

GLOBALISATION AND INTERNATIONAL STANDARDS ON LABOUR MIGRATION

Romana Asmat* and Miss Sidra Mehboob**¹

“As an international community, we need to manage the movement of people across borders far better than we do – not just for the sake of those who move, but for the sake of the countries they leave behind, those they travel through and those they migrate to.”

Kofi Annan²

ABSTRACT

Mobility and migration are inevitable aspects of the process of globalization and transnational linkages. International migration is a complex phenomenon, ever-increasing in scale, which affects almost every country and region in the world. It involves a diverse range of stakeholders with different, and sometimes conflicting, interests, and it is increasingly linked with other pressing global issues, such as development, trade, human rights and security. The international mobility of labour will surely accelerate in the twenty first century. International labour migration has emerged as a major global issue that affects most nations in the world and ranks high on the international, regional and national policy agendas. Migration of labour being inevitable invokes the attention of world community. Migration of labour involves not only economic considerations of an individual migrant labour but has a wide range of influence on economy of the nation for, the development of a nation depends on its working labors. It is not

^{1*} LLB (University of Kashmir, J&K, India); M.A (Indira Gandhi National Open University, New Delhi, India); LLM (University of Kashmir, J&K, India);
Lecturer Kashmir Law College, Srinagar, J&K, India.
Email: romanaasmat504@gmail.com

^{**}LLB (University of Kashmir, J&K, India); M.A (Indira Gandhi National Open University, New Delhi, India); LLM (University of Kashmir, J&K, India); Post-Graduate Diploma In Criminal Justice System (Indira Gandhi National Open University, New Delhi, India).
Advocate, J&K High court, India.
Associate Legal Advisor (Yamina Almas and Associates, Company Secretaries).
E-mail: sidramehboob.llm@gmail.com

²UN Secretary General, Kofi Annan, from his address to the European Parliament upon receipt of the Andrei Sakharov Prize for Freedom of Thought, 29 January 2004.

only the need but also the compulsory duty of a State to look after the betterment of the workers class whose untiring efforts ultimately lead towards economic wellbeing of entire nation. This paper aims to highlight the impact of globalization on migration of labour. This paper further aims to document the steps taken at international level which ensure better and satisfactory working conditions to international migrant labour. Through this paper the authors intend to seek the responsible role of international community in improving and implementing the international migrant labour standards.

KEYWORDS: *Globalization, International Labour Organization, International Labour Standards, International Migrant labour, International Migrant Labour Rights.*

INTRODUCTION

International Labour Migration is generally defined as cross-border movement for purposes of employment in a foreign country. Persons who move from one country to another for work are commonly known as Foreign or International Migrant workers. However, there is no universally accepted definition of international labour migration. According to the **United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families**³, a ‘migrant worker’ is a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a citizen. A ‘migrant worker’ is defined in the ILO instruments as a person who migrates from one country to another or who has migrated from one country to another with a view to being employed otherwise than on his own account, and includes any person regularly admitted as a migrant for employment.⁴

Each year millions of women and men leave their homes and cross national borders in search of greater security for themselves and their families. Throughout human history, migration has been a courageous expression of the individual’s will to overcome adversity and to live a better life. Many migrants are motivated by the quest for higher wages and better opportunities, responding to the demand for their skills abroad, but many others are forced to migrate because of famine, natural disasters, violent conflict, persecution or simply a lack of decent work in their home country. The Global Commission on International Migration (GCIM) describes the driving forces in international migration in terms of “3Ds”: development, demography and democracy. Widening disparities in income, wealth, human rights and security across countries serve as push

³United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families; Available at <http://www.un.org/documents/ga/res/45/a45r158.html>

⁴*Migration and labour, Essentials of Migration Management*; Volume 2; International organization for Migration

factors towards migration. Migration in search of work has increasingly become a livelihood strategy for both women and men because of the lack of opportunities for full employment and decent work in many developing countries. At the same time, the proliferation of skill-intensive economic sectors, increased demand for skilled workers, reluctance of local workers to accept certain low-skilled jobs, and demographic trends such as population decline and population ageing in major destination countries act as strong pull factors,⁵

The forces driving migration are varied and complex, and global explanations may not apply to all individual situations. Poverty, wars, famine and repression are certainly among the major causes of migration, but there are other factors as well. Some of the reasons for crossing national borders include population pressures on scarce natural resources; income inequality between poor and rich countries; growing urbanization; reduction in the cost of transport and communications, resulting in increasing interactions among societies; the absence of respect for human rights in some countries; and establishment of migration networks by earlier migrants. In the future, climate change may raise migration pressures. Contemporary International Migration can essentially be explained, however, by the increasing differences between countries, the lack of gainful employment, decent work and human security in certain parts of the world, the growing demand for both high- and low-skilled workers in destination countries, and the geographical proximity and historical linkages between origin and destination countries.⁶

While international migration can be a positive experience for migrant workers, many suffer poor working and living conditions, including low wages, unsafe working environments, a virtual absence of social protection, denial of freedom of association and workers' rights, discrimination and xenophobia. Migrant integration policies in many destination countries leave much to be desired. Despite a demonstrated demand for workers, numerous immigration barriers persist in destination countries. As a result, an increasing proportion of migrants are now migrating through irregular channels, which has understandably been a cause of concern for the international community. As large numbers of workers – particularly young people – migrate to more developed countries where legal avenues for immigration are limited, many fall prey to criminal syndicates of smugglers and traffickers in human beings, leading to gross violations of

⁵International Labour Office; *International Labour Migration: A Right Based Approach*; International Labour Office Geneva, 2010

⁶ Ibid

human rights. Despite international standards to protect migrants, their rights as workers are too often undermined, especially if their status is irregular.

