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**HUMAN RIGHTS**  
OFFICE OF THE HIGH COMMISSIONER



# Migration, human rights and governance

Handbook for Parliamentarians N° 24

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### **Cover Page**

Migrants and refugees crowd on board a boat some 25 kilometres from the Libyan coast. The numbers of people risking their lives to cross the Mediterranean sea has risen sharply in recent years. © Massimo Sestini, 2014

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# Foreword

Millions of people are on the move. The world's policymakers and political leaders face the complex challenge of ensuring that migration takes place in ways that are fair, mutually beneficial and respectful of human rights.

There is no shortage of laws and policies on migration. Some measures recognize the positive contribution of migrants and migration to economic welfare, to national prosperity and to development. However, other measures react to migration and to migrants as threatening phenomena. These measures can have negative consequences, including violations of the human rights of migrants and their families.

Parliamentarians have a critical role to play to ensure a meaningful, balanced and informed response to migration. They are first of all responsible for adopting adequate laws on migration to give effect to international obligations entered into by the state under the international treaty framework, in particular with respect to human rights norms and labour standards. Parliamentarians, as well as governments, can and should promote fair and effective policies in order to maximize the benefits of migration while addressing the real challenges that host, transit and origin countries and migrants face.

The Inter-Parliamentary Union, the International Labour Office and the Office of the United Nations High Commissioner for Human Rights, according to their respective mandates, have decided to produce this information tool that should help parliamentarians to achieve the above objective.

The handbook offers responses to fundamental questions on migration, such as those concerned with its root causes and possible responses in terms of good policies and practices, as well as the challenges, both for migrants and for countries, in relation to national well-being, development and social cohesion. The handbook proposes a balanced approach to make effective laws and policies that address the human rights of migrants and the governance of migration.

The handbook reflects the long experience of our three cooperating organizations and our constituents worldwide. It contains examples of measures and practices relating to migration that have worked successfully. It is intended to be useful not only for parliamentarians, but also for government officials and civil servants as well as for social partners and civil society. The ultimate objective of this Handbook is to promote fair and rights-based migration policies, aligned with international norms and standards, in the interest of all migrants as well as host, transit and origin countries.



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# Abbreviations

ACHR	American Convention on Human Rights
ACTRAV	ILO Bureau for Workers' Activities
ASEAN	Association of Southeast Asian Nations
AU	African Union
CARICOM	Caribbean Community
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Committee on the Elimination of Discrimination against Women
CEMAC	Central African Economic and Monetary Community
CERD	Committee on the Elimination of Racial Discrimination
CFA	ILO Committee on Freedom of Association
CIS	Commonwealth of Independent States
CNIg	Tripartite National Immigration Council
COMESA	Common Market for Eastern and Southern Africa
CRC	Convention on the Rights of the Child
EAC	East African Community
EAEC	Eurasian Economic Community
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
EESC	European Economic and Social Committee
ESC	Economic, social and cultural rights
EU	European Union
FPI	Fiscal Policy Institute
FRA	European Union Agency for Fundamental Rights
GCC	Gulf Cooperation Council
GCIM	Global Commission on International Migration
GDP	Gross domestic product
GFMD	Global Forum on Migration and Development
GMG	Global Migration Group

HLD	United Nations General Assembly High-level Dialogue on International Migration and Development
HRC	Human Rights Council
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPD	International Conference on Population and Development
ICRC	International Committee of the Red Cross
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
IMO	International Maritime Organization
IOM	International Organization for Migration
IPU	Inter-Parliamentary Union
KNOMAD	Global Knowledge Partnership on Migration and Development
MERCOSUR	South American Common Market
MoU	Memorandum of understanding
NHRIs	National human rights institutions
OAS	Organization of American States
OUA	Organization of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PICUM	Platform for International Cooperation on Undocumented Migrants
RCPs	Regional consultative processes
SADC	Southern African Development Community
SAWP	Canadian Seasonal Agricultural Worker Program
SDGs	Sustainable Development Goals
SMEs	Small and medium-sized enterprises

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UN DESA	United Nations Department of Economic and Social Affairs
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund
UNODC	United Nations Office on Drugs and Crime
UPR	Universal Periodic Review
WHO	World Health Organization

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# Introduction

## What does the handbook contain?

This handbook provides a step-by-step overview of the conditions, issues, tools and policy responses regarding international migration that parliamentarians need to understand to effectively carry out their responsibilities for ensuring the protection of the rights of migrants and the governance of international migration under the rule of law.

**Chapter 1 “International migration today”** provides an overview of the principal international migration trends. It documents the importance of labour migration for countries of destination and countries of origin; outlines the impact of the global economic downturn and employment crisis on migrants and migration; highlights the issues of gender and migration with particular reference to migrant women; and identifies the challenges migration brings in changing societies.

**Chapter 2 “International law, migration and human rights”** lays out the foundations for migration governance in international law. Particular attention is given to the principle of the rule of law and core international human rights instruments and labour standards, with special attention devoted to the specific international instruments concerned with the protection of migrant workers and the governance of labour migration. An overview is also provided of how international human rights treaties and labour standards are supervised. Relevant regional instruments relating to migration governance, the protection of migrant rights, regional integration communities and processes and bilateral agreements are also discussed.

**Chapter 3 “Elimination of discrimination and equality of opportunity and treatment”** underscores that the principle of non-discrimination and equality serves as an essential building-block for the effective enjoyment of most human rights (including labour rights). It examines the application of this principle in international human rights treaties and in the context of work. Specific attention is given to the particular vulnerabilities to discrimination of certain categories of migrant workers, especially migrant domestic workers, and their families. Some examples are provided of how discrimination may affect migrants, with particular reference to application of the non-discrimination and equality principle at the border.

**Chapter 4 “Key human rights principles regarding protection of migrants”** looks in more depth at five fundamental human rights principles of particular relevance to migrants, namely: (1) effective recognition of economic, social and cultural rights; (2) freedom of association and the right to collective bargaining; (3) elimination of all forms of forced or compulsory labour, including trafficking for forced labour and labour exploitation; (4) migrant children’s rights, including the abolition of child labour; and (5) a broad category labelled “movement rights”, which attempts to capture the diverse human rights issues relating to the movement of persons, including free movement within, and the right to leave and return to, a country, as well as restrictions on such movement; protection of persons who face a real risk of human rights violations if returned to their country of origin or a third country, such as the principle of non-



refoulement; the detention and criminalization of migrants; and protection against arbitrary expulsion, including collective and mass expulsion.

**Chapter 5 “Human rights-based governance of migration”** discusses the interplay between migration governance and human rights, the role of the multilateral system and the contours of a human rights-based approach to migration. Given that parliamentarians have a mandate to shape agendas relating to migration at the national level, this chapter also seeks to demonstrate how international human rights (including fundamental rights at work) and labour standards relating to migrants (as described in preceding chapters) can best be applied in law and practice at the national level. In this regard, it discusses the specific role national human rights institutions and human rights indicators can play to ensure that migrants’ rights are optimally applied. Given that a large part of international migration today comprises persons seeking decent jobs and livelihoods, and that labour migration can be an important enabler of inclusive, sustainable economic and social development in origin as well as destination countries, a section of this chapter is devoted to some key areas of labour migration governance in both sets of countries, with reference to tools that have proven useful and related sources. In this regard, the principal actors of the world of work, namely representative employers’ and workers’ organizations, play a key role. The chapter finishes with a brief overview and assessment of how the human rights of migrants are being addressed in the global debates on migration and development.





## Chapter 1

# International migration today

Each year thousands of Latin American migrants have made the grueling journey north, enduring threats of violence and extortion. © Getty Images/AFP/ John Moore, 2010

International migration is the movement of people across borders to reside permanently or temporarily in a country other than their country of birth or citizenship. The United Nations (UN) estimates that in 2013 some 232 million people were living outside their country of birth or citizenship for more than one year. This represents just over three per cent of the world's population and would rank such migrants, if living within the same territory, as the world's fifth largest country. While the number of international migrants has grown steadily, that three per cent proportion of world population has remained stable over the past 40 years.

Migration today is motivated by a range of economic, political and social factors. Migrants may leave their country of origin because of conflict, widespread violations of human rights or other reasons threatening life or safety. Many are compelled by the absence of decent work to seek employment elsewhere. They may also migrate to join family members already established abroad. Immigration – entry into a destination country – often reflects historical migration patterns, family connections and migration networks. As globalization expands the global circulation of capital, goods, services and technology, migration responds to growing demand for skills and labour in destination countries. These factors along with ageing populations and declining workforces in high-income countries increase international migration, including mobility of labour and skills.

## Box 1.1 International migrants – definitions and terminology

The UN global estimates of international migrants count those living outside their country of birth or citizenship for more than one year. While this estimate includes migrant workers, migrants in an irregular situation and refugees, it does not account for the millions of persons worldwide who migrate on a short-term temporary or seasonal basis to and from another, usually neighbouring country for a few weeks or months each year. However, many of these persons are included in legal definitions of “migrant workers”. The most recent and comprehensive definition is that found in the [UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990](#):

*The term “migrant worker” refers to 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 national. (Article 2(1))*

This convention also defines migrant workers and members of their families in an irregular situation:

*Migrant workers and members of their families [...] are considered as non-documented or in an irregular situation if they do not comply with the conditions provided [...] [namely] authorization to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party. (Article 5)*

Use of the term “illegal” should be avoided in respect of migrants and migration because of its negative connotations with criminality and in acknowledgement that “everyone should have the right to recognition everywhere as a person before the law” ([Universal Declaration of Human Rights, 1948](#), Article 6). Indeed, in 1975, the UN General Assembly requested UN agencies to use in all official documents “the term ‘non-documented or irregular migrant workers’ to define those workers that illegally and/or surreptitiously enter another country to obtain work” ([Res. 3449 \(XXX\)](#), para. 2).

Migration is a global phenomenon; no region and few countries are unaffected by it. In 2013, the number of international migrants moving between developing countries or between high-income countries was equal to South – North movements. Most countries today are countries of origin, transit and destination for international migration. Migration has long contributed to economic development and social well-being in both destination and origin countries. It has existed since time immemorial, even if its character and the numbers of migrants vary with time and circumstances. In this age of globalization and increasing labour mobility, migration brings important benefits to both origin and destination countries, and to migrants themselves – so long as it occurs under proper, regulated conditions. But migration also carries costs, particularly for countries of origin and for the migrants and their families.

## 1.1 State sovereignty and international migration

While international migration, in its increasingly complex forms, affects today a greater number of countries than in the past, there is no global system in place for regulating the movement of people, with the result that state sovereignty remains the overarching principle in this domain. As discussed in Chapter 2, international law recognizes the right of everyone to leave any country, including their own, and to return to their own country. However, it does not establish a right of entry to another country: states retain their sovereign prerogative to decide on the criteria for admission and expulsion of non-nationals, including those in irregular status. That prerogative is subject, however, to their human rights obligations and to any agreements or arrangements they may have concluded to limit their sovereignty in this field, such as participation in a regional mobility regime. Indeed, the principle of state sovereignty and its application to international migration is clearly reflected in the core international human rights instrument specifically devoted to the protection of migrant workers and their families, namely the [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families \(ICRMW\)](#), adopted by the United Nations General Assembly on 18 December 1990.

### Box 1.2 International migration: the roles of state sovereignty and shared responsibility under ICRMW

- **ICRMW is very clear that states have the right to control their borders**, including the establishment of criteria governing admission of migrant workers and members of their families. ICRMW strikes a balance between the sovereign power of States Parties to control their borders and to regulate the entry and stay of migrant workers and their families, on the one hand, and protection for the rights, under Part III of ICRMW, of all migrant workers and their families, including those in an irregular situation, on the other. This balance is reflected in Article 79 of ICRMW:

*Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.*

- Under Article 34 of ICRMW, **migrants also have a duty to comply with the laws and regulations** of the states of transit and destination as well as **respect the cultural identity** of the inhabitants of the states of transit and destination. The obligation to comply with the laws and regulations of the state of employment or any state of transit comprises a duty to refrain from any hostile act directed against national security, public order (*ordre public*) or the rights and freedoms of others.

- Moreover, states are under **no legal obligation to regularize the irregular status of migrant workers**. Article 35 of ICRMW clarifies that while Part III protects the rights of all migrant workers and their families, irrespective of their migration status, it cannot be interpreted as implying the regularization of irregular situations, or as conferring any right to such regularization, for migrant workers or their families. While States Parties have no obligation to regularize the situation of migrant workers or their families, they are required, whenever faced with irregular situations, to take appropriate measures to ensure they do not persist (Article 69(1)). They should also consider the possibility of regularizing the situation of such persons in each individual case, in accordance with applicable national legislation and bilateral or multilateral agreements, taking into account the circumstances of their entry, the duration of their stay and other relevant considerations, in particular those relating to their family situation (Article 69(2)).
- Under Part VI of ICRMW, all States Parties, including states of origin, have the obligation to cooperate in promoting sound, equitable, humane and lawful conditions for international migration (Article 64(1)). **States of origin also have an obligation to address irregular migration in cooperation with states of transit and states of employment.** [The Committee on Migrant Workers](#), a body of independent experts that monitors the implementation of ICRMW by its States Parties, routinely enquires about the measures taken by States Parties to prevent irregular migration by their nationals, including through multilateral and bilateral agreements, policies and programmes aimed at enhancing regular migration channels and steps to address the root causes of irregular migration, such as violence, insecurity and poverty.

## 1.2 Centrality of the world of work to international migration

A great part of international migration today is bound up with employment and thus with economic and social development. In the publication [International labour migration: A rights-based approach](#), ILO estimated that in 2010 some 105 million of the then total 214 million people living outside their countries of birth or citizenship were economically active, that is to say employed, self-employed or otherwise engaged in remunerative activity. This means that most working-age adults in the global migrant population – including refugees – are engaged in the world of work, taking into account that this migrant population also includes children and aged dependants.

### Box 1.3 Some basic figures on international migration, including in the world of work

- International migrants in 2013, estimated at 232 million, represent 3.2 per cent of the global population.

- Economically active migrants (including refugees) numbered about 105 million in 2010.
- Together with an average of one dependant per economically active person, migrant workers and their families represent more than 90 per cent of all international migrants. Therefore, *most international migration today is essentially bound up with the world of work.*
- South – South and South – North migration have reached similar levels, both having increased from about 60 million in 2000 to about 82 million in 2013. As a result, they each now account for roughly 40 per cent of the overall growth in foreign-born populations.
- Women make up 48 per cent of international migrants. Most adult migrant women are economically active, and in some destination countries, women represent over 55 per cent of working migrants.
- Migrants between the ages of 20 and 34 constitute 28 per cent, or 65 million, of the total migrant population.
- Migrants in an irregular situation comprise about 15 – 20 per cent of all international migrants.
- Around 10 – 15 per cent of the workforce in most west European countries is foreign-born; that figure is 15 per cent in Australia, Canada and the United States, and up to 90 per cent or more in several Arab Gulf countries.

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- [Trends in international migrant stock: The 2013 revision](#), United Nations Department of Economic and Social Affairs (UN DESA), Population Division, United Nations database POP/DB/MIG/Stock/Rev.2013.
- [“International migration 2013: Age and sex distribution”](#), UN DESA, *Population Facts* No. 2013/4 (September 2013).
- [“International migration 2013: By origin and destination”](#), UN DESA, *Population Facts* No. 2013/3 (September 2013).

While the reasons for leaving their countries of origin and the basis for admitting them to destination countries vary widely, many international migrants end up in the latter's labour markets. Indeed, this also applies to most refugees and family reunification migrants once settled in destination countries, even when their original motivation for moving was not necessarily to seek employment abroad.

Migration for employment today serves as an instrument to balance the skills, ages and composition of national and regional labour markets and has become a key feature in meeting economic, labour market and productivity challenges in a globalized economy. It provides responses to changing needs for skills and personnel resulting from technological advances, changes in market conditions and industrial transformations. In countries with ageing populations, migration replenishes declining workforces with younger workers, often increasing dynamism, innovation and mobility in the workforce. It allows fast-developing economies to meet needs for labour and skills not yet available from national workers. And in regions with more workers than the national economy

can absorb, it provides a safety valve, allowing workers to find employment and livelihoods not available in their own countries and often to return with skills they could not have gained at home and a more secure foundation to develop their capabilities in the future.

As important as migration is today to inclusive and sustainable economic and social development, all indications suggest it will become even more significant over the course of this decade and beyond. Populations and workforces are ageing and declining in more and more countries, and migration will likely be an ever more important source of skills to keep workforces viable and competitive in a globalized world economy. “Getting it right” today on migration law and policy will be essential to national performance and well-being tomorrow, so governments must address migration appropriately, recognizing its importance to national economies and labour markets and thus to economic development and social cohesion. Chapter 5 elaborates on some of the vital contributions gained from the linkages between migration, employment and development.

### 1.2.1 Importance of labour migration for countries of destination

Destination countries – those to which migrants go to seek work – benefit substantially from their presence. The increased availability of skills provided by migrant workers helps to boost gross domestic product (GDP), stimulate business development and job creation, enhance performance of national social security systems and foster innovation. Their presence helps to keep some companies and economic sectors viable and competitive and to lower prices for agricultural produce, construction and other services.

The widely held belief that migrant workers take jobs away from nationals is false, as shown by solid research data from a number of countries. ILO research in Southern European countries, for example, has demonstrated the extent to which migrant workers take the jobs locals *refuse*, not the ones they want: “*We can conclude that migrants are in competition only with marginal sections of the national labour force [...], when they are not sufficiently sustained by welfare provisions, in specific sectors [...] and/or in the less-developed areas inside these countries*” (E. Reynieri, “[Migrants in irregular employment in the Mediterranean countries of the European Union](#)”, ILO, 2001, p. 57). Relative to their population, migrants are also more entrepreneurial than natives and thus create new jobs. For example, in the United Kingdom migrants account for 8 per cent of the population but own around 12 per cent of all small and medium-sized enterprises (SMEs) ([European Economic and Social Committee, The contribution of migrant entrepreneurs to the EU economy \(own-initiative opinion\)](#), SOC/449, Brussels, 18 September 2012, para. 3.1.5). This finding is consistent with a United States study showing immigrants to account for 18 per cent of small business owners, compared with only 13 per cent of the overall population and 16 per cent of the labour force ([Fiscal Policy Institute \(FPI\), Immigrant small business owners: A significant and growing part of the economy](#), June 2012).



## Box 1.4 Contributions of migrant workers to destination countries

***Migrant workers often perform low-skilled jobs that nationals are unwilling to do.*** There is frequently high demand for migrant workers to work in sectors eschewed by national workers, such as agriculture and food processing, construction, cleaning and maintenance, hotel and restaurant services, domestic work and labour-intensive assembly and manufacturing, often in so-called “3D jobs” (dirty/degrading, dangerous and difficult)”. In his April 2014 report to the UN Human Rights Council on the “[Labour exploitation of migrants](#)” (A/HRC/26/35), the [UN Special Rapporteur on the human rights of migrants](#) explains that exploitation is more likely to be prevalent in such jobs due to pressures to lower labour costs in highly competitive sectors, inadequate implementation of labour and occupational health and safety standards and a frequent lack of unionization.

***Migrant workers may supply skilled labour not available in destination countries.*** Many highly educated migrant workers have valuable technical skills not available in destination countries, where technical and vocational training often lags behind rapid changes in technology and organization of work. Others help to develop capacities in destination countries that have not yet acquired them.

***Migrant workers compensate for ageing populations.*** In European countries in particular, where the average age of workers has risen steadily, migrant workers already supply the younger workforce necessary to keep economies moving.

***Migrant workers pay social contributions.*** Migrant workers are a part of the workforce. As with national workers, their taxes and social security contributions are often withheld from their wages and forwarded to the national treasury, thus helping to keep national finances healthy. Many migrant workers in irregular situations never benefit from their contributions due to their legally unrecognized status; their contributions thus provide a kind of subsidy to national tax and social security revenues.

***Migrant workers impede the loss of economic activities.*** Migrant workers who are available and compelled by circumstances to take low-pay and low-protection jobs impede loss of economic activity that would otherwise disappear or be exported offshore. While it is disputed whether the availability of migrant labour impedes innovation and greater efficiency in these labour markets, the retention of marginally competitive economic activity does keep jobs, companies and economic activity going in places where closure could threaten the survival of local communities, towns and districts. An important regulatory challenge for legislation is to ensure that the conditions of these jobs respect minimum national and international labour standards for decent work.

In other words, there is little reason to fear migration and ample cause to welcome it – as long as appropriate measures are adopted to facilitate the aforementioned advantages and benefits.

But migration poses challenges as well as advantages in destination countries, relating most visibly to change and diversity. Migration often brings ethnic, cultural, racial, religious and linguistic identities that differ from those previously dominant,

homogeneous or unique in host countries. For many if not most countries, this requires adaptation and accommodation to the new identities, even to diversity itself. In the case of significant differences, if not adequately addressed and appropriately regulated, migration and diversity can give rise to social tensions. Addressing these tensions, promoting integration and achieving social cohesion depends on implementing the universal values of non-discrimination and equality of treatment, which in turn requires legislative action and a regulatory framework. The principle of non-discrimination and equal opportunity and treatment is discussed further in Chapter 3.

## 1.2.2 Importance of labour migration for countries of origin

The migration of nationals to other countries for the purpose of employment can have significant benefits for countries of origin as well as destination.

### Box 1.5 Contributions of migrant workers to countries of origin

***Migration can relieve unemployment pressures and create job opportunities.***

In many developing countries, the economically active population is growing considerably faster than jobs can be created, resulting in a shortage of decent jobs and a rise in so-called “surplus labour”. These challenges are intensified in times of economic crisis, political turmoil or rapid social change.

***Migrant workers send money home.*** Remittances from migrant workers abroad can make a significant contribution to national economies and to the welfare of their families and local communities. The World Bank estimated officially recorded remittances to developing countries at “\$436 billion in 2014, a 4.4 increase over the 2013 level. [...] In 2015, however, the growth of remittance flows to developing countries is expected to moderate sharply to 0.9 per cent to \$440 billion [...] Remittance flows are expected to recover in 2016 to reach \$479 billion, in line with the more positive global economic outlook”. However, the cost of transferring remittances remains high at a current global average of 8 per cent in the fourth quarter of 2014, with the highest average of approximately 12 per cent in sub-Saharan Africa. In some countries, migrant worker remittances are the largest single source of foreign income, representing significant proportions of GDP. It should be underlined, however, that remittances are private monies and that there are inherent policy limitations in ensuring their productive use for development-related projects in countries of origin.

***Some migrant workers bring home “social remittances”.*** The professional and social skills that migrant workers can learn abroad, drawing on values, ideas, knowledge and practices they cannot acquire in their home countries, can help to improve their lives and those of their families.

#### Sources:

- “Migration and remittances: Recent development and outlook”, Migration and Development Brief 24, Migration and Remittances Team, Development Prospects Group, Washington, DC, D. Ratha, *et al.*, World Bank, 13 April 2015.
- Issues Brief No. 3: [Migration as an enabler for inclusive social development](#), Global Migration Group (GMG), November 2013.

However, there are also drawbacks to such migration, as *the departure of migrant workers often depletes national skills and diminishes the return on national resources invested in education and training*. The “brain drain” phenomenon can deprive countries of the skills they need to support national development, business activity and local innovation. Large-scale migration abroad can weaken national economies and drain labour forces of skills and vitality, which is particularly damaging to small countries. It is therefore important that long-term reliance on sending nationals for employment abroad, as observed in some countries, be balanced with efforts to create decent jobs at home and raise living standards for everyone.

#### Box 1.6 Human interest story: helping migrants make the most of their money

Moussé Bao is a 35 year-old migrant from Senegal who has been living in France since 2006.

Like most migrant workers, he sends a substantial amount of his monthly salary back to Louga, his hometown in north-western Senegal, near the coastal city of Saint Louis. Every month, his mother and wife receive about 500 Euros through a money transfer service.

“They don’t keep all the money that I send as I am expected not only to support my parents and wife but also my extended family as a whole, including my brothers and sisters,” he explained during a financial education training session in Paris organized by the French Federation of Migrant Workers’ organisations, FORIM, and supported by the International Labour Organization.

Bao came to France nine years ago with a university degree in geography, but he quickly developed an interest in financial education and became a trainer. This is now his main professional activity.

