

Migrant workers: The ILO standards

The protection of workers employed in a country other than their country of origin has always had an important place among the activities of the ILO, since more than any other workers they are liable to exploitation, particularly if they are in an irregular situation and are victims of the trafficking of persons.

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The situation of workers employed abroad was addressed as soon as the ILO was founded in 1919.¹ This concern of the ILO with the situation of migrant workers was reflected in the adoption, at the First Session of the International Labour Conference in 1919, of a Recommendation which already sketched out the two aims of the ILO in this field, namely: *equality* of treatment between nationals and migrant workers; and *coordination* on migration policies between States, on the one hand, and between governments and employers' and workers' organizations, on the other.² The Declaration concerning the aims and purposes of the International Labour Organization, or the Declaration of Philadelphia, adopted in 1944, also makes specific reference to the problems of migrant workers.³ It should be added that this concern remains highly topical, since the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference on 18 June 1998, in the fourth paragraph of the Preamble, reaffirms the need for the Organization to give special attention to this category of workers.⁴

Specific standards relating to migrant workers

The International Labour Conference had a dual objective in adopting instruments on migrant workers: in the first place, the intention was to *regulate* the conditions of migration and, secondly, to provide specific *protection* for a very vulnerable category of workers. In this regard, the ILO's standards have focused on two main directions:

- firstly, the Conference has endeavoured to establish the right to equality of treatment between nationals and non-nationals in the field of social security, and at the same time to institute 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;⁵ and
- secondly, the Conference has endeavoured to find comprehensive solutions to the problems facing migrant workers and has adopted a number of instruments for this purpose (including those containing only a few provisions relating to migrant workers).⁶

Relations with other ILO standards

It should first be recalled that, with the exception of the instruments relating to migrant workers and other special categories, the Conventions and Recommendations adopted by the International Labour Conference are of general application, that is they cover *all* workers, irrespective of nationality, even though since the Organization's inception there has been an awareness of the need to adopt instruments providing specific protection for migrant workers.

Therefore, although they do not specifically cover migrant workers, the following instruments either contain provisions relating to them, or the Committee of Experts has on occasion referred to the specific situation of migrant workers in supervising their application: the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); the Forced Labour Convention, 1930 (No. 29); the Labour Inspection Convention, 1947 (No. 81); the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Employment Service Convention, 1948 (No. 88); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Equal Remuneration Convention, 1951 (No. 100); the Maternity Protection Convention (Revised), 1952 (No. 103); the Abolition of Forced Labour Convention, 1957 (No. 105); the Indigenous and Tribal Populations Convention, 1957 (No. 107); the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958; the Workers' Housing Recommendation, 1961 (No. 115); the Employment Policy Convention, 1964 (No. 122); the Minimum Age Convention, 1973 (No. 138); the Human Resources Development Recommendation, 1975 (No. 150); the Occupational Safety and Health Recommendation, 1981 (No. 164); the Termination of Employment Convention, 1982 (No. 158); the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169); the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168); the

Indigenous and Tribal Peoples Convention, 1989 (No. 169); and the Private Employment Agencies Convention (No. 181) and Recommendation (No. 188), 1977.

This list is by no means exhaustive. Mention should also be made of the numerous observations formulated by the Committee of Experts during its supervision of the application of the maritime Conventions.

The specific case of Convention (and Recommendation) No. 111. Under the terms of Paragraph 8 of Recommendation No. 111, regard should be given to the provisions of Convention No. 97 and Recommendation No. 86, relating to equality of treatment and the lifting of restrictions on access to employment in relation to immigrant workers of foreign nationality and the members of their families.⁷ It should be recalled that Convention No. 111 protects *all* workers, therefore including migrant workers. Although nationality is not one of the grounds of discrimination formally prohibited by Convention No. 111, migrant workers are protected by this instrument in so far as they are victims of discrimination in employment or occupation on the basis of one or other of the grounds of discrimination formally prohibited by Convention No. 111, namely race, colour, sex, religion, political opinion, national extraction or social origin.⁸

Other standards in the field of migration

Although this section is limited to United Nations instruments, it should be emphasized that the management of international migratory flows features highly on the agenda of a number of regional and sub-regional bodies and that instruments and institutions designed to regulate the entry, stay, treatment and departure of non-national workers have been established in most regions of the world. It should also be pointed out that many States have concluded bilateral agreements to regulate the most significant emigration and immigration flows.⁹

The Universal Declaration of Human Rights, adopted by the United Nations in 1948, naturally applies to migrants.

Other United Nations instruments are more pertinent in relation to the protection of migrant workers, such as the International Convention on the Elimination of All Forms of Racial Discrimination (1965). Other instruments are relevant, but to a lesser extent, such as the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989).