The challenge now confronting the global community is to govern and regulate migration in such a way that it can serve as a force for growth and development in both origin and destination countries, while protecting the rights of migrant workers. Global issues need global and multilateral responses, not unilateral ones. While various initiatives in pursuit of a global consensus on the principles and rules to govern migration were undertaken soon after the demise of bilaterally arranged migration in the mid-1970s, success has been elusive.⁷

GLOBALIZATION AND INTERNATIONAL LABOUR MIGRATION

The world is being transformed by the globalization process. States, societies, economies and cultures in different regions of the world are becoming increasingly integrated and interdependent. New technologies make it possible for capital, goods, services, information and ideas to move quickly from one country and continent to another. Moreover, owing to the expansion of the global economy, millions of women and men and their children can now access better opportunities in life. Although globalization trends have facilitated the movement of goods, services and capital across borders, their impact on the cross-border movement of people and labour remains much more restricted, regulated by a complex web of immigration laws and policies that uphold the principle of state sovereignty. Economic indicators of globalization – exports, foreign direct investment (FDI) and financial integration – have expanded rapidly since the mid-1980s. Yet globalization has had important implications for international labour migration, acting as both a “push” and a “pull” factor. It has facilitated linkages between international labour markets through vast improvements in information and communications technology (ICT).

The demand for high technical skills has expanded opportunities for the mobility of skilled labour. Concurrently, expanded trade reduces some need for migration by creating jobs in home countries. Virtual mobility enabled by ICT has similarly promoted outsourcing and more jobs in other regions. It is also clear, however, that globalization has led to widening disparities in employment opportunities, incomes and living standards, and human security across the globe⁸. Expanded trade has benefited only a limited group of countries. In some countries, globalization

⁷ ibid

⁸ Available at <http://www.ilo.org/wcmsp5/>Last visited on:10.01.16

has adversely affected jobs and livelihoods in traditional sectors. The failure of globalization to create new jobs where people live is a prime factor in increasing migration pressures.⁹ When people cannot find work at home in their communities and societies they look elsewhere.¹⁰ International migration, including increasing irregular migration, has occurred despite a tightening of immigration controls in industrialized countries, and – in contrast to the cross-border movement of goods, services and capital – without any concerted effort to promote *it*.

The management of globalization and increased migration flows have become issues of pressing concern for policymakers, employers, workers and their respective organizations, and civil society worldwide. International labour standards adopted by governments, workers and employers lay down the basic minimum social standards so that people can work in freedom, safety and dignity. The standards are there to ensure that economic development is not pursued as an end in itself but as a means to improve the lives of people. They help governments and employers to avoid the temptation of lowering labour costs to gain advantages in international trade by creating a level playing field in the global economy. International labour standards inspire the development of national legislation, policies and practices. Millions of workers have benefited from national laws enacted to comply with international labour standards, although only a small number of them may be aware of the connection between, for example, a poster on occupational safety and health standards in their factory, or rules on rest periods and maternity leave in the workplace, and the corresponding Conventions.¹¹

RIGHTS OF INTERNATIONAL MIGRANT LABOUR: A PRIORITY

Migrant workers all share a common characteristic: they live and work in a country of which they are not nationals. They therefore face the challenge of adapting to a society that is not their own and that may reject them. Moreover, as noncitizens, they usually have fewer rights than the native population. They suffer directly from the widespread idea that migrants are not entitled to the full protection of human rights laws. This is a fundamentally misguided idea from a human rights perspective, but it contributes to migrants' difficult access to social protection and welfare. Moreover, migrants do not always enjoy the protection provided by specific institutions or legal provisions. For example, workers' rights are defended by unions, but these

⁹ Lucas. E. B. Robert; *International Labour Migration in Globalising Economy*; Carnegie Endowment for International Peace; 2008;

¹⁰<http://www.globalmigrationpolicy.org/.../Globalisation%20Int-1%20Labour%....pdf>, visited on 10.01.16

¹¹ International Labour Standards on Migrant Workers' Rights: A Guide for Policy Makers and Practitioners in Asia and the Pacific; International Labour Office; Bangkok 2007. P. 5

do not always include migrant workers. Similarly, women and children have been recognized as vulnerable groups, and have benefited from several forms of legal protection, including UN Conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention on the Rights of the Child (1989). Both of these Conventions have been widely ratified. This is not the case for the Convention on Migrants' Rights. Migrants are therefore a highly vulnerable group. They often suffer from several forms of exploitation, and from serious abuses of human rights and dignity.¹² Being in one way or another perceived as 'different', migrants often encounter hostility: they are sometimes used as scapegoats, and may face racism and xenophobic violence. This scenario makes a demand for protecting their rights.

INTERNATIONAL INSTRUMENTS ON INTERNATIONAL MIGRANT LABOUR

International migration cannot be left to market forces alone, but should be subject to governance and regulation at the international level. International standards provide a framework for cooperation between states at either end of the migration process, and for national legislation, policy and practice. Standards provide principles and guidelines for the governance of migration, protect migrant workers and safeguard States' interests. The ILO has pioneered the development of labour standards for migrant workers since the 1930s. The international community has developed several complementary legal instruments covering areas such as human rights, labour and the criminal trade in human beings. The regulatory system is multilayered, reflecting efforts to protect migrant workers' rights and to address issues related to migration at the multilateral, regional, bilateral and national levels.

