

International legal framework for the protection of migrant workers

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The protection of the rights of workers employed outside their countries of origin has been the subject of increasing concern throughout the United Nations system. A large array of international instruments exists to provide the parameters for the regulation of international migration and to provide standards in the area of human and labour rights. The rights and freedoms stipulated in the Universal Declaration of Human Rights apply equally to migrants as to any other individual, as do the provisions of the human rights instruments which have subsequently been developed by the United Nations. The protection of the human rights of men and women migrant workers and the promotion of their equal opportunity and treatment is also embedded in the Preamble to the Constitution of the International Labour Organization (ILO), 1919, and in the Declaration of Philadelphia, 1994. Special attention is devoted to migrant workers in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). Apart from the adoption of specific international standards protection the rights of migrant workers, the concern for migrant workers has also been expressed through the insertion of specific provisions targeting migrants in the respective Declarations and Plan of Actions of UN World Conferences¹ held over the past decade, and to the appointment of a UN Special Rapporteur on the Human Rights of Migrants in 1997.

The ILO and UN Conventions concerning migrant workers: a complementary set of standards

The first international instruments providing for more comprehensive solutions to the problems facing migrant workers include the *Migration for Employment Convention, 1949 (Revised) (No. 97)* and the *Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)* as well as their accompanying Recommendations. Because migration often has consequences on both the migrant workers and members of their families, the ILO instruments on migrant workers provide for guarantees and facilities to assist migrant workers and their families in all stages of the migration process. It is worth recalling that the ILO Conventions do not affect the sovereign right of each member State to allow or refuse to allow a foreigner to enter its territory and that it is up to the State to determine the manner in which it intends to organize the potential entry of migrant workers or the refusal of their entry. The provisions of the instruments do not depend on reciprocity and are also intended to cover refugees and displaced persons in so far as they are workers employed outside their country.

While the ILO instruments concerning migrant workers do not cover all migrant-related operations – for example, they do not deal with the elaboration and establishment of a national labour migration policy - the principles enshrined in these instruments provide an important framework for guidance on what should constitute the basic components of a comprehensive migration policy, the protection of migrant

¹ The most extensive provisions on the protection of the rights of migrant workers, including trafficked and smuggled migrants, are found in the *Durban Declaration and Programme of Action Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, adopted in 2001*.

workers and measures to facilitate as well as to control migration movements. More specifically, they call for measures aimed at regulating the conditions in which migration for employment occurs, measures aimed at combating irregular migration and labour trafficking, measures to detect the illegal employment of migrants with the aim of preventing and eliminating abuses, and contain provisions on cooperation between States and with employer's and workers' organizations in this regard. In addition, the instruments call for measures relating to the maintenance of free service to assist migrants and the provision of information, steps against misleading propaganda, and the transfer of earnings. They define parameters for recruitment and contract conditions, participation of migrants in job training and promotion, and for family reunification and appeals against unjustified termination of employment or expulsion. They contain special provisions on access to social services, medical services and reasonable housing. Lastly but essentially, they call for the adoption of a policy to promote and guarantee equality of treatment and opportunity between regular status migrants and nationals in employment and occupation in the areas of access to employment², remuneration, social security, trade union rights, cultural rights and individual freedoms, employment taxes and access to legal proceedings.

It should be noted that Conventions Nos. 97 and 143 allow for a number of exceptions with respect to the categories of migrants covered by the Conventions, notably seafarers (covered by a wide range of specific Conventions), frontier workers and short-term entry members of the liberal profession and artists as well as the self-employed. Convention No. 143 also excludes trainees and specific duty assignments. However, these exclusions in this Convention only apply to Part II, which deals with equality of opportunity of regular migrants with nationals.