Remittance flows to developing countries are constantly growing. [...] Top recipients are India, China, the Philippines, Mexico, Nigeria and Egypt. Many other African countries also depend heavily on remittances. [...]

“[Helping migrants make the most of their money](#)”, Geneva, ILO Newsroom, International Labour Office.

## 1.3 Migrants in times of economic crises

Just as migration flourishes in times of economic prosperity and growing globalization, it can also be important during downturns, though in a very different way.

The global financial crisis and subsequent economic recession at the end of the first decade of the 21st century was above all an employment crisis. Migrants seeking employment tend to be particularly hard hit by economic downturns for several reasons. Migrant labour is often used as a “cyclical buffer”, like other macroeconomic policies aimed at maximizing growth and minimizing unemployment. Migrant workers are thus often “the last to be hired and the first to be fired”, and their employment relationships are frequently non-standard, precarious and in poorly regulated sectors or activities.

### **Box 1.7 The impact of the financial crisis and economic recession on migrant workers**

Data and research compiled by ILO have confirmed several widely experienced impacts of the financial crisis and subsequent economic downturn on migrant workers:

- Migrant workers and persons of foreign origin were hard hit and disproportionately among those laid off or rendered unemployed.
- In the 2008 – 2009 financial crisis, sectors more sensitive to the economic cycle, such as construction and manufacturing, were hardest hit, with the result that the crisis also had a differentiated impact on male and female migrant workers, as male migrant workers predominate in construction and female migrant workers are often overrepresented in manufacturing, such as the garment and textile industries.
- Migrant workers who stayed employed were often affected by reductions in pay or working time and deteriorating working conditions.
- Migrant workers have less access to social safety net support than do national workers. This is especially true for migrant workers in an irregular situation.
- However, many migrant workers did not return home, unless forcibly expelled. This was – and remains – the case even when migrants were being offered financial incentives to depart voluntarily. Simply put, conditions in home countries were even worse. While there may be opportunities for some kind of work in host countries, there were simply none at all at home.
- Migrant workers were thus compelled to take whatever work they could find. They accepted even more substandard pay and abusive conditions than before. This presented an immediate policy challenge for governance and for stabilization of labour markets and working conditions.

- Scapegoating of migrants and xenophobic violence against foreigners was perceived to rise throughout the world, as expressed in the murder or lynching of migrants in some countries; generalized anti-foreigner sentiment; hostile political discourse; and calls to exclude migrants from labour markets and social protection benefits.
- Many countries reduced the quotas for admission of foreign workers, including the highly skilled; some governments embarked on policies to deliberately exclude and expel migrant workers.
- While the presence of migrant workers in an irregular situation is often tolerated in economic boom times, pressures to expel them from the country are likely to increase during downturns.
- Migrant remittances to their home countries declined in 2008 and 2009, despite deteriorated situations in some home countries that made remittances an even more crucial lifeline for families and communities. Since 2010, while migrant remittances have recovered and indeed increased overall, they continue to vary, depending on the extent to which employment has improved in destination countries.
- For many migrants, employment opportunities have disappeared in their countries of origin, meaning fewer options for persons returning from abroad, posing additional challenges to labour market stability and social cohesion in some countries.

**Sources:**

- [Protecting migrant workers beyond the crisis](#), The Global Jobs Pact Policy Brief No. 17, ILO, 2010.
- [The global economic crisis and migrant workers: Impact and response](#), 2nd ed., Geneva, I. Awad, International Labour Office, 2009.
- [The impact of the global economic crisis on migrants and migration](#), IOM Policy Brief, March 2009.

These consequences of the crisis on migration and migrant workers in particular underline the urgency of parliamentary action in every country affected by migration, those of origin, transit as well as destination. While not all such problems can necessarily be solved solely by a human rights-based approach, all of them have a human rights component.

### **Box 1.8 What parliaments should do in times of financial and economic crisis**

- ***Elaborate and implement measures to combat racism and xenophobia, for example by enacting anti-discrimination provisions.*** The crisis and the rhetoric of some political groups has led to the belief that migrants are taking away the jobs of nationals, exacerbating racist and xenophobic behaviour and multiple discrimination.

- **Reinforce social safety net coverage.** This should be expressly addressed to both nationals and migrants, including those in an irregular situation, who are more likely to fall outside the coverage of national health, social protection and social security systems. Moreover, access to social protection can make it easier re-enter the labour market.
- **Reinforce labour inspections.** The crisis induces employers to offer and migrants to take jobs that fail to meet minimum labour standards. Labour inspection targeted at sectors where migrants may be prevalent is an important means of reducing abuse and supporting a “level playing field”, where national and foreign workers benefit from equivalent conditions and protection.
- **Adopt measures aimed at promoting social dialogue.** In adopting legislation to deal with crises, social dialogue can provide a means of ensuring non-discrimination and equality of treatment and opportunity.
- **Devote additional vigilance to monitoring the implementation and enforcement of laws in times of financial and economic crisis.**

## 1.4 Migration, diversity and social change

Migration today is inevitably bringing change to societies. Most visibly, and as noted above, it is bringing about the ethnic, cultural and religious diversification of populations in countries around the world, raising questions of identity in most societies. Many states have been constructed around unifying, homogenizing identities that are essentially mono-ethnic, mono-cultural, mono-linguistic and sometimes mono-religious.

The challenge is whether different racial, ethnic, cultural, linguistic and religious identities of migrant and other minority populations can be acknowledged, accepted and indeed celebrated, thus also enriching the societies in which they live. This means including those varied individuals and groups in an evolving understanding of what it means to belong to the nation, to its “national identity”. It means ensuring that all are entitled to non-discrimination and equality of treatment and opportunity. In the absence of such efforts, differences may be defined as markers of exclusion from national identity. The result, as recent history suggests, is likely to divide societies on ethnic, racial and nationality lines, undermining social cohesion.

## Box 1.9 Multiculturalism in Australia and Canada

### Canada

Canada's Parliament recognized the multicultural heritage of Canadians in the country's Constitution when it adopted the Canadian Charter of Rights and Freedoms in 1982. The Charter provides for equality rights without discrimination, such as discrimination based on race, national origin or ethnic origin. Previous legislation, such as the Canadian Human Rights Act passed in 1977, explicitly prohibited discrimination based on national origin. In 1988, the Canadian Multiculturalism Act was passed mandating the provision of state assistance to ethno-cultural minority communities in order to overcome discriminatory barriers, in particular based on race and national origin. It also promoted diversity in federal institutions and more broadly set out a vision of national integration that promoted the full and equitable participation of individuals and communities of all origins – including migrants – in the continuing evolution and shaping of Canadian society and culture.

The House of Commons Standing Committee on Immigration and Citizenship is tasked with monitoring implementation of the country's multiculturalism policy. The Minister of Multiculturalism is responsible for tabling an annual report to Parliament. According to its [2013 report on the operation of the Canadian Multiculturalism Act](#), approximately 8.5 million Canadian dollars are spent annually to help fund migrant and minority community organizations and non-governmental organizations. The government is also strengthening the responsiveness of public institutions to diversity through programmes aimed at ensuring that minorities are represented in federal institutions and by promoting partnerships with community organizations to help support migrants.

### Australia

In 2013, the Australian Parliament's Joint Standing Committee on Migration published a [comprehensive report on the state of multiculturalism in Australia](#), identifying the strengths and weaknesses of current policy. The report, a collaborative effort taking into account submissions from civil society groups and the Australian Human Rights Commission, made recommendations to further promote inclusivity and non-discrimination, including suggestions that the government reaffirm the vision of multiculturalism as an inclusive policy respecting diversity; develop programmes to assist community organizations; ensure that education promotes intercultural and interfaith understanding; and conduct further empirical research to develop a robust national approach to planning and policy covering a vast array of economic, social and political dimensions.

Employment in decent conditions is central to everyone's participation in society, and to individual independence, self-support, identity and dignity. For residents and newcomers alike, employment is also key to social and economic integration. The European Economic and Social Committee (EESC), a consultative body of the European Union (EU) comprising employers', workers' and civil society organizations, underscored the following in a September 2006 Opinion on ["Immigration in the EU](#)

and integration policies: cooperation between regional and local governments and civil society organisations”: *“Employment is a key part of the integration process, because decent jobs are vital to immigrants’ self-sufficiency, and they enhance social relations and mutual understanding with the host society”* (para. 8.2).

The challenge of equality of treatment and non-discrimination, which is addressed in greater depth in Chapter 3, is not just a question of values. It is a question of whether social cohesion and economic welfare are even possible. Discrimination – unjustified differential treatment – denies equal opportunity, provokes conflict within populations and undermines social cohesion. Discrimination reinforces attitudes that constrain certain identifiable groups to marginalized roles and poor conditions. Consistent denial of employment opportunities and good-quality education, relegation to life in the ghettos, inadequate police protection and multiple discrimination in community life all result in marginalization, exclusion and, ultimately, the breakdown of social cohesion.

Discrimination also prevents integration. The consequences of past policies that neither anticipated nor prevented discrimination can be seen in the presence of migrant ghettos, high unemployment, low school attainment and increased violence and crime rates in numerous countries. The longer migrants and their offspring live and work in host societies that do not take steps to include them, the more likely that prejudice and discrimination will deny them the economic and educational attainments enjoyed by majority populations. In some countries, the cumulative effects of past discrimination have shaped a contemporary environment that is itself discriminatory.

It is clear that much more needs to be done to change negative political and public perceptions of migrants and recognize the contributions they make to host societies. This requires a range of measures: from legislation to combat discrimination and xenophobia, to multi-stakeholder public education campaigns, to the improvement of relevant evidence and knowledge.

### **Box 1.10 Recognizing the contribution of migrants and improving perceptions**

[...] Migrants make significant and essential contributions to the economic, social and cultural development of their host countries and their communities back home. But too often these contributions go unrecognized, and instead the public debate is dominated by xenophobic attitudes and discrimination, both in and outside the workplace.

Discrimination based on one’s migration status not only violates human rights, it is also an impediment to decent work and to social integration more broadly.

Migrants in an irregular situation are often particularly at risk of abuse, as they are more likely to face discrimination, exclusion, exploitation and abuse at all stages of the migration process.



Against this backdrop, it is time for a major shift in the way we perceive migration. We need to redouble our efforts to raise awareness of migrants' positive social and economic contributions to society. It is time to implement human rights and labour standards more effectively and to put in place concrete measures to combat discrimination and xenophobia, including:

- legislative and other reforms to eliminate all forms of discrimination against migrants;
- strengthened law enforcement and criminal justice responses to xenophobia and violence and enabling migrants to access justice;
- multi-stakeholder campaigns to end negative and inaccurate public messages and promote tolerance and respect for migrants; and
- collection and dissemination of accurate data on discrimination and on the positive contributions that migrants make to the development of both their host countries and home communities. [...]

Extracts from “Promote and protect the rights and fundamental freedoms of all migrants”, Joint statement by ILO Director-General, Guy Ryder, and United Nations High Commissioner for Human Rights, Navi Pillay, International Migrants Day, 18 December 2013.

On the occasion of International Migrants Day, OHCHR and ILO also launched a series of cartoons to challenge myths and encourage a positive public perception of migration.

## 1.5 Gender and migration: the situation of women migrants

Women today comprise about half of the global migrant population. International migration has become increasingly feminized as more women are migrating on their own account rather than as dependant family members. In moving for work abroad, many women gain opportunities they would not have at home and are thus economically empowered by migration, enabling them to make constructive contributions to destination countries as well as to their families in countries of origin.

Women are particularly at risk of discrimination, abuse and exploitative treatment when they are migrant workers. The United Nations Committee on the Elimination of Discrimination against Women, which monitors how States Parties apply the Convention on the Elimination of All Forms of Discrimination Against Women (see Chapter 2), issued a General Recommendation on this subject in 2009. The Recommendation provides a comprehensive overview of the situation and issues facing migrant women. The following extract summarizes the principal concerns:

### Box 1.11 Committee on the Elimination of Discrimination against Women (CEDAW) general recommendation No. 26 on women migrant workers

UN doc. CEDAW/C/2009/WP.1/R [Extracts] (2) While migration presents new opportunities for women and may be a means for their economic empowerment through wider participation, it may also place their human rights and security at risk.

(3) While States are entitled to control their borders and regulate migration, they must do so in full compliance with their obligations as parties to the human rights treaties they have ratified or acceded to. That includes the promotion of safe migration procedures and the obligation to respect, protect and fulfil the human rights of women throughout the migration cycle. Those obligations must be undertaken in recognition of the social and economic contributions of women migrant workers to their own countries and countries of destination, including through caregiving and domestic work.

(5) Although both men and women migrate, migration is not a gender-neutral phenomenon. The position of female migrants is different from that of male migrants in terms of legal migration channels, the sectors into which they migrate, the forms of abuse they suffer and the consequences thereof.

(13) Once they reach their destinations, women migrant workers may encounter multiple forms of *de jure* and *de facto* discrimination. There are countries whose Governments sometimes impose restrictions or bans on women's employment in particular sectors. Whatever the situation, women migrant workers face additional hazards compared to men because of gender-insensitive environments that do not allow mobility for women, and that give them little access to relevant information about their rights and entitlements. Gendered notions of appropriate work for women result in job opportunities that reflect familial and service functions ascribed to women or that are in the informal sector. Under such circumstances, occupations in which women dominate are, in particular, domestic work or certain forms of entertainment.

(15) Because of discrimination on the basis of sex and gender, women migrant workers may receive lower wages than do men, or experience non-payment of wages, payments that are delayed until departure, or transfer of wages into [bank] accounts that are inaccessible to them. For example, employers of domestic workers often deposit the worker's wages into an account in the employer's name. If a woman and her spouse both have worker status, her wages may be paid into an account in the name of her spouse. [...]

(17) Women migrant workers often suffer from inequalities that threaten their health. They may be unable to access health services, including reproductive health services, because insurance or national health schemes are not available to them, or they may have to pay unaffordable fees. As women have health needs different from those of men, this aspect requires special attention. [...] Women migrant workers are sometimes subjected to sex-discriminatory mandatory HIV/AIDS testing or testing for other infections without their consent, followed by provision of test results to agents and employers rather than to the worker herself. This may result in loss of job or deportation if test results are positive.

(18) Discrimination may be especially acute in relation to pregnancy. Women migrant workers may face mandatory pregnancy tests followed by deportation if the test is positive; coercive abortion or lack of access to safe reproductive health and abortion services, when the health of the mother is at risk, or even following sexual assault; absence of, or inadequate, maternity leave and benefits and absence of affordable obstetric care, resulting in serious health risks. [...]

(20) Women migrant workers are more vulnerable to sexual abuse, sexual harassment and physical violence, especially in sectors where women predominate. Domestic workers are particularly vulnerable to physical and sexual assault, food and sleep deprivation and cruelty by their employers. Sexual harassment of women migrant workers in other work environments, such as on farms or in the industrial sector, is a problem worldwide (see E/CN.4/1998/74/Add.1).

In order to ensure that migration *“presents new opportunities for [women] and ... a means for their economic empowerment through wider participation”*, as CEDAW recommends, and enhance the important contributions they make to development in both destination and origin countries, more gender-sensitive migration policies, including policies on labour migration, need to be adopted. The [Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families](#) also highlighted the gender perspective in its [General Comment No. 1 on migrant domestic workers](#), adopted at its 13th Session in December 2010. Over the years, a number of international organizations have developed important tools for governments and other stakeholders to assist them in this task. One such tool is the [ILO Information guide on preventing discrimination, exploitation and abuse of women migrant workers](#), published in 2003. Another is the Organization for Security and Co-operation in Europe (OSCE) [Guide on gender-sensitive labour migration policies](#), published in 2009.

### **Box 1.12 The need for gender-sensitive labour migration policies**

In order to ensure that international migration contributes substantially to the achievement of equitable, sustainable and inclusive development, policymakers and other stakeholders should take into account a gender-sensitive and rights-based approach to developing labour migration policies. This would enhance equal protection, treatment and opportunities for both men and women migrant workers and their families, and equally benefit countries of origin and destination.

Gender mainstreaming is still a challenge for all policies, and in particular those designed to improve the governance of migration for employment. But why are gender-sensitive labour migration policies so essential? For one thing, such policies take into account how sociocultural roles, needs, opportunities, constraints and vulnerabilities differ for women and men. They also guarantee that human rights, including labour rights, are enjoyed equally by women and men migrant workers and that migration legislation, policies and programmes promote equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination based on sex.

Efforts to promote gender equality in labour migration policies may include special gender-specific provisions (e.g. preferential treatment or affirmative action) to compensate for long-term discrimination, particularly that suffered by women. The main elements of a gender-sensitive labour migration policy include ensuring gender equality and equity at all stages of the migration process:

- decision-making, planning and preparation to go abroad in search of employment and better wages;
- recruitment and placement;
- the journey or transit to the destination country;
- living and working conditions abroad; and
- return to and reintegration within the country of origin.

### **National policy on the protection of migrant workers in Brazil**

Gender equality has been identified as a principal aim of Brazil's National Policy on the Protection of Migrant Workers, which refers to decent work as a fundamental condition. The policy includes measures to combat discrimination against migrant workers in employment and occupation and protect them against forced labour, child labour and trafficking. It simplifies the administrative procedures for immigration, providing for regularization of migrant status and access to labour rights. The inter-ministerial Tripartite National Immigration Council (CNIg), which is coordinated by the Ministry of Labour and Employment, includes employer and worker organizations, and civil society and international organizations as observers. CNIg is a permanent organ created to accompany the policy's development and implementation. ILO provides technical assistance with monitoring, publication of studies, development of policies, and legislation, etc. With its technical support, the database on migrant workers maintained by the Ministry of Labour and Employment has been improved and expanded, with data disaggregated by sex.

**Source:**

*A practical guide on maximising the contribution of women migrant workers to development*, Geneva, G. Moreno-Fontes Chammartin, International Labour Office, forthcoming [footnotes omitted].

## Checklist for parliamentarians

### What can parliamentarians do to improve public perceptions of migrants, combat discrimination and xenophobia, and highlight the contributions of migrants and migration to development?

- ☑ What can parliamentarians do to improve the public perception of migrants? A first step entails **positive discourse in parliament**. It needs to be stressed that migration can serve to balance national and regional labour markets, in terms of skill sets, age and composition. It is also crucial to highlight the **positive contributions** of migrants and migration to development in countries of destination as well as origin.
  - **Countries of destination:** Are the gains from immigration known and valued? Immigration can contribute to raising GDP, fostering innovation through the infusion of needed new skills, keeping companies viable, and enhancing the performance of national social security systems. Widespread beliefs that migrant workers take jobs away from nationals need to be challenged with evidence.
  - **Countries of origin:** Are the gains from emigration known and valued? Emigration relieves unemployment pressures and generates remittances to home countries – both economic, as a significant proportion of GDP in some smaller countries, and social, when migrants return home with new skills, values and ideas. At the same time, it is important for economies not to become over-dependant on remittances, so parliamentarians also need to give due attention to stimulating the creation of decent work opportunities at home and ensuring synergies between migration and national employment policies.
- ☑ Parliamentarians should endeavour to portray ethnic, cultural, linguistic and religious diversity as **enrichment** for society. It is especially important to adopt laws and policies to address discrimination and xenophobia, devoting special attention to proper implementation and enforcement, particularly during economic downturns, when migrants are especially vulnerable.
- ☑ Parliamentarians should promote concrete measures to **combat xenophobia**, including strengthening law enforcement and criminal justice responses to xenophobia, collecting data on xenophobic crimes, improving the quality of such data-collection systems and creating adequate institutions and mechanisms to monitor and report on xenophobia – for example, by creating specialized national bodies and building networks with civil society.
- ☑ Parliamentarians should promote **education campaigns** to fight negative perceptions of migrants and discrimination.
- ☑ Parliamentarians need to adopt a **gender-sensitive approach to labour migration policies and to address discrimination against women migrant workers**.
  - They should oppose and seek to address the following in particular: bans on women’s employment abroad in particular sectors; sexual harassment and

sexual violence in the workplace; unjustified wage gaps between women and men migrant workers; unequal access to health care and social security benefits (including reproductive health services); and mandatory HIV/AIDS and pregnancy testing, which can result in an irregular migration status or even expulsion.

- Parliamentarians can also give consideration to preferential treatment and/or affirmative action, which represent important tools to fight discrimination against women migrants, particularly in cases of long-term and/or entrenched discrimination.
- To protect migrant domestic workers, who are mainly women, parliamentarians need to ensure that labour laws explicitly apply to this sector of employment.



## Chapter 2

# International law, migration and human rights

A member of medical staff plays with children following a rescue operation at sea in the Port of Messina, Italy. International law contains a number of provisions concerning the rights of migrant children, a group particularly affected by migration. © AFP/ Giovanni Isolino, 2015

### Box 2.1 Universal Declaration of Human Rights

*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]*

Universal Declaration of Human Rights, United Nations General Assembly resolution 217A (III), 10 December 1948, Articles 1 and 2.

An extensive range of international conventions, regional treaties, bilateral agreements and national provisions provides the framework for regulating migration. Well-defined rules also exist in international law specifically addressing the treatment of migrants. The international legal framework integrates detailed provisions to protect the rights of migrants, including migrant workers, with measures to regulate migration and facilitate intergovernmental cooperation. International instruments provide a comprehensive legal framework for the development of policy and good practices at the national level, which has proven effective where implemented.

This chapter elaborates on those instruments and outlines the role, purposes and application of international law – and the rule of law itself – as the normative foundation for national law and policy to effectively govern migration. The adoption and application of international norms and standards remains a work in progress; migration is a politically complex and sensitive issue and policy responses are most often adopted piecemeal (and at times regressively) at the national level. It is therefore particularly important that parliamentarians are aware of the framework of international human rights law and international labour standards governing migration.

International human rights law applies not only to the nationals of a state, but to everyone within the state's jurisdiction, including migrants, be their status regular, irregular, documented or undocumented. Their human rights are not isolated from the rights of others and, with the exception of the right to enter another country and to vote and stand for election to political office, migrants enjoy the same human and labour rights as nationals.

International law recognizes the right of everyone to leave any country, including their own, and to return to their own country. However, it does not establish a right of entry to another country; instead, it upholds the sovereign prerogative of states to decide on criteria for the admission and expulsion of non-nationals, including migrants. States are prohibited from returning anyone to countries where they would face torture, other serious human rights violations or persecution on grounds set out in the [1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol](#). They are also expected to provide due process in removal or deportation proceedings and to avoid collective expulsions. General interpretation of international law also stipulates that there are certain unacceptable grounds of discrimination, such as race, sex, religion or health status (e.g. real or perceived HIV status) concerning who may be admitted; these should also be avoided in migrant selection procedures or quotas.

Every country in the world is considered to be bound by the principles articulated in international human rights law, which defines the range of human rights applicable to all humanity. International, regional and national courts have also upheld the position of ILO supervisory bodies that, as a matter of law, all international labour standards are applicable to all workers, including migrant workers, unless otherwise stated.

Migrants in an irregular situation, or undocumented migrants, are entitled to the same human rights as everyone else, including both nationals and other categories of migrants, such as migrant workers. However, ICRMW and the ILO conventions specifically relating to the protection of migrant workers do make some distinctions between the protection of fundamental human rights for all persons present on the territory of a country, irrespective of their immigration status, and the extension of a



greater array of rights to migrants whose admission and residence are authorized. This question is discussed in more detail in Chapter 3.

While human rights and international labour standards are generally applicable to all migrants, in practice the extension and enforceability of human rights and labour protections to all persons, including migrants, in the national context may depend on which specific international instruments the country has ratified. There are overarching reasons, however, why all migrants should be accorded the full measure of human rights, including fundamental rights at work, provided for in international law.

### **Box 2.2 Three overarching reasons why it is important to protect the human rights of migrants**

First, it is a matter of both law and morality. Most national laws and constitutions do not restrict their recognition of human rights to citizens or nationals only, and accept that these rights are applicable to everyone physically present in the territory of the state or subject to its jurisdiction. While there are limitations on some rights that migrants and their families are accorded in international law, such as the degree to which they have a right to residence and the right to political participation in the country of destination, there are no limitations on their human rights, such as the right to life, the right to be treated as persons everywhere before the law, the right to freedom from slavery, forced or compulsory labour and torture, the right to liberty and security of person, and human rights to education, health and cultural identity. The core international human rights treaties protect such rights, and virtually every country has ratified a number of them.