There are several sets of international standards which provide rights to migrant workers. Some are broad and general, applying to all human beings; others are narrower, applying variously to all workers, to all migrant workers or only to migrant workers in regular status. International standards can be found in international instruments, in ILO standards on workers and other ILO standards more specifically on migrant workers, in UN Conventions and instruments, and in other international agreements between or among countries covering migrant workers. The discussion of standards below will begin with those conferring the most basic rights on all human beings,

¹² *United Nations Convention of Migrants' Rights; international Migration Programme*, United Nations Educational, Scientific and Cultural Organisation, France, 2005

moving on to those applying to workers in general, and then to those specifically targeted on migrant workers.

Migrant workers, whatever their status, are always entitled to human rights, as are all members of the human family in every part of the world. There are three international instruments which together comprise the International Bill of Human Rights – the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights¹³.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, is universal in scope¹⁴. It applies to every member of the human family in every part of the world, regardless of whether or not States have formally accepted its principles, and grants anyone the right to file a complaint. The Declaration establishes basic rights for “human beings”, rights that are held by all persons, “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status¹⁵”. Rights particularly relevant for migrant workers are the right to be free from slavery or servitude; equality before the law and equal protection of the law; protection against discrimination; effective remedy by national tribunals; freedom from arbitrary arrest, detention or exile; freedom of movement and residence; peaceful assembly and association; and social security. There are Articles specifically addressing work and employment, granting: the right to work; free choice of employment; just and favourable conditions of work and protection against unemployment; equal pay for equal work without any discrimination; just and favourable remuneration; the formation and membership of trade unions; rest and leisure, including reasonable limitation of working hours and periodic holidays with pay; adequate standard of living; and security in the event of unemployment, sickness, disability or other lack of livelihood¹⁶.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The International Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly in 1966 and is legally binding on those States that have accepted it by

¹³ <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>, visited on Jan 10.01.16

¹⁴ <http://www.un.org/en/documents/udhr>, visited on 12.01.16

¹⁵ Article 2 of Universal Declaration Of Human Rights

¹⁶ Article 23,24,25 of Universal Declaration Of Human Rights

ratification or accession¹⁷. It speaks of rights for “all members of the human family” and for “everyone”. The rights are to be exercised “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status¹⁸”. Among the economic rights is the right to work, including the rights to receive technical and vocational training; to just and favourable conditions of work; to fair wages and equal remuneration for work of equal value; to safe and healthy working conditions; to equal opportunity for promotion in employment; to rest, leisure and reasonable limitation of working hours and holidays with pay; and to form and join trade unions and to take strike action¹⁹.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights was also adopted by the UN General Assembly in 1996 and is legally binding on those States that have accepted it by ratification or accession²⁰. It, too, is inclusive of all human beings, speaking of “all members of the human family” and “all individuals”. It applies to all individuals within the territory “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status²¹. All are equal before the law; discrimination is prohibited, and equal and effective protection against discrimination is guaranteed for everyone. The Covenant states that no one shall be held in slavery or servitude or required to perform forced or compulsory labour. It also provides the right to form and join trade unions²².

CONVENTIONS AND INSTRUMENTS FORMULATED BY ILO

Since ILO Conventions apply to workers, they generally apply to all workers. Thus, unless otherwise stated, all ILO Conventions apply to migrant workers, who should not receive differential treatment because they are not nationals of the countries in which they work. While some Conventions state explicitly that there are no exclusions for any workers, other Conventions cover migrant workers by virtue of the fact that they do not specifically exclude them from any provision. By ratifying an ILO Convention, States commit to applying it in national law and practice and submitting reports to the ILO at regular intervals regarding its

¹⁷ <http://www2.ohchr.org/english/law/cescr.htm>, visited on 12.01.16

¹⁸ International Covenant On Economic, Social and Cultural Rights (ICESCR), Article 2.2

¹⁹ International Covenant On Economic Social And Cultural Rights (ICESCR), Article 6,7,8.

²⁰ <http://www2.ohchr.org/english/law/ccpr.htm>, visited on 12.01.16.

²¹ International Covenant on Civil and Political Rights, Article 2.1

²² International Covenant on Civil and Political Rights, Article 8 and 22.

application. Complaints alleging non-compliance with a ratified Convention may be filed against a member State.

ILO instruments applicable to migrant workers can be categorized as follows:

- core labour standards or fundamental Conventions which apply to all persons, including migrant workers;
- labour standards which apply to all workers in the workplace, including migrant workers; and
- Instruments dealing specifically with migrant workers.

DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK

In 1998, the ILO turned its focus on eight Conventions in four key areas in its Declaration on Fundamental Principles and Rights at Work²³. These eight fundamental Conventions contain what are considered human rights at work. All member States of the ILO have an obligation arising from the very fact of membership to comply with these core Conventions, regardless of whether or not they have ratified them. Apart from the Declaration's Conventions applying to migrant workers, the Declaration specifically states that "the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers".

The four fundamental principles are:

- Freedom of association and the effective recognition of the right to collective bargaining;
- The elimination of all forms of forced or compulsory labour;
- The effective abolition of child labour; and
- The elimination of discrimination in respect to employment and occupation.

FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING CONVENTION

The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87),²⁴ and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98),²⁵ are the two basic Conventions providing freedom of association²⁶. Convention No. 87 guarantees the right of workers and employers to establish and join organizations of their own choosing without previous authorization. Convention No. 98 protects workers and employers who exercise the

²³<http://www.ilo.org/declaration/thedeclaration/textdeclaration/index.htm>, visited on 12.01.16.

²⁴<http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 13.01.16

²⁵<http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 13.01.16.