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, which was adopted in 1990 embodies most of the substantive provisions of the ILO Conventions and in some ways goes beyond them. The UN Convention and Conventions Nos. 97 and 143 have therefore been considered complementary. While the long-term objective of the UN Convention is to discourage and finally eliminate irregular migration, at the same time it furthers the rights and protections of persons migrating for employment. Other significant aspects of the Convention include the fact that ratifying States are not permitted to exclude any category of migrant worker from its application, the "indivisibility" of the instrument, and the fact that it includes every type of migrant worker, including those which are excluded from existing ILO instruments³. The Convention also provides for a broad definition of "family" taking into account a more modern and up-to-date composition of it. Compared to the specific ILO instruments, the UN Convention seems to articulate more broadly the principle of equality of treatment between migrant workers and nationals before the courts and tribunals, with respect to remuneration and other working conditions as well as with respect to migrant workers' access to urgent medical assistance and education for children of migrant workers. It also contains more extensive rights for migrant workers to transfer their

² Article 14 (a) of Convention No. 143, however, permits limited restrictions on equality of opportunity in access to employment. With respect to access to employment and protection against loss of employment, see also paragraphs 381-401 and 577-597 of the *ILO General Survey on Migrant Workers*, International Labour Conference, 87th Session, 1999, Report III (Part 1B).

³ It should be noted however that while the designation of frontier workers, seafarers and the self-employed, is very important and useful, they are not covered in the substantive provisions of the UN Convention.

earnings and savings, and migrant workers appear to benefit from a clearer level of protection in relation to expulsion. In terms of the right to reimbursement of social security contributions, however, the ILO instruments (including specific Conventions on social security) define migrant workers' rights more clearly. As regards additional rights from which documented migrants and members of their families may benefit (Part IV of the United Nations Convention), the ILO and UN instruments are quite similar, except that the ILO Conventions provide for more distinct rights for migrant workers to form a trade union, and the right to equal treatment in terms of access to education, housing and vocational and social services. Finally, the UN Convention provides for the possibility of individual complaints by migrant workers (art. 77) but does not, unlike the ILO instruments, emphasize the involvement of workers' and employers' organizations.

At the heart of the protection of the rights of men and women migrant workers lies their potential vulnerability to discrimination, exploitation and abuse, especially in marginal, low status and inadequately regulated sectors of employment. Additionally, those migrants without an authorization for entry and or employment are at the margin of protection by safety and health, minimum wage and other standards as they are most often employed in sectors where either those standards are not applicable, or not respected or enforced. It is therefore imperative that countries ensure some minimum standards of protection, including the basic human rights, for all migrants workers, *whatever their status*. The UN Convention and Convention No. 143 contain provisions intended to ensure that all migrant workers enjoy a basic level of protection even when they have immigrated or are employed illegally and their situation cannot be regularized. Under Convention No. 143, these relate to basic human rights, protective measures for migrant workers who have lost their employment and certain rights arising of past employment as regards remuneration, social security and related benefits. The UN Convention extends to migrant workers who enter or reside in the host country illegally (and members of their families) rights which were previously limited to individuals involved in regular migration for employment, going beyond those elaborated in Convention No. 143.

In addition to measures to protect rights of migrant workers, the most recent ILO instruments on migrant workers and the United Nations Convention (Part VI) both place great emphasis on efforts to curb irregular migration and the need to formulate appropriate migration policies to that effect; and on exchanging information, providing information to migrant workers, and facilitating the provision of consular services and the imposition of sanctions to give effect to regulations in this area.

Other international instruments relevant to migrant workers

In addition to the specific ILO and UN standards safeguarding the rights of migrant workers, other important ILO and UN instruments are applicable. Many relevant provisions in the more widely ratified ILO fundamental Conventions as well as in other even less ratified Conventions are not limited to nationals or to those migrants with regular residence and employment status⁴. It is important to consider

⁴ When considering the applicability of ILO instruments to all migrant workers, whether they are temporary or permanent, or in a regular or irregular situation, a distinction needs to be made between scope and application. For

these standards when looking for guidance for the development of comprehensive migration policies. It is also worth recalling that unless otherwise specified in the ILO instruments concerned, all of the Conventions and Recommendations adopted by the International Labour Conference to date cover nationals and non-nationals, while at the same maintaining the sovereign right of States to regulate access to the territory or to the national labour market.