Second, while migration can and does take place in unregulated circumstances, experience shows that well-governed migratory processes make far more beneficial contributions to the economic and social development of origin, transit and destination countries as well as the human development of both migrants and nationals, and that they also contribute to social cohesion. This makes it both appropriate and practical to put in place a legislative framework that is both carefully thought out and correctly applied.

Third, a just, viable and sustainable migration system necessarily includes the recognition of migrants' human rights and attention to ensuring decent working conditions for migrants. Treating people without respect for their rights places the act of migration outside the regulation and protection of the law. When this happens, states lose many of the advantages to be gained through proper regulation and safe migration. Migrants whose rights are unprotected are more likely to be subject to abuse and exploitation; they are more likely to be perceived as unfair competition for jobs giving rise to social tensions; and their tax and social contributions may not be collected or passed on to government.

## 2.1 Rule of law

Migration policies and practices can only be viable and effective when they are based on a firm foundation of legal norms, and thus operate under the rule of law. To obtain credibility and ensure enforceability, migration governance needs to be based on a public legal framework established by a formal legislative process in parliament, administered under law by the executive branch of government, which is reviewable and enforceable by the judicial branch of government.

The **rule of law** is a maxim that communities, states and international relations are governed by a system or systems of formally established and supervised rules and guidelines, usually set up – or at least endorsed – by a legislative process and enforced through a set of institutions and mechanisms under the authority of states. Essential principles are that: (1) no person, collective or institution is above the law; (2) no individual or body can be punished by the state or any other entity except for a breach of the law; and (3) no one can be convicted of breaching the law except in the manner set forth by the law itself.

A key step in establishing the governance – and governability – of migration is the establishment of national law based on and in compliance with international law. This is usually accomplished through ratification by states of relevant international human rights instruments and international labour standards, followed by their effective implementation.

### Box 2.3 Ratification of international treaties

Parliaments usually play an important role in ratifying international treaties, including international human rights and labour conventions. Rules and procedures differ from country to country, but normally the national executive (the presidency or a government minister) proposes the ratification of a treaty or convention, and the parliament must give its consent before the executive can register it. In many countries, parliaments may also initiate ratification, at least in a political sense, by asking the government about its plans for ratification of a particular treaty.

## 2.2 International law pertaining to migration

International human rights instruments, including those relating to fundamental rights at work, and international labour standards are essentially sets of minimum legal provisions drawn up at international conferences to provide guidance, and often specific language, for national legislation, policy and practice. International instruments comprise both conventions and declarations, although the latter are not binding unless they represent customary international law. On the one hand, while the [1948 Universal Declaration of Human Rights \(UDHR\)](#) and the [1998 ILO Declaration of Fundamental Principles and Rights at Work](#) are not legally binding treaties, they do express widely accepted principles and rights found in the legally binding instruments of international human rights and international labour law, many of which are also recognized as customary international

law. On the other hand, the [1966 UN International Covenant on Civil and Political Rights \(ICCPR\)](#), the [1966 International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#), the seven other core human rights treaties (see below), as well as international labour standards in the form of ILO conventions are binding upon the countries which have ratified them. In contrast, ILO recommendations, which are another form of international labour standard, provide non-binding guidance, either as a complement to accompanying ILO conventions or on stand-alone subjects, on which all ILO Member States are bound to report as to the effect given. A unique characteristic of international labour standards, including those relating to fundamental rights at work, is that these are designed not only by governments but also by employers' and workers' representatives, who together with governments comprise ILO's tripartite structure. Likewise, general comments and recommendations adopted by the human rights treaty bodies serve to provide guidance to States Parties on the implementation of their treaty obligations under the core international human rights treaties.

These instruments usually define the rights and entitlements of the persons and populations concerned, and may establish their obligations as well. They also lay out guidelines to states and provisions for implementing rights and obligations, including mechanisms for application and supervision. In some areas, such as international migration, international instruments may provide for specific measures and mechanisms of international consultation and cooperation to implement basic principles regarding rights, obligations and governance mechanisms.

Modern-day international norms addressing refugees and migrants began to emerge nearly a century ago. The need to provide for protection of workers outside their own countries was identified early in this process. It was explicitly raised after the First World War in the Treaty of Versailles, which also established the [Constitution of the International Labour Organization](#). The first specific international treaty on migrant workers was drawn up in the 1930s, and the ILO [Migration for Employment Convention \(Revised\) \(No. 97\)](#) was adopted in 1949, shortly after [UDHR](#) emerged in 1948. Coincidentally, instruments and mechanisms to provide for recognition and protection of refugees also emerged shortly after the First World War.

The specific instruments providing the basis for national migration laws, policies and practice have been elaborated in seven branches of international law:

1. International human rights law
2. International labour law/standards
3. International refugee law
4. International criminal law
5. International humanitarian law
6. International consular law
7. International maritime law

This handbook focuses on the first two branches, as discussed in more detail in subsequent sections of this chapter. A brief overview of the other branches and their relevance to migrants is provided below.

**International refugee law**, namely the [1951 Geneva Convention Relating to the Status of Refugees](#) and the [1967 Protocol](#) and related regional instruments, is amply covered in [Refugee protection: A guide to international refugee law](#), handbook for parliamentarians No. 2, jointly produced in 2001 by IPU and UNHCR.

Another category of persons for which UNHCR is responsible and where there are important linkages to migration and human rights is stateless persons, and in 2005 IPU and UNHCR also collaborated to prepare [Nationality and statelessness: A handbook for parliamentarians](#) (No. 22).

The main applicable instruments of **international criminal law** pertaining to migration are the two “Palermo Protocols” to the UN Convention against Transnational Organized Crime, adopted in 2000, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air. These are discussed in [Combating trafficking in persons: A handbook for parliamentarians](#) (No. 16), jointly produced in 2009 by IPU and the UN Office on Drugs and Crime (UNODC). This publication encourages parliamentarians to take an active part in stopping human trafficking. It contains a compilation of international laws and good practices developed to combat human trafficking, and offers guidance to parliamentarians on how national legislation can be brought in line with international standards. It outlines measures to prevent the crime of trafficking in persons, prosecute offenders and protect victims. It also contains advice on how to report on this crime and how to enlist civil society in the cause. Another noteworthy publication in this field of law is the [Handbook for parliamentarians: The Council of Europe Convention on Action against Trafficking in Human Beings](#), prepared in 2007 by the Council of Europe’s Parliamentary Assembly.

The principal instruments of **international humanitarian law** most relevant to migrants are the four [Geneva Conventions of 1949 and their Additional Protocols of 1977](#), which are presented, among others, in the first handbook for parliamentarians [Respect for international humanitarian law](#), jointly produced in 1999 by IPU and the International Committee of the Red Cross (ICRC).

**International consular law** is enshrined in the [Vienna Convention on Consular Relations 1963](#), its Optional Protocol concerning Acquisition of Nationality, and the Optional Protocol concerning the Compulsory Settlement of Disputes, which also include several provisions for the protection of a country’s nationals abroad. Most of the Vienna Convention’s 79 articles provide for the operation of consulates, the functions of consular agents and the privileges and immunities granted to consular officials when posted to a foreign country. But several provisions also specify the duties of consular officials when citizens of their country face difficulties abroad. Of particular interest for the protection of migrants is Article 36, outlining obligations for competent authorities in cases of the arrest or detention of a foreign national, to guarantee his or her inalienable right to counsel and due process through consular notification and effective access to consular protection. See the UN Audiovisual Library of International Law for a [summary overview of the Vienna Convention](#), by Juan Manuel Gómez Robledo, Deputy Foreign Minister for Multilateral Affairs and Human Rights, Ministry of Foreign Affairs, Mexico.

**International maritime law** is an umbrella term that refers to the UN Convention on the Law of the Sea, 1982, as well as the many instruments adopted under the auspices

of the International Maritime Organization (IMO), which include a number that are of particular relevance to the rights of migrants, such as the International Convention for the Safety of Life at Sea, 1974, and the International Convention on Maritime Search and Rescue, 1979. Important as non-binding instruments are the Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases, 1997 (revised 2011); Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, 1998 (revised 2001); and Guidelines on the Treatment of Persons Rescued at Sea, 2004. For relevant extracts from the texts, see [Compendium of international migration law instruments](#), compiled by Richard Perruchoud and Katarína Tömölová, International Organization for Migration (IOM) and T.M.C. Asser Press, 2007. This field is also closely connected to the many international labour standards adopted by ILO relating to the rights and working conditions of seafarers, many of which have now been consolidated in the [Maritime Labour Convention, 2006](#), which entered into force on 20 August 2013.

## 2.2.1 International human rights law

International law on human rights establishes unequivocally that migrants and members of their families are first and foremost human beings, the holders of universal human rights whose dignity and security require specific protection. Consequently, they enjoy the protection of international human rights law like anyone else, even if they are in an irregular situation as can be the case with migrants. The only exceptions relate to political rights, namely the right to vote, to stand in elections and to enter and stay in a country, which are restricted to citizens, although, as observed in Chapter 4, the right to enter and stay in a country may also apply to foreign nationals with permanent or secure residence in the country. International human rights law tells us what governments and other stakeholders have agreed *ought* to be done concerning migrants and their families. It contains norms that address wider human rights questions affecting all migrants, as well as specific standards that deal directly with migrant workers and their families.

### Box 2.4 UN instruments protecting human rights for all, including migrants

#### UN core human rights conventions

- [International Covenant on Economic, Social and Cultural Rights](#), 16 December 1966
  - [Optional Protocol to the International Covenant on Economic, Social and Cultural Rights](#), 10 December 2008
- [International Covenant on Civil and Political Rights](#), 16 December 1966
  - [Optional Protocol to the International Covenant on Civil and Political Rights](#), 16 December 1966
  - [Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty](#), 15 December 1989

- [International Convention on the Elimination of All Forms of Racial Discrimination](#), 21 December 1965
- [Convention on the Elimination of All Forms of Discrimination against Women](#), 18 December 1979
  - [Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women](#), 6 October 1999
- [Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#), 10 December 1984
  - [Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#), 18 December 2002
- [Convention on the Rights of the Child](#), 20 November 1989
  - [Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#), 25 May 2000
  - [Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict](#), 25 May 2000
  - [Optional Protocol to the Convention on the Rights of the Child on a communications procedure](#), 19 December 2011
- [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), 18 December 1990
- [Convention on the Rights of Persons with Disabilities](#), 13 December 2006
  - [Optional Protocol to the Convention on the Rights of Persons with Disabilities](#), 13 December 2006
- [International Convention for the Protection of All Persons from Enforced Disappearance](#), 20 December 2006

#### **Other selected UN instruments**

- [Universal Declaration of Human Rights](#), 10 December 1948
- [Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live](#), 13 December 1985
- [Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities](#), 18 December 1992
- [Durban Declaration and Programme of Action](#) (from the [World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance](#), 2001) and the [Outcome Document of the Durban Review Conference](#), 2009
- [Recommended Principles and Guidelines on Human Rights and Human Trafficking](#), text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (UN doc. E/2002/68/Add.1)

Migrants therefore enjoy the human rights available to all persons under UN and ILO conventions (see next section), and under regional human rights instruments.

## 2.2.2 International labour standards

From its very inception, ILO resolved that migrant workers deserve special attention. Indeed, the protection of migrant workers is enshrined in the Preamble to the [ILO Constitution](#) (second recital) as one of the areas where an improvement in labour conditions is seen as urgent:

*Whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of persons as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of these conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, **protection of the interests of workers when employed in countries other than their own**, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures; [...]* [Emphasis added]

As noted above, in principle, all international labour standards, unless otherwise stated, are applicable to all migrant workers. Those standards include those set out in the eight ILO conventions on fundamental rights identified in the [1998 ILO Declaration on Fundamental Principles and Rights at Work](#). They apply to all migrant workers, irrespective of their migration status.

### **Box 2.5 The 1998 ILO Declaration on Fundamental Principles and Rights at Work**

In 1998, the International Labour Conference adopted the [Declaration of Fundamental Principles and Rights at Work](#) and named four rights as an interconnected foundation for human rights at the workplace. The Declaration states the following:

*[A]ll Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:*

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

In adopting the Declaration, the Conference recognized in the Declaration's preamble that:

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

International labour standards also encompass standards of general application, such as the ILO “priority” or “governance” conventions concerning labour inspection, employment policy and tripartite consultation, as well as standards addressing protection of wages and occupational safety and health; and instruments containing specific provisions on migrant workers, such as those on social security, private employment agencies, HIV and AIDS, and domestic work. ILO supervisory bodies (see below) closely monitor their effective application to migrant workers. ILO has also pioneered the development of specific international standards for the governance of labour migration and protection of migrant workers, which are discussed in the next section.

## **Box 2.6 International labour standards and migrant workers**

### **Constitutional documents**

ILO Constitution, 1919 (Preamble, recital 2), as amended by the Declaration of Philadelphia, 1944

ILO Declaration on Fundamental Principles and Rights at Work, 1998

ILO Declaration on Social Justice for a Fair Globalization, 2008



## **Conventions on fundamental rights**

- Abolition of forced labour
  - Forced Labour Convention, 1930 (No. 29) and the Protocol of 2014 to the Forced Labour Convention
  - Abolition of Forced Labour Convention, 1957 (No. 105)
- Elimination of child labour
  - Minimum Age Convention, 1973 (No. 138)
  - Worst Forms of Child Labour Convention, 1999 (No. 182)
- Trade union rights
  - Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)
  - Right to Organize and Collective Bargaining Convention, 1949 (No. 98)
- Equality and non-discrimination in employment and occupation
  - Equal Remuneration Convention, 1951 (No. 100)
  - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

## **Governance conventions**

- Labour Inspection Convention, 1947 (No. 81)
- Employment Policy Convention, 1964 (No. 122)
- Labour Inspection (Agriculture) Convention, 1969 (No. 129)
- Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

## **Selected conventions and recommendations of general application**

- Labour Clauses (Public Contracts), 1949 (No. 94)
- Protection of Wages Convention, 1949 (No. 95)
- Employment Injuries Benefit Convention, 1964 (No. 121)
- Minimum Wage Fixing Convention, 1970 (No. 131)
- Nursing Personnel Convention, 1977 (No. 149)
- Occupational Safety and Health Convention, 1981 (No. 155)
- Occupational Health Services Convention, 1985 (No. 161)
- 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)

**Selected conventions and recommendations containing specific provisions on migrant workers**

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

Employment Service Convention, 1948 (No. 88)

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

Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (No. 100)

Plantations Convention, 1958 (No. 110)

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

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

Private Employment Agencies Convention, 1997 (No. 181)

HIV and AIDS Recommendation, 2010 (No. 200)

Domestic Workers Convention, 2011 (No. 189)

Domestic Workers Recommendation, 2011 (No. 201)

Social Protection Floors Recommendation, 2012 (No. 202)

Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203)

Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204)

**Conventions and recommendations on migrant workers**

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

Migration for Employment Recommendation (Revised), 1949 (No. 86)

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

Migrant Workers Recommendation, 1975 (No. 151)

The texts of all ILO conventions and recommendations are available from the [International System on International Labour Standards – NORMLEX](#).

Moreover, jurisprudence at the regional level has reinforced the notion that international labour standards and national labour laws should apply to all migrant workers.

## Box 2.7 Advisory opinion of the Inter-American Court of Human Rights on the rights of undocumented migrants

In accordance with Article 64(1) of the American Convention on Human Rights (ACHR), Member States of the Organization of American States (OAS) may consult the Inter-American Court of Human Rights regarding the interpretation of ACHR or of other treaties concerning the protection of human rights in the American states. In 2003, at the request of Mexico, the court issued a sweeping advisory opinion that clearly reinforces the application of international labour standards to non-national workers, particularly those in irregular status. The court found that non-discrimination and the right to equality are applicable to all residents, regardless of their migration status; that states thus cannot restrict the labour rights of unauthorized workers, including their equal rights to social security; and that once the employment relationship is initiated, unauthorized workers are entitled to the full panoply of labour and employment rights available to authorized workers. The court took the unanimous view that:

*The migratory status of a person can never be a justification for depriving him [or her] of the enjoyment and exercise of his [or her] human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his [or her] regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.*

[Juridical Condition and Rights of Undocumented Migrants](#), Advisory Opinion OC-18/03, Inter-Am. Ct. H.R., (ser. A) No. 18, 17 September 2003.

Even though advisory opinions are strictly speaking not legally binding, they produce legal effects not only on the state or organ requesting an advisory opinion, but on all OAS Member States. Moreover, the court has since reiterated that the principle of equality before the law, equal protection and non-discrimination applies to undocumented workers in its contentious jurisdiction. For example, see [Vélez Loor v. Panama](#) (judgment of 23 November 2010, Inter-Am. Ct. H. R. (ser. C) No. 218, para. 100), where the court ruled that “States should respect human rights and guarantee their exercise and enjoyment to all persons who are within their territory, without discrimination based on their regular or irregular status, or their nationality, race, gender or any other reason”. See also [Nadege Dorzema et al. v. Dominican Republic](#) (judgment of 24 October 2012, Inter-Am. Ct. H. R. (ser. C) No. 251, para. 154) and [Pacheco Tineo Family v. Plurinational State of Bolivia](#) (judgment of 25 November 2013, Inter-Am. Ct. H. R. (ser. C) No. 272, para. 129).

## 2.2.3 International standards specifically addressing labour migration and migrant worker rights

The particular challenges of regulating labour migration while adequately protecting migrant workers has led to the elaboration of three specific instruments under UN auspices, as outlined below in chronological order. Two of those instruments have been adopted by the International Labour Conference of the ILO while the third is a core human rights treaty, adopted by the UN General Assembly. All three instruments are subject to ILO and UN human rights supervisory mechanisms, respectively (see below).

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

Convention No. 97 revised and brought up to date earlier ILO standards and included legal and regulatory provisions for migrant workers in *regular* situations. It contains provisions regulating the conditions in which labour migration should take place – including obligations to provide an adequate and free service to assist migrant workers (Article 2) and to take steps against misleading propaganda (Article 3), and standards for protection of workers from discrimination and exploitation while employed in countries other than their own. Article 6 establishes the principle of equal treatment of lawfully resident migrant workers and nationals on the grounds of nationality, race, religion and sex in respect of wages and working conditions, trade union rights, accommodation, social security, employment taxes and legal proceedings. Convention No. 97 is accompanied by the non-binding [Migration for Employment Recommendation \(Revised\), 1949 \(No. 86\)](#), which provides further guidelines on the regulation of labour migration. The Annex to Recommendation No. 86 contains a model bilateral labour migration agreement, which has served as a blueprint for ILO Member States in designing their own bilateral arrangements for regulating labour migration (see also Box 2.15).

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

Convention No. 143 was adopted at a time when the attention of the international community was being drawn to the growing abuses connected with irregular migration. It is divided into two parts. Part I on migrations in abusive conditions contains provisions aimed at eliminating unauthorized migration and “illegal” employment. Article 1 obliges States Parties to respect the basic human rights of all migrant workers, including those in an irregular status. Basic human rights are understood to include the fundamental human rights contained in the international instruments adopted by the UN in this domain, which include some of the fundamental principles and rights at work found in the ILO fundamental conventions. Specifically, Article 8 underlines that migrant workers are not to be regarded as in an irregular situation by the mere fact of losing their employment, while Article 9(1) stipulates that migrant workers in an irregular status who cannot be regularized are entitled to equal treatment in respect of rights arising out of past employment as regards remuneration, social security and other benefits. Part II of Convention No. 143 on equality of opportunity and treatment focuses on regular migration and facilitates in effect the integration of migrant workers who are lawfully resident in host countries. Article 10 requires the state to adopt a national policy designed to promote and guarantee equality of opportunity

and treatment for migrant workers and members of their families lawfully within the territory, which implies taking active measures, some of which are set out in Article 12. Examples of such measures include cooperation with workers' and employers' organizations and other appropriate bodies; enactment of legislation and adoption of educational programmes as necessary to implement the national policy; repeal of legislation and modification of administrative instructions and practices inconsistent with the national policy; formulation and application of a social policy in consultation with representative employer and worker organizations; and ensuring equal treatment for all migrant workers with regard to their working conditions. Convention No. 143 is accompanied by the [Migrant Workers Recommendation, 1975 \(No. 151\)](#), which sets out further guidance on equality of opportunity and treatment, social policy, and employment and residence of migrant workers.

### **Box 2.8 Human interest story: edging closer to justice – the journey of migrant domestic workers in Lebanon**

After witnessing war first-hand during the Israeli invasion of Lebanon, in July 2006, Jennifer [a Philippine national] who wishes to withhold her family name to protect her identity, did not want to renew her contract to work in Lebanon as a migrant domestic worker. [...]

The Philippine embassy took Jennifer in for two weeks, and arranged for her flight back home. But after many months of arduous work in Lebanon, she was forced to leave without her unpaid wages.

Although this was the end of Jennifer's ordeal as a migrant domestic worker in Lebanon, it was the start of her long journey to achieving justice through the Lebanese judicial system. [...]

"Under the Lebanese law, a migrant domestic worker has the right to file a complaint in front of the judge or the police, and the right to a fair trial, like any other Lebanese citizen [...]."

The first time a Lebanese court ruled in favour of a migrant domestic worker was in 2005. Then, a judge ruled for the payment of 500,000 Lebanese liras – around US\$ 330 – to a migrant domestic worker, represented by Caritas, who was found to have been abused and exploited by an employer in the Bekaa Valley in south-eastern Lebanon.

Since then, many domestic workers in Lebanon have taken their cases to court. While it is a slow and challenging process, their quest for justice has been delivering results, and the consequences of these landmark rulings are trickling down through society, slowly changing how many Lebanese perceive migrant domestic workers and their rights. Today, compensation for abuse and forced labour can reach up to US\$ 20,000.

This month, seven years after speaking to Jennifer at the Philippine Embassy in Beirut, the Caritas lawyer [dealing with her case] finally had some good news. Caritas had managed to get a ruling in her favour, and the wages owed to her by former employers have now been transferred to her.

“Edging closer to justice: The journey of migrant domestic workers in Lebanon”, ILO Media Centre, International Labour Office, 2014

Given that ILO is a tripartite organization comprising governments, workers and employers, consultation with workers’ and employers’ organizations is seen as key in all policy areas relating to the world of work. Recommendation No. 86, paragraph 4(2), specifically proposes that such consultation take place “on all general questions concerning migration for employment”. The four ILO instruments specifically concerned with the protection of migrant workers and the governance of labour migration are complemented by the [ILO Multilateral Framework on Labour Migration](#), 2006. The Framework comprises a set of non-binding principles and guidelines supported by a compendium of “best practices” in the following nine areas: decent work, global knowledge base, effective management/governance of labour migration, means for international cooperation on labour migration, prevention of and protection against abusive migration practices, social integration and inclusion, protection of migrant workers, migration and development, and the migration process.

### **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), 1990**

ICRMW was adopted by the UN General Assembly on 18 December 1990. It is the most comprehensive international treaty dealing with the rights of migrant workers and their families, migration regulation and inter-state cooperation on migration, and is one of the core international human rights treaties.

ICRMW explicitly spells out that fundamental rights articulated in the [Universal Declaration of Human Rights](#) and guaranteed under the [International Covenant on Civil and Political Rights](#) and the [International Covenant on Economic, Social and Cultural Rights](#) and other core human rights treaties apply to all migrant workers. Part II of ICRMW underscores the application of the non-discrimination principle to all migrant workers, who are entitled to the rights in ICRMW “without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status” (Article 7). The rights applicable to all migrant workers and members of their families, including those in an irregular situation, are enumerated in Part III (Articles 8 to 35) and include the freedom to leave and enter any state, including the state of origin (Article 8); the right to liberty and security of person, and to protection against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions (Article 16); the right to equality with nationals of the state concerned before courts and tribunals (Article 18); the prohibition of collective expulsion and safeguards in the expulsion process (Article 22); the right to recognition everywhere as a person before the law (Article 24); and the right to information (Article 33). Fundamental social rights as regards equal treatment

with nationals in respect of remuneration and other conditions of work and terms of employment (Article 25), social security (Article 27), access to medical care (Article 28) and education (Article 30) are also protected.