After a very long drafting process, to which the ILO contributed actively, the General Assembly of the United Nations adopted on 18 December 1990 the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.¹⁰ However, the new Convention had a lukewarm welcome from States. It only recently (December 2002) obtained the twentieth ratification required for the Convention to come into force.¹¹ The United Nations launched a global campaign in 1998 to promote the rights of migrants, of which the principal objective is to promote the ratification of this Convention by the largest possible number of member States of the United Nations.

Finally, reference should be made to the adoption on 15 November 2000 of the United Nations Convention against Transnational Organized Crime and its two additional protocols, the first of which is intended to prevent, suppress and punish trafficking in persons, especially women and children, and the second to prevent the smuggling of migrants by land, sea and air.

Contemporary trends in international migration

Since the adoption in 1949 and 1975 of the four instruments which form the basis of this section, the extent, direction and nature of international labour migration has undergone significant changes, which are not without consequences for the application of the instruments.

Extent of international migration. International labour migration is currently a global phenomenon and few countries remain completely unaffected by it. However, it is difficult to establish with accuracy the number of migrant workers in the world today.¹² However, it is clear that international labour migration has grown considerably since the adoption of the four instruments under consideration.¹³ The ILO recently estimated that over 96 million people (migrant workers and their families) are currently residing, legally or illegally, in a country other than their own and are remitting each year some 73 billion US dollars to their country of origin,¹⁴ while the United Nations reports 130 million migrants, of whom 40 per cent are irregular, with the number increasing for all categories taken together by between 4 and 8 per cent a year.

As the total number of persons involved in migration processes has increased, the number of sending and receiving countries has also risen.

Direction of international migration. The following few examples illustrate the directions taken by the phenomenon of migration in recent years:

- The *first example* is the economic, social and political transformation of the countries of Central and Eastern Europe which, combined with ethnic and social tensions throughout the region, has had the effect that countries which were previously merely affected by migration as countries of transit, have become migrant-receiving countries in their own right.

- The *second significant development* consists of the current trend in many migrant-receiving countries of developing preferential immigration policies, as a consequence of the rise in domestic unemployment rates and the establishment of regional groupings of countries.¹⁵
- *Globalization*, combined with the development of communication networks and in international transport, has had a profound effect on international labour migration, in the sense that it has increased the number of people who are envisaging international migration as a means of escaping poverty, unemployment and other social, economic and political pressures in their home countries.

Nature of international migration. While at the time of the adoption of the 1949 instruments, the traditional distinction between immigration for purposes of *permanent settlement* and *temporary immigration* was clear, the crisis which affected the main (European) receiving countries at the beginning of the 1970s blurred this initial distinction.

After tightening their border controls and freezing immigration, these countries found that many migrants initially recruited for temporary employment, in fact, settled permanently in the host country and took the opportunity to bring their families.

As the ban on immigration for permanent settlement has, with few exceptions, remained in force for many major migrant-receiving countries, the only remaining means of migrating for many people is to resort to time-bound migration.

The profile of migrant workers recruited under temporary migration systems has also changed. While in the past most temporary migration flows consisted of semi-skilled workers, current immigration policies tend to focus on highly skilled migrants. However, seasonal workers, primarily recruited for agricultural work, continue to constitute an exception to this rule.

Another aspect which should be taken into consideration is the flexibility that characterizes today's labour market and that affects all workers, including migrant workers. Temporary migrant workers who, by definition, occupy precarious positions, frequently change from one job to another and from one category to another, such as self-employment, contract work and salaried work.

Recruitment practices have also changed significantly since the adoption of the four instruments under consideration. The decline in group recruitment systems, under government control, and the general decline in state leadership in the world of work, have left a vacuum which has been rapidly and effectively filled by private agencies specializing in the recruitment of workers for employment abroad.¹⁶ As will be seen below, this development is not wholly positive.

Irregular migration. In recent years, illegal immigration has become a matter of concern. The irregular entry, employment and residence of foreign workers has emerged as a disturbing trend, against which governments and the international community have endeavoured to take action.¹⁷ This type of migration is by its nature difficult to quantify and estimates are imprecise, with fairly disparate figures being put forward. The most commonly cited figure is of 30 million irregular migrants worldwide.

Convention No. 143 and Recommendation No. 151 were adopted in 1975 partly with the objective of protecting irregular migrant workers against abuses of all types.

An examination of the current immigration policies of most major migrant-receiving countries might lead to the belief that migration has become essentially temporary in nature and only concerns highly qualified foreign workers. However, this does not necessarily reflect the real situation. In practice, it is found that the majority of migrant workers occupy unskilled or semi-skilled positions, often under illegal conditions.

Individuals who migrate or reside in a country in violation of immigration and employment regulations are very likely to find themselves in a situation in which they are vulnerable to abuse and exploitation of all types, particularly in the case of women and children.

