reports. This exercise prompts them to take stock and analyse their legislation and practices in relation to a given treaty. In addition to the reporting procedure, some of the treaty bodies may perform additional monitoring functions through three other mechanisms: the inquiry procedure, the examination of inter-state complaints and the examination of individual complaints.

This system of human rights monitoring is common to most of the UN human rights treaties. It is operated by the [treaty monitoring bodies](#). They include the Human Rights Committee (which monitors implementation of the ICCPR), the Committee on Economic Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child, the Committee against Torture and the newly elected Committee on Migrant Workers. Committee members are nationals of States parties to the relevant conventions. They serve on the committees in their personal capacity and not as country representatives. In elections, consideration has to be given to equitable geographical distribution as well as to the principal legal systems.

The TMB system is unique inasmuch as governments voluntarily accept to see their human rights performance scrutinized. Regrettably, because of its technical nature, it does not enjoy high visibility and its findings often remain unknown. The different Committees of the TMB thus oversee and monitor the reporting of states on the implementation of rights granted in the various conventions. It is these observations and conclusions of the TMB that were used as the basis for this study.

The research was conducted electronically through the public [United Nations High Commissioner for Human Rights Treaty Bodies Database](#). The phrase “migrant workers” as such seldom appears in TMB conclusions (cf. Section 2.3. Terminology). Thus broader and related concepts were used to conduct searches in the UN Database. Keyword included “migrant/migration”, “work “(in order to also cover overseas, irregular, foreign or undocumented worker), “minorities”, “alien”, “unaccompanied”, “national/citizen” (to identify treatment of “non-nationals” and “non-citizens”) and “foreign”. The keyword “rejected” (asylum-seeker) produced no result. Following this initial broad cast of the “electronic research net”, only relevant entries were retained for the study. Informal discussions were also conducted with UN officials and non-governmental organisations representatives in Geneva, prior to and during the research.

## 1.2. Basis for States parties reporting on migrant issues

The international human rights treaties oblige States parties to report back to the TMB. Each TMB has [Guidelines on the Form and Content of Reports to be submitted by State parties](#)<sup>2</sup>. In many instances, they do specifically refer to reporting on migrants.

The **Committee on Economic, Social and Cultural Rights (CESCR)** asks States to indicate to what extent and in what manner are non-nationals not guaranteed the rights recognized in the Covenant and what justification there is for any difference. It specifically refers to children of migrant and immigrant workers in its section on the right to education and lists migrant workers among especially vulnerable or disadvantaged groups on whom States parties should provide data in relation to the right to adequate food.

The **Human Rights Committee (HCR)**, which monitors the implementation of the Covenant on Civil and Political Rights, advises that State parties should “examine progress made towards and the current situation concerning the enjoyment of Covenant rights by persons within its territory or jurisdiction” as a starting point in drafting periodic reports.

The **Committee on the Elimination of Racial Discrimination (CERD)** lists migrants as parts of vulnerable groups and asks for information on available social indicators of forms of disadvantage that may be linked with racial discrimination.

Guidelines for the **Committee on the Elimination of Discrimination against Women (CEDAW)** recommend that: “Taking into account the gender dimensions of declarations, platforms and programmes of action adopted by relevant United Nations conferences, summits and special sessions of the General Assembly (such as the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Second World Assembly on Ageing), reports should include information on the implementation of specific aspects of these documents which relate to specific articles of the Convention in the light of the subjects with which they deal (for example, migrant women or older women).”

The **Committee on the Rights of the Child (CRC)** asks States Reports to indicate the measures adopted to ensure the rights set forth in the Convention to each child under the jurisdiction of the State without discrimination of any kind, including non-nationals, refugees and asylum-seekers. It also asks whether the convention has been translated and has been made available in the languages spoken by the larger refugee and immigrant groups in the country concerned.

Reporting guidelines for the **Committee against Torture (CAT)** are much shorter than for other core human rights treaties. They make no specific reference to migrants or to any

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<sup>2</sup> Un Index: HRI/GEN/2/Rev.2

vulnerable group. However, for periodic reports, States are requested to give details on legislation on places of detention within their jurisdiction and on training given to law enforcement and medical personnel. Both issues are relevant for migrants. Furthermore, Article 3 (on expulsion and guarantees against non-refoulement or extradition in cases where the person might be subject to torture) is relevant for some migrants.

### 1.3. General Comments

Over the years, TMB have issued interpretative comments of the content of human rights provisions and on thematic issues. These are called “[general comments](#)”<sup>3</sup> (HCR, CESCRC, CAT, CRC) or “general recommendations” (CERD and CEDAW). They seek to clarify the reporting duties of State parties with respect to certain provisions and suggest approaches to implementation of treaty provisions. The General Comments listed below specifically underscore Member States obligations with respect to non-nationals, including migrants:

[Human Rights Committee General Comment 15](#), on “The position of Aliens under the Covenant” adopted in 1986. Its opening paragraph reads: “Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction” (art. 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.”

[CESCR General Comment 14](#), on the Right to the Highest Attainable Standard of Health, adopted in 2000. It reads: “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”.

[CEDAW General Recommendation 21](#), entitled Equality in marriage and family relations, adopted in 1994, which states: “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”.

[CRC General Comment No. 3](#), on HIV/AIDS and the rights of the child, adopted in 2003, states that vulnerability to HIV/AIDS is more acute for a number of children, including migrant children, and underlines their special protection need.

[CERD General Recommendation 20](#), adopted in August 2004, on Discrimination against non-citizens. It 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.”