Part IV of ICRMW enumerates the more specific rights of migrant workers and family members who are in a documented or regular situation, such as those addressing family reunification (Article 44) and access to the labour market (Articles 52 and 53). Part V contains a number of provisions dealing with particular categories of migrant workers, such as frontier workers, seasonal workers, project-tied workers and the self-employed.

Part VI promotes sound, equitable, humane and lawful conditions in connection with the international migration of migrant workers and members of their families, and sets out principles for intergovernmental consultation and cooperation on the regulation of labour migration.

As of 12 August 2015, 87 countries and territories – two-thirds of the some 130 countries and territories for which international migration is an important feature – are bound by at least one of these three complementary conventions. While ICRMW has not yet been ratified by any single high-income country, 11 EU Member States (among them most of the larger migrant destination countries), Israel, Norway and New Zealand have ratified one or both of the ILO conventions on migrant workers. A number of newly industrialized countries, such as Brazil, China (Hong Kong Special Administrative Region) and Malaysia (Sabah) are also bound by Convention No. 97. One reason provided for non-ratification of ICRMW by high-income countries is that the distinction between the economic and social rights afforded to migrant workers and members of their families in an irregular situation and regular migrants is insufficiently clear ([EU Council Conclusions on the 2013 UN High-Level Dialogue on Migration and Development and on broadening the development-migration nexus](#), para. 13). However, as observed below and in Chapter 3, human rights apply to all persons, irrespective of their nationality and migration status, and any differences in treatment between nationals and non-nationals (including those in irregular status), or between different groups of non-nationals, need to serve a legitimate objective, and any action taken to achieve that objective must itself be proportionate and reasonable ([The economic, social and cultural rights of migrants in an irregular situation](#), United Nations, 2014, p. 24).

## **Box 2.9 Ratifications of ILO Conventions Nos. 97 and 143 and the UN migrant workers convention**

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

***Africa:*** Algeria, Burkina Faso, Cameroon, Kenya, Madagascar, Malawi, Mauritius, Nigeria, United Republic of Tanzania (Zanzibar), Zambia

***Americas and Caribbean:*** Bahamas, Barbados, Belize, Brazil, Cuba, Dominica, Ecuador, Grenada, Guatemala, Guyana, Jamaica, Saint Lucia, Trinidad and Tobago, Uruguay, Venezuela

**Asia and Pacific:** Hong Kong (Special Administrative Region, China), Kyrgyzstan, Malaysia (Sabah), New Zealand, Philippines, Tajikistan

**Europe:** Albania, Armenia, Belgium, Bosnia and Herzegovina, Cyprus, France, Germany, Italy, Montenegro, Netherlands, Norway, Portugal, Republic of Moldova, Serbia, Slovenia, Spain, the former Yugoslav Republic of Macedonia, United Kingdom

**Middle East:** Israel

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

**Africa:** Benin, Burkina Faso, Cameroon, Guinea, Kenya, Togo, Uganda

**Americas and Caribbean:** Venezuela

**Asia and Pacific:** Philippines, Tajikistan

**Europe:** Albania, Armenia, Bosnia and Herzegovina, Cyprus, Italy, Montenegro, Norway, Portugal, San Marino, Serbia, Slovenia, Sweden, the former Yugoslav Republic of Macedonia

**International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990**

**Africa:** Algeria, Burkina Faso, Cape Verde, Egypt, Ghana, Guinea, Lesotho, Libya, Madagascar, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Rwanda, Senegal, Seychelles, Uganda

**Americas and Caribbean:** Argentina, Belize, Bolivia, Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Paraguay, Peru, Saint Vincent and the Grenadines, Uruguay

**Asia and Pacific:** Bangladesh, Indonesia, Kyrgyzstan, Philippines, Sri Lanka, Tajikistan, Timor-Leste

**Europe:** Albania, Azerbaijan, Bosnia and Herzegovina, Turkey

**Middle East:** Syria

This convention has also been signed by 18 countries (as of 12 August 2015):

**Africa:** Benin, Cameroon, Chad, Comoros, Congo, Gabon, Guinea-Bissau, Liberia, Sao Tome and Principe, Sierra Leone, Togo

**Americas and Caribbean:** Haiti, Venezuela

**Asia and Pacific:** Cambodia, Palau

**Europe:** Armenia, Montenegro, Serbia

Collectively, these three conventions provide a broad and comprehensive framework covering most issues related to the treatment of migrants. These are not just instruments on the protection of rights; they contain provisions to encourage and guide



intergovernmental consultation, information sharing and cooperation on nearly all aspects of international migration.

### **Box 2.10 Ten reasons to ratify the international conventions on protection of migrant workers**

1. To put in place the essential legal foundation and framework for national policy to regulate labour migration, protect migrant workers and ensure social cohesion.
2. To obtain public support for labour migration policy and practice by demonstrating conformity with international human rights norms and labour standards.
3. To show that migrant origin and destination countries are accountable to the same basic rules for citizens, nationals abroad and foreigners on their territories.
4. To protect the rights and gains of national and migrant workers alike by ensuring a “level playing field” of equality of treatment and non-discrimination.
5. To ensure that standards relating to decent work are applied to all workers.
6. To discourage treating migrant workers as commodities by establishing their human and labour rights in national law.
7. To guarantee freedom of association and collective bargaining for all workers by ensuring that migrant workers’ rights are recognized and protected under law.
8. To enable states to benefit from the contribution of key actors in the world of work in devising labour migration policies and associating migrants themselves in their formulation, given that migrants are often represented by trade unions and that adoption and implementation of international instruments addressing the world of work involve social dialogue.
9. To reduce irregular migration and trafficking in persons by eliminating incentives for labour exploitation, abusive working conditions and unauthorized employment.
10. To obtain guidance for national policy and for international cooperation on migration through periodic review by the ILO and UN human rights supervisory systems, and their advisory services.

Adapted from [Guide on Ratification: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), International Steering Committee for the Campaign for Ratification of the Migrants Rights Convention, April 2009.

## 2.3 Supervision of international human rights norms and labour standards

Ratification of international human rights instruments and international labour standards is insufficient in itself to guarantee their effective application at the national level. This question is considered in a little more detail in Chapter 5, but it is important to underline that the international human rights and labour standards systems both have a formal review process to assist States Parties in effectively implementing their commitments. In both cases, governments are expected to submit regular reports on the national measures they have taken to implement the conventions to which they are party and difficulties they may have encountered. These reports are reviewed by independent committees of experts. The general purposes of both systems are to encourage application of the standards, ensure their consistent interpretation internationally and identify areas where states may experience difficulties or have gaps in implementation. For this last purpose international advisory services and technical cooperation can be obtained to support appropriate implementation of these conventions.

There are some differences, however, between the two systems, as described below.

### 2.3.1 United Nations treaty bodies

In the UN international human rights system, implementation of each of the core human rights treaties is monitored by a “treaty body”, made up of experts elected from among the States Parties. Treaty implementation rests with States Parties, which accept the obligation to report regularly on the treaties. The treaty bodies review these reports and provide recommendations on state implementation, known as concluding observations. The treaty bodies also provide guidance to states on the interpretation of specific treaty provisions by issuing general comments/recommendations. They may also hear individual or inter-state complaints, where provided for under the treaties and accepted by the State Party concerned. As already indicated above, most of the core UN human rights treaties apply to migrant workers and members of their families, and the treaty bodies regularly raise concerns about migrant workers that fall within those treaty frameworks.

#### **Box 2.11 Examples of general comments and recommendations of relevance to migrants adopted by UN treaty bodies**

In its **General Comment No. 15 (1986) on *The position of aliens under the Covenant on Civil and Political Rights***, adopted in April 1986, the Human Rights Committee made it clear that there shall be no discrimination between “aliens” and citizens in the application of human rights guaranteed by the Covenant.

In its **General Comment No. 30 (2004) on *Discrimination against non-citizens***, adopted in August 2004, the Committee on the Elimination of Racial Discrimination (CERD) recommended that States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopt measures to “[e]nsure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens”. Moreover, it recommended inter alia that states should adopt measures to ensure “that public educational institutions are open to non-citizens and children of undocumented migrants residing in the territory of the State party”; to “eliminate discrimination against non-citizens in relation to working conditions and work requirements”; and “to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault”. The Committee clarified also that “all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated”.

In its **General Recommendation No. 26 (2008) on *Women migrant workers***, adopted in December 2008, the Committee on the Elimination of Discrimination against Women affirmed that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) applies to all women, including migrant women, and that the latter should not be discriminated against in any sphere of their lives.

In its **General Comment No. 20 (2009) on *Non-discrimination in economic, social and cultural rights (art. 2, para. 2)***, adopted in June 2009, the Committee on Economic, Social and Cultural Rights confirmed that the term “other status” in the non-discrimination provision, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, encompasses additional prohibited grounds of discrimination, including that of nationality, with the result that the rights in the Covenant “apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation” (para. 30).

[Human Rights Treaty Bodies – General Comments](#), United Nations.

Under Article 72, ICRMW application is monitored by the [Committee on the Protection of the Rights of all Migrant Workers and Members of their Families](#), known more commonly as the Committee on Migrant Workers. The Committee consists of 14 independent experts who serve in their personal capacity. States Parties are obliged to submit an initial report within one year following ICRMW’s entry into force for the State Party concerned and to report thereafter every five years on the steps they have taken to implement it. They should also indicate the difficulties encountered in implementing ICRMW and provide information on migration data, such as migration flows and the number of migrant workers in the country. The challenges in collecting such data were considered in a [day of general discussion on the role of migration statistics for treaty reporting and migration policies](#), which the Committee organized

in April 2013. After examining the reports, the Committee adopts concluding observations, which are transmitted to the State Party concerned. The Committee has also started to issue general comments, the first of which was adopted at its 13th Session in December 2010, concerning migrant domestic workers, providing guidance on ICRMW's application to this group of migrant workers, who are particularly vulnerable to abuse and exploitation. A second general comment on the rights of migrant workers in an irregular situation and members of their families was adopted by the Committee at its 18th Session, in April 2013. The Committee's concluding observations to States Parties, the general comments as well as the initial and periodic reports of States Parties, are available from: <http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx>.

Once 10 States Parties have accepted the procedure, in accordance with Article 77, the Committee will also be able to consider [individual complaints](#) or communications from individuals claiming that their rights under the ICRMW have been violated. As of 12 August 2015, three States Parties (El Salvador, Mexico and Uruguay) had accepted it.

### 2.3.2 United Nations Charter-based system of human rights protection

The UN Charter-based system of human rights protection includes the following principal mechanisms, which have undergone revision since the establishment of the new Human Rights Council to replace the Commission on Human Rights in 2006:

- The possibility of bringing complaints under the confidential [5/1 procedure](#) "to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances" (Human Rights Council (HRC) Res. 5/1 of 18 June 2007 – formerly the 1503 procedure under ECOSOC Res. 1503 (XLVIII) (1970));
- [Special Procedures of the Human Rights Council](#), designating a rapporteur, working group or Special Representative of the UN Secretary-General to consider violations of human rights relating to a specific country situation or thematic issue in all parts of the world; and
- [Universal periodic review \(UPR\)](#), a state-driven process under the auspices of the Human Rights Council, which ensures that the human rights obligations of all 193 UN Member States are subject to scrutiny.

These UN Charter-based mechanisms are important for migrants because they are applicable to all UN Member States, whether or not they have ratified any of the international human rights treaties, including any specific instrument protecting migrants. The last two mechanisms are particularly relevant to ensuring that the rights of all migrants are adequately protected.

## Box 2.12 Parliamentarians' engagement with United Nations human rights mechanisms

Parliamentarians are ideally placed to bring international human rights standards to the national and community level and thus help ensure that they have real impact on the ground.

Parliaments and their members can play a key role in the UN Human Rights Council's UPR and the work of the UN human rights treaty bodies, including the Committee on Migrant Workers, which oversee the implementation of the core UN human rights treaties.

A feature common to UPR and the UN human rights treaty bodies is the regular review, every four or five years, of individual states' human rights situation and the adoption of concrete recommendations for action to enhance respect for human rights at the national level.

IPU has placed strong emphasis on enhanced parliamentary involvement in those international human rights procedures, in particular UPR. Regional seminars on fostering the contribution of parliaments to UPR have been organized by IPU and its partners since 2014, and the importance of the parliamentary contribution was affirmed in a unanimously adopted Human Rights Council resolution in June 2014 (A/HRC/RES/26/29). Among the outcomes of the seminars and the 2014 resolution was the recommendation that members of parliament can contribute to UPR process by participating:

- in the preparation of their respective state's national report to the Human Rights Council;
- as part of the state delegation presenting the national report to the Human Rights Council; and
- in the consideration, follow-up and implementation of recommendations from the international community during the review.

Given the similarity between the reporting procedures of UPR and the UN human rights treaty bodies, these recommendations for enhanced parliamentary involvement are also applicable to the work of the treaty bodies.

As of 1 June 2015, there were 41 thematic mandates and 14 country mandates under the Special Procedures of the Human Rights Council. One very relevant thematic mandate is that of the [UN Special Rapporteur on the human rights of migrants](#), which was established in 1999 by the former UN Commission on Human Rights and has been extended on five occasions. Professor François Crépeau (Canada) is the current incumbent. The Special Rapporteur's main functions include examining ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants; requesting and receiving information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families; formulating appropriate recommendations to prevent and remedy violations of the human rights of migrants, wherever they may occur; and promoting

the effective application of relevant international norms and standards on the issue. The Special Rapporteur is also required to take into account a gender perspective when requesting and analysing information, and to give special attention to the occurrence of multiple discrimination and violence against migrant women. The Special Rapporteur presents regular reports, including on country visits, to the Human Rights Council and to the General Assembly.

### **Box 2.13 Engaging with the United Nations Special Rapporteur on the human rights of migrants**

Since 2000, the Special Rapporteur on the human rights of migrants has engaged with parliamentarians from a number of states while on fact-finding country visits, including to Albania, Canada, Ecuador, Guatemala, Italy, Mexico, Peru, the Philippines, Romania, Senegal and South Africa.

The Special Rapporteur's visits may also help stimulate action, including at the parliamentary level. During the 2001 visit to Ecuador, the authorities informed the Special Rapporteur that accession to the [International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families](#) had been approved by the Congressional Commission on International Affairs and National Defence. By the time the Rapporteur's report was published in February 2002, Congress had ratified the Convention. The Ecuadorian Migration Act was also amended by Congress, in 2004, pursuant to the Special Rapporteur's recommendation that the Act be in compliance with the Convention.

The human rights of migrants are not only the subject of Professor Crépeau's mandate but have also been considered under the thematic mandates of other special rapporteurs and working groups, such as the [Special Rapporteur on trafficking in persons, especially in women and children](#), the [Special Rapporteur on violence against women, its causes and consequences](#) and the [Special Rapporteur on contemporary forms of slavery, its causes and its consequences](#). The work of the [Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance](#) is particularly important since "migrants" are one of the groups to which the Special Rapporteur has to give particular attention when investigating incidents of contemporary forms of racism and racial discrimination. Moreover, the work of the [Working Group on Arbitrary Detention](#) has also drawn attention to the growing number of state detention practices in respect of migrants around the world.

With the examination of all UN Member States within its first cycle (2006 – 2011) now completed, UPR has proved to be a useful mechanism in drawing attention to the human rights obligations of states towards certain groups of persons at risk, including migrants. Frequent recommendations submitted to Member States by their peers include ratification of international human rights instruments, including ICRMW.

### 2.3.3 International Labour Organization supervisory procedures

ILO requires countries that have ratified fundamental and priority/governance conventions to submit reports at intervals of three years and every five years for technical conventions. Reports may be requested at shorter intervals. Employers' and workers' organizations have the right to comment on the government's reports and submit communications on the application of conventions directly to ILO. These are examined by the [Committee of Experts on the Application of Conventions and Recommendations \(CEACR\)](#), which meets once a year to examine reports on all ILO conventions. The members of CEACR are outstanding legal experts at the international and national level appointed by the Governing Body upon the proposal of the ILO Director-General. Appointments are made in a personal capacity from among impartial persons of competence and independent standing from different geographic regions, legal systems and cultures. CEACR makes two kinds of comments. **Observations** concern fundamental questions raised by the application of a particular convention by a state, and are published in CEACR's annual report submitted to the International Labour Conference. **Direct requests** relate to more technical questions or requests for further information. They are not published in the report but are publicly available on the ILO website ([NORMLEX – Information System on International Labour Standards](#)), and directly communicated to the governments concerned. The Conference Committee on the Application of Standards – a standing committee of the International Labour Conference composed of government, employer and worker delegates – examines the report of CEACR and selects from it a number of observations for discussion.

The [ILO Constitution](#) also provides for two kinds of complaints to be filed alleging violation of ratified conventions. **Representations** (governed by Articles 24 and 25) may be filed by employers' and workers' organizations against any member state for non-observance of a particular convention that state has ratified, and are examined by a three-member tripartite committee of the Governing Body. **Complaints** (governed by Articles 26 to 34) may be filed against a Member State for not complying with a ratified convention by another Member State which has ratified the same convention, delegates to the International Labour Conference, or by the Governing Body in its own capacity. The Governing Body may form a commission of inquiry which is responsible for carrying out a full investigation of the complaint, visiting the country concerned, holding hearings, making recommendations and filing its report.

In 1951, soon after adopting its two fundamental conventions addressing trade union rights (Conventions Nos. 87 and 98), ILO established the [Committee on Freedom of Association \(CFA\)](#) – which is an ILO Governing Body committee composed of an independent chairperson and three representatives each of governments, employers and workers – for the purpose of examining complaints about violations of freedom of association, irrespective of whether the country concerned had ratified the relevant conventions. Complaints may be brought to the CFA against an ILO Member State by employers' and workers' organizations.

A fuller account of ILO's supervisory system is provided in the ILO publication [Rules of the game: A brief introduction to international labour standards](#) (revised edition, 2014), and, as noted above, ILO supervisory material is available from ILO's website in [NORMLEX – Information System on International Labour Standards](#).

## 2.4 Regional instruments relating to migration governance and protection of the rights of migrants

In addition to the international instruments adopted under the auspices of the UN and ILO, the protection of human rights is the subject of a number of regional treaties, namely the [American Convention on Human Rights \(ACHR\)](#), 1969, the [African Charter on Human and Peoples' Rights](#), 1981, the League of Arab States [Charter on Human Rights](#), 2004, and the [European Convention for the Protection of Human Rights and Fundamental Freedoms](#), 1950, as well as their related Protocols. In principle, as with international human rights and labour standards, these regional treaties are generally applicable to all human beings regardless of nationality or immigration status, and thus are also relevant for the protection of migrants.

There are also a number of specific regional and sub-regional instruments, adopted in the form of legally binding agreements or non-binding declarations, or expressing regional policy with regard to migration. Information on the most important of these specific instruments is provided below.

**Europe:** Two specific instruments relating to the protection of migrant workers have been adopted under the auspices of the [Council of Europe](#), which comprises [47 Member States](#). The [European Social Charter](#), adopted in 1961 and [revised](#) in 1996, contains Article 18 on *"the right to engage in a gainful occupation in the territory of other Contracting Parties"* and Article 19 on *"The right of migrant workers and their families to protection and assistance"*, which applies to migrant workers lawfully within the countries concerned. A number of other provisions in the Charter, concerning the provision of medical assistance, social security and the protection of young persons, are also of particular relevance to migrants. The [European Convention on the Legal Status of Migrant Workers](#), adopted in 1977, is based on the premise that *"the legal status of migrant workers who are nationals of Council of Europe Member States should be regulated so as to ensure that as far as possible they are treated no less favourably than workers who are nationals of the receiving State in all aspects of living and working conditions"* (Preamble). A number of non-binding measures have also been adopted under the auspices of the Council of Europe, including by the [Parliamentary Assembly](#), which is an organ comprising parliamentarians from Member States that has a [Committee on Migration, Refugees and Displaced Persons](#). One of the priority areas of the Committee's work is "strengthening the protection of rights of migrants, refugees, asylum seekers, and displaced persons". The Parliamentary Assembly has adopted a number of measures on the human rights of migrants, most notably [Resolution 1509 \(2006\) on the human rights of irregular migrants](#), which enumerates a minimum set of human rights applicable to this group of migrants. The Council of Europe also hosts a [Commissioner for Human Rights](#). The [human rights of immigrants, refugees and asylum-seekers](#) form an important part of the Commissioner's work and the current incumbent, Mr Nils Muižnieks, has made a number of pronouncements/issue papers on various aspects of migration and human rights, including on the [criminalization of migration in Europe in February 2010](#) and on [the right to leave a country](#) in October 2013.



**Africa:** The African Union (AU) at the level of the Heads of State Executive Council adopted a broad strategic [Migration Policy Framework for Africa](#) in 2006. An entire chapter of this document provides guidelines for the adoption of conventions and specific measures to protect the human rights of migrants across the continent, and the first chapter is devoted to labour migration. The Framework urges a comprehensive approach to regulatory and administrative measures to ensure safe, orderly and productive migration. The [2013 Youth and Women Employment Pact for Africa](#) includes promotion of regional and sub-regional labour mobility and calls for an AU and Regional Economic Communities Labour Migration Plan. In response, the AU Commission, together with ILO, IOM and the UN Economic Commission for Africa (UNECA), have developed a regional programme on [Labour Migration Governance for Development and Integration in Africa](#).

**South America:** The Andean Labour Migration Instrument was adopted in 2003 to promote the orderly flow of migration among the Member States of the Andean Community (see Section 2.5). It includes provisions recognizing the rights of migrants and establishing flexible mechanisms for recognition of documents and labour force participation by nationals of one Member State in another Member State.

**Southeast Asia:** The [Association of Southeast Asian Nations](#) (ASEAN) adopted a non-binding [Declaration on the Protection and Promotion of the Rights of Migrant Workers](#) in January 2007. This Declaration lays out general principles, the obligations of destination and origin countries, and a number of commitments by ASEAN, including a commitment in paragraph 22 “to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers”. However, there is no explicit reference in the Declaration to the non-discrimination and equality of treatment principle or to the protection of migrants in irregular status. In July 2007, the [ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers](#) (see Annex I) was established to oversee implementation of the Declaration, including fulfilment of the commitment to develop an ASEAN instrument.

**Eastern Europe and Central Asia:** The Commonwealth of Independent States (CIS), which comprises the republics of the former Soviet Union, adopted in April 1994 an [Agreement on Cooperation in the Field of Labour Migration and Social Protection of Migrant Workers](#), subsequently signed by all CIS member countries.

## 2.5 Regional economic integration communities

The rights of migrants are also the concern of regional economic integration communities, such as [ASEAN](#) (see above), the [Andean Community](#) (see above), the [Caribbean Community \(CARICOM\)](#), the [Central African Economic and Monetary Community \(CEMAC\)](#), the [East African Community \(EAC\)](#), the [Common Market for Eastern and Southern Africa \(COMESA\)](#), the [Economic Community of West African States \(ECOWAS\)](#), the [Southern African Development Community \(SADC\)](#) and the [South American Common Market \(MERCOSUR\)](#), which all have regional agreements on the movement of people that include provisions to enhance the legal recognition

and protection of Member State nationals in other member countries. These provisions usually include mechanisms to facilitate documentation for migrants and visa-free movement across borders, and to regulate their access to labour markets. The most advanced of these regional integration systems is the [EU](#), comprising 28 Member States, 25 of which have established full free movement rights. The remaining restrictions on access to the labour market for Bulgarian and Romanian nationals were removed as of 1 January 2015, although restrictions remain in place in some Member States for nationals of Croatia which acceded to the EU on 1 July 2013. The EU is also developing a common legal and policy framework on migration from third countries and has adopted a number of measures in such areas as visa and border policy; labour migration, research and studies; sanctions on employers who hire migrants in an irregular situation; and return and readmission. All of these measures contain important rights for migrants.