Some principles and rights at work that derive from the ILO Constitution and that have been expressed and developed in eight ILO Conventions⁵ are deemed to be fundamental for the protection of the human rights for all workers, including migrant workers by the international community and the ILO. They concern freedom of association and the right to collective bargaining, freedom from forced labour and child labour and non-discrimination in employment and occupation. Moreover, following the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at work “all members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of their membership of the Organization, to respect and to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions” (paragraph 2 of the Declaration).

While unmistakably the eight core ILO Conventions must be promoted without delay for all workers, migrant workers’ rights are not only a matter of fundamental rights. The international labour standards in the areas of social security, maternity protection, employment policy, private and public employment agencies, occupational safety and health, conditions of work, protection of wages and labour inspection, as well as those covering sectors employing a large number of migrant workers have been identified by the ILO as equally important to the promotion of decent work of all migrant workers (see box). The ILO instruments that promote equality of treatment between migrant workers and nationals in the area of social security are particularly relevant. The most recent Equality of Treatment (Social Security) Convention, 1962 (No. 118) broadens the scope of protection and specifically establishes the right to equality of treatment in all of the nine branches of social security between nationals and non-nationals of a State which has also ratified the Convention. The Maintenance of Social Security Rights Convention, 1982 (No. 157) institutes an international system for the maintenance of acquired rights and rights in the course of acquisition for workers who transfer their residence from one country to another, and which ensure the effective provision of the benefits abroad when they return to their country of origin⁶. In addition, the general ILO social security Conventions provide either implicitly or explicitly for equality of treatment

example, while the Conventions may not explicitly exclude irregular workers from their scope of application, it may be difficult to apply certain provisions in practice with regard to these workers. This may be especially the case in areas such as social security or maternity protection where entitlements to benefits may be subject to completion of a qualifying period (based on period of contribution, employment or residence) or depend on contributions made by the workers concerned. Irregular workers, due to their status, are often not in a position to participate in contributory social security schemes.

⁵ The Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); and the Minimum Age Convention, 1979 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182).

⁶ See for a detailed overview of the ILO instruments on social security: Martine Humblet and Rosinda Silva. 2002. *Standards for the XXIst Century. Social Security*, International Labour Office, Geneva, pages 41 – 45.

between nationals and regular migrant workers and contain explicit non-discrimination clauses. For some of the instruments, the persons covered are defined very broadly and cover all workers, as is the case for the Maternity Protection Convention, 2000 (No.183). Others contain special non-discrimination clauses.

Considering the increase in private employment agencies dealing with the recruitment of migrant workers, the *Private Employment Agencies Convention (No. 181)*, 1997 has become one of the most relevant ILO standards for migrant workers today. Convention No. 181 requires ratifying States to adopt measures to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These measures shall include laws or regulations which provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses (Article 8.1). In addition, the *Protection of Wages Convention, 1949 (No.95)* also deserves particular attention as it provides for the settlement of wages due upon the termination of a contract and prohibits “any deduction of wages with a view to ensuring a direct or indirect payment for the purpose of obtaining or retaining employment”. Consequently, any deductions from wages for payments to fee-charging agencies for the purpose of obtaining or retaining employment would be contrary to the Convention⁷.

At the level of the United Nations, while the 1990 Convention is the only United Nations instrument of direct relevance to migrant workers there are several other UN instruments that are of potential importance in terms of protecting them from discrimination and exploitation on grounds other than their non-national status. *The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, currently one of the most widely ratified of the UN human rights conventions, binds States parties to outlaw discrimination on the grounds of race, colour, descent, or national or ethnic origin against all individuals within the jurisdiction of the State and to enact sanctions for activities based upon such discrimination. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, consolidates the provisions of existing UN instruments concerning discrimination on the basis of sex and applies to citizens and non-citizens. Other human rights instruments of relevance to migrant workers include the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the International Convention on the Rights of the Child (1989).

Formerly accounting for only a small percentage of clandestine migration, labour trafficking and smuggling have been broadly affected by the changing nature of international migration, and “unless it brought under control, it could become one of the dominant forms of abusive migration in the years to come”⁸. Recognizing that such action requires a comprehensive international approach, the UN General

⁷ ILO. 2003. *Protection of Wages: Standards and Safeguards Relating to the Payment of Labour Remuneration*, General Survey on the Protection of Wages Convention, (No. 95) and the Protection of Wages Recommendation No. 85, 1949, International Labour Conference, 91st Session, Report III (Part 1B), Para. 267; for a more detailed explanation on the application of Article 9 of Convention No. 95 see also Paras. 268-271 of the Survey.