Four of the Committees (HRC, CERD, CAT and CEDAW) can, under certain conditions, receive petitions - individual complaints - from individuals who claim that their rights under the treaties have been violated. CAT adopted only one General Comment, in 1997. It relates to conditions for filing such complaints with respect to implementation of Article 3: “No State

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<sup>3</sup> UN Index: HRI/GEN/1/Rev.7

Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. “

## 2. Findings

The research covers all TMB conclusions and recommendations adopted since 1994, including all sessional reports with country specific conclusions, as well as TMB annual reports to the General Assembly. A total of 1053 concluding observations and comments were surveyed (conclusions), of which 527 contained migrant related issues. The compilation of relevant excerpts from conclusions is 287-page long. In many cases, although the focus of the research is on migrants and not refugees, it has been difficult to distinguish between both populations in conclusions, especially on trafficking. In this case, references to trafficking issues were retained in documents examined in this research project.

The full research findings are posted on a database on the December 18 website. The database allows for searches by [country](#) as well as by [treaty monitoring body](#).

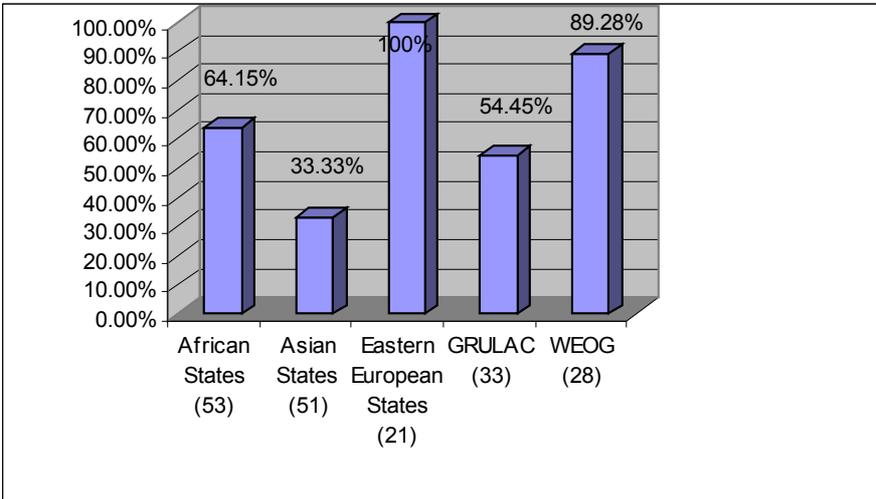
### 2.1. Breakdown of TMB conclusions referring to migrant related issues per treaty

On average, close to half of TMB conclusions refer to migrants. The two Committees with the highest percentage of references to migrants, CRC and CEDAW overwhelmingly focus on trafficking. This is especially the case since 2000, when the Convention against Transnational Organized Crime was adopted, together with its [Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children](#). The same trend is also observed within CESCR since 2001. The low figure for CAT conclusions is not surprising. Torture and ill-treatment are more likely to be the hallmark of political regimes little respectful of the rule of law, which tend to target their own nationals as victims of human rights violations. However, as international migrants represent close to 3% of the world population, that 17% of CAT conclusions refer to migrant related issues is a concern.

	<b>Conclusions adopted during 1994-2004</b>	<b>Conclusions Referring to migrants</b>	<b>Percentage of conclusions referring to migrants</b>
<b>CRC</b>	219	155	71%
<b>CEDAW</b>	164	109	66%
<b>CESCR</b>	133	64	48%
<b>HRC (ICCPR)</b>	136	62	46%
<b>CERD</b>	267	114	43%
<b>CAT</b>	134	23	17%
<b>Total 1994-2004</b>	1053	527	50%

Conclusions are more specific when they address more developed countries as this mirrors the level of detail in country reports. There is also a difference in the issues raised according to regions, depending on the level of protection generally afforded to migrants. TMB conclusions will usually argue for application of relevant treaty provisions to undocumented migrants in European countries, whereas in the Middle East for instance, conclusions recommend a more general and basic protection for legally residing migrants.

**2.2. Ratification rate of all six human rights treaties by regional group members<sup>4</sup>**



The 100% ratification rate for Eastern European States is very markedly linked to the fall of the Berlin Wall and to the subsequent eagerness of Eastern European democracies to ratify international human rights treaties. The same applies for ratification or accession for countries from the Balkans. For the Western European and other States<sup>5</sup> (WEOG), the three States that have not ratified all six international core human rights conventions are small nations States whose combined population is less than 150,000 inhabitants (Andorra, Monaco and San Marino). The USA, associated to WEOG, has only ratified half of the human rights conventions. The medium to high ratification level in Latin America and Caribbean, Africa and Europe respectively is also under girded by the existence of regional inter-governmental organisations in these regions (Organisation of American States, African Union, Council of Europe and European Union), which over the years have adopted human rights conventions and mechanisms. These regional bodies both testify to and promote states’ willingness to collectively draft human rights instruments and accept supervisory mechanisms.

Likewise, Asia (including the Middle Eastern region), which lags behind in terms of ratification, does not have regional inter-governmental mechanisms that focus on human rights. However, in view of the low level of ratification in this region, the relatively high number of TMB conclusions referring to migrant issues is very commendable and reflects that migration is high on the agenda of this region, be it for countries of origin as well as for host countries. In the GRULAC, countries that have not ratified all six human rights treaties are overwhelmingly Caribbean countries (Antigua and Barbuda, Barbados, Cuba, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia and Trinidad and Tobago), with some Central American countries (Belize and Nicaragua).