### **Box 2.14 EU law and policy on migration from third countries**

The EU gained more extensive competence over migration from third countries in May 1999, when the Treaty of Amsterdam came into force and transferred asylum and immigration matters – which were formerly the subjects of intergovernmental cooperation – to the then first (Community) pillar giving the EU Council of Ministers the mandate to adopt legally binding measures in a specified number of areas. However, not all EU Member States are fully engaged in this endeavour – Denmark, Ireland and the United Kingdom secured “opt-outs” when the Treaty of Amsterdam entered into force. Moreover, as laid down in the [Treaty on the Functioning of the European Union](#), the EU does not have the competence to determine admission volumes for third-country nationals to the territory of Member States for the purpose of seeking employment or self-employment. It has only limited competence in respect of their integration, with the possibility of establishing incentives and providing support for Member State actions to promote the integration of lawfully resident third-country nationals. Since 1999, the role of European parliamentarians in adopting measures in this field has increased incrementally, and the ordinary EU decision-making procedure – where the European Parliament has a “co-decision function” with the Council of Ministers – has now been extended to matters of asylum and migration.

To date, the substantive measures adopted have focused on steps towards the creation of a common European asylum system, border and visa policy, prevention of irregular migration, readmission and return, and trafficking in persons. None of the adopted or proposed measures is devoted solely to the matter of protecting the rights of third-country national migrant workers in an irregular situation. The regulations establishing EU border and visa codes, however, contain anti-discrimination provisions, and some safeguards in the expulsion/return process, including the detention phase, are provided for in the “Returns” Directive. Migrant workers in an irregular situation may also bring complaints against employers for outstanding unpaid wages, with the assistance of trade unions or other associations, under the Employer Sanctions Directive.

Formulation of coherent and robust EU rules on legal or labour migration from outside the EU has been less successful given resistance from some Member States, exacerbated by the global financial crisis and subsequent economic downturn. In 2001, the European Commission proposed a directive containing rules on the conditions governing the lawful entry and residence of third-country nationals for the purpose of employment (i.e. by way of a “horizontal” approach applicable to most forms of labour migration). In essence, this approach mirrored that taken by the specific international instruments protecting migrant workers, discussed earlier in this chapter. However, the text of the 2001 draft directive did not meet with any consensus in the Council of Ministers. The European Commission, after consultation with Member States and a number of other stakeholders, replaced that version with a “sectoral” approach, as outlined in the 2005 *Policy plan on legal migration*, focusing on the conditions of entry and residence for specific categories of migrant workers. It has taken almost ten years to agree on these measures demonstrating that this is a sensitive and contentious area of EU policymaking. They consist of the following: a “Blue Card” directive, on the admission and residence of highly qualified third-country nationals; a “Single Permit” directive, providing for a single permit for work and residence and safeguarding a minimum level of rights for less qualified or lower-skilled third-country nationals; and directives on the conditions of entry and stay of third-country national seasonal workers and intra-corporate transferees. The texts also provide some lower levels of protection for different groups of third-country national migrant workers, reflecting to a certain degree the approach taken at the national level in many EU Member States. In such areas as access to employment and social security, fragmentation of the equal treatment principle between EU and third-country nationals – and between different categories of third-country nationals – is a concern in the light of international human rights and labour standards, which provide a greater degree of protection for the fundamental right to non-discrimination and equality of treatment.

**Key EU migration measures and proposals (in chronological order) with reference to the text above:**

- [Proposal for a directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities](#), European Commission, COM(2001) 386, 11 July 2001.
- [Policy Plan on Legal Migration](#), European Commission, COM(2005) 669, 21 December 2005.
- [Regulation \(EC\) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders \(Schengen Borders Code\)](#), OJ 2006 L 105/1.
- [Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals](#), OJ 2008 L 348/98.

- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009 L 155/17.
- Directive 2009/52/EC of the European Parliament and the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ 2009 L 168/24.
- Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ 2009 L 243/1.
- Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ 2010 C 83/1, Title V – Area of Freedom, Security and Justice, Chapter II – Policies on Border Checks, Asylum and Immigration.
- Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343/1.
- Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ 2014 L 94/375.
- Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ 2014 L 157/1.

## 2.6 Bilateral agreements

In addition to readmission agreements, which deal with the return of rejected asylum-seekers or migrants in irregular situations to their country of origin or to a third country through which they have transited, numerous bilateral agreements regulate migration between countries of origin and destination in all parts of the world. Many of these set the conditions and procedures for recruitment, admission, employment and residence, and return, for example in the case of bilateral labour migration agreements. Other bilateral agreements focus on specific protection issues, such as the portability of social security benefits.

## Box 2.15 Bilateral labour migration agreements

A “bilateral labour migration agreement” is an umbrella term referring to a variety of arrangements that facilitate labour mobility between two countries, often temporarily and into specific employment sectors. These arrangements may be found in a legally binding treaty or in a less formal memorandum of understanding (MoU) or other forms of cooperation between administrations in the countries concerned. Examples of formal instruments include the bilateral labour migration agreements concluded by Spain with Colombia, Ecuador and the Dominican Republic, or the agreement on circular migration between France and Mauritius. Examples of MoUs include those concluded by Canada with Mexico and the Caribbean States facilitating the movement of workers into the [Canadian Seasonal Agricultural Worker Program \(SAWP\)](#). There are also MoUs between the Gulf States and South and Southeast Asian countries, as well as a number of Asian countries and the Republic of Korea under the [Employment Permit System \(EPS\)](#).

A comprehensive bilateral labour migration agreement would normally contain provisions encompassing the following elements:

- Identification of the competent government authority
- Exchange of information
- Notification of job opportunities
- Pre-selection and final selection of candidates
- Medical examination
- Entry visas
- Residence and work permits
- Transportation and conditions of transport (both outgoing and return)
- Equality of treatment and non-discrimination
- Contracts of employment
- Terms of employment, including possibilities to change employment
- Working conditions, including occupational safety and health
- Trade union rights
- Social security\*
- Taxation, including measures addressing double taxation\*
- Accommodation
- Family reunification
- Education and vocational training
- Activities of social and religious associations

- Supervision of living and working conditions, including through labour inspection
- Remittances
- Dispute settlement procedures
- Return and reintegration
- Cooperation, usually through establishment of a joint commission/committee to
  - monitor the implementation of the agreement, including resolution of disputes between the parties;
  - propose amendments; and
  - discuss follow-up
- The applicable law and place of jurisdiction

\* In practice, however, most bilateral agreements do not regulate all of these areas, and some elements, such as social security and taxation, are subject to separate arrangements.

Many of these elements are found in the Model Agreement on Temporary and Permanent Migration for Employment, which is annexed to the [ILO Migration for Employment Recommendation \(Revised\), 1949 \(No. 86\)](#) and which, as noted earlier, has been used by a number of ILO Member States as a blueprint for concluding their own bilateral labour migration agreements.

#### Sources:

- [Migration for Employment Recommendation \(Revised\), 1949 \(No. 86\)](#), Annex: Model agreement on temporary and permanent migration for employment, including migration of refugees and displaced persons, ILO.
- “[Something is better than nothing: Enhancing the protection of Indian migrant workers through bilateral agreements and memoranda of understanding](#)”, P. Wickramasekara, Migrant Forum in Asia, February 2012, p. 45.
- [Acuerdos bilaterales de migración de mano de obra: Modo de empleo](#), International Migration Paper No. 65, Geneva, E. Geronimi, International Labour Office, 2004, pp. 23 – 26.

### **Box 2.16 Parliament influences the standards for a Philippines – Saudi Arabia bilateral agreement**

In September 2013, the Philippines and Saudi Arabia announced a bilateral agreement aimed at strengthening protection of the rights of Filipino migrant domestic workers in Saudi Arabia, including complaint mechanisms, salary regulations and a 24-hour helpline for migrant workers. The standards set out in the agreement were inspired by the [Filipino Republic Act No.10022](#), an omnibus bill entailing an array of legislative proposals that originated in the Senate and was signed into law by the President in March 2010. Replacing the 1995 Migrant Workers Act, the 2010 Act mandated increased adoption of bilateral agreements regarding overseas workers and strengthened support mechanisms to assist overseas workers in distress, including support for judicial recourse and complaints.

## Checklist for parliamentarians

### How can parliamentarians contribute to improved governance of migration in accordance with international law?

- ☑ International law, including the principle of the rule of law, international human rights law and international labour standards, should guide the governance of migration at the national level.
- ☑ Parliamentarians can **improve a state's compliance with international law** by approving proposals to ratify international treaties and conventions or by initiating their ratification. Further actions in this regard could include:
  - Asking oral or written questions to the government in parliament to determine its intention to ratify a treaty or the reasons for any government inaction.
  - Encouraging parliamentary debate and mobilizing public opinion.
- ☑ International law instruments pertaining to migration consist of **legally binding conventions and non-binding instruments** (which can also be binding if they represent customary international law). National law, policy and practice governing migration and the protection of migrants should mainly be based on two branches of international law:
  - **International human rights law.** Migrants are human beings and thus holders of human rights as outlined in the core UN human rights treaties. States have to **accord human rights to everyone present on their territory** and thus falling under their jurisdiction. Apart from the exceptions of the right to vote and to stand for political office and the right of entry to another state, migrants enjoy the same human rights as nationals. While **regulating admission of non-nationals to the territory constitutes a sovereign prerogative of states**, the principle of *non-refoulement*, due process, the prohibition of collective expulsions, and the prohibition of discrimination have to be respected when regulating admission.
  - **International labour law/standards.** International labour standards are adopted by ILO's International Labour Conference. Since 1919, ILO has a constitutional mandate to protect migrant workers. Specific standards for their protection and on labour migration governance have also been adopted (Conventions Nos. 97 and 143 and accompanying Recommendations Nos. 86 and 151). All international labour standards, unless otherwise stated, apply to migrant workers. The 1998 ILO **Declaration on Fundamental Principles and Rights at Work** identifies eight fundamental rights conventions covering important human rights. In 2006, the **ILO Multilateral Framework on Labour Migration**, containing non-binding principles and guidelines supported by a compendium of best practices, was approved for wide dissemination by ILO's Governing Body.
- ☑ Parliamentarians should ensure that the rule of law applies to migrants in the implementation of international human rights and international labour standards.

Priority consideration should also be given to ratification of the following three conventions on the protection of migrant workers (if not already ratified):

- The **UN Migrant Workers Convention**, Part III, spells out the fundamental rights that apply to all migrant workers and their families, including those in an irregular situation. At the same time, the Convention also stipulates that regulating admission of non-nationals remains a prerogative of the state (Article 79).
- **ILO Convention No. 97** contains regulatory provisions and safeguards for migrant workers in a regular situation. In particular, Article 6 provides for **equal treatment** of lawfully resident migrant workers, vis-à-vis nationals, in a number of important areas. **ILO Recommendation No. 86** provides further guidance, and its annex contains a model bilateral labour migration agreement.
- **ILO Convention No. 143** was drafted at a time of growing attention to the abuses connected with irregular migration. Part I deals with migrations in abusive conditions and lays down a set of rights applicable to all migrant workers, including those in an irregular situation. Part II requires States Parties to adopt a national policy on equality of opportunity and treatment for migrant workers in a regular situation, thus facilitating their integration in the destination country. **ILO Recommendation No. 151** gives further guidance on equality of opportunity and treatment, social policy, employment and residence for migrant workers.

- Parliamentarians should also draw attention to the observations made by the **UN human rights treaty bodies, the mechanisms of the UN Charter-based system of human rights protection and the ILO Committee of Experts on the Application of Conventions and Recommendations, as well as the other ILO supervisory mechanisms**. These bodies and mechanisms monitor the application by States Parties of international human rights and international labour standards. For example, the human rights treaty bodies have made it clear that the core human rights treaties apply to everyone, including non-nationals, without discrimination.
- Parliamentarians should also advocate the ratification and effective implementation of **regional and sub-regional instruments** pertaining to migration, including provisions relating to labour mobility in regional economic communities.





## Chapter 3

# Elimination of discrimination and equality of opportunity and treatment

Foreign domestic helpers, wearing masks to conceal their identities from their employers, demonstrate in Hong Kong to call for better employment protection and fairer wages. © AFP/ Andrew Ross, 2008

The right to freedom from discrimination and to equality of opportunity and treatment is the basis for the enjoyment of all other rights as well as a fundamental right in itself. It is identified as such in the United Nations Charter, UDHR and the ILO Constitution, and reiterated in all core international human rights instruments and labour standards.

### 3.1 General principles

The Preamble to the [Charter of the United Nations](#), signed on 26 June 1945, reaffirms “*faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small*”. Articles 1(3) and 55(c) recognize that one of the purposes of the United Nations is “*to achieve international*

*cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.*

The Preamble to the 1948 UDHR proclaims that all members of the human family are entitled to “equal and inalienable rights”, underscoring the importance of the equality principle as a foundation of freedom, justice and peace in the world. Earlier, the Declaration of Philadelphia concerning the Aims and Purposes of the ILO, which was adopted by the International Labour Conference in 1944 and incorporated as an annex into the revised ILO Constitution of 1946 (when ILO became the first specialized agency of the UN), espouses the equality principle in the context of the pursuit of material well-being and spiritual development:

*[A]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity (Part II(a)).*

This proclamation is of particular relevance to those persons who move away from home to seek a better life elsewhere, such as migrant workers.

In addition to the general reference to the non-discrimination and equality principle in the Preamble cited above, Article 2(1) of UDHR enumerates a number of prohibited grounds of discrimination:

*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The use of the terms “such as” and “other status” in this clause indicates that the list of prohibited grounds is not exhaustive and that other grounds, including nationality, citizenship or immigration status, may also be contemplated.

### **Box 3.1 Major sources of international law proscribing discrimination**

#### ***Elimination of discrimination generally***

[ILO Constitution, 1919 \(as amended by the Declaration of Philadelphia, 1944\)](#)

[Universal Declaration of Human Rights, 1948, Article 2](#)

[International Convention on the Elimination of All Forms of Racial Discrimination, 1965](#)

[International Covenant on Civil and Political Rights, 1966, Article 2\(1\) and Article 26](#)

[International Covenant on Economic, Social and Cultural Rights, 1966, Article 2\(2\)](#)

[International Convention on the Elimination of All Forms of Discrimination against Women, 1979](#)

Convention on the Rights of the Child, 1989, Article 2

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, Article 1(1) and Article 7

***In respect of employment and occupation***

ILO Constitution, 1919 (as amended)

ILO Equal Remuneration Convention, 1951 (No. 100)

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

For the texts of these instruments, see [ILO NORMLEX](#) and the [OHCHR web page on human rights instruments](#).

## 3.2 The principle of non-discrimination and equality in international human rights treaty law

Any doubts as to whether the principle of equality and non-discrimination applies to persons who are not citizens of a country have been dispelled by the treaty bodies in monitoring the implementation of the human rights treaties that states have adhered to since the adoption of UDHR and which contain similar non-discrimination and equality provisions.

### **Box 3.2 Human rights treaty bodies and the application of the principle of non-discrimination and equality to migrants**

In considering Article 2 of the 1966 UN International Covenant on Civil and Political Rights (ICCPR), the [Human Rights Committee](#) has clarified that ICCPR applies to non-citizens on equal terms with nationals:

*In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.*

*Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in Article 2 thereof. This guarantee applies to aliens and citizens alike [...]*

[General Comment No. 15 \(1986\): The position of aliens under the Covenant](#), paras. 1 and 2.

Similarly, the [Committee on Economic, Social and Cultural Rights](#) has confirmed that Article 2(2), the non-discrimination provision in the International Covenant on Economic, Social and Cultural Rights (ICESCR), prohibits unjustified distinctions based on nationality and immigration status.

*The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.*

[General Comment No. 20 \(2009\): Non-discrimination in economic, social and cultural rights \(art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights\)](#), para. 30.

In that same General Comment (para. 7) the Committee stated that, in contrast to other rights enshrined in the Covenant, the non-discrimination principle is not subject to progressive implementation according to Article 2(1), but represents an immediate obligation (together with that of enforcing the core content of the rights enshrined in ICESCR).

With respect to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the [Committee on the Elimination of Racial Discrimination](#) (CERD) revised its recommendation on discrimination against non-citizens taking the opportunity to highlight the specific discrimination issues faced by non-citizens. In [General Recommendation No. 30 \(2004\) on discrimination against non-citizens \(UN doc. CERD/G/GC/30\)](#), CERD addressed the meaning of Article 1(2) of ICERD, which appears at first glance to exclude distinctions made in respect of non-citizens from the Convention's scope of application ("*This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens*"). CERD has underlined that Article 1(2) is to be interpreted as not undermining the basic prohibition of discrimination or detracting from rights and freedoms in international human rights law (para. 2). Moreover, CERD has observed that the state obligation in Article 5 of ICERD to guarantee a range of civil, political, economic, social and cultural rights to all persons without discrimination includes the obligation to guarantee equal treatment between citizens and non-citizens, with the exception of certain political rights, such as the right to vote and stand for election (para. 3). CERD has also issued the following definition of discrimination and confirmed its applicability to distinctions based on citizenship or immigration status:

*[D]ifferential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim (para. 4).*

The Human Rights Committee, in considering a number of individual communications, has also applied the substantive equality provision in ICCPR, Article 26, to non-nationals. For example, in Communication No. 196/1985, [Ibrahima Gueye et al. v. France](#) (UN doc. CCPR/C/35/D/196/1985, 12 October 1985), the Committee considered discrimination between nationals and non-nationals in respect of the application of pension rights. The Committee further underlined in its [General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#) (UN doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004) the *erga omnes* nature of the principle of non-discrimination, namely that the obligation is owed towards everyone, thus making clear that all states have a legal interest in upholding the principle (para. 2).

The application of the non-discrimination and equality principle to distinctions between citizens and non-citizens was confirmed by David Weissbrodt, the Special Rapporteur on the rights of non-citizens of the UN Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body to the former Commission of Human Rights. He concluded in his final report on [The rights of non-citizens](#) (UN doc. E/CN.4/Sub.2/2003/23, 26 May 2003): “*In general, international human rights law requires the equal treatment of citizens and non-citizens*” (para. 1). This position is elaborated in a [2013 report by the UN Special Rapporteur on the human rights of migrants](#) to the UN General Assembly:

*All migrants, without discrimination, are protected by international human rights law. There are very few and narrowly defined exceptions to this, namely the right to vote and be elected, and the right to enter and stay in a country. Even for those exceptions, procedural safeguards must be respected, as well as obligations related to non-refoulement, best interests of the child and family unity. All other rights extend to all migrants, whatever their administrative status. Any distinction must be proportionate, reasonable and serve a legitimate objective: the two human rights Covenants (ICCPR and ICESCR) explicitly refer to “national origin” as a prohibited ground of discrimination in the enjoyment of civil, political, economic, social and cultural rights.*

*Report of the Special Rapporteur on the human rights of migrants, UN General Assembly, 68th Session, UN doc. A/68/283 (5 August 2013), para. 28.*

Despite these clear references to the application of the principle of non-discrimination and equality between citizens and non-citizens in international human rights law, as noted in Chapter 2, the situation in practice remains very different. In his report, Weissbrodt observed that there is “*a disjuncture between the rights that international human rights law guarantees to non-citizens and the realities that non-citizens must face*” (para. 2). Indeed, the human rights – including labour rights – of migrants remain unfulfilled or precarious in many regions of the world, and migrants are frequently subject to many forms of exploitation. The existence of a gap between the principles found in international human rights law and their application in practice was echoed by the Global Commission on International Migration in its 2005 report, which called for the legal and normative framework affecting migrants to be strengthened, implemented more effectively and applied in a non-discriminatory manner.

### **Box 3.3 Global Commission on International Migration (GCIM)**

#### **A principled approach: Laws norms and human rights**

##### **Principle – Protecting the rights of migrants**

*The legal and normative framework affecting international migrants should be strengthened, implemented more effectively and applied in a non-discriminatory manner, so as to protect the human rights and labour standards that should be enjoyed by all migrant women and men. Respecting the provisions of this legal and normative framework, states and other stakeholders must address migration issues in a more consistent and coherent manner.*

[Migration in an interconnected world: New directions for action](#), GCIM, October 2005, Annex I – Principles for Action and Recommendations, p. 81.

### **Box 3.4 Protecting the right to migrate at the constitutional level: the case of Ecuador**

The human rights of migrants can also be explicitly promoted and protected at the constitutional level. One example is Ecuador, whose [2008 Constitution](#) stipulates equal rights for migrants regardless of country of origin or status. Article 40 explicitly affirms the right to migrate, stipulating that no human being is to be identified or considered as “illegal” because of his or her migratory status. It also provides guarantees to assist and protect Ecuadorians if their rights are violated in foreign states.

As underlined by CERD above, however, not every distinction in treatment constitutes discrimination. It is often said that discrimination is *unjustified* differential treatment.

*Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is **reasonable and objective**. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of **proportionality** between the aim sought to be realized and the measures or omissions and their effects.*

General Comment No. 20 (2009): Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN doc. E/C.12/GC/20 (2 July 2009), para. 13.

There are situations where differential treatment is merited or required, for instance when women, children or members of minorities need special protection because they are at greater risk of discrimination or abuse. Similarly, choices based on the differing qualifications of workers or job candidates are not considered to be prohibited discrimination. The overarching aim under international law is to *realize equality of opportunity and treatment*.

### 3.3 Non-discrimination and equality of opportunity and treatment at work

The ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) is one of two ILO fundamental conventions addressing non-discrimination and equality of opportunity and treatment at work. It has been widely accepted, having received 172 ratifications as of 12 August 2015. Article 1(1)(a) of Convention No. 111 defines discrimination as “*any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation*”. Article 2 requires States Parties “*to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation*”.

The purpose of Convention No. 111 is to protect all persons against discrimination in employment and occupation on the basis of the grounds specified, with the possibility of ILO Member States extending this protection to other grounds after consultation with representative employers’ and workers’ organizations and other appropriate bodies (Article 1(1)(b)). The Convention applies to all workers, both nationals and non-nationals, in all sectors of activity, both public and private, formal and informal. It applies to

wage-employment as well as self-employment and the right to establish one's own business. Under Article 1(3), *"the terms **employment** and **occupation** include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment"*. While Convention No. 111 does not identify "nationality" as a specific prohibited ground of discrimination, migrant workers do come within the ambit of its protection, through the application of grounds that are prohibited. And this has been confirmed by the ILO Committee of Experts on numerous occasions.

### **Box 3.5 Migrant workers and discrimination under ILO Convention No. 111**

776. In some countries persons belonging to racial and ethnic minorities mainly consist of foreign workers, immigrants or the descendants of immigrants. While Article 1(1)(a) of the Convention does not refer specifically to "nationality", both nationals and non-nationals should be protected from discrimination on the grounds covered by the Convention. Migrant workers are particularly vulnerable to prejudices and differences in treatment in the labour market on grounds such as race, colour and national extraction, often intersecting with other grounds such as gender and religion. **The intersection between migration and discrimination should be addressed in the context of the Convention. Governments should declare and pursue a national equality policy which covers all workers, including migrant workers, with a view to eliminating discrimination against them on all the grounds listed in the Convention.**

777. In some countries, constitutional guarantees on equality or non-discrimination are confined to citizens. **In the absence of any other relevant legislative provisions protecting non-nationals from discrimination in employment and occupation, concrete measures must be taken to protect these workers in practice against discrimination on the grounds enumerated in the Convention. In most instances, it is necessary to ensure that non-nationals are covered by non-discrimination and equality provisions in the labour or other relevant legislation.** The Committee has underlined the importance of effective legislative protection, and the promotion and enforcement of such legislation, to ensure that migrant workers are not subject to discrimination and abuse.

778. **The particular vulnerability to discrimination of migrant workers in an irregular situation, especially with respect to conditions of work, including wages, and issues relating to occupational safety and health, as well as workplace injuries, is a concern that needs to be addressed. The Committee recalls that under the Convention all migrant workers, including those in an irregular situation, must be protected from discrimination in employment on the basis of the grounds set out in Article 1(1)(a).**



779. **It should also be ensured that migration laws and policies and their implementation do not result in discrimination against migrant workers based on race, colour and national extraction. The Committee has noted particular difficulties in the application of the Convention with respect to certain laws and regulations governing the employment of foreign workers. These have included certain employment permit systems and sponsorship systems severely restricting the possibility of workers changing workplaces, employers or sponsors.** The Committee considers that where a system of employment of migrant workers places those workers in a particularly vulnerable position and provides employers with the opportunity to exert disproportionate power over them, this could result in discrimination based on the grounds of the Convention. It is essential that under systems of employment migrant workers enjoy the protection provided by the Convention, in law and practice. Especially in countries where migrant workers constitute a large proportion, and sometimes the majority of the working population, it is important to keep the specific legislation governing migrant workers, including sponsorship systems, under review. **The Committee considers that providing for appropriate flexibility for migrant workers to change their employer or their workplace assists in avoiding situations in which they become particularly vulnerable to discrimination and abuse.** Providing legal protection for migrant workers against discrimination and adequate and effective dispute resolution mechanisms are essential in this context. Fear of retaliation by the employer, including termination or non-renewal of their contract, should be addressed through effective labour inspection and the access of migrant workers to legal remedies, including accessible and speedy complaints procedures.