²⁶There were 160 ratifications as of 31.12.09.

right to organize, forbids interference in the activities of workers' and employers' organizations, and promotes voluntary collective bargaining. Representation by trade unions and the right to a collective voice at work are important means through which migrant workers, just like other workers, can secure other labour and employment rights and improve their working conditions. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA) have repeatedly reaffirmed the fundamental rights of workers, including migrants and those in irregular status, to form and join trade unions and to be protected against any act of discrimination on the grounds of trade union activities²⁷. Overly restrictive nationality provisions related to these rights risk depriving migrant workers of the right to elect their representatives in full freedom, especially in sectors where they account for a significant proportion of the workforce. National legislation should allow foreign workers to take up trade union office, at least after a reasonable period of residence in the country in which they are working²⁸.

ELIMINATION OF FORCED LABOUR CONVENTION

The Forced Labour Convention, 1930 (No. 29),²⁹ and the Abolition of Forced Labour Convention, 1957 (No. 105),³⁰ prohibit forced and compulsory labour for all persons, irrespective of the type or location of their economic activity. Convention No. 29 prohibits work exacted under the menace of penalty where the individual has not offered him- or herself voluntarily. It prohibits forced labour for private entities and severely restricts its use by public authorities to imminent necessity, when it requires that wages be paid to workers. Convention No. 105 requires States to implement "effective measures to secure the immediate and complete abolition of forced or compulsory labour". The ILO has defined the incidence of forced labour in relation to migrant workers, particularly as a result of cross-border trafficking, as a major area of concern. Migrant workers in irregular status are more at risk than others of being lured into

²⁷The Committee on Freedom of Association (CFA) examines complaints about violations of freedom of association, whether or not the country concerned has ratified the relevant Conventions. The CFA is composed of an independent chairperson and three representatives each of Governments, Employers and Workers. If it finds that there has been a violation of freedom of association standards or principles, it issues a report through the ILO Governing Body and makes recommendations on how the situation can be remedied. Where the country has ratified the relevant instruments, legislative aspects of the case may be referred to the Committee. With respect to migrant workers in an irregular situation, the CFA considered that Article 2 of Convention No. 87 "recognized the right of workers, without distinction whatsoever, to establish and join organizations of their own choosing without previous authorization. The only permissible exception to Convention No. 87 was that set out in Article 9 concerning the armed forces and the police".

²⁸ ILO 1994 para 118

²⁹ <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 13.01.16. There were 173 ratifications as of 17 Nov. 2008.

³⁰ <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 13.01.16. There were 171 ratifications as of 17 Nov. 2008.

situations of forced labour, including trafficking. The illegal exaction of forced labour often implies that the migrantworker concerned is in irregular status, whether as a result of irregular or undocumentedentry or stay, or to irregular employment. ILO supervisory bodies have expressed grave concern about the illegal exaction of forced labour, including debt bondage of migrant workers in both agricultural and non-agricultural sectors, and trafficking of men and women migrant workers in agriculture, the sex industry and domestic service³¹. They have also expressed concern about the absence of penal sanctions on those perpetrating forced labour practices involving migrant workers and the inadequacy of penal protection for those subject to them. Such practices have included, for example, the use of excessive power by employers over migrant workers in irregular status, in particular domestic workers; the retention or non-payment of wages; contract substitution and retention of passports; long working hours; and physical violence. The absence or inadequacy of measures, including legislation, taken against the trafficking of women and children into forced prostitution, or forced labour in agriculture abroad, indicate the lack of commitment or institutional capacity to address the issue seriously.

ABOLITION OF CHILD LABOUR

The elimination of child labour is covered by the Minimum Age Convention, 1973 (No. 138),³² and the Worst Forms of Child Labour Convention, 1999 (No. 182).³³ Convention No. 138 prescribes specific age limits for the admission of children to work, including a prohibition on children under 18 years engaging in hazardous work. Convention No. 182 calls for “immediate and effective measuresto secure the prohibition and elimination of the worst forms of child labour as a matter of urgency”. It defines the worst forms of child labour as (a) slavery and forced labour, including child trafficking and forced recruitment for armed conflict; (b) child prostitution and pornography; (c) production and trafficking of drugs; and (d) work likely to harm the health, safety or morals of children. The exact types of work to be prohibited as hazardous work under category (d) are to be determined at the national level, after consultation with employer’s and worker’s organizations and taking into consideration relevant international standards.

³¹ Concerned by the increase in trafficking of men, women and children for purposes of forcedlabour in areas such as domestic service, agriculture, factory work and the sex industry, in 2001 theCEACR adopted a general observation concerning labour trafficking under Convention No. 29: see ILO(2001e), p. 119.

³² <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 14.01.16.

³³ <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 14.01.16.

Most comments by the supervisory bodies on migrant child labour have been issued under Convention No. 29 and relate to the lack of penal sanctions on those perpetrating practices such as the trafficking of children into prostitution, domestic service, agriculture and vending, the use of children as camel jockeys, and the forced labour of migrant children in plantations.

EQUALITY OF OPPORTUNITY AND TREATMENT

The Discrimination (Employment and Occupation) Convention, 1958 (No. 111),³⁴ requires ratifying States to declare and pursue a national policy aimed at promoting equality of opportunity and treatment and eliminating all forms of discrimination in employment and occupation based on race, colour, sex, religion, political opinion, national extraction and social origin³⁵. The Equal Remuneration Convention, 1951 (No. 100),³⁶ requires States to pursue a policy of equal remuneration for work of equal value carried out by men and women workers. The two Conventions apply to nationals and non-nationals alike without distinction of status. Although nationality is not listed among the grounds of discrimination expressly prohibited by Convention No. 111, ILO supervisory bodies have repeatedly affirmed that migrant workers are protected by this instrument in so far as they are victims of discrimination in employment and occupation on the basis of any of the expressly prohibited grounds of discrimination.³⁷

CONVENTIONS PARTICULARLY RELEVANT TO MIGRANT WORKERS

As stated earlier, ILO Conventions generally apply to all workers, including migrant workers. In addition to the above eight fundamental Conventions, other Conventions are particularly relevant to migrant workers through their engagement with certain aspects of their employment as migrants and certain sectors of work in which they are concentrated. These include the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), the Protection of Wages Convention, 1949 (No. 95), the Minimum Wage Fixing Convention, 1970 (No. 131), the Plantations Convention, 1958 (No. 110), the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Health Services Convention, 1985 (No. 161), the Safety and Health in Construction Convention, 1988 (No. 167), the Safety

³⁴ <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 14.01.16.