<sup>4</sup>Regional groups refer to the five regional groups in the United Nations (African States, Asian States, Eastern European States, Latin American and Caribbean States and Western European and Other States ([www.unitar.org/diplomacy/OnlineResources/Glossarythematicalindex.htm](http://www.unitar.org/diplomacy/OnlineResources/Glossarythematicalindex.htm) and United Nations Handbook, Wellington: New Zealand Ministry of Foreign Affairs, 1961-)

<sup>5</sup> In addition to Western Europe, the group includes Australia, Canada, Israel and New Zealand. The USA is not a member of any regional group but attends meetings of this group as an observer and is considered to be a member for electoral purposes. Turkey participates fully in both the Asian and WEOG groups, but for electoral purposes is considered a member of WEOG only.

Combined reporting obligations to various human rights TMB reportedly put a heavy burden on smaller administrations of small Western European states. This might also account for the low ratification rate in many small island States in the Pacific (Fiji, Kiribati, Maldives, Marshall Islands, Micronesia, Nauru, Niue, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu).

### 2.3. Terminology used in TMB conclusions and in state reporting

#### *“Migrant workers” in TMB conclusions*

The specific use of the phrase “migrant worker” is not frequent. Other designations such as “alien”, “foreigner”, “immigrant” are by far more common. The use of “migrant worker” varies according to TMB and countries examined. CAT does not use it at all; HRC very little (4 occurrences); CEDAW uses it mostly about protection of women migrants (particularly domestic workers), often with a very general wording such as “The Committee urges the State party to step up its efforts to protect women migrant workers<sup>6</sup>” or “urges the Government to address the issue of women migrant workers<sup>7</sup>”. In CERD: “migrant workers” is used mostly in sentences covering discrimination/equality, lack of data, or general concern for their situation. In CESCR: migrant workers are evoked on general protection issues and in CRC in relation to discrimination.

Generally speaking most **occurrences** of the expression “migrant worker” in TMB conclusions appear either in connection with direct references to the Convention on Migrant Workers or in relation to discrimination in access to economic, social and cultural rights and especially to education and social services (of which many in relation to children of undocumented migrants).<sup>8</sup>

	TMB conclusions referring to migrant related issues	Occurrences of the phrase “migrant workers”	%
Western European and other States (WEOG)	187	17	9 %
Eastern Europe	85	3	3%
Asia	117	22	19%
Africa	65	6	9%
Latin American and the Caribbean (GRULAC)	73	9	12%
Total	527	57	11%

#### *States parties terminology*

TMB often mirror wording used by the states themselves in their reports. The terminology used varies according to countries and regions. Sending countries such as Sri Lanka or Mexico and receiving countries of the Middle East or Asia (Libyan Arab Jamahiriya, Kuwait, Israel or the Republic of Korea), use the phrase “migrant worker”. For European receiving countries, Canada or Australia “immigrant” is much more common, as well as “non-citizens”, “aliens”, and “foreigner”. It is striking that in recent years not a single occurrence of the

<sup>6</sup> Ethiopia CEDAW/C/2004/I/CRP.3/Add.7/Rev.1 30 January 2004

<sup>7</sup> Greece. 01/02/99. A/54/38, paras.172-212. or Bangladesh. 12/08/97. A/52/38/Rev.1, (Part II) paras.409-464

<sup>8</sup> For each case there were about 20 occurrences.

expression “migrant worker” was found in conclusions on Western European countries. This reflects the perspective of these countries on their own immigration policy.

#### **2.4. Treaty provisions quoted by TMB when dealing with migrant issues**

TMB at times specifically quote relevant treaty articles in country conclusions.

For instance the Human Rights Committee mainly quotes ICCPR:

- Art. 8 (Prohibition of slavery, forced labour and traffic in persons);
- Art. 3 (Equality before the law);
- Art.12 (Right to freedom of movement; Right to leave any country including one’s own and to return); and
- Art. 26 (Non-discrimination, equality before the law).

The Committee on Economic, Social and Cultural Rights rarely mentions specific articles and limits itself to:

- Art. 6 (right to work);
- Art.7 (right to the enjoyment of just and favourable conditions of work); and
- Art. 8 (right to form and join trade unions).

For the Committee on the Elimination of Racial Discrimination, articles include:

- Art. 5 (elimination of racial discrimination and guarantee enjoyment of rights);
- Art. 2 (condemnation of racial discrimination and adoption of measures for the protection of certain racial groups); and
- Art. 4 (condemnation of racist propaganda).

The Committee on the Rights of the Child mainly quotes:

- Art. 2 (State parties shall respect and ensure the rights set forth in the Convention to each child without discrimination of any kind);
- Art. 34 (protection against all forms of sexual exploitation and sexual abuse);
- Art. 3 (best interest of the child – well-being);
- Art.7 (birth registration and right to acquire a nationality);
- Art. 22 (refugee children); and
- Art. 35 (prevention of traffic).

The Committee on the Elimination of Discrimination against Women only quotes Art.6 (adoption of measures to suppress all forms of traffic) and the Committee against Torture only mentions Art. 3 (non-refoulement clause).

Whether country conclusions refer to specific articles varies enormously from one TMB to another (HCR: 34%, CESCR: 12%, CERD: 42%, CEDAW: 8%; CAT: 21% and CRC: 50%). Apart from the CERD, TMB members tackle a specific issue in their analyses of country reports and of delegations answers without quoting the specific articles of the relevant treaty. Although specific references to key articles might seem very technical, it is useful for government delegates to be informed precisely as to which provision of a given treaty their legislation or practice infringes.