⁸ 1990 General Survey on Migrant Workers, para 289.

Assembly adopted in 2000, the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol)* and the *Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol)* supplementing the *UN Convention Against Transnational Organized Crime*.⁹

Regional instruments

When identifying relevant standards concerning labour migration and the protection of migrant workers in OECE countries, it is useful to look at the set of regional standards elaborated in Europe and North America. However, it is worth recalling here that where regional instruments on migration are more restrictive than the relevant UN or ILO standards, especially when these have been ratified by the member state concerned, they should not be considered as a replacement for international standards set in this domain.

The Council of Europe's instruments in the field of labour migration cover general human rights as well as more specific agreements relating to migrants and migrant workers. The *European Convention on the Protection of Human Rights and Fundamental Freedoms (1950)*, and the *European Social Charter (1961)* and its *Additional Protocol (1988)*, include a number of provisions relating to individuals living and working in countries of which they are not nationals, covering the rights to privacy, family life, the right to engage in a gainful occupation in another member's territory, provision of information to migrant workers, facilitation of the migration process, equality of treatment of nationals and non-nationals in employment, the right to family reunification, and guarantees against expulsion, etc. These instruments, however, are relevant only to migrants who are citizens of Council of Europe Member States, and their application is conditional on reciprocity. The *European Convention on the Legal Status of Migrant Workers (1977)* includes provisions relating to the main aspects of the legal status of migrant workers coming from Contracting Party countries, and especially to recruitment, medical examinations and vocational tests, travel, residence and work permits, family reunion, housing, conditions of work, transfer of savings, social security, social and medical assistance, expiry of the contract of employment, dismissal and re-employment, and preparation for return to the country of origin. However, few countries have ratified this Convention.

The entry into force in 1999 of the *Treaty establishing the European Community, as amended by the Amsterdam Treaty* (the EC Treaty), represents a turning point in the commitment with regard to a common migration policy for the European Union. Differences however exist in terms of rights and benefits granted to migrant workers coming from within the EU, from future accession countries, and migrant workers coming from third countries. The EC Treaty provides for freedom of movement for workers from EU member States and shall entail the abolition of any discrimination based on nationality between these workers as regards employment, remuneration and other conditions of work and employment. The EC Treaty also

⁹ The purpose of the Trafficking Protocol is (a) to prevent and combat trafficking in persons, paying particular attention to women and children; (b) to protect and assist the victims of such trafficking, with full respect of their human rights and (c) to promote cooperation among States Parties in order to meet those objectives (Article 2). The Smuggling Protocol aims to prevent and combat smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants (Article 2).

invites the European Council to take measures necessary to combat discrimination based on, *inter alia*, race, ethnic origin, religion or belief. It affords migrant workers from EU member states a set of social rights unequalled in other regions of the world. Furthermore, measures shall be taken in the field of asylum, immigration and safeguarding of the rights of nationals of third countries. The Council is also required to adopt measures on immigration policy with regard to conditions of entry and residence, with regard to standards on procedures for the issue by Member States of long-term visa and residence permits, including those for the purpose of family reunification; and with regard to illegal immigration and illegal residence, including repatriation of illegal residents. In its Conclusions adopted in Tampere in 1999¹⁰, the European Council reasserted to make full use of the possibilities offered by the provisions of EC Treaty in the area of migration.

The European Commission and European Council have also developed a body of regional norms with the aim of regulating intra-regional migration flows and treatment of non-national workers from within the region¹¹. Directives emanating from the EC cover such issues as freedom of movement and residence, right to remain in the territory of another Member State after employment has been terminated, education of children of migrant workers, issues of health and safety of migrant workers, and the right to vote and stand in elections of other Member States. In addition, the EC Directives relating to equality of opportunity and treatment in employment are also an important reference point¹².