780. **Migrant domestic workers**, notably women, have been particularly affected by the lack of legal protection against discrimination on the grounds of the Convention and restrictive sponsorship systems. Some positive steps have been undertaken to address the situation of migrant domestic workers through training and information campaigns, steps to review sponsorship systems, the adoption of special regulations covering their conditions of work, model employment contracts and the strengthening of complaints mechanisms.

781. Difficulties in application of the Convention to migrant workers also exist in the context of legal employment restrictions for migrant workers in certain job categories, or when precedence is given to residents in respect of hiring and maintaining employment. **The practical application of the legislation should not lead to indirect discrimination against migrant workers on the grounds set out in the Convention with respect to hiring and job security.**

[Giving globalization a human face](#), general survey on the fundamental conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), International Labour Conference, 101st Session, 2012, Geneva, paras. 776 – 781 [footnotes omitted].

ILO Convention No. 111 was the first comprehensive international instrument dealing specifically with non-discrimination and equality in respect of employment and occupation. Other international instruments on discrimination are consistent with its approach, though additional prohibited grounds for discrimination have steadily been added. As underlined above, the enumeration of prohibited grounds in pertinent core human rights instruments is illustrative and not exhaustive.

Prohibition of discrimination based on nationality is also the *raison d'être* of the three specific conventions protecting migrant workers, ILO Conventions Nos. 97 and 143 and ICRMW. Moreover, the grounds listed in the non-discrimination clause of ICRMW (Article 7) are broader than those found in the other core human rights treaties and specifically include nationality. It should be noted that this provision is limited to the rights found in ICRMW and does not provide for an autonomous right.

### **Box 3.6 Non-discrimination and equality in the migrant workers conventions**

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

Article 6(1)

*Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory treatment no less favourable than that which it applies to its own nationals in respect of the following matters:*

- (a) *in so far as such matters are regulated by law or regulations or are subject to the control of administrative authorities—*
  - (i) *remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;*
  - (ii) *membership of trade unions and enjoyment of the benefits of collective bargaining;*
  - (iii) *accommodation;*
- (b) *social security [with some exceptions] [...]*
- (c) *employment taxes, dues or contributions payable in respect of the person employed; and*
- (d) *legal proceedings relating to the matters referred to in this Convention.*

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

Article 1

*Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.*

## Article 9(1)

*Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.*

## Article 10

*Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.*

Some of the measures to be taken to implement the national equality policy are set out in Article 12. Article 12(g) specifically provides for equality of treatment in respect of conditions of work.

Articles 14(a) and (c) allow for certain restrictions to the free choice of employment for a period not exceeding two years, or restrictions regarding access to limited categories of employment or functions when this is in the interests of the State.

## ***International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families***

### Article 1

*The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.*

### Article 7

*States Parties undertake, in accordance with the international instruments concerning human rights, to respect and ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status”.*

Part III of ICRMW lists the human rights of all migrant workers and members of their families, including those in an irregular situation, and many of these rights are afforded to all migrant workers on the basis of equality with nationals. For example, Article 25(1) stipulates that migrant workers “shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and [...] (a) Other conditions of work [...] [and] (b) Other terms of employment [...]”. Other rights afforded to all migrant workers on equal terms with nationals include the right to social security (Article 27) and education for children of migrant workers (Article 30). Part IV of ICRMW grants additional rights to migrant workers and members of their families who are documented or in a regular situation, many of which are afforded on a basis of equality of treatment with nationals.

With regard to access to employment, discrimination between migrant workers and nationals is also prohibited in principle. In its General Comment No. 18 on the right to work, the Committee on Economic, Social and Cultural Rights observes:

*The principle of non-discrimination as set out in Article 2.2 of the Covenant and in Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families.*

[General Comment No. 18 \(2005\): The right to work \(Article 6 of the International Covenant on Economic, Social and Cultural Rights\)](#), UN doc. E/C.12/GC/18 (24 November 2005), para. 18.

As noted above, ILO Convention No. 143 allows for some restrictions on free choice of employment for migrant workers in a regular situation, but these can only be retained for a maximum period of two years. Convention No. 111 also prohibits discrimination against migrant workers in respect of access to employment and occupation on grounds enumerated in the Convention.

Freedom from discrimination, at work and in life generally, is one of the principal human rights that must be respected for everyone, migrant workers and nationals alike, although, as noted above, not all differences in treatment will necessarily amount to discrimination.

### 3.3.1 Migrant domestic workers

Migrant domestic workers, many of whom are women and members of ethnic minorities, have been recognized as particularly at risk of discrimination, abuse and exploitative working and living conditions, as also observed by the ILO Committee of Experts in examining their situation under ILO Convention No. 111. A special “[Day of General Discussion on Migrant Domestic Workers](#)”, held by the UN Committee on Migrant Workers on 14 October 2009, aptly summed up the situation:

*One of the main factors rendering it difficult to protect the rights of migrant domestic workers is that domestic work*

*is broadly not perceived as real work, and is thus almost universally excluded from labour legislation and regulations and not subject to labour inspections. Migrant domestic workers suffer discrimination, not only because they belong to a group with low status in society but also because they are non-nationals. Often they are engaged in irregular work without a contract; employers don't usually pay social security contributions for their workers and sometimes salaries are withheld. Conditions of work are often difficult, with excessively long working hours. The irregular migration status of many migrant domestic workers makes them more vulnerable to abuse, including sexual abuse. Employers very often confiscate the identity documents of migrant domestic workers. It was remarked that women, who constitute the majority of migrant domestic workers, suffer a further vulnerability to abuse and have often no access to justice or other forms of assistance.*

As noted in Chapters 1 and 2, at its 13th Session in December 2010, the Committee on Migrant Workers adopted its first [General Comment on migrant domestic workers](#), elaborating on the application of ICRMW to this particularly vulnerable group of migrant workers.

### **Box 3.7 Human interest story: new law leads to new life for migrant domestic workers**

“Why do other workers have rights but not us?” Maria Perez remembers asking over and over again when she first arrived in Argentina from Paraguay for a job as a domestic worker.

Today, after decades of labour organizing and with the support of the ILO, Argentina has given her an answer – with the passage of a new migration policy, a new law on domestic workers and a strong commitment to regularize and formalize all domestic workers – nationals and migrants alike.

“I’m very optimistic. I always believed things could be better. Many people thought it was our destiny to be exploited, but I never lost faith things could improve for us workers,” she said as we met her in Buenos Aires, where she now works as a domestic worker.

“I’m excited about the future,” says the 24-year old native of Itá, Paraguay. She now works with a contract and can claim social protection benefits. “Now I feel I can give my daughter a decent life.”

Perez is one of the many women every year who leave everything behind in search of a job in Argentina. “It was not an easy decision but Argentina provided me with more opportunities.” [...]

“[New law leads to new life for migrant domestic workers](#)”, ILO Newsroom, International Labour Office, 2014.

In June 2011, the International Labour Conference of ILO adopted the first international legally binding international instrument specifically on domestic workers, [Convention No. 189 on Decent Work for Domestic Workers](#), which is accompanied by a non-binding [Recommendation No. 201](#). The Convention is important because it recognizes domestic work as employment and contains provisions intended to improve protection and ensure equality of treatment for all domestic workers, both nationals and non-nationals, who comprise the majority of domestic workers in certain parts of the world. Convention No. 189 also contains a number of provisions specifically addressing the situation of migrant domestic workers. As of 12 August 2015, [Convention No. 189](#) has been ratified by 22 countries (Argentina, Belgium, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Finland, Germany, Guyana, Ireland, Italy, Mauritius, Nicaragua, Panama, Paraguay, Philippines, Portugal, South Africa, Switzerland and Uruguay). It entered into force on 5 September 2013. The adoption of Convention No. 189 now offers parliamentarians the occasion to discuss incorporating its content into national law and practice, notably by way of ratification. Articles 19(5)(b) and 19(6)(b) of the ILO Constitution require newly adopted conventions and recommendations to be submitted to “the competent national authorities”, which usually means parliaments, within 12 months (or 18 months in exceptional circumstances) of their adoption.

### **Box 3.8 Enhancing the protection of migrants and domestic workers in Jordan**

Following the adoption by the National Assembly of [Act No. 48 \(2008\) amending the Labour Law](#), migrant and domestic workers are no longer excluded from the provisions of the Labour Code. Although implementation remains a concern, the Act was welcomed by the United Nations Committee on the Elimination of Discrimination against Women as a positive measure in combating discrimination against women, including migrant women.

## **3.4 Particular vulnerability of migrants and their families to discrimination**

Migrants are particularly vulnerable to discrimination because their ethnicity, race or religion often differs from those of most people in the host country. Women migrants often face discrimination on multiple grounds of sex, ethnicity, religion and migratory status. There is increasing evidence of racism and xenophobia in destination countries against migrant populations who come from other cultures. In its concluding [outcome document](#), the [Review Conference for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance](#), held in Geneva on 20 – 24 April 2009, urges states:

*to take measures to combat the persistence of xenophobic attitudes towards and negative stereotyping of non-citizens, including by politicians, law enforcement and immigration officials and in the media, that have led to*

*xenophobic violence, killings and the targeting of migrants, refugees and asylum-seekers (para. 76).*

This highlights some of the special responsibilities of parliamentarians, which include not only ensuring that the necessary legislation and policies are in place, but also refraining from inflammatory, racially-charged or xenophobic language when speaking of migrants.

### **Box 3.9 Extending anti-discrimination legislation to migrants: the cases of Albania and the United Kingdom**

#### **Albania**

In 2010, the Albanian Parliament adopted [Law No. 10 221](#) to strengthen anti-discrimination legislation and mechanisms. Article 4 of the Law stipulates that such protections against discrimination apply to all who “live and stay in the territory of the Republic of Albania”. The Law also provides for a complaint mechanism for alleged abuses.

#### **The United Kingdom**

In 2010, the United Kingdom Parliament adopted a law consolidating previous anti-discrimination legislation and its own anti-discrimination policy, titled the [Equality Act](#). This Act was studied extensively in the House of Commons Public Bill Committee in an inclusive and participatory manner; oral testimony was received from over 25 governmental and non-governmental organizations and written submissions were accepted from over 65 groups. Section 9 explicitly includes nationality as one of the grounds in respect of which discrimination is prohibited. The Act has played an instrumental role in developing what the [Migrant Integration Policy Index](#) has suggested is one of the strongest anti-discrimination frameworks in the world.

Discrimination against migrants needs to be addressed from two angles: the general human right to be free from discrimination; and discrimination based specifically on nationality and migration or migratory status.

### **Box 3.10 Discrimination based on nationality**

Discrimination based on nationality is a major aspect of unjustified differential treatment suffered by migrant workers. In globalized labour markets and populations, nationality discrimination undermines not only social cohesion but also economic stability, labour market coherency and decent work conditions. Tolerance of discrimination that excludes certain workers from equality of treatment allows – sometimes explicitly – for discriminated groups to be exploited at sub-standard wages and conditions and exempted from protection under law. This in turn worsens working conditions and leads to productivity losses, unfair competition among employers and conflicts among workers and social groups.

Discriminatory practices arise from legislation and policies as well as practical measures. The following are examples commonplace in law and practice: legal provisions permitting inferior pay (including lower minimum wages) and social security coverage for migrant workers; unjustified restrictions on lawfully present migrants holding public sector jobs even in areas such as public health where they are needed (Article 14(c) of ILO Convention No. 143 only permits restrictions on access to limited categories of employment or functions where necessary in the interests of the state); discriminatory behaviour by employers, such as job advertisements and hiring practices explicitly targeted to citizens or mother-tongue language speakers only; and residence requirements that discriminate indirectly against newly arrived or temporary migrant workers. Discriminatory attitudes in respect of nationality are also expressed in terms of workplace conduct, such as rules set by companies with foreign employees that make any use of non-local languages a ground for disciplinary measures or dismissal.

Open-ended non-discrimination clauses in international and regional human rights instruments have been interpreted to outlaw unjustifiable distinctions between persons based on nationality. These include Article 2 of UDHR, Articles 2 and 26 of ICCPR, Articles 1 and 24 of ACHR, Article 2 of the African Charter on Human and Peoples' Rights, and Article 14 of the European Convention on Human Rights (ECHR) and [its Protocol No. 12](#). ICRMW explicitly lists nationality in Article 1, referring to the applicability of ICRMW to all migrant workers and members of their families, and Article 7, referring to non-discrimination in respect of the rights provided for in the ICRMW.

It is often challenging to determine whether discrimination faced by migrant workers is based exclusively on their nationality or perceived nationality, or on racial, ethnic or other visible differentiations, or a combination of these factors (multiple discrimination). This makes it all the more crucial to explicitly prohibit nationality discrimination so that a person's nationality or perceived nationality cannot serve as pretext or cover for discrimination motivated by other unlawful differentiations.

Free movement regimes in regional economic integration spaces are necessarily broadening legal constraints to prohibit nationality discrimination. Discrimination based on nationality between nationals of EU Member States is explicitly prohibited under Article 18 of the Treaty on the Functioning of the European Union.

Legal provisions prohibiting discrimination based on nationality have also been adopted in a number of EU countries, including Belgium, Bulgaria, the Czech Republic, Ireland, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and the United Kingdom.

While it has been less common for courts to recognize migration or migratory status as a prohibited ground of discrimination, there are some examples where such a distinction was seen as violating ECHR and ACHR. For example, in [Ponomaryovi v. Bulgaria \(Application No. 5335/05, judgment of 21 June 2011\)](#), the European Court of Human Rights ruled that requiring two Russian children living in Bulgaria with their



mother, who was married to a Bulgarian, pay fees for their secondary education on account of their nationality and immigration status, as not required of Bulgarian citizens or non-nationals with permanent residence permits, was not justified under Article 14 of ECHR taken in conjunction with Article 2 of [Protocol No. 1 to the ECHR](#), providing for the right to education. The Inter-American Court on Human Rights has found in a number of cases that “*States should respect human rights and guarantee their exercise and enjoyment to all persons who are within their territory, without discrimination based on their regular or irregular status, or their nationality, race, gender or any other reason*” (for example, see [Vélez Loor v. Panama](#), judgment of 23 November 2010, Inter-Am. Ct. H. R. (ser. C) No. 218, para. 100 and [Nadege Dorzema et al. v. Dominican Republic](#), judgment of 24 October 2012, Inter-Am. Ct. H.R. (ser. C) No. 251, para. 238, where the Court observed, among other violations, “*de facto discrimination against [a group of undocumented Haitian nationals killed by the army in the Dominican Republic] owing to their condition as migrants*”).

### 3.5 Right of migrants to freedom from discrimination in practice

Under international law, states have the sovereign prerogative to regulate which non-nationals can enter their territory and under what conditions. However, the principle of equality and non-discrimination also applies at the border, meaning that states do not have the right to refuse entry on the basis of distinctions such as race, religion, sex or HIV status. The Durban Review Conference, referred to above, urges states:

*to prevent manifestations of racism, racial discrimination, xenophobia and related intolerance at country border entry areas, in particular vis-à-vis immigrants, refugees and asylum-seekers, and in this context encourages States to formulate and implement training programmes for law enforcement, immigration and border officials, prosecutors and service providers, with a view to sensitizing them to racism, racial discrimination, xenophobia and related intolerance (para. 75).*

This has also been confirmed in national law as well as in legislation at the regional level. For example, the [EU Regulation establishing a community code on the rules governing the movement of persons across borders](#), known as the Schengen Borders Code (No. 562/2006 of 15 March 2006), contains the following provision in Article 6 concerned with the conduct of border checks:

1. *Border guards shall, in the performance of their duties, fully respect human dignity. Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.*
2. *While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

### Box 3.11 Border controls and the principle of non-discrimination

In December 2004, the highest court in the United Kingdom, the then House of Lords, ruled that the conduct of United Kingdom immigration officers operating at Prague airport towards Czech nationals of Roma origin constituted direct discrimination on the basis of ethnic origin.

The operation in question took place before the accession of the Czech Republic to the European Union. The background to the operation was the disproportionately high number of asylum applications made by Czech nationals of Roma origin in the United Kingdom. Roma passengers were subject to longer and more intrusive questioning at the airport and were far more likely to be refused permission to board the aircraft.

One judge in the House of Lords, Baroness Hale of Richmond, underlined that the rationale of anti-discrimination law is to ensure individual treatment and to avoid stereotyping or profiling, including at the border:

*The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. [...]*

*It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong. [...]*

*[S]etting up an operation like this, prompted by an influx of asylum-seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion is that the operation was inherently and systematically discriminatory and unlawful.*

R v. Immigration Officer at Prague Airport, ex parte European Roma Rights Centre [2004] UKHL, judgment of 9 December 2004, paras. 74, 90 and 97.

Discrimination at the border is addressed in the [OHCHR Recommended Principles and Guidelines on Human Rights at International Borders](#), which accompanied the report of

the UN Secretary-General on Protection of Migrants presented to the 69th session of the UN General Assembly in 2014:

*8. The principle of non-discrimination shall be at the centre of all border governance measures. Prohibited grounds of discrimination include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation or gender identity, health status, and economic and social situation. Any differential treatment of migrants at international borders shall be in lawful pursuit of a legitimate and proportionate aim. Specifically, measures taken to address irregular migration, or to counter terrorism, human trafficking or migrant smuggling, shall not be discriminatory in purpose or effect, including by subjecting migrants to profiling on the basis of prohibited grounds, and regardless of whether or not they have been smuggled or trafficked.*

*9. States shall ensure that border governance measures address and combat all forms of discrimination by State and private actors at international borders.*

Once resident in a country, there should be no difference in treatment between migrants and nationals, either in general or in respect of their working conditions and terms of employment, such as wages, benefits, and opportunities for advancement. While migrants do not generally have the right to a secure residence under international law, in some countries they do incrementally acquire rights of residence the longer they live and work there, with the possibility eventually to acquire the citizenship of the country concerned. Often residence is tied to employment, and migrant workers who lose their employment may be required to leave the country. In such instances, the specific international and regional instruments protecting migrant workers determine that it is good practice to permit such migrants to stay in the country a little longer with a view to finding alternative employment (for example, see ILO Convention No. 143, Article 8). Ensuring regular labour migration channels to meet demand at all skills levels is also important and can help reduce irregular migration. Migrants who are already in the country, but in an irregular situation, may also be afforded opportunities to regularize their status. The right to political participation, however, is limited under international law to citizens, although in some countries of destination, long-term resident migrants are permitted to vote and to stand as candidates in municipal elections.

## Checklist for parliamentarians

### How can parliamentarians help fight discrimination against migrants and ensure their equality of treatment?

- ☑ Parliamentarians should recognize and promote the principle of non-discrimination and equality of opportunity and treatment, which is the basis for the enjoyment of many other human rights, and its application to migrants. This principle is found in all core international human rights treaties, clearly **applies to distinctions between nationals and non-nationals** and underpins the UN Migrant Workers Convention and ILO Conventions Nos. 97 and 143.
- ☑ It is important that parliamentarians understand the distinction between **discrimination**, which is unjustified differential treatment, and **justified differential treatment**. Differential treatment may also be required to realize equality of opportunity for disadvantaged groups, including migrants and members of minorities.
- ☑ Parliamentarians need to draw attention to the fact that **migrants are particularly vulnerable to discrimination**, because they are often of a different ethnicity, race or religion, and that women migrants are more likely to experience **multiple discrimination**, on the basis of their sex, ethnicity, religion and/or nationality.
- ☑ Parliamentarians should highlight the reasons **why it is important to combat discrimination against migrants in the workplace**:
  - It results in substandard wages and poor working conditions, ultimately lowering the wages and worsening the working conditions of all workers.
  - It leads to productivity losses, unfair competition among employers and tensions and conflicts among workers and social groups.
- ☑ To avoid discrimination against migrant workers, parliamentarians need to
  - Ensure that the provisions of **ILO Convention No. 111 addressing non-discrimination and equality of opportunity and treatment in employment and occupation** are applied. The principles in this instrument, one of the eight fundamental ILO conventions, have to be respected, promoted and realized by all ILO Member States, even if they have not ratified it. Convention No. 111 applies to all workers, to all sectors, and to the formal and informal economy. Nationality is not a prohibited ground of discrimination; nevertheless, migrant workers come within the ambit of its protection through the application of grounds that are prohibited.
  - Advocate for the ratification and implementation of **ILO Conventions Nos. 97 and 143**, which contain clear provisions for equal treatment between nationals and migrant workers in a regular situation.
  - Advocate the ratification and implementation of **ILO Domestic Workers Convention, 2011 (No. 189)**, which recognizes domestic work as

employment, so that domestic workers will be covered by national labour laws. It also ensures **equality of treatment and a minimum set of guarantees for all domestic workers**, regardless of nationality. Once ratified, it is essential to:

- > incorporate the content of Convention No. 189 into national law: Articles 19(5)(b) and 19(6)(b) of the ILO Constitution require newly adopted conventions and recommendations to be submitted to the “competent national authority”, which usually means the parliament, within 12 or 18 months; and
- > organize information/publicity campaigns and support training on Convention No. 189.

☑ **Parliamentarians should take practical action to combat discrimination against migrants**, for example:

- Initiate and elaborate anti-discrimination legislation, which includes nationality and migratory status as prohibited grounds of discrimination, or, if anti-discrimination legislation already exists, incorporate nationality and migratory status among the prohibited grounds of discrimination.
- Review law and practice to identify and remedy legislation, policy and practices that may be discriminatory on the basis of nationality and/or national origin.
- Support and monitor legislation and policies to ensure that effective and regular labour inspections take place, particularly in low-skilled sectors of the economy where migrant workers often predominate.
- Support and monitor legislation and policies that facilitate access for migrant workers to justice, namely to courts, tribunals and effective dispute resolution mechanisms that provide for adequate remedies.
- Oppose legislation, policies and practices that permit lower wages (including lower minimum wages) and reduced social security coverage for migrant workers. Unjustified restrictions on lawfully resident migrants accessing public-sector jobs also have to be addressed.
- Oppose systems that place migrant workers in a vulnerable situation, such as sponsorship visas that tie migrant workers to their employer and condition their departure from the country on permission from the sponsor.
- Advocate against discriminatory employer attitudes and actions, such as job advertisements and hiring practices explicitly targeted to citizens or speakers of the mother-tongue language only, and residence requirements that discriminate indirectly against newly arrived or temporary migrants.
- Refrain from inflammatory, racially charged or xenophobic language in and outside of parliament, and combat xenophobic attitudes and negative stereotyping of migrants in the media.

- ☑ The **principle of equality and non-discrimination also applies at the border**: so migrants cannot be refused admission on the basis of race, religion, sex or HIV status. To ensure that migrants have the right to be free from discrimination and to avoid stereotyping and profiling, it is essential that parliamentarians:
  - support the design and implementation of training programmes for law enforcement, immigration and border officials, prosecutors and service providers, to raise their awareness about racism, racial discrimination, xenophobia and related intolerance; and
  - advocate strongly for the treatment of each person as an individual and not only as a member of a particular group.



Sharon, a Nigerian sex worker, sits on her makeshift bed outside Rome. Many migrant sex workers are victims of human trafficking.  
© Paolo Patrizi, 2013

## Chapter 4

# Key human rights principles regarding protection of migrants

### Box 4.1 Recommendation of the Parliamentary Seminar on Migration

*We all should resist policies, including those advocated by our fellow parliamentarians, that create a divisive society, and should use our powers in favour of the rights of all migrants to promote a diverse and cohesive society. We should not forget that by restricting and violating the human rights of migrants, the fundamental rights of all will be diminished.*

[Summary and Recommendations](#) presented by the Rapporteur of the Parliamentary Seminar on Migration: the human rights perspective, Geneva, 24 – 26 October 2007.