#### **2.5. The enhancement of human rights of migrants as reported on by States**

State parties are encouraged to report on positive measures adopted to implement treaties. Committees usually “note with satisfaction” or “welcome” positive aspects relating to the adoption or amendment of legislation or measures such as the setting up of national strategies or plans of action. However, these positive aspects are usually less detailed than

concerns and are often couched in very general terms. They comprise measures to promote the human rights of migrants (including undocumented migrants), integration of immigrants, effective implementation of existing legislation, measures relating to the fight against discrimination and for equality (especially in employment), regularization of irregular migrant workers and counter-trafficking. Studies, surveys and data on the enjoyment of rights are also frequently highlighted among positive aspects, as well as ratification or steps towards the ratification of the Convention on Migrant Workers or relevant ILO Conventions.

Below is a cross section of thematic (civil, political, economic and social rights) and country specific examples of positive aspects noted by various TMB:

- A new Law on Foreigners that includes a provision **prohibiting the deportation** of individuals who could face **torture** if returned to their own country. ([Croatia](#), CAT, 2004)
- Implementation of the “Aliens Act” in 1991 and other legislative measures which broaden the criteria for the issuance of **residency permits**, create procedures for **review of deportation decisions**, give the **Ombudsman for Aliens** a role in these proceedings, and give alien residents the **right to vote** in local elections. ([Finland](#), HRC, 2001)
- **Children of illegal immigrants entitled to education and medical care.** ([Belgium](#), HRC, 1998)
- The Office of the United Nations High Commissioner for Refugees and non-governmental organisations have **access to the Carmichael Road Detention Centre** where undocumented migrants and asylum-seekers are held. ([Bahamas](#), CERD, 2004)
- A new Act on Citizenship, which came into force on 1 July 2001, accepting the possibility of **dual citizenship** and facilitating the **acquisition of Swedish citizenship for children** of foreign background. ([Sweden](#), CERD, 2004)
- The recent initiative to include non-Saudis in a **health insurance system**. The Committee has noted with satisfaction that measures have been taken to put an **end to the practice of employers retaining the passports** of their foreign employees, in particular domestic workers. It also notes the high number of **schools** that have been authorized to offer programmes for the **education of children of migrant workers** that have been designed in their country of origin. ([Saudi Arabia](#), CERD, 2003)
- [The Committee notes with satisfaction that Bolivia] is a **party to a range of international human rights instruments**, including **International Labour Organization, Convention No. 169** concerning Indigenous and Tribal Peoples in Independent Countries and the **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**. ([Bolivia](#), CERD, 2003)
- Decree Law modifying the regulations on the entry, stay and departure of foreigners with a view to, *inter alia*, introducing penal legislation against the **illegal trafficking** of migrant workers as well as an enlarged definition of the beneficiaries of **family reunification**. The establishment of **the Consultative Council on questions of immigration** and the **participation in it of representatives of immigrants’ associations**. ([Portugal](#), CERD, 2001)

- A "migratory amnesty" in force, from 1 February 1999 to 31 July 1999, allowing for the **regularization of the situation of a large number of clandestine immigrants** in order to ensure their enjoyment of social, economic and cultural rights, particularly in regard to work. ([Costa Rica](#), CERD, 1999)
- The establishment of a bilateral commission by the Governments of the Dominican Republic and Haiti, as well as the agreement signed with the Government of Haiti concerning the granting of **temporary work permits for Haitian seasonal** sugar cane cutters during the next harvest, in order to give them a **legal status** and to protect them from the exploitation related to the lack of such status. ([Dominican Republic](#), ECSR, 1997)
- The Act which establishes the **offence of trafficking of children**. ([Gabon](#), CRC, 2002)
- Act Amending the Aliens Act, providing for an **independent right of residence for foreign spouses in the event of separation** after two years of cohabitation in Germany or earlier under the hardship clause. ([Germany](#), CEDAW, 2004)
- National health policy for women providing **innovative primary health care** and emphasizing on services for disadvantaged groups of women, including Aboriginal and Torres Strait Islanders, as well as **migrant women**. ([Australia](#), CEDAW, 1997)

Other positive aspects noted by CERD include the repayment to migrant workers of **social security contributions** which they had made during the period of their employment prior to them leaving [Italy](#); monitoring the employment of foreign domestic servants to ensure that **recruitment agencies** act in a fair and just manner in [Kuwait](#); assistance to ethnic associations, to cultural and information activities for and about immigrants and refugees, as well as to **integration projects** in [Denmark](#); administrative guidelines on the **protection of foreign industrial trainees** in order to ensure them protection on an equal basis with nationals, as well as the setting up of **complaint centres** in all immigration control centres, where foreign workers can file complaints in cases where their rights have been violated in [Korea](#). The ESCR notes equal standing for regularly present foreigners with Italian citizens regarding access to **residential and public housing, and credit** on favourable terms for building, acquiring or renting their first home in Italy; and the possibility for foreign workers who are not citizens of the European Union but have a one-year work permit to **serve on joint enterprise committees** in [Luxembourg](#). The CRC welcomes the incorporation of the **principle of the best interests of the child** in the new Immigration and Refugee Protection Act in [Canada](#).

## 2.6. Concerns about the human rights of migrants as identified by the TMB

The **Human Rights Committee** examines issues such as trafficking, detention, ill treatment by law enforcement officials and impact of anti-terrorism laws. Some of these are common to most TMB. HRC's specificity is to focus on various forms of discrimination in the access to civil and political rights guaranteed in the Covenant affecting non-citizens in general and undocumented migrants in particular. In addition to CCPR articles listed in the section 2.4, rights articles of concern to the Committee are art. 2 (non-discrimination), art. 9 (right to liberty, arbitrary detention), art. 17 (right to privacy), art. 22 (freedom of association) and art. 23 (protection of the family, right to marry) of the CCPR. Other freedoms and rights of migrants that are frequently infringed upon are notably freedom of expression, freedom of association (especially regarding trade unions) and more than anything freedom of movement (linked to issues of naturalization and citizenship).