Women migrants. In general, the extent to which women engage in international migration is not known. The use of gender-specific language in the 1949 and 1975 instruments shows that at that time the typical migrant was male and the stereotyped view was that he was young and engaging in migration for economic reasons.¹⁸

Women have long been perceived merely as accompanying their spouse in the context of family reunification. However, it is reported that as many women as men are currently migrating for employment and that they account for almost 48 per cent of migrants worldwide.¹⁹

Due to the nature of the work that they undertake, women migrant workers can be particularly vulnerable when employed abroad. In recent years, the abuses to which *women domestic workers* are subjected have attracted much attention. Another cause of concern is the vulnerability of women recruited to work outside their countries as *sex workers*.²⁰ While some migrate specifically for this purpose, the vast majority are forced into prostitution networks upon their arrival in the host country. In many cases, the confiscation of their travel documents and identity papers, large debts which may be owed to the recruiter and the fear of being reported to the police place these women in an extremely vulnerable position.

Fundamental human rights of migrant workers and state sovereignty

Many of those who are involved in the debate on migration draw attention to the difficulties that exist, on the one hand, in reconciling the sovereign right of States to protect their labour market (in response

to concerns, whether or not they are legitimate, of public opinion preoccupied by the presence of migrants) and, on the other hand, the fundamental human rights of individuals who, out of choice or necessity, leave to seek work abroad. There is a resulting tension between internal and external forces, which tends to accentuate even further the prejudices, xenophobia and racism of which migrants are often the victims. Since its creation, the ILO has participated actively in this debate and has endeavoured to find a balance between these apparently conflicting interests through, among other measures, the adoption of international labour standards.

The problems raised by international migration for employment are becoming ever more complex and varied. In the framework of the process of the revision of international labour standards in which the ILO is currently engaged, the 1998 General Survey of the Committee of Experts on the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143), and the Migrant Workers Recommendation, 1975 (No. 151), showed:

- that there are serious discrepancies between national practice and the key provisions of Conventions Nos. 97 and 143; and
- the impact of changes from the context in which the ILO's standards on migrant workers were adopted.²¹

For this reason, in March 2001, the ILO proposed to the Governing Body that a general discussion on the question of migrant workers should be held at a future International Labour Conference. This will take place in 2004.

Notes

¹ For example, Article 427 of the Treaty of Versailles, which laid the basis for the ILO in 1919, provides that "the standard set by law in each country with respect to the conditions of labour should have

due regard to the equitable economic treatment of all workers lawfully resident therein". Similarly, the Preamble to the Constitution of the ILO lays down the obligation for the ILO to improve "protection of the interests of workers when employed in countries other than their own".

² The Reciprocity of Treatment Recommendation, 1919 (No. 2).

³ Paragraph III(c): "The Conference recognizes the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve [...] the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement."

⁴ "Whereas the ILO should give special attention to the problems of persons with special social needs, particularly [...] migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation."

⁵ Four Conventions and two Recommendations have been adopted for this purpose: the Equality of Treatment (Accident Compensation) Convention (No. 19) and Recommendation No. 25, 1925; the Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48); the Equality of Treatment (Social Security) Convention, 1962 (No. 118); and the Maintenance of Social Security Rights Convention (No. 157) and Recommendation No. 167, adopted respectively in 1982 and 1983.

⁶ In addition to the two principal Conventions and Recommendations which are covered by this section, namely: on the one hand, the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86), 1949 and, on the other hand, the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the Migrant Workers Recommendation, 1975 (No. 151). For the sake of completeness, it should be noted that in 1926 the Conference adopted the Inspection of Emigrants Convention (No. 21) and the Migration (Protection of Females at Sea) Recommendation (No. 26); in 1939, the Migration for Employment Convention (No. 66) and Recommendation (No. 61), and the Migration for Employment (Co-operation between States) Recommendation (No. 62); and in 1947, the Social Policy (Non-Metropolitan Territories) Convention (No. 82). Convention No. 66 never entered into force due to lack of ratifications and it was accordingly decided to revise it in 1949, when the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86) were adopted. In 1955, the Conference adopted the Protection of Migrant Workers (Underdeveloped Countries) Recommendation (No. 100); in 1958, the Plantations Convention (No. 110), and Recommendation (No. 110); and in 1962, the Social Policy (Basic Aims and Standards) Convention (No. 117). Finally, in 1975, the Conference supplemented the 1949 instruments by adopting the Migrant Workers (Supplementary Provisions)

Convention (No. 143) and the Migrant Workers Recommendation (No. 151).

⁷ In this respect, it should be noted that, in its Special Survey of 1996 on Convention No. 111, the Committee of Experts recommended that the possibility should be examined of adopting an *additional protocol* to the Convention which could include, among other matters, the possibility of adopting additional grounds, including nationality, on which discrimination would be prohibited under Convention No. 111. See the section of this chapter on equality of opportunity and treatment for more details on this additional protocol to Convention No. 111.