Effective recognition and application of certain rights of migrants requires particular attention. While these and other rights are established as fundamental human rights in international law, their incorporation in national law and policy is sometimes

constrained by past law, existing policies and practices, and/or public and governmental attitudes, often influenced by short-term political objectives.

This chapter looks a little more closely at five important issues in this connection: recognition of economic, social and cultural rights; freedom of association and the right to collective bargaining; elimination of all forms of forced or compulsory labour, including trafficking for forced labour and labour exploitation; migrant children's rights, including protection from child labour; and rights relating to the movement of migrants and their rights to liberty and security of the person, including protection against detention and arbitrary expulsion.

## 4.1 Effective recognition of economic, social and cultural rights

Economic, social and cultural (ESC) rights – to work, education, health, social security, housing, food and water, a healthy environment and culture – embody essential elements for a life of dignity and freedom. These rights provide a common framework of universally recognized values and norms to mobilize efforts in support of economic and social welfare and justice, political participation and equality. They provide standards for the responsibility of state and non-state actors to respect and uphold these human rights. For a detailed review of ESC rights, see the [International Network for Economic, Social and Cultural Rights \(ERSC-Net\)](#).

ESC rights are articulated in UDHR and elaborated in the binding ICESCR. As of 12 August 2015, 164 countries have ratified ICESCR, accepting the obligation to respect, protect and fulfil the ESC rights of all persons on their territories.

There is no hierarchy between civil and political rights and economic, social and cultural rights, a position that was reiterated by the World Conference on Human Rights in 1993.

### **Box 4.2 “All human rights are universal, indivisible and interdependent and interrelated”**

*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*

[Vienna Declaration and Programme of Action](#), para. 5 (adopted by the World Conference on Human Rights, Vienna, 23 June 1993).



As underscored in Chapters 2 and 3, international human rights law generally does not distinguish between nationals and non-nationals in respect of the human rights afforded to them. UDHR lists the civil and political rights and economic and social rights guaranteed to everyone without distinction of any kind. In his [final report](#), the Special Rapporteur on the rights of non-citizens, following a thorough review of human rights law, concluded that “*all persons [...] by virtue of their essential humanity enjoy all human rights unless exceptional distinctions [...] serve a legitimate State objective and are proportional to the achievement of that objective*” (p. 5). The UN treaty supervisory bodies for the core international human rights instruments have explicitly recognized the application of rights – including ESC rights – in those respective instruments to non-nationals, including in many cases to non-nationals in irregular situations. As observed in Chapter 2, the UN Committee on Economic, Social and Cultural Rights, the treaty body for ICESCR, explicitly recognized this applicability in its General Comment No. 20 (2009) on non-discrimination in economic, social and cultural rights (art. 2, para. 2): “*The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation*” (para. 30).

ICESCR contains an explicit exception in Article 2(3), which reads. “*Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals*”. Neither “economic rights” nor “developing country”, however, are defined in ICESCR (see E.V.O Dankwa, “[Working paper on Article 2\(3\) of the International Covenant on Economic, Social and Cultural Rights](#)” (1987) 9 *Human Rights Quarterly* 230). “Economic rights” would reasonably refer to rights enabling a person to earn a living or relating to the process of income contingencies. But the possibility for developing countries to impose restrictions in respect of non-nationals is, in any event, to be exercised “with due regard to human rights and their national economy”. OHCHR has affirmed that “[i]t should be noted here that there is no universal understanding of the content of “economic rights”. While the right to work may be seen as the clearest example of such a right, it may also be considered a social right. In its [General Comment No. 11 \(1999\) on plans of action for primary education](#), the Committee stated that “the right to education ... has been variously classified as an economic right, a social right and a cultural right. It is all of these (para. 2)” (United Nations, [The economic, social and cultural rights of migrants in an irregular situation](#), 2014, p. 31). Article 2(3) is considered an exception to be interpreted narrowly in the light of the object and purpose of ICESCR (see on this point the [Limburg principles on the implementation of the International Covenant on Economic, Social and Cultural Rights](#)), and ESCR Committee’s reporting guidelines specifically require States Parties that are developing countries to report “*information on any restrictions imposed under Article 2, paragraph 3, of the Covenant, on the enjoyment by non-nationals of the economic rights recognized in the Covenant*” (UN doc. E/C.12/2008/2 (24 March 2009) para. 11). However, many developing countries already exclude this option through a commitment to a higher standard in their own regional human rights system. For example, the African Charter on Human and Peoples’ Rights, in Article 15, provides for the right to work for everyone, without limitation to nationals. For a fuller treatment of this subject, see J. Diller, [Securing dignity and freedom through human rights. Article 22 of the Universal Declaration of Human Rights](#), Martinus Nijhoff, 2012, at pp. 111 – 112.

As in the case of the human rights instruments, protecting specific groups of persons at greater risk of human rights violations, such as women, children and persons with disabilities, ICRMW was elaborated to specifically spell out the human rights applicable to migrant workers. This instrument provides explicit norms for legislation to ensure application of rights, including ESC rights, to non-nationals, otherwise vulnerable to exclusion from protection in circumstances where they are not explicitly covered. However, as already referred to in Chapter 2 in the observations of the Special Rapporteur on the rights of non-citizens and the Global Commission on International Migration, there is a considerable gap between the principles found in international human rights law and their application in practice to non-nationals, a position that has also been underlined by the UN High Commissioner for Human Rights, with particular reference to the application of ESC rights.

### Box 4.3 The rights of non-citizens

*For non-citizens, there is, nevertheless, a large gap between the rights that international human rights law guarantees to them and the realities that they face. In many countries, there are institutional and pervasive problems confronting non-citizens. Nearly all categories of non-citizens face official and non-official discrimination. While in some countries there may be legal guarantees of equal treatment and recognition of the importance of non-citizens in achieving economic prosperity, non-citizens face hostile social and practical realities. They experience xenophobia, racism and sexism; language barriers and unfamiliar customs; lack of political representation; difficulty realizing their economic, social and cultural rights – particularly the right to work, the right to education and the right to health care [...]*

The rights of non-citizens, New York and Geneva, United Nations, 2006, Introduction, p. 5.

Respect and protection for ESC rights remain particularly limited for migrants in irregular situations. The rhetoric and practice in some countries of designating migrant human beings as “illegal” serves to justify non-recognition of fundamental rights and even denial that these rights apply. Moreover, obligations on officials to report such migrants to the police or immigration authorities can have a serious effect on their enjoyment of ESC rights.

#### Box 4.4 Migrant children’s right to education and reporting obligations

*A school administration’s reporting obligations may discourage parents from sending their children to school for fear of being detected and removed. Disclosure of pupils’ data to the police can have a similar effect. In Germany, the Federal Parliament abolished such an obligation to report on schools, nurseries and educational facilities in 2011, but not on other public services.*

The economic, social and cultural rights of migrants in an irregular situation, New York and Geneva, United Nations, 2014, p. 85 [footnote omitted].

However, important initiatives at the regional level have underscored that ESC rights apply to migrants in an irregular situation and can also be secured effectively in practice. See in this regard the 2011 Report of the European Union Agency for Fundamental Rights on the [Fundamental rights of migrants in an irregular situation in the European Union](#).

#### Box 4.5 Human interest story: bar exam passed, immigrant still can’t practise law

Cesar Vargas seemed to have checked all the right boxes in his quest to become a lawyer in New York State. He made honors at both college and law school in New York City, his home since coming to the United States from Mexico at age 5. He interned with a State Supreme Court judge, a Brooklyn district attorney and a United States congressman. And he passed the state bar exam.

The only obstacle that remained before he could become a certified lawyer was an evaluation of his background and character by a committee appointed by the State Supreme Court.

That committee rated him “stellar.” In the same stroke, however, they also recommended against his certification as a lawyer. The reason: Mr. Vargas is an unauthorized immigrant. The question of whether he should be allowed to practice law, the committee said, was better suited to the courts or the Legislature to decide. The matter, which now rests with the State Supreme Court’s appellate division, has become a test case for whether immigrants in [in the United States irregularly] can practice law in New York.

“I feel like I’m getting left behind,” Mr. Vargas, 30, said this week of his thwarted bid to become a lawyer. “After sacrificing so much, it’s left me with the sense that all that work was for nothing.” [...]

Last week, lawyers for Mr. Vargas, who has in recent years become a national activist for immigration reform, submitted a brief to the appellate division of the New York Supreme Court arguing why he should be allowed to practice law.

State law, he explained, does not appear to make immigration status a criterion for admission. The crux of his argument, he said, is a paragraph in state judiciary law that specifically precludes race, color, creed, national origin or “alienage” — being a foreigner — as grounds for prohibiting admission.

Mr. Vargas also argued that he is currently allowed to work legally under a program, known as deferred action, that provides work authorization to qualified immigrants brought to the country [irregularly] as children. [...]

“The ultimate fault of all of this is Congress,” said Mr. Godínez Samperio, who currently is authorized to work under the deferred action program. “They have refused to clarify the law and they have refused to pass immigration reform.”

Adapted from “[Bar exam passed, immigrant still can’t practice law](#)”, New York Times, 3 December 2013.

#### 4.1.1 Recognition and application of economic, social and cultural rights in legislation and government action

Effective recognition and application of ESC rights for non-nationals, and migrant workers in particular, requires both explicit enactment of these rights in national law, and deliberate action by states to meet their obligations to respect, protect and fulfil these rights.

##### Box 4.6 Obligations to respect, protect and fulfil ESC rights

*Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The **obligation to respect** requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions [including in the eviction of undocumented migrants]. The **obligation to protect** requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards [including in respect of migrant workers] may amount to a violation of the right to work or the right to just and favourable conditions of work [Article 7 ICESCR]. The **obligation to fulfil** requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need [including migrants] may amount to a violation.*

## Maastricht guidelines on violations of economic, social and cultural rights

International Commission of Jurists, Urban Morgan Institute on Human Rights, Cincinnati, Ohio, United States, and Faculty of Law, Maastricht University, 22 – 26 January 1997 (UN doc. E/C.12/2000/13), para. 6.

For parliamentarians, effective recognition and application of ESC rights starts with ascertaining that national legislation explicitly protects these rights for non-nationals as well as citizens. It will further require review of legislation and practice regarding non-nationals in respect of employment, health, social security, housing, education and other areas. Such a review would normally take into account national expectations and means, while recognizing that all persons within a country's territory, including migrants, should have access to these benefits and services on a non-discriminatory basis. A review would also provide the basis for improving legislation and encouraging government action to ensure respect, protection and fulfilment of these rights.

### Box 4.7 Protecting the social and economic rights of migrants in Argentina

The National Migration Law, adopted by Argentina's National Congress in 2004, sets high standards for the promotion and protection of the social and economic rights of migrants and their families. The Law stipulates that regular migrants are to be provided with equal access to social services, including in the fields of health, education, social security, employment and legal support. It also eases the criteria for family reunification. Although the Law made such treatment partially conditional upon regular entry into the country, reports indicate that it also resulted in many additional measures to further support migrants in irregular status, including the regularization of 200,000 migrants through the *Patria Grande* programme. Subsequent measures also included granting migrants the right to vote in municipal elections.

## 4.2 Freedom of association and the right to collective bargaining

### Box 4.8 Protecting the right of migrant workers to freedom of association in practice

*Increasing labour mobility in the context of globalization has given rise to important challenges regarding the rights of migrant workers to organize and bargain collectively. These challenges are threefold: defending the rights of migrant workers, including those in irregular situations, to organize and bargain collectively; organizing them; and upholding decent work conditions for migrant workers in the same way as for the rest of the workforce.*

**Freedom of association in practice: Lessons learnt**, global report under the follow-up to ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 97th Session, Geneva, International Labour Office, 2008, p. 56, para. 228.

The right of all migrant workers to join and form trade unions is amply established in international law and in international treaty body and court jurisprudence. As the list of provisions below demonstrates, rights to freedom of association and collective bargaining are widely recognized in international labour standards and human rights instruments. Virtually every country in the world is bound by one or more of these conventions, and the 1948 Universal Declaration of Human Rights is applicable to all states. Most countries are also members of ILO, and the 1998 Declaration on Fundamental Principles and Rights at Work reaffirmed that the principles concerning the fundamental rights which are the subject of the eight ILO core conventions, including freedom of association, have to be respected, promoted and realized by all Member States by virtue of their membership in ILO and irrespective of whether they have ratified the convention in question.

#### **Box 4.9 Provisions on the right to freedom of association in international labour standards and human rights instruments**

##### ***International labour standards***

- ILO Constitution 1919, as amended by the Declaration of Philadelphia and incorporated into the Constitution in 1946
- ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)

*Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation (Article 2).*

- ILO Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

##### ***International human rights***

- Universal Declaration of Human Rights, 1948, Article 23(4)

*Everyone has the right to form and to join trade unions for the protection of his interests.*

- International Covenant on Civil and Political Rights, 1966, Article 22

*1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

2. *No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

- International Covenant on Economic, Social and Cultural Rights, 1966, Article 8(1)

1. *The States Parties to the present Covenant undertake to ensure:*

(a) *The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

(b) *The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;*

(c) *The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*

(d) *The right to strike, provided that it is exercised in conformity with the laws of the particular country.*

- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), 1990, Articles 26 and 40 [see below]

### **Specific conventions on migrant workers**

- ILO Convention No. 97, Article 6(1)

*Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters: ...*

(ii) *membership of trade unions and enjoyment of the benefits of collective bargaining;*

- ILO Convention No. 143, Article 10

*Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.*

- ICRMW, Article 26

*1. States Parties recognize the right of migrant workers and members of their families:*

*(a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;*

*(b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;*

*(c) To seek the aid and assistance of any trade union and of any such association as aforesaid.*

#### Article 40

*1. Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.*

That the right to freedom of association, including the right to form and join trade unions, is included in both ICCPR and ICESCR demonstrates that it is at once a civil, political, economic and social right. Both of these instruments also give due regard to the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), adopted 18 years earlier. Moreover, UDHR, ICCPR and ICESCR all underscore that trade union rights apply to “everyone” and can only be subject to narrow restrictions in respect of the armed forces and police, or on the grounds of national security, public order and the protection of the rights and freedoms of others. While ICRMW appears to limit the right to *form* trade unions to migrant workers in a regular situation (compare Articles 26 and 40 above), these provisions should be read in the context of those found in the more general core international human rights instruments as well as ILO Convention No. 87.

Indeed, ILO and UN supervisory bodies have reinforced the universal application of these rights; the fact of a worker being a migrant, or even an undocumented migrant, does not permit the state concerned to restrict the right to join and form trade unions. In this regard, Article 2 of ILO Convention No. 87 reads:

*Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.*

The ILO Committee on Freedom of Association has stated that this provision applies to all workers, including migrant workers in an irregular situation.



## Box 4.10 Trade union rights and migrant workers in an irregular situation

In March 2001, the ILO Committee on Freedom of Association concluded that the Spanish Foreigners' Law (Basic Act No. 4/2000), which made the exercise of trade union rights by migrant workers dependent on authorization of their presence or residence in Spain, was not in conformity with the broad scope of Article 2 of ILO Convention No. 87. The Committee stated that Article 2 covers all workers and that exceptions were only permissible in relation to the armed forces and the police as provided for in Article 9. The Committee invited the ILO Governing Body to approve the recommendation to the Spanish Government, "as concerns the legislation in cause, to take into account the terms of Article 2 of Convention No. 87, according to which workers, without distinction whatsoever, have the right to join organizations of their own choosing". In 2007, the Spanish Constitutional Court found that the requirement imposed by Basic Act No. 4/2000 on foreign nationals to be lawfully resident in Spain in order to exercise the fundamental rights of assembly, association, trade union membership and strike constituted an unjustified restriction and is therefore contrary to the Constitution. Rulings Nos. 236/2007 of 7 November and 259/2007 of 19 December. In its Observation published in 2011, CEACR noted with satisfaction the adoption of Act No. 2/2009 of 11 December, reforming Basic Act No. 4/2000 and integrating into the provisions of the Act the contents of the rulings of the Constitutional Court. It noted that the new Section 11 of Basic Act No. 4/2000, in accordance with the wording set out in Basic Act No. 2/2009, provides that foreign nationals shall have the right to organize freely or to join an occupational organization and to exercise the right to strike under the same conditions as Spanish workers.

### Source:

Case No. 2121, complaint of 23 March 2001 by the General Union of Workers of Spain (UGT); ILO, Committee on Freedom of Association, *Report No. 327*, Vol. LXXXV, 2002, Series B, No. 1, paras. 561 – 562, available from [ILO NORMLEX](#). *Spain*, Observation on Convention No 87; ILO, [Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III \(Part 1A\)](#), International Labour Conference, 100th Session, Geneva, 2011, at p. 160.

In practice, however, migrant workers are still unable to freely exercise these rights in many situations, or in some instances to exercise them at all. The [2008 ILO Global Report on Freedom of Association](#) identified the following constraints on the exercise of trade union rights:

*In a number of countries, legislation still limits the right of migrant workers to organize. In some, only citizens are allowed to form trade unions. In some others, freedom of association is denied to migrant workers in irregular or unauthorized status. Some union constitutions also make membership of migrant workers subject to a number of conditions. Migrant workers may be concentrated in jobs not sought after by nationals, in isolated workplaces, or in sectors that are not protected by labour legislation (agricultural or domestic workers in some countries) or*

*in other situations in which organizing by trade unions is difficult.*

*In some cases, migrant workers may come from societies which lack a strong trade union tradition, or where workers' organizations have been associated with ruling parties or regimes, rather than acting as trade unions at the service of workers. Migrant workers without authorization for employment are easily intimidated by the threat of possible deportation. These factors often make it more difficult to organize migrants into unions. (p. 57, paras. 232 – 233)*

Other restrictions on freedom of association, as identified by the UN Special Rapporteur on the human rights of migrants in his report on the “[Labour exploitation of migrants](#)” (A/HRC/26/35), include denying legal status to migrant trade unions because their membership includes migrants in an irregular situation, arresting and deporting migrant trade union leaders, or denying their entry to a country despite their possession of valid travel documents.

These constraints notwithstanding, the ILO Global Report also recognizes that the growth in labour migration and the exploitative conditions of work often imposed on migrant workers underscore the importance of the right to freedom of association and collective bargaining:

*[I]ncreased labour mobility objectively presents opportunities for upholding and extending the actual practice of freedom of association and collective bargaining. The increasing numbers of migrant workers are an important natural potential for trade union membership. The substandard working conditions and pay, combined with possible abuse, that might be faced by migrant workers provide strong arguments for unions to organize those workers. (p. 57, para. 235)*

Ensuring the right to freedom of association and collective bargaining for migrant workers in practice, in accordance with the widely accepted universal principles cited in the instruments above, is a crucial element in preventing exploitation and improving their conditions at work. It is also an important enabling factor in exercising other labour rights. Moreover, the lack of labour protection for migrant workers, including for those in an irregular situation, undercuts protection generally for lawfully resident migrant workers as well as national workers.

## 4.3 Elimination of all forms of forced or compulsory labour, including trafficking for forced labour and labour exploitation

*[T]he precarious legal status of millions of irregular migrant women and men makes them particularly vulnerable to coercion, because of the additional and ever-present threat of denunciation to the authorities. Victims can be faced with the difficult choice between accepting highly exploitative conditions of work and running the risk of deportation to their home countries if they seek redress. [...] [A] growing body of research, in particular on the situation of the forced labour victims of trafficking in industrialized destination countries, has served to identify a serious legislative gap which makes it difficult to move forward against the hidden and often subtle forms of coercion in the private economy. (A global alliance against forced labour, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 93rd Session, Geneva, International Labour Office, 2005, p. 2, para. 6).*

### Box 4.11 Estimates of forced labour

*The ILO estimates that 20.9 million people are victims of forced labour globally, trapped in jobs into which they were coerced or deceived and which they cannot leave. Human trafficking can also be regarded as forced labour, and so this estimate captures the full realm of human trafficking for labour and sexual exploitation, or what some call “modern-day slavery”.*

**ILO global estimate of forced labour: Results and methodology**, Special Action Programme to Combat Forced Labour (SAP-FL), Geneva, International Labour Office, 2012, p. 13.

*It is estimated that the total illegal profits obtained from the use of forced labour [i.e. outside state-imposed forced labour] worldwide amount to US\$150.2 billion per year. More than one third of the profits – US\$51.2 billion – are made in forced labour exploitation, including nearly US\$8 billion generated in domestic work by employers who use threats and coercion to pay no or low wages.*

**Profits and poverty: The economics of forced labour**, SAP-FL, Geneva, International Labour Office, 2014, p. 13.

Everyone has the right to be free from slavery, servitude and all forms of forced and compulsory labour, as expressly recognized in UDHR (Article 4) and ICCPR (Article 8). The right to be free from forced labour is also one of the ILO fundamental rights, as underscored in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and therefore must be respected by every ILO Member State, irrespective of whether it has ratified ILO's [Forced Labour Convention, 1930 \(No. 29\)](#) or the [Abolition of Forced Labour Convention, 1957 \(No. 105\)](#). States, moreover, have broadly accepted this right, as reflected in the numbers of states – 178 and 175, respectively (as of 12 August 2015) – that have ratified these two ILO conventions. In recent years, the scope of this right has been expanded to include trafficking in human beings, and greater efforts have also been undertaken to prevent the scourge of forced labour and protect victims, as in the [Protocol to the Forced Labour Convention](#) adopted by the International Labour Conference in June 2014. These are discussed in more detail below.

### 4.3.1 What is forced labour?

The definition of forced labour in Article 2 of ILO's Convention No. 29 has become the accepted definition throughout international labour and human rights law. It reads as follows:

*[T]he term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself [or herself] voluntarily.*

The Convention makes various exceptions to this definition in Article 2(2)(c), such as compulsory military service, prison labour under certain conditions, minor communal service and any work or service exacted in cases of emergency. None of these, however, are particularly relevant to the specific situation of migrants. Convention No. 29 is supplemented by the Abolition of Forced Labour Convention, 1957 (No. 105), whose Article 1 obliges States Parties to discontinue and suppress the use of specified additional forms of forced or compulsory labour, namely those used as a means of political coercion or education; as punishment for holding or expressing political views; as a method of deploying labour for purposes of economic development; as a means of labour discipline; as punishment for having participated in strikes; and as a means of racial, social, national or religious discrimination.

In its Article 11, ICRMW likewise outlaws slavery or servitude and forced or compulsory labour in respect of migrant workers and members of their families. It excludes from the definition of forced or compulsory labour: (a) any work or service normally required of a person who is lawfully under detention or undergoing conditional release from such detention; (b) any service exacted in cases of emergency or calamity threatening the life or well-being of the community; and (c) any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the state concerned. It does not preclude the performance of hard labour as punishment for a crime in states where such punishment is provided for by law.

### 4.3.2 Trafficking in human beings

Trafficking in human beings is a vicious phenomenon often associated with and leading to forced labour situations affecting migrant workers. The adoption in Palermo, Italy in 2000 of the [UN Convention against Transnational Organized Crime](#) and its supplementary [Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children](#) [hereinafter “Palermo Trafficking Protocol”] focused increased attention on the phenomenon. It also provided for specific legal standards to prevent and combat trafficking, protect victims, and promote cooperation among states to achieve these objectives.

The Palermo Trafficking Protocol provides a definition of trafficking in Article 3(a):

*“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*

As regards the issue of victim consent, Article 3(b) adds that the consent of the victim shall be irrelevant where the means set out in Article 3(a) have been used. Article 3(c) of the Protocol stipulates that consent is also irrelevant where the victim is a child (defined in Article 3(d) as any person under 18 years of age), irrespective of the means used.

The definition of trafficking in persons in the Palermo Protocol refers explicitly to “forced labour or services” as one element of its purpose, namely exploitation. The synergies between the Palermo Protocol and ILO Convention No. 29 have been underlined by the ILO Committee of Experts and are examined in more detail in [Human trafficking and forced labour exploitation – guidance for legislation and law enforcement](#), Geneva, International Labour Office, 2005. This publication also observes (p. 1) that, in addition to Conventions No. 29 and No. 105, ILO conventions pertinent to the protection of migrant workers also help to shed light on trafficking, in particular Conventions No. 97 and No. 143, and the Private Employment Agencies Convention, 1997 (No. 181).