It is interesting to note the definition of “own country” with reference to ICCPR Article 12.4 on the right to enter one’s own country. The HRC recalled that the words “one’s own country” are not synonymous with “country of one’s own nationality” and strongly urged a State party to remove from its law the necessity for permanent residents (like for example persons of Korean origin born in Japan) to obtain a permit to re-enter prior to departure. (Japan, 19 November, 1998, CCPR/C/79/Add.102)

**CESCR** migrant focus is on working conditions. The Committee notes with concern the unfair terms of employment and the discrimination in enjoyment of economic, social and cultural rights affecting migrant workers. Like CERD, it considers that non-nationals should be on an equal footing with nationals as far as the enjoyment of economic, social and cultural rights in employment is concerned (i.e. minimum wage, health and maternal benefits, pension benefits, unemployment benefits and safe working conditions). Specific sectors with high density of illegal work where legal protection is likely to be incomplete should be targeted e.g. domestic work, hotel and catering, agriculture, textile, cleaning and building industries. The Committee welcomes the enjoyment in some countries by illegal workers of basic social services, health care and education but notes that in general the protection they enjoy in the area of welfare is very limited which aggravates their precarious situation. CESCR therefore welcomes measures taken to regularize the situation of clandestine immigrant workers. Just as the CRC, the CESCR carries out an analysis of the causes of emigration in a more detailed manner than the other Committees. This includes the consequences and constraints on the enjoyment of economic, social and cultural rights in the country of origin, pre-departure information and education of potential migrant workers about their rights and possible difficulties to be faced abroad.

**CERD** conclusions deal first of all with growing racism and intolerance of host populations towards foreigners in general and asylum seekers and immigrants in particular. Migrant workers are not considered a specific category here, but rather seen as a group among non-citizens. To counter the rise in racism and xenophobia, CERD recommends that states adopt various measures: criminalize violence against members of national, ethnic or racial minorities and religious groups; prohibit racist organizations; consider racial discrimination as an aggravating circumstance for other offences; and fight ill-treatment by law enforcement officials.

Secondly, the Committee focuses on the enjoyment of Convention rights by foreigners (including migrant workers) and especially on the right to security of person under article 5b of CERD and economic, social and cultural rights under article 5e. According to the Committee, discrimination against migrants is noted in the areas of education, employment and housing, access to public services, land property, social security benefits, as well as between migrants themselves according to the kind of work they perform or their nationality.

Migrant workers should enjoy the same labour protection as national workers, but are often discriminated against on the basis of their colour or ethnic or national origin. Labour protection is particularly important as regards minimum protection against poor working conditions and low wages, social security and services, right to security of person, right to property and proper representation of ethnic minority groups in the labour market. The Committee insists that the principle of equality before the law and equality in the exercise of the rights and freedoms between nationals and non-nationals be ensured. Undocumented migrant workers, trainees and domestic workers constitute particularly vulnerable categories. CERD also puts a strong focus on regularization of undocumented workers.

As regards post September 11 anti-terrorist measures, CERD recalls that states should ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin. (See CERD General Recommendation 20, above)

Regarding women migrants, trafficking and sexual exploitation are by far the main issue of concern to **CEDAW**. The Committee goes into a detailed analysis of the causes of vulnerability of women to traffickers and of the various measures to combat trafficking, punish perpetrators and protect victims. The second most common conclusion regards emigration. CEDAW analyses the causes of migration and the measures to help ensure respect of the human rights of women migrants. Regarding working conditions, the Committee lists minimal labour rights women migrants should enjoy. Special attention is given to typically female labour sectors with higher risk of abuse such as domestic work, “entertainment”, free trade zones and tourist and maquiladora industries.<sup>9</sup> In order to ensure the full enjoyment by migrant women of their rights under the Convention, receiving countries should put in place information and awareness-raising programmes about the availability of social services, information on rights of women, residence permits, legal remedies and language classes. The Committee stresses that women are victims of multiple discrimination and violence due to the intersection of gender with ethnic and religious factors. CEDAW advises that culturally and gender-sensitive measures can be necessary and that the specific needs of women should be taken into account in the areas of health and protection against violence.

Migrant-related issues in **CAT** conclusions are mostly to be found in concluding observations on European countries and in connection with detention and removal of foreigners in an irregular situation, often asylum-seekers but possibly also irregular migrants. The main concern of the Committee against Torture regarding migrant workers is the excessive use of force and discriminatory practices by the police, especially in detention prior to expulsion and during expulsion procedures. Those issues are common to most Committees, but they are more detailed under CAT which takes into account other aspects beyond police brutality when examining detention and removals. CAT’s recommendations are also more specific.

**CRC** refers to foreign children in general without singling out migrant children. Since 2000 CRC has developed a strong interest for trafficking. The main concern of the Committee is the discrimination in access to adequate social services, in particular health and education for foreign children in general, and irregular children in particular. Both education and social services are often accessible de facto but not de jure to illegal immigrant children and unaccompanied children, notably in Europe. This is in contradiction to CRC articles 2 (non-discrimination) and 3 (best interest of the child). The Committee also examines child labour and economic exploitation and recommends that the best interest of the child be taken into account in procedures, as well as administrative and legal frameworks having an impact on children. Relating to labour emigration, especially of women, the Committee notes that parents who emigrate often leave their children behind with relatives or in institutions. These children are often subject to abuse and exploitation. The Committee also draws the attention to the impact of emigration of professionals who play a pivotal role for children, such as specialized educators or health workers. The Committee expresses concern at legal standards, administrative frameworks and procedures that fail to ensure the protection of unaccompanied minors. With respect to other TMB, the CRC is the committee which insists the most on a good dissemination of information on the Convention in the general public and in particular among new immigrants, in their languages, and with appropriate material for children.