³⁵ For a discussion of the distinctions between races, national extraction and other terms such as national origin, see O'Rourke (2008).

³⁶ <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 14.01.16.

³⁷ A proposal has been submitted to the ILO Governing Body to adopt a Protocol to Convention No. 111 that would allow member States to formally accept additional grounds on which discrimination would be prohibited. The grounds proposed include nationality. See ILO (2004e), paras 8–15.

and Health in Mines Convention, 195 (No. 176), the Safety and Health in Agriculture Convention, 2001 (No. 184), the Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172), the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19),³⁸ the Nursing Personnel Convention, 1977 (No. 149), the Maternity Protection Convention, 2000 (No. 183), and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).³⁹

CONVENTIONS ON SOCIAL SECURITY

Migrant workers are confronted with particular difficulties in the field of social security, as social security rights are usually related to periods of employment, contributions or residency. They run the risk of losing entitlements to social security benefits in their country of origin due to absence, and may at the same time encounter restrictive conditions in the destination country with regard to their coverage by its national social security system. Social security is of particular importance for migrant workers (1) to have the same access to coverage and entitlement to benefits as native workers, (2) to maintain acquired rights when leaving the destination country, including the right to export the benefits they have earned, and (3) to benefit from the accumulation of rights acquired in different countries.⁴⁰

There are two Conventions and an accompanying Recommendation on social security rights that aim at equal treatment with national workers. These are the Equality of Treatment (Social Security) Convention, 1962 (No. 118),⁴¹ the Maintenance of Social Security Rights Convention, 1982 (No. 157),⁴² and the Maintenance of Social Security Rights Recommendation, 1983 (No. 167).⁴³ All current ILO social security standards stipulate that the personal scope of coverage applies irrespective of nationality⁴⁴, and almost all contain similar clauses on equality of treatment for native and foreign workers in the destination country. However, the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), specifically establishes the

³⁸ There were 121 ratifications as of 18 Nov. 2008.

³⁹ <http://www.ilo.org/ilolex/english/convdsp1>, visited on 15.01.16

⁴⁰ Social security benefits are traditionally divided into nine different branches: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors benefit.

⁴¹ <http://www.ilo.org/ilolex/english/convdsp1.htm>, visited on 14.01.16.

⁴² <http://www.ilo.org/ilolex/english/convdsp1.htm>, visited on 14.01.16.

⁴³ <http://www.ilo.org/ilolex/english/recdisp1.htm>, visited on 14.01.16.

⁴⁴ Their applicability to migrant workers is demonstrated by the fact that the ILO supervisory bodies have made specific reference to migrant workers in the context of their regular supervision: for example, with respect to application of the Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121), and of the Medical Care and Sickness Benefits Convention, 1969 (No. 130).

right to equality of treatment for foreign workers of any other State that has ratified the Convention with regard to workmen's compensation for industrial accidents. Convention No. 118 provides for equality of treatment with regard to the nine branches of social security. For each of the nine branches that it accepts, a State party to the Convention undertakes to grant within its territory to nationals of any other State that has ratified the Convention equality of treatment with its own nationals. The provisions in both Conventions are thus dependent on reciprocity.

Other social security instruments also contain special non-discrimination clauses, for example the Social Security (Minimum Standards) Convention, 1952 (No. 102).⁴⁵ Part XI of this Convention is entirely devoted to equality of treatment of non-national residents. Article 68 of Convention No. 102 applies to all branches of social security, and calls for nationals and non-nationals to have the same rights. It also provides, however, for some flexibility permitting exclusions of non-nationals in cases where benefits or parts of benefits are payable wholly out of public funds. Convention No. 118 further provides for the maintenance of acquired rights and the export of benefits. In essence, a State party to Convention No. 118 has to ensure the provision of benefits abroad in a specific branch for its own nationals and for the nationals of any other State that has accepted the obligations of the Convention for the same branch, regardless of the place of residence of the beneficiary. Convention No. 19 also provides for the export of benefits for foreign workers covered by the Convention, but only when the ratifying State provides for such export of benefits for its own nationals.

Convention No. 157 and Recommendation No. 167 institute an international system for ensuring that workers who transfer their residence from one country to another maintain their acquired social security rights and that benefits acquired abroad are effectively provided when migrants return to their country of origin. Under this Convention, the maintenance of acquired rights has to be ensured for the nationals of other States party to the Convention in any branch of social security in which the States concerned have legislation in force. Within this context, the Convention provides for the conclusion of bilateral or multilateral social security agreements. The accompanying Recommendation contains model provisions for such agreements. Other social security Conventions, such as the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), contains specific clauses providing for the maintenance of acquired rights.

⁴⁵ <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 14.01.16.

For regular and longer-term migrant workers, equality of treatment between native and migrant workers in the country of employment with regard to existing social security benefits seems to be the rule. Regarding the export of benefits abroad, equality of treatment also seems to be the rule; however, possibilities for exporting benefits vary greatly depending on the country and the branch of social security in question⁴⁶. Restrictions most often concern unemployment benefits, so that temporary migrant workers are at a comparative disadvantage with respect to this contingency. In most cases where migrant workers carry out work in different countries over a period of time, they are entitled to accumulate and maintain rights.