Although not a binding instrument, the European Union Charter of Fundamental Rights adopted in 2000 is a major point of reference in this context as most its provisions are applicable to all persons irrespective of their nationality. It sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU.

While the inter-American system does not provide for a specific instrument on migrant workers, they enjoy the general protection provided by the Organization of American States' (OAS) American Declaration on the Rights and Duties of Man (1948) and the 1969 American Convention on Human Rights (Pact of San José). Both instruments guarantee freedom from discrimination. Certain principles applicable to migrants and their families have been developed on the basis of case law of the Inter-American Commission on Human Rights (IACHR) and of the Inter-American Court of Justice.¹³ In light of the enormous importance that migration has acquired in the

¹⁰ Presidency Conclusions of the Tampere European Council 15-16 October 1999 (SN 200/99).

¹¹ For example, Regulation No. 1612/68/EEC, dealing principally with equality of treatment in respect of access to employment, working conditions, social and tax advantages, trade union rights, vocational training and education, it also lays down guidelines for family reunification; Regulation No. 1408/71/EEC relating to the application of social security regimes to employed persons and the self-employed and to members of their families who move within the Community (modified by Regulation No. 1606/98/EC, 29 June 1998).

¹² EC Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions, and its amending Directive 2002/73 (23 September 2002); EC Directive 2000/43/EC of 29 June implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; EC Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

¹³ See in particular the *Consultative Opinion OC-18/2003 of 17 December 2003 of the Inter-American Court of Justice on the "Legal Status of Undocumented Migrants"*: "The Court considers that undocumented migrant workers, who find themselves in a situation of vulnerability and discrimination with respect to workers who are nationals, have the same labor rights that belong to the rest of the workers in the State in which they are working,

past decade the IACHR decided to devote special attention to the situation of migrant workers and their families in the Americas. The OAS General Assembly adopted several resolutions and organized Summits of Heads of State. In 1997 the IACHR appointed a Special Rapporteur on Migrant Workers and their Families.

The North American Free Trade Agreement (NAFTA) deals only marginally with migration issues through the North American Agreement on Labour Cooperation (NAALC) and also in the body of NAFTA itself, which permits the entrance of a certain quota of investors, highly qualified personnel and executives of multinational corporations between signatory States.

and this last must take all necessary measures to see that this is recognized and complied with in practice. Workers, being entitled to labor rights, must be able to count on all adequate means to exercise them.", para. 160.

Principal ILO Conventions relevant to migrant workers

Migration for Employment Convention (Revised), 1949 (No. 97)

Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

Forced Labour Convention, 1930 (No. 29)

Abolition of Forced Labour Convention, 1957 (No. 105)

Freedom of Association and Protection of the Rights to Organise Convention, 1948 (No. 87)

Right to Organise and Collective Bargaining Convention, 1949 (No.98)

Equal Remuneration Convention, 1951 (No. 100)

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Minimum Age Convention, 1973 (No. 138)

Worst Forms of Child Labour Convention, 1999 (No. 182)

Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)

Equality of Treatment (Social Security) Convention, 1962 (No. 118)

Social Security (Minimum Standards) Convention, 1952 (No. 102)

Maintenance of Social Security Rights Convention, 1982 (No. 157)

Protection of Wages Convention, 1949 (No. 95)

Employment Policy Convention, 1964 (No. 122)

Employment Service Convention, 1948 (No. 88)

Private Employment Agencies Convention, 1997 (No.181)

Labour Inspection Convention, 1947 (No. 81)

Labour Clauses (Public Contracts) Convention, 1949 (No. 94)

Plantations Convention, 1958 (No. 110)

Employment Injury Benefits Convention, 1964 (No. 121)

Labour Inspection (Agriculture) Convention, 1969 (No. 129)

Nursing Personnel Convention, 1977 (No. 149)

Occupational Safety and Health Convention, 1981 (No. 155)

Safety and Health in Construction Convention, 1988 (No. 167)

Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172)

Safety and Health in Mines Convention, 1995 (No. 176)

Maternity Protection Convention, 2000 (No. 183)

Safety and Health in Agriculture Convention, 2001 (No. 184)