## **2.7. Cross-cutting references in the six Treaty Monitoring Bodies**

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<sup>9</sup> The maquiladora are assembly factories, from inputs of large companies in other countries, that often operate in sweat-shop like conditions.

Some concerns and clusters of rights are examined by a number of TMB, though with varying perspectives according to the specificity of the treaty they are tasked with supervising.

### ***Deportation***

CAT focuses on the prohibition of ill-treatment, on the use of excessive force during involuntary expulsion and on the provision of appeals with suspensive effect if a fear of torture in the destination country is alleged. CHR's main concern is that states give access to legal advice and information to detainees. For CRC, states should make sure that expelled children are effectively returned to their family or to social welfare agencies in their country of origin. It also recommends an impact assessment on children of the deportation of close relatives taking into account the best interest of the child. CESCR and CEDAW hardly mention this issue.

### ***Trafficking***

Trafficking is an issue of concern to all Committees especially since 2000. This date coincides with the adoption of the UN Convention on Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Before then, the same kind of issues used to be referred to as "sexual exploitation". (It is however to be noted that the definition of exploitation in the Protocol also covers other forms of exploitation including slavery and bond labour as well as the removal of organs.) The extent to which the different Committees consider trafficking varies, but not so much the content. CEDAW and CRC are the two Committees giving most attention to trafficking. CEDAW focuses more on protection measures for victims, on the possibility to give evidence (witness) and on training of officials to investigate trafficking cases.

CRC examines the causes of trafficking and the types of activities trafficked children are forced into and insists on protection measures for trafficked children, among others through reunification with their family. Another aspect touched upon by CRC is the training of law enforcement officials, social workers and prosecutors on how to monitor, receive, investigate and prosecute reported cases of sexual abuse in a child-sensitive manner. Cooperation is recommended with UNICEF and IOM.

In HCR conclusions, women and children migrants are explicitly referred to almost exclusively in relation to trafficking.

CESCR focuses essentially on actions for the protection of victims and the issue is hardly mentioned in CERD.

### ***Working conditions***

This is CESCR's main concern. Their special emphasis is on unfair terms of employment and on discrimination in enjoyment of economic, social and cultural rights, such as the right to work, fair conditions of employment, minimum wage, health and maternal benefits, pension benefits, unemployment benefits and safe working condition. The Committee recommends that states oversee whether employers treat migrant workers in conformity with ILO standards and the provisions of the Covenant. It recommends also sanctions for employers, compensation for victims of violations, freedom for foreign workers to change employer for the legal duration of their stay and to seek new employment upon expiration of their contract.

CERD is concerned with discrimination between national and non-national workers who should enjoy the same protection as regards especially minimum wages and good working conditions, social security and services, right to security of person, right to property and proper representation of ethnic minority groups in the labour market.

HRC also considers that the risk of abuse facing migrant workers is due to distinctions made in legislation between national and non-national workers. Irregular migrants and domestic workers in particular should enjoy legal protection. Forced labour should be eliminated. Access to legal information, to courts and to trade unions should be guaranteed.

CEDAW lists minimal conditions for the most vulnerable workers. CRC concerns cover forced labour, exploitation of children, minimal age for employment and the fact that migrant children are more often employed in clandestine work or illegal activities than other children.

### ***Emigration and its human consequences***

The CESCR mostly deals with this issue. It notes that migrants often are skilled and semi-skilled workers and that their massive emigration can have a negative impact on social and economic development in countries of origin. The Committee also recommends that States inform and educate potential workers about their rights and the difficulties to be faced abroad.

CEDAW approaches emigration mainly from the perspective of the feminisation of migration and analyses the causes and risks facing women migrants abroad, especially in typically female occupations, recommending detailed measures for the protection of human rights of migrant workers at all stages of the migration process.

CRC is concerned with consequences for children whose parents have emigrated and left them behind with relatives or in institutions.

### ***Irregular migrants***

HRC mostly refers to irregular migrants in connection with detention and expulsion. The Committee also considers them to be more often victims of discrimination in access to rights guaranteed in the Covenant than others. CEDAW draws attention to the fact that undocumented migrant women are particularly at risk as regards potential violation of their labour rights.

CERD is particularly concerned that undocumented workers may suffer from ill treatment. It recommends various protective measures including prohibition of the retention of passports by employers, controls on recruitment agencies, possibility to lodge complaints in case of infringement and education for children of parents in irregular situations. On illegal immigration, the Committee notes the difficulties faced by State parties linked to large influx of migrants and refugees. It encourages regularization of undocumented migrant workers, as it is difficult to implement the provisions of the Convention on persons without status. This measure it argues, would enable them to enjoy economic, social and cultural rights, in particular access to work, social services and housing.

According to the CESCR, those sectors with a high density of illegal work and where legal protection is likely to be incomplete should be targeted specifically for government action. The Committee welcomes the enjoyment by irregular migrant workers of basic social services, good working conditions and education, but notes that in general the protection they enjoy in the area of welfare is very limited and that they find themselves in a very precarious situation. It therefore welcomes measures taken to regularize the situation of clandestine immigrant workers. It also recommends states to take educational measures to combat the emerging trend of xenophobia and racism.

CRC focuses on persisting disparities in the enjoyment of economic, social and cultural rights (health, social welfare, education and housing) for non-national children, migrant children (whether documented or undocumented), irregular seasonal workers, minority children and refugee and asylum-seeking children. Birth registration procedures are important and should be known by the population and especially irregular immigrant families.