⁸ The concept of *national extraction* contained in Convention No. 111 does not refer to the distinctions that may be made between the citizens of one country and those of another, but to distinctions between citizens of the same country.

⁹ Such agreements have the advantage that they can be adapted to the specific characteristics of particular groups of migrants and that both sending and receiving countries can share the burden of ensuring adequate living and working conditions for these migrant workers, as well as monitoring and more actively managing pre- and post-migration processes. The use of bilateral instruments as a means of regulating migration was first developed in the 1960s when the countries of Western Europe concluded a series of bilateral agreements with countries which were keen to provide a source of temporary labour. Since then, bilateral agreements regulating migration have developed throughout the world, although Asia appears to be the region which has had the least success in using this method. The ILO has always considered that bilateral agreements are a good means of managing migration flows. The annex to Recommendation No. 86 contains an elaborate model of a bilateral agreement, and several provisions of Conventions Nos. 97 and 143 emphasize the role of bilateral cooperation in the field of migration.

¹⁰ This Convention recognized the provisions contained in existing ILO Conventions, built upon them and in many ways went beyond them. It 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. While the long-term objective of the Convention is to discourage and finally eliminate irregular migration, it also aims to protect the fundamental rights of migrants caught up in such migratory flows, taking account of their particularly vulnerable position. Other significant aspects of the Convention include the fact that ratifying States are not permitted to exclude any category of migrant workers from its application, the "indivisibility" of the instrument and the fact that it includes every type of migrant worker, including those that are excluded from existing ILO instruments.

¹¹ As is the case with the ILO's instruments, the majority of States parties to the Convention are countries that "export" migrant labour and that only ex-

ercise very little influence over the everyday life and working conditions of most migrant workers, even if they play an extremely important role in terms of the protection of migrant workers before their departure and after their return.

¹² In many countries, and particularly transition countries, incomplete or non-existent data make it difficult to establish with accuracy the number of migrant workers in the world today. Furthermore, methods of collecting data often differ significantly, thereby reducing the relevance of statistical comparisons between countries. Finally, data on irregular migration and illegal employment are sparse even in countries with sophisticated data collection systems. Moreover, even where such data exist, there is no general consensus on the definition of such key terms as “economic migrant”, “permanent migrant” and “irregular migrant”.

¹³ The number of immigrants (non-national residents who have been in the country for more than one year) has increased regularly over recent years, from 84 million in 1974, to 105 million in 1975 and 120 million in 1990.

¹⁴ According to this estimate, the number of migrant workers is 20 million in Africa, 18 million in North America, 12 million in Latin America, 7 million in South-East Asia, 22 million (made up of 9 million economically active persons accompanied by 13 million dependants) in Western Europe, 9 million in Central and Eastern Europe and 9 million in the Middle East.

¹⁵ A preferential immigration policy means a migration policy favouring immigration by nationals of countries from the region or from countries with which the region has particular ties, while making it more difficult for nationals of countries outside the region to immigrate.

¹⁶ By way of illustration, with regard to migration for employment between Asian countries and

the Gulf States, the ILO estimates that as many as 80 per cent of all foreign job placements are handled by private agents.

¹⁷ However, it is impossible to fail to notice the coincidence between extremely restrictive migration policies, on the one hand, and the explosion in the number of irregular migrants, on the other hand.

¹⁸ By way of illustration, Article 6 of Convention No. 97 refers to “women’s work” and Paragraph 15(3) of Recommendation No. 86 indicates that the family of a migrant worker is defined as his “wife and minor children” (emphases added).

¹⁹ In certain countries, such as Indonesia, women account for as many as 78 per cent of workers migrating for employment abroad through official channels.

²⁰ According to an ILO report (Lin Leam Lim (ed.): *The sex sector: The economic and social bases of prostitution in South-East Asia*, Geneva, ILO, 1998), prostitution and other “sex work” in South-East Asia has grown so rapidly in recent decades that the sex business has assumed the dimensions of a commercial sector, one that contributes substantially to employment and national income in the region. Yet, there is no clear legal stance nor effective public policies or programmes to deal with this phenomenon in any of the countries examined by the study. Governments are constrained not only because of the sensitivity and complexity of the issues involved, but also because the circumstances of “sex workers” can range widely from freely chosen and remunerative employment, to debt bondage and conditions that are similar to slavery.

²¹ These include, for example, the declining leadership of the State in the world of work, the emergence of profit-making private recruitment agencies, the rise in the number of women in the migrant worker population, the development of temporary migration instead of permanent immigration systems, the rise in the phenomenon of illegal migration, the modernization of means of transport, etc.