MIGRANT WORKER CONVENTIONS

There are two ILO Conventions and two Recommendations specifically regarding migrant workers. These are the Migration for Employment Convention (Revised), 1949 (No. 97),⁴⁷ and its accompanying Recommendation, the Migration for Employment Recommendation (Revised), 1949 (No. 86);⁴⁸ and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143),⁴⁹ and its accompanying Recommendation, the Migrant Workers Recommendation, 1975(No. 151).⁵⁰ Conventions Nos. 97 and 143 both apply to persons who migrate from one country to another with a view to being employed other than on their own account, and cover issues concerning the entire migratory process: that is, emigration, transit and immigration. With a few exceptions, they do not make a distinction between permanent and temporary migrant workers. The provisions in these instruments do not depend on reciprocity, and their coverage of migrants who are employed includes those refugees and displaced persons who are employed. There are exceptions to the application of both Conventions,⁵¹ namely in relation to seamen, frontier workers, and artists and members of the liberal professions who have entered the destination country on a short-term basis. Convention No. 143 also contains some exclusions for trainees and employees admitted temporarily to carry out specific duties or assignments.

⁴⁶ Finland, for instance, allows both native and migrant workers to export only long-term benefits (old-age benefit, employment injury benefit, invalidity benefit and survivors' benefit), while Egypt does not limit the benefits that can be exported.
37. <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 14.01.16.

⁴⁸ <http://www.ilo.org/ilolex/english/recdisp1.htm>, visited on 14.01.16.

⁴⁹ <http://www.ilo.org/ilolex/english/convdisp1.htm>, visited on 14.01.16.

⁴⁰ <http://www.ilo.org/ilolex/english/recdisp1.htm>, visited on 14.01.16

⁴¹ Under Article 11 of Convention No. 143, the named categories are excluded from the scope of Part II only.

The 1949 Convention and Recommendation were prompted by interest in facilitating the movement of surplus labour from Europe to other parts of the world in the aftermath of the Second World War. Thus, Convention No. 97 and Recommendation No. 86 focus on standards applicable to the recruitment of migrants for employment and their conditions of work. These instruments cover only those migrant workers in regular status. The Convention includes provisions on facilitating the departure, journey and reception of migrant workers. It requires that migrant workers be treated no less favorably than nationals in areas including pay, working hours, holidays with pay, apprenticeship and training, trade union membership and collective bargaining, and, with some limitations, social security. The Convention has two Annexes, one covering those recruited under government-sponsored arrangements for group transfers and one covering those recruited under other means.

Recommendation No. 86 supplements Convention No. 97 with more detail on such matters as providing information to migrants, facilitating migration, providing access to schools for migrants and their families, providing medical assistance, selecting migrants for employment, family reunification and protection upon loss of employment. An Annex contains a model agreement on temporary and permanent migration for employment that origin and destination countries can use as a guide in drawing up agreements to arrange the transfer of groups of migrant workers. The model agreement includes provisions concerning the equal treatment of migrants and natives and appropriate arrangements for acquired rights in the area of social security. It also advocates the development of model employment contracts to govern the situation of migrant workers.

By the time the 1975 Convention and Recommendation were developed, governments had become increasingly concerned about unemployment and the increase in irregular migration. The focus shifted from facilitating the migration of surplus labour to bringing migration flows under control. Convention No. 143 and Recommendation No. 151 resulted from the first multilateral attempt to deal with migrant workers in irregular status and to call for sanctions against traffickers. Thus Convention No. 143 covers migrant workers in both regular and irregular status, with some provisions covering all migrant workers and other provisions granting additional rights to those in regular status. The Convention first asserts that the basic human rights of all migrant workers must be respected. It places a duty upon States to determine whether there are illegally employed migrant workers in their territories and to take all necessary and appropriate

measures to suppress clandestine movements of migrants for regular or irregular illegal employment. Measures, including the imposition of sanctions, must be taken against the organizers of these movements and against those who employ workers who have immigrated in illegal conditions, in order to prevent abuses⁵².

Those in irregular status are granted equality of treatment in respect of rights arising out of their past employment as regards remuneration, social security and other benefits. They are also entitled to equality of treatment in working conditions. In other words, they are entitled to equal treatment – as workers – for work they have actually performed. For those migrant workers in regular status, Convention No. 143 provides both equality of treatment (as in Convention No. 97) and equality of opportunity. This equality is to be given in respect of employment and occupation⁵³, social security, trade union rights, cultural rights, and individual and collective freedoms. Recommendation No. 151 supplements Convention No. 143 with more detail on equality of treatment and opportunity for those migrant workers in regular status and on equality of treatment for those in irregular status. It additionally includes provisions on social policy, family reunification, protecting the health of migrant workers, social services, and employment and residence.

In 1998, the CEACR conducted a detailed examination of the instruments relating to migrant workers and concluded that the international context had changed since their formulation. As examples of contextual changes, it cited the declining role of state leadership in the world of work (demonstrated by, among other things, the increasing role of private recruitment agencies), the increasing proportion of women among migrants for employment, the increase of temporary migration in place of migration for permanent settlement, the growth of irregular migration and the development of certain means of transport. The CEACR further noted that Conventions Nos. 97 and 143 did not provide for the elaboration and establishment of a national migration policy, in consultation with employers' and workers' organizations, within the framework of overall national policy.