### ***Post-September 11***

HRC and CERD recall that the fight against terrorism cannot be a source of abuse (see CERD General Recommendation 20, in Section 1.3 above). CERD is concerned with possible indefinite detention without charge or trial for foreigners. CCPR calls on states to protect the rights to privacy and freedom of expression for foreigners or people of foreign extraction. The Committee furthermore stresses the importance of a possibility of review of the expulsion measure when the deportee could be exposed to a violation of his/her rights in the country of return. This last point is shared by CAT.

### ***Discrimination***

CRC looks at discrimination regarding access to welfare, nationality, documentation, education and housing for non-national children, migrant children (whether documented or undocumented), and irregular seasonal workers.

CAT highlights discriminatory practices by the police and argues in favour of the possibility of complaint without any discrimination in law.

HRC comments on various forms of discrimination in the access to the rights guaranteed in the Covenant, especially by articles 2, 3, 8, 9, 12, 17, 22 and 23 (see Sections 2.4 and 2.6), affecting non-citizens in general and undocumented migrants in particular. Regarding working conditions, the Committee notes in broad terms that the risk of abuse facing migrant workers is due to distinctions made in legislation between national and non-national workers.

CEDAW notes that migrant women are faced with multiple discrimination in society at large and in their own communities. The intersection of gender with ethnic and religious factors negatively affects access to health, education, permanent residence status, work permit and employment.

CERD recommends the elaboration of national plans on the rights of foreigners, migrants, refugees and stateless persons. States should also adopt legislation establishing equality between nationals and non-nationals in the exercise of rights and freedoms and prohibiting discrimination on grounds of colour, racial or ethnic origin and nationality. Discrimination against migrants is noted in the areas of education, employment, housing, access to public services, land property, social security benefits as well as discrimination among migrants according to the kind of work they perform or their nationality. The Committee notes with concern the re-emergence of discriminatory and racist attitudes towards migrants and foreigners in general and considers that racist organizations should be prohibited and racial discrimination considered an aggravating circumstance.

For CESCR, migrant workers are discriminated against with regard to the enjoyment of working conditions and of economic, social and cultural rights. National law should put them on an equal footing with nationals in this regard. The Committee recommends that social welfare should not exclude foreign workers and observes that in general the protection they enjoy in this area is very limited and that they find themselves in very precarious situation. Various recommendations are formulated on the need for equal rights and freedoms with nationals including as regards training, appeals in court and trade union rights. The Committee also advocates family reunification and naturalization without discrimination between non-nationals. States should adopt penal measures to combat all forms of discrimination, whether by police and law-enforcement officials or on the labour market.

### ***Birth registration***

HRC emphasizes the importance of registration at birth in so far as it conditions the enjoyment of political and electoral rights, and the possibility to hold public positions. According to CRC states should ensure birth registration for all children, including those of undocumented migrants, to avoid statelessness and ensure full enjoyment of rights, such as

access to health and education. Children should be registered even when they are not entitled to nationality.

## **2.8. Gaps in the reporting of States on human rights of migrants**

Notwithstanding the level of protection migrants could and at times do enjoy under the combination of the core international human rights treaties, there remain some objective gaps in fulfilling some of those specific rights as long as States do not ratify the Migrant Workers Convention (MWC). Migrant workers and members of their families find themselves outside the territory of their country of origin and often beyond the protection afforded to its citizens by that state. Some categories of rights important for migrants are hence characterized *only* in the Migrant Workers Convention. These are not new rights. They merely highlight specific protection needs. Some rights are covered in other conventions, but expanded upon in the MWC.

What follows is a list of rights elaborated upon in the 1990 Migrant Workers Convention which are not covered, or only partially so, by other human rights conventions and treaties:

Article 71 relates to States facilitating the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families.

The MWC expands on the protection of human rights of migrants by amongst others providing broader grounds for discrimination than those initially listed in the Universal Declaration on human rights or elaborated upon in subsequent conventions. Its wording reflects the evolving international context. The MWC Article 1 includes “conviction”, “nationality”, “age”, “economic position” and “marital status”. CRC for its part contains “disability” as an additional ground. This list contains helpful grounds in view of the trends observed in human rights violations of migrants, as for instance detailed in annual reports by the United Nations Commission on Human Rights Special Rapporteur on the Human Rights of Migrants.

The MWC covers categories of migrant workers excluded from other international conventions, such as frontier workers and self-employed workers. It also addresses issues of employment and residence authorization. MWC Article 25 (3) stipulates: “States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle [equality of treatment] 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.” This is important inasmuch as, even in an irregular situation, a migrant worker is entitled to receiving remuneration. This is particularly relevant prior to forced expulsions for instance.

The MWC places particular emphasis on the rights of members of the families and on protection of the family, including protection of family members, even in the event of the death of a migrant worker or dissolution of marriage.

Article 38 encourages States of employment to authorize migrant workers and members of their families to be temporarily absent without effect upon their authorization to stay or to work.

Transfer of earnings and savings is guaranteed under the Convention. This is crucial as remittances contribute to support of families in countries of origin. The Convention also refers to exemption of import and export duties for personal effects and the equipment

necessary to engage in the activity for which migrant workers they were admitted in the state of employment.

The Convention protects migrant workers from destruction of identity and other documents. It also contains strong safeguards against collective and arbitrary expulsions.

There is hence an objective gap in government reporting on implementation of treaties that do not contain provisions specific to the situation of migrant workers and members of their families. The perspective and level of detail of the Convention on Migrant Workers can be used to inform other committees and give substance to some clusters of rights when they examine state reports.

### **3. Conclusion**

The sum total of cross committee references and recommendations on migrants is both comforting and also leaves much to be desired. Before embarking on this research, there was no measuring rod to assess if governments that have not ratified the Convention on Migrant Workers, and that are not keen on ratifying it, actually use the other human rights treaties to protect migrants.

It is encouraging that all TMB have included recommendations for States parties to provide data on the implementation of relevant provisions of human rights treaties so as to protect migrant workers, too. That one half of country specific conclusions of treaty monitoring bodies refer to migrant issues is positive. As long as large host states for migrants have NOT ratified the Migrant Workers Convention, the combined other six core human rights treaties represent the best compromise and the best tool to-date to monitor and implement respect of the human rights of migrants workers and members of their families.

However, while some very practical and detailed positive elements are noted (Section 2.5), in many cases the conclusions and recommendations remain vague. It is little helpful to read that: "the situation of migrants should be improved". In fact States need to be given clear guidance as to how and in which area they should improve their performance. The terminology used by reporting states makes it difficult to identify whether the category of non-citizens described in reports includes migrant workers. Refugees, asylum-seekers, at times also minorities, ethnic groups and trafficked persons are often not disaggregated in reporting. As different legal frameworks do apply to some of these populations, it is necessary that states produce reports that clearly identify the various categories of non-citizens on their territories, and the level of protection they are afforded. Likewise, independent experts sitting on HRC, CESCR, CERD, CEDAW, CAT and CRC cannot be expected to build in skills and knowledge in migration, immigration law, the transfer of remittances and the protection of trafficked persons. Pending more universal ratification of the MWC, there is a need for the presence of a number of experts with this kind of migration background across the various TMB.

That 50% of country specific conclusions do not include migrant related references, while reportedly very few countries in the world are not affected by migration, illustrates a shortcoming of the present system. The specificity of the situation of migrant workers is lost. The entry into force of the Convention on the Rights of Children and the regular reporting of 192 States parties has made a quantitative and qualitative difference. It has definitely put the rights of the child on the international agenda. Despite a proliferation of regional consultative processes, the rights of migrants are still far from featuring on the international agenda. Far too frequently, despite strong and detailed recommendations in the conclusions of international conferences, such as the World Conference against Racism, Xenophobia and Related Intolerance, migrants are criminalized and represented as scapegoats. The focus is

on counter trafficking and curbing irregular migration and less so on respect for the human rights of migrants.

Streamlining migrant concerns in the six treaty monitoring bodies above is not done in a concerted manner by States parties. There are thus unavoidably gaps. There are also a number of overlaps. Recurrent cross cutting references in most TMB conclusions include deportation, trafficking, working conditions and exploitation, emigration and its negative consequences on countries of origin, irregular migrants, discrimination and post-September 11 effect. Detention is another concern. These are serious issues which should be approached in an integrated manner.

No entity in the UN system, or in government administrations, is tasked with collecting the sum of conclusions delivered by TMBs on country situations, and more importantly with ensuring the systematic follow up of these recommendations. Cross referencing with the public findings of relevant UN thematic mechanisms, such as the Special Rapporteurs on the Human Rights of Migrants, on Torture, on Violence against Women, and on Trafficking should also be built into the overall supervision of treaty implementations. The High Commissioner for Human Rights could undertake such a task.

The present study provides some leads on how to advance the protection of the human rights of migrants thanks to the combined work of the treaty monitoring bodies. Non-governmental organisations, UN experts, lawyers and interested stakeholders should tap more systematically in the wealth of TMB conclusions available on the database of the Office of the High Commissioner for Human Rights and go back to governments with specific questions on the implementation of TMB conclusions and offer concrete suggestions for improvement. Pending the possible creation of a “super committee” with “super experts, preferably in session all year round, to supervise the combined implementation of the seven core international human rights treaties, the 1990 Convention on Migrant Workers does offer a sensible and comprehensive tool to ensure the integrated reporting that the welfare and dignity of migrants deserve. The voluntary state reporting system instituted by the international human rights treaties remains unique. It has demonstrated its value over the past four decades for other groups of human beings. It provides a unique tool to advance protection of the rights of all migrant workers and members of their families.

Geneva, November, 2004

## Links and further information

The online version of this document includes hyperlinks to selected documents as well as the detailed results of the study. Visit: [www.december18.net](http://www.december18.net)

For further information on this research project you can contact:

- December 18 vzw [www.december18.net](http://www.december18.net)
- International Catholic Migration Commission [www.icmc.net](http://www.icmc.net)
- UNESCO [www.unesco.org/migration](http://www.unesco.org/migration)

For further information about treaty monitoring bodies:

### Amnesty International Treaty Bodies website

The site is designed to offer information on the activities of treaty bodies and to encourage NGOs and individuals to participate in their work.

<http://web.amnesty.org/pages/treaty-index-eng>

- Anti-Racism Information Service (ARIS)  
ARIS was set up to make the Convention on the Elimination of Racial Discrimination better known and to publicize the work of the Committee for the Elimination of Racial Discrimination (CERD) which monitors the application of the Convention.

<http://www.antiracism-info.org/Kiwi/pageHome.php>

### NGO Group for the Convention on the Rights of the Child

The group brings together international Non Governmental Organisations (NGOs) directly involved in the implementation of the Convention. The NGO Group aims to raise awareness about the Convention and make its implications known, to promote full implementation of the Convention, and to be an active source of information for the Committee on the Rights of the Child, concerned UN bodies and interested NGOs.

<http://www.crin.org/NGOGroupforCRC/>