THE ILO MULTILATERAL FRAMEWORK ON LABOUR MIGRATION

⁵² The Convention does not, of course, provide for sanctions against the workers themselves consequent on their irregular status.

⁵³ Quality of treatment between regular migrants and nationals with regard to admission to employment had earlier been provided in Recommendation No. 86.

The ILO placed labour migration and the rights of migrant workers at the forefront of its agenda in 2004, when it undertook a General Discussion on Migrant Workers at the 92nd Session of the ILC. As stated earlier, one outcome of this Discussion was the adoption by consensus of a resolution on a fair deal for migrant workers in the global economy. That, in turn, called for an ILO plan of action on labour migration. The centre piece of the plan of action was the development of a rights-based Multilateral Framework on Labour Migration. In 2005, the ILO convened a tripartite meeting of experts, with representatives from all regions of the world, who debated and adopted the ILO guidelines for a rights-based approach to labour migration. In 2006, the ILO Governing Body approved the publication and dissemination of this Framework. Available in Arabic, Chinese, English, French, Russian and Spanish, it is intended to be a guide in the development, strengthening, implementation and evaluation of national, regional and international labour migration policies and practices for improving the governance, promotion and protection of migrant rights and promoting linkages between migration and development. The Framework has drawn in particular upon Conventions Nos. 97 and 143 and their accompanying Recommendations Nos. 86 and 151, as well as the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The ILO Multilateral Framework on Labour Migration addresses the major issues faced by those making migration policy at national, regional and international levels and the important themes of decent work for all, governance of migration, protection of migrant workers, promoting migration–development linkages and expanding international cooperation. The Framework also advocates gender-responsive migration policies that address the special problems faced by women migrant workers. It sets out in one non-binding instrument principles and guidelines for migration policy and practice that can be used by governments and employers’ and workers’ organizations, as well as other stakeholders. At the same time, it recognizes the sovereign right of all nations to determine their own policies on migration. The Framework addresses nine major areas and is composed of 15 broad principles, with guidelines under each principle for giving practical effect to them. The nine areas are as follows:

- ***decent work***, with a principle and guidelines addressing opportunities for decent and productive work for all men and women of working age, including migrant workers;
- ***means for international cooperation on labour migration***, with a principle and guidelines on how governments, in consultation with employers’ and workers’

organizations, can engage in international cooperation to promote managed migration for employment purposes;

- *a global knowledge base*, with a principle and guidelines regarding the collection of knowledge and information on labour migration and its application to policy and practice;
- *effective management of labour migration*, with principles and guidelines on the role of international labour standards in government policy, expanding avenues for regular labour migration, social dialogue, and consultation with civil society and migrant associations;
- *protection of migrant workers*, with principles and guidelines on the human and fundamental labour rights of migrant workers, international labour standards, and the protection of the rights of migrant workers by the application and enforcement of national laws and regulations in accordance with the standards;
- *prevention of and protection against abusive migration practices*, with a principle and guidelines on measures to prevent abusive practices, migrant smuggling and trafficking in persons, and to inhibit irregular labour migration;
- *the migration process*, with principles and guidelines on promoting an orderly and equitable process of labour migration through all stages of migration, and licensing and supervising recruitment services;
- *social integration and inclusion*, with a principle and guidelines on promoting the social integration and inclusion of migrant workers, preventing discrimination against them, and measures to combat racism and xenophobia;
- *Migration and development*, with a principle and guidelines on recognizing and maximizing the contribution of labour migration to development and to the alleviation of poverty in both origin and destination countries.

The Framework contains an annex of best practices, and the ILO maintains database of good practices on labour migration, which it updates regularly⁵⁴.

UN AND OTHER INTERNATIONAL CONVENTIONS ON MIGRANT WORKERS

⁵⁴ <http://www.ilo.org/dyn/migpractice/migmain.home>, visited on 14.01.16.

The UN has also devoted a Convention to the protection of migrant workers and the furtherance of their rights. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides a broad range of protections for migrant workers and their families in many areas of work and life⁵⁵. Migrant workers in regular status are provided with certain additional rights. Briefly, some important provisions include the following. Human rights are guaranteed to all migrant workers and their families who reside within the territory, without distinction of any kind. No migrant worker or member of his or her family shall be held in slavery or servitude. Certain freedoms are guaranteed, including freedom of religion and expression, as well as the right to privacy, liberty and security of person, and protection by the State against violence, physical injury, threats and intimidation, whether by the Government or private persons. Certain rights are guaranteed in the event of arrest, detention or legal proceedings, including the right to the free assistance of an interpreter, if necessary.

The Convention requires States to make it unlawful for private individuals to confiscate, destroy or attempt to destroy migrant workers' identity or other documents authorizing their presence in the country. There are provisions in respect of rights related to expulsion, including the right to a reasonable opportunity to seek the payment of unpaid wages before departure. The Convention gives migrant workers the right to the assistance of the consulates of their own countries. With regard to employment, all migrant workers are entitled to treatment not less favourable than that applying to nationals with regard to pay and conditions of work. All are entitled to join trade unions and engage in union activity, to receive emergency medical care, and to transfer their earnings out of the country upon the termination of their stay. Additional rights provided to those migrant workers in regular status include equality of treatment with nationals in vocational training, and access to housing and to social and health services. Measures are to be taken to promote family reunification and equality of treatment in education and social and health services for the family members of migrant workers.

Those in regular status are not to be regarded as in irregular status if their jobs are terminated prior to the expiration of their work permits (except where a permit is expressly dependent on a particular job) and have the right to seek alternative employment. Migrant workers in regular status are further accorded equality of treatment with nationals with regard to protection against dismissal and to unemployment benefits.

⁵⁵ <http://www2.ohchr.org/english/law/cmw.htm>, visited on 14.01.16.

Additional provisions contained in the Convention relate to the orderly return of migrant workers, preventing and eliminating irregular or clandestine movements, and employment of migrant workers in irregular status. These provisions include imposing sanctions against those who operate such movements or employ those in irregular status.

SOME OTHER RELEVANT CONVENTIONS

Two additional international Conventions relevant to migrant workers should be mentioned, both of which are aimed at eliminating discrimination. The first is the **Convention on the Elimination of All Forms of Discrimination against Women**⁵⁶. It includes an Article directed at eliminating discrimination in employment on the basis of sex, addressing such issues as equal remuneration for work of equal value, and women's rights to the same employment opportunities available to men, to free choice of profession and employment, and to training, equal remuneration, social security, and health and safety. The Convention further specifies the prohibition of dismissal on the grounds of pregnancy. Also of relevance to migrant workers is a provision directing the suppression of trafficking in women and of the exploitation of women through prostitution.

The second is the **International Convention on the Elimination of All Forms of Racial Discrimination**, which provides for equality in employment.⁵⁷ This Convention does not prohibit discrimination on the basis of nationality, that is, according to whether an individual is a citizen or a non-citizen, but does cover instances where migrant workers are victims of discrimination because of their "race, colour, descent, or national or ethnic origin". It expressly does not affect the legal provisions of States concerning nationality, citizenship or naturalization, so long as such provisions do not discriminate against a particular nationality. Thus, for example, it would prohibit a destination country from giving preferential treatment to migrant workers from one particular country over migrant workers from another country, a practice which, unfortunately, does exist.

PROMOTING THE RATIFICATION OF INTERNATIONAL STANDARDS AND INCREASING THEIR IMPACT

The impact of ILO and other international Conventions and instruments on migrant workers depends in the first place on the number of ratifying countries. As of late 2008, a total of 80

⁵⁶<http://www.un.org/womenwatch/daw/cedaw/>, visited on 15.01.16

⁵⁷<http://www2.ohchr.org/english/law/cerd.htm>, visited on 15.01.16

countries had ratified at least one of the three migrant worker Conventions. By November 2008, ILO Convention No. 97 had been ratified by 48 countries, nearly half of which are countries with net immigration;

ILO Convention No. 143 had been ratified by 23 countries, including both those with net immigration and those with net emigration. Probably the most ratified are the eight core Conventions that comprise the ILO Declaration on Fundamental Principles and Rights at Work, which have been ratified by 80–95 per cent of ILO member States.

It must be emphasized that the impact of the standards contained in Conventions and Recommendations is not limited to ratifying countries. Even member States that have not ratified them use them as models for national rules and policies. In general, countries have tended to follow these instruments more in broad terms and less in specific commitments regarding the protection of migrant workers. The promotion of ILO standards is not always pursued in a consistent way. Once an instrument has been submitted to the competent authorities of a country, there is no specific obligation to periodically reconsider ratification. Therefore, unless a focused promotional campaign is undertaken, ratifications may stagnate. Promotional campaigns are beneficial, because they can help governments understand the perceived obstacles to ratification and, in many cases, overcome them. The increased level of ratifications of the fundamental Conventions is a telling demonstration of the effectiveness of targeted, sustained and systematic promotional campaigns.

The 2004 resolution concerning a fair deal for migrant workers in a global economy proposed a series of measures aimed at achieving wider application of ILO standards and other instruments:

- identifying the impediments to the ratification of the Conventions;
- taking appropriate steps to better promote the ratification of Conventions Nos. 97 and 143, and other relevant ILO standards, and the application of the principles they contain pertaining to the protection of migrant workers;
- addressing the issue of gaps in current instruments⁵⁸
- carrying out further research on how to address some of the gaps identified in ILO standards on migrant workers; and

⁵⁸The resolution also highlighted the need to consider the gender dimension and temporary migrant workers in the application of relevant international labour standards.

- Periodically preparing and widely disseminating a report on the implementation of international labour standards relevant to migrant workers.

The 2004 resolution recognized that existing ILO instruments contain gaps in the protection of some migrant workers, including migrant workers in irregular status. In relation to these workers, it called for:

- due consideration to be given to the particular problems faced by migrant workers in irregular status and the vulnerability of such workers to abuse;
- measures to ensure that their human rights and fundamental labour rights are effectively protected, and that they are not exploited or treated arbitrarily; and
- The development of best practice guidelines on preventing and combating irregular labour migration, including amnesties and regularizations.

CONCLUSION

There are a wide variety of international instruments providing rights and protection that apply to migrant workers, including both those developed by the ILO and UN and agreements between and among countries at the bilateral and regional levels. These instruments and agreements apply variously because migrant workers are members of the human family, because they are workers, or because they are migrant workers. Some rights vary depending on whether the workers are in regular or irregular status. But even when migrants have performed work in irregular status, they are entitled to certain rights by virtue of the fact that they have actually performed the work.

With regard to the three Conventions specifically pertaining to migrant workers, there are several priorities for further action. One priority is to launch a promotional campaign, coupled with structured technical assistance, for the ratification of ILO Conventions Nos. 97 and 143 and the application of their provisions in national law and policy. This could be combined with the continuing promotion of the International Convention and would thus benefit from the strengths of both the UN and the ILO. Another priority for further action is promotion of the implementation of the principles and guidelines contained in the ILO Multilateral Framework on Labour Migration, which is a comprehensive instrument designed to address current issues in labour migration. Since the Framework is based upon ILO Conventions and other international instruments, implementation of its principles and guidelines by countries can go a long way in the promotion of standards and of a rights-based approach to labour migration.

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