#### Box 4.12 The Palermo Trafficking Protocol and the ILO Forced Labour Convention No. 29

*A crucial element of the definition of trafficking is its purpose, namely, exploitation, which is specifically defined to include forced labour or services, slavery or similar practices, servitude and various forms of sexual exploitation. The notion of exploitation of labour inherent in this definition allows for a link to be established between the Palermo Protocol and Convention No. 29, and makes clear that trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour provided under Article 2, paragraph 1, of the Convention. This conjecture facilitates the task of implementing both instruments at the national level.*

[Eradication of forced labour](#), General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), Report of the Committee of Experts on the Application of Conventions and Recommendations, Geneva, International Labour Office, International Labour Conference, 96th Session, 2007, para. 77.

Part II of the Palermo Protocol also contains important provisions to protect and assist trafficking victims in respect of relevant court and administrative proceedings as well as their physical, psychological and social recovery, including appropriate housing; counselling and information in a language they can understand, in particular as regards their legal rights; medical, psychological and material assistance; employment, education and training opportunities; physical safety; and the possibility of obtaining compensation for damage suffered (Article 6). There are also provisions on the status to be provided to trafficking victims so that they can remain in a State Party's territory, either temporarily or permanently (Article 7), and on their repatriation to the State Party of their nationality or where they hold permanent residence (Article 8).

OHCHR has also issued the [Recommended Principles and Guidelines on Human Rights and Human Trafficking](#), which contain important guidelines on protection and support for trafficked persons (Guideline 6), including child victims of trafficking (Guideline 8).

#### Box 4.13 OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking – Guideline 6: Protection and support for trafficked persons

**The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.
2. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counselling. Trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.
3. Ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality. Staff working in embassies and consulates should be provided with appropriate training in responding to requests for information and assistance from trafficked persons. These provisions would not apply to trafficked asylum-seekers.
4. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.
5. Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand.
6. Ensuring that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard.
7. Ensuring the safe and, where possible, voluntary return of trafficked persons and exploring the option of residency in the country of destination or third-country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely).
8. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.

[Recommended principles and guidelines on human rights and human trafficking](#), United Nations, (UN doc. E/2002/68/Add.1).

In February 2013, ILO organized a [Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation](#) to consider whether there was a need for standard setting to complement Convention No. 29 to advance prevention and victim protection and address human trafficking for labour exploitation. The experts concluded that there was added value in the adoption of supplementary measures to address significant implementation gaps and eradicate forced labour in all its forms. They agreed these implementation gaps should be addressed through standard setting, but supplementing Convention No. 29 by way of a protocol and/or recommendation rather than adopting a new convention. In June 2014, the International Labour Conference adopted a [Protocol to the Forced Labour Convention](#), as well as accompanying [Recommendation No. 203](#), to address a number of the implementation gaps in the prevention of forced labour, including the protection of migrant workers from abusive and fraudulent recruitment processes; protection of victims; and access to appropriate and effective remedies, including compensation.

### 4.3.3 Particular vulnerability of migrant workers to forced labour and trafficking

Despite the legal obligation of states to protect all persons from forced or compulsory labour, including trafficking, migrant workers are particularly vulnerable to this form of exploitative treatment, for two reasons. One is quite simply because national authorities devote less attention to their protection, or lack the capacity to provide it, or focus more on fighting the crime of trafficking than on protecting victims. The other is that in their quest to migrate, migrant workers are sometimes led into situations of great risk, because of an irregular situation or because they have been trafficked. The [2012 ILO Global Estimate of Forced Labour](#) observes that 9.1 million of the 20.9 million victims of forced labour (44 per cent) have moved either internally or internationally.

Migrant workers are at risk of forced labour in many ways, and some categories of migrant workers are more vulnerable than others. Migrant domestic workers are particularly vulnerable, because they are often hidden from public view. As noted in Chapter 3, they face a wide range of abuses, including psychological and physical abuse, sexual aggression, withholding of identity and travel documents, low or no wages and excessive working hours without meal or rest breaks. Moreover, domestic workers are often not covered by national labour legislation, hence the importance of the [ILO Domestic Workers Convention, 2011 \(No. 189\)](#).

Workers in the agricultural sector, where many migrant workers are employed, are also at particular risk of forced labour. National labour legislation often does not extend or is not fully applicable to agriculture – though it should be – leaving migrant and other agricultural workers without legal protection. Agricultural work is often isolated and seasonal, and income can be irregular, increasing migrant workers' vulnerability to forced labour. Some of the most common indicators that point to the possible existence of forced labour affecting migrant workers in agriculture include (but are not limited to) the retention of workers' passports by the employer or sponsor; their isolation in remote work sites; and even debt bondage, which often occurs when a person's work becomes a security against an incurred – or sometimes inherited – debt or loan:



*“the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined”* (Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, Article 1(a)).

#### **Box 4.14 Addressing labour exploitation: the Gangmasters Act in the United Kingdom**

In response to concerns about the exploitation of migrant workers, including an incident in which 23 migrants in irregular status drowned in February 2004 while picking cockles off the coast of England, the Parliament of the United Kingdom adopted the [Gangmasters \(Licensing\) Act in 2004](#) to strengthen the protection of migrant workers in the food service industry. The Act created the [Gangmasters Licensing Authority](#), which issues obligatory licences to food agencies after assurances that proper labour standards are enforced. The Act employs a broad definition of the term “worker” to include those persons in the United Kingdom who are working without authorization. A 2009 follow-up report by state regulators noted, among other things, the positive influence of the Act in improving workers’ conditions.

### 4.3.4 Factors underlying trafficking

Despite increased demand for labour at all skill levels in many high- and middle-income countries, including in the South – South context, and notwithstanding the large pool of people prepared to move abroad to seek decent work, regular travel across international borders has become increasingly restricted to the highly skilled or economically privileged. Restricting visas and obligating airline and maritime transporters to check passports and visas before departure from a country of origin are common forms of action. With some exceptions, such as some of the Gulf State destinations, regular channels of labour migration for low- and middle-skilled workers are few.

Where the demand for labour and skills overwhelms the restrictions on regular migration, people smugglers and traffickers are prepared to supply the difference. While smugglers merely provide an illegal service to the migrant, such as assistance in crossing an international border, the trafficker seeks to exploit the person beyond the migratory process to make continued profits. But this distinction can become blurred, as smuggling can evolve into trafficking. Trafficked persons often end up involuntarily in “sweatshops”, on isolated plantations or in brothels. They are usually channelled into the informal economy, out of sight of regulators and deprived of any protection and thus unable to productively contribute to the economy and social welfare of the host country.

## Box 4.15 Parliamentarians combat human trafficking

### Belgium

Between 1999 and 2003, the ad hoc Senate Subcommittee on Trafficking of Human Beings conducted a comprehensive investigation into the causes and mechanisms of trafficking, conducting field research with a trafficking victim and meeting with police from Albania, reported to be a source country of trafficking, and with national and international non-governmental organizations, among other activities. It also conducted on-site missions in Albania, Italy and France to enhance its understanding of the transnational nature of trafficking. The Committee's recommendations were adopted by the Senate Standing Committee on Interior and Administrative Affairs, which subsequently presented them to the Prime Minister and the Ministers of the Interior and Justice, and monitored their implementation.

### Philippines

The Congress of the Philippines passed the [Anti-Trafficking in Persons Act in 2003](#). In addition to providing the legislative framework to combat human trafficking, the Act provides for legal, financial and social support for victims of trafficking. According to Section 19, these measures also apply to trafficked persons who are foreign nationals. Section 20 mandates the creation of the Inter-Agency Council against Trafficking, a body comprised of executive authorities and representatives of non-governmental organizations. The Council is tasked with broad responsibilities, including monitoring implementation of the Act, coordinating with agencies to more effectively address human trafficking, and assisting in the filing of cases.

### United States of America

In 2000, the United States Congress adopted the [Victims of Trafficking and Violence Protection Act](#), which was renewed in 2013. The Act stipulates that state services and benefits – including health, labour and legal services – are to be provided to victims of trafficking regardless of their immigration status. The Act also created a procedure enabling victims of trafficking to be granted a three-year visa that could be converted into permanent residence. However, this grant is conditioned on victims cooperating with the authorities in the prosecution of the human traffickers concerned.

As noted in Chapter 2, the publication [Combating trafficking in persons: A handbook for parliamentarians](#), jointly produced by IPU and UNODC, provides a compilation of international laws and good practices for combating human trafficking, and guidance on how national legislation can be brought in line with international standards. Parliamentarians needing more information on this particularly exploitative form of migration should consult that handbook. The [Resolution on Migrant Workers, People Trafficking, Xenophobia and Human Rights](#), adopted by the 118th IPU Assembly in April 2008, is noteworthy in this regard:

*[The IPU Assembly] emphasizes that protection of victims of trafficking should be incorporated into, and placed at the centre of states' legislative frameworks, thereby requiring governments to review immigration laws and policies in the light of their impact on the victims of trafficking and shifting the focus from immigration control to preventing the exploitation of migrants and workers and the care of victims.*

## 4.4 Migrant children's rights, including the abolition of child labour

### Box 4.16 The human rights of children

*Children have always been part of migration and affected by it in different ways. Children left behind by migrant family members are affected by migration in countries of origin. Children on the move are affected at the pre-departure stage in countries of origin and in countries of transit and destination at the passage and arrival stages. Children in host countries are affected at the post-arrival and long-term stay and integration stages of the migration process.*

*Children can migrate in various ways. Children move across borders with their parents or are accompanied by extended family members or other adults and within mixed migratory flows. Children are also increasingly seeking migration opportunities to move across borders autonomously and unaccompanied. Falling prey to transnational organized crime and exploitation practices including smuggling, trafficking in persons and contemporary forms of slavery, which are described [...] as abusive forms of migration, may also be a part of the migration experience for many children. ...*

*Migration potentially enhances the child's opportunities and future choices. However, many forms of migration, like the treatment of children during the migration process, can also pose serious threats to the child's rights. ... [T]he potential benefits of migration may be eroded for both undocumented children and children with an irregular migration status, who are exposed to the denial of rights, such as arbitrary deprivation of liberty and limited or no access to health-care services and education.*

*Children who are unaccompanied or separated from their parents are particularly vulnerable to human rights violations and abuses at all stages of the migration process.*

Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, Human Rights Council, 11th Session, UN doc. A/HRC/11/7 (14 May 2009), paras. 18, 19, 22 and 23.

UDHR and the core international human rights instruments protect all persons, including children, and several of these instruments include specific provisions relating to children, and notably the state obligation to reduce infant mortality and ensure healthy child development (ICESCR, Article 12(2)(a)); protection of children from economic and social exploitation (ICESCR, Article 10(3)); the right to education (ICESCR, Article 13); the right of the child to be registered after birth, to have a name and to acquire a nationality (ICCPR, Article 24); and protection of children in case of dissolution of a marriage (ICCPR, Article 23(4)). ICRMW also contains a number of specific provisions outlining the obligations of States Parties towards the families of migrant workers, including children, as well as on the rights of such children.

#### **Box 4.17 ICRMW**

- Obligation of States Parties to respect the liberty of parents or legal guardians, at least one of whom is a migrant worker, “to ensure the religious and moral education of their children in conformity with their own convictions” – Article 12(4);
- Obligation of States Parties to pay particular attention, inter alia, to the problems that may be posed to minor children by the deprivation of a migrant worker’s liberty – Article 17(6);
- The right of “each child of a migrant worker [...] to a name, to registration of birth and to a nationality” – Article 29;
- The basic right of children of all migrant workers to “access [...] education on the basis of equality of treatment with nationals of the State concerned”, with “access to public pre-school educational institutions or schools ... not [to] be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child’s stay in the State of employment” – Article 30;
- Obligation of States Parties “to facilitate the reunification of migrant workers [in a regular situation] with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependant unmarried children” – Article 44(2);

- Obligation of States Parties “to pursue a policy, where appropriate in collaboration with the states of origin, aimed at facilitating the integration of children of [documented] migrant workers in the local school system, particularly in respect of teaching them the local language” – Article 45(2);
- Obligation of States Parties “to endeavour to facilitate for the children of [documented] migrant workers the teaching of their mother tongue and culture and, in this regard, states of origin shall collaborate whenever appropriate” – Article 45(3) – and “States of employment may provide special schemes of education in the mother tongue of children of [documented] migrant workers, if necessary in collaboration with the states of origin” – Article 45(4).

There is also a wide range of international labour standards specifically aimed at the protection of children against child labour, as outlined in the next section.

The principal instrument safeguarding the rights of children in international law, including migrant children, is the [Convention on the Rights of the Child \(CRC\)](#), adopted by the UN General Assembly on 20 November 1989 (resolution 44/25). As of 12 August 2015, it has gained virtually universal ratification (195 States Parties). The Convention requires States Parties to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the [CRC]” (Article 4). They are also to be guided, in all their actions concerning children, by the following overarching principles:

- Non-discrimination (Article 2);
- The “best interests of the child” as the primary consideration in all actions concerning children (Article 3);
- The inherent right to life of every child and the obligation to ensure to the maximum extent possible the survival and development of the child (Article 6); and
- The right of the child to freely express his or her views in all matters affecting him or her and to have them taken into account (Article 12 and [General Comment No. 5 \(2003\): General measures of implementation of the CRC](#)).

In September 2012, the Committee on the Rights of the Child, responsible for monitoring the application by States Parties of CRC, held a [Day of General Discussion on the Rights of All Children in the Context of International Migration](#), in which it outlined a number of key recommendations encompassing the whole range of a child’s migration experience. The recommendations concern not only the principles identified above but also a number of rights, including the right of the child to identity, including name and nationality; the right to liberty; freedom from all forms of violence, including in the migration context; the right to family life; economic, social and cultural rights, with particular reference to the right to health; protection from economic exploitation (see also “child labour” below); access to regular and safe migration channels and a secure residence status; and rights in conflict situations.

## Box 4.18 Committee on the Rights of the Child

### Day of General Discussion on the Rights of All Children in the Context of International Migration

#### Recommendations [extracts]

##### **General recommendations, including on legislation, policy and coordination**

States should ensure that the rights enshrined in the Convention are guaranteed for all children under a state's jurisdiction, regardless of their own or their parents' migration status and address all violations of those rights. Child care and protection agencies/bodies rather than immigration agencies take primary responsibility for all children in situation of international migration.

States should adopt comprehensive human rights-based laws and policies to ensure that all children involved in or affected by international migration enjoy the full protection of the Convention in a timely manner, regardless of age, economic status, documentation status of themselves or their parents, in both voluntary and involuntary migration situations, whether accompanied or unaccompanied, or any other.

##### **Non-discrimination**

States should ensure adequate measures to combat discrimination on any grounds. In doing so, efforts to combat xenophobia, racism and discrimination and promote the integration of families affected by migration into society should be strengthened. [...]

##### **Best interests of the child**

States should conduct individual assessments and evaluations of the best interests of the child [...] In particular, primary consideration should be given to the best interests of the child in any proceeding resulting in the child's or their parents' detention, return or deportation.

States should make clear in their legislation, policy, and practice that the principle of the child's best interests takes priority over migration and policy or other administrative considerations. [...]

##### **Right of the child to be heard**

[...] All children, including children accompanied by parents or other legal guardians, must be treated as individual rights-holders, their child-specific needs considered equally and individually and their views appropriately heard. [...]

##### **Right to identity, including name and nationality**

States should strengthen measures for ensuring universal birth registration, including removing any legal and practical barriers to birth registration for migrant children, and, in situations where a child would otherwise be Stateless, grant citizenship to children born in their territory.

## **Right to liberty and alternatives to detention**

[...] The detention of a child because of their or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.

To the greatest extent possible, and always using the least restrictive means necessary, States should adopt alternatives to detention that fulfil the best interests of the child. [...]

## **Freedom of the child from all forms of violence, including in the context of migration**

States should adopt legally binding and gender-sensitive affirmative policies, programmes and actions to ensure equal protection from violence for children of all ages affected by international migration, regardless of their own or their parent's migration status with special focus on the school and community settings. [...]

## **Right to family life**

States should ensure that their migration policies, legislation and measures respect the right of the child to family life and that no child is separated from his/her parents by State action or inaction unless in accordance with his/her best interests. Such measures should, inter alia, include positive, humanitarian, and expeditious attention to family reunification applications; options for regularization of migration status wherever possible; and, family reunification policies, at all stages of migration, for enabling children left behind to join their parents (or parents to join their children) in transit and/or destination countries.

States should refrain from detaining and/or deporting parents if their children are nationals of the destination country. Instead, their regularization should be considered. [...]

## **Standard of living, enjoyment of economic, social and cultural rights**

States should ensure that all children in the context of migration have equal access as national children to economic, social, and cultural rights and to basic services regardless of their or their parent's migration status, making their rights explicit in legislation. [...]

Policies, programmes and measures to protect children from poverty and social exclusion must include children in the context of migration, regardless of their status, in particular those left behind in countries of origin and those born to migrant parents in countries of destination. [...]

## **Right to health**

States should ensure and implement adequate and accessible measures for addressing trauma experienced by children during migration, asylum-seeking or trafficking. Special care should be taken to make mental health services available to all children, including in the context of conducting the child's best interests assessment, evaluation and determination.

## Protection from economic exploitation

States should ensure their migration policies and measures take into account the Convention and [ILO Conventions Nos. 132, 182 and 189] It is further recommended that States consider establishing monitoring and reporting systems for identifying and remedying child rights' violations taking place in work contexts, particularly in informal and/or seasonal situations.

## Access to regular and safe migration channels and secure residence status

Wherever possible, States should make available regular and non-discriminatory migration channels, as well as provide permanent and accessible mechanisms for children and their families to access long-term regular migration status or residence permits based on grounds such as family unit, labour relations, and social integration. [...]

## Conflict situations

Recalling that States have legal obligations to comply with the Convention and international human rights standards, including in migration situations arising from conflict, States should ensure that their migration policies and procedures relating to conflict situations have adequate safeguards regarding children's rights.

In 2005, the Committee adopted [General Comment No. 6 \(2005\) on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin](#), providing guidance on the protection, care and appropriate treatment of such children based on the entire CRC legal framework, with particular reference to the principles of non-discrimination, best interests of the child and the right of the child to express his or her views freely.

### Box 4.19 Parliamentarians protect all children's rights

#### Kenya

In December 2001, the Parliament of Kenya adopted the [Children Act](#), translating into law the principles enshrined in the Convention on the Rights of the Child and the [African Charter on the Rights and Welfare of the Child](#). The Act was last reviewed and amended in 2010; it broadly defines the term "child" to include *any* human being under the age of 18, protects children against discrimination regardless of origin, and guarantees government support and protection to children without a proper identity and nationality. Following on a parliamentary workshop organized in 2000 to study the issue of child labour, the Act also addresses this issue and guarantees children protection from economic exploitation.

#### Thailand

In 2008, the Parliament of Thailand adopted the [Civil Registration Act](#), which affirmed the right to birth registration for all children born in Thailand, including those born to displaced persons, migrant workers, and migrant parents with no legal status in Thailand. The Act has been praised by United Nations agencies as making a major contribution towards preventing statelessness and, more broadly, protecting the human rights of vulnerable children.



## The Nouakchott Appeal

In collaboration with the UN Children’s Fund (UNICEF), in 2001, parliamentarians from north, west and central Africa assembled in Nouakchott, Mauritania, to galvanize international efforts to further promote and protect the rights of children. The Nouakchott Appeal called on governments to ratify and implement international and regional agreements aimed at strengthening children’s rights, including the [African Charter on the Rights and Welfare of the Child](#), which affirms the rights of children regardless of nationality. It also called on governments to allocate more financial resources to the key areas of education, health care and nutrition.

### 4.4.1 Child labour

Children of migrant workers in the destination country and children left behind when parents migrate to provide for them can be at risk of child labour, which is prohibited by international human rights and labour standards. Article 32(1) of the [Convention on the Rights of the Child](#) stipulates:

1. *States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.*
2. *States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:*
  - a. *Provide for a minimum age or minimum ages for admission to employment;*
  - b. *Provide for appropriate regulation of the hours and conditions of employment;*
  - c. *Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.*

As this provision implies, not all work by children is considered child labour or prohibited by national legislation or international standards. Two of the ILO fundamental conventions, the [ILO Minimum Age Convention, 1973 \(No. 138\)](#) and the [Worst Forms of Child Labour Convention, 1999 \(No. 182\)](#), seek to abolish child labour. As of 12 August 2015, Convention No. 138 had been ratified by 168 and Convention No. 182 by 179 of ILO’s 186 Member States. Under Convention No. 138, all employment or work is forbidden for children – with certain specified exceptions (see below) – before the age of 15 or the end of compulsory schooling, whichever age is higher. Members are also called on to raise progressively the minimum age for employment or work. Convention No. 138 additionally contains certain flexibility provisions, particularly for developing countries, which may, after consultation with the organizations of employers and workers concerned, where such exist, initially specify a minimum age of 14. The Convention also contains an allowance for light work (which does not harm the health, development,

schooling or vocational training of the children concerned) by persons 13 – 15 years of age, so long as the competent authority identifies which activities constitute light work and prescribes the number of hours and conditions under which such employment or work may be undertaken. It is also possible, in ratifying Convention No. 138, to exempt certain occupations, such as family-owned businesses and farms, from this definition, so long as safety and health are not jeopardized. Hazardous work, on the other hand, can only be undertaken at age 18, or 16 on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity.

#### **Box 4.20 Human interest story: migrant working girls, victims of the global crisis**

10 years old, working two jobs, no time for school.

[Marifat] helps her mother clean streets in Moscow. She has never attended school. With her limited knowledge of the Russian language and irregular status she has little chance of ever being admitted to a Moscow school.

Marifat says that even if she were admitted to school she wouldn't have the time to study. She works from early morning cleaning streets, then spends the rest of the day looking after her four-year-old brother.

Still, it's hard for the family to make ends meet. So Marifat is very proud to have found an extra job for herself – in addition to cleaning streets and providing child care, she cleans the apartment and does the laundry of an old woman in the building where they live.

She and her family have no plans to return to Dushanbe [Tajikistan], they couldn't afford it if they did and they would hardly find any job there. When asked about her plans for the future, Marifat said she simply has none – at the age of 10, life has taught her not to think ahead.

Marifat's plight is emblematic of the growing vulnerability facing child labourers in general, and girl child labourers in particular, in today's climate of economic crisis, unemployment and increasing poverty, says [an] ILO report issued for the World Day Against Child Labour.

The report states that because of the increase in poverty resulting from the crisis, poor families with a number of children may have to choose which children stay in school. In cultures where a higher value is placed on education of male children, girls risk being taken out of school, and are then likely to enter the workforce at an early age.

The report cites the importance of investing in the education of girls as an effective way of tackling poverty, noting that educated girls are more likely to earn more as adults, marry later in life, have fewer and healthier children and have greater decision-making power within the household. Educated mothers are also more likely to ensure that their own children are educated, thereby helping to avoid future child labour.

“[Migrant working girls, victims of the global crisis](#)”, Geneva, ILO Newsroom, International Labour Office, 2009.

In contrast to the flexibility devices and progressive implementation contained in Conventions Nos. 138 and 182, which targets the worst forms of child labour, requires the same level of implementation from all members, irrespective of level of development or national circumstances. The Convention lists the types of work that are prohibited for children under 18, which include all forms of slavery or practices similar to slavery; prostitution and the production of pornography or pornographic performances; illicit activities; and hazardous work. Member States must also design and implement programmes of action to eliminate, as a priority, these worst forms of child labour, and must establish or designate appropriate mechanisms to monitor implementation of the Convention. In addition to programmes of action, Convention No. 182 calls on members to take effective and time-bound measures to prevent, protect and remove children from the worst forms of child labour and socially integrate them into free basic education or vocational training.

According to the recent ILO publication, [Marking progress against child labour – global estimates and trends 2000 – 2012](#), 168 million children aged 5 – 17 worked as child labourers in 2012 (approximately 100 million boys and 68 million girls). More than half – 85 million (55 million boys and 30 million girls) – performed “hazardous work”. The large majority of child labourers were unpaid family workers (68 per cent), followed by those with paid employment (21 per cent) and self-employment (5 per cent).

#### **Box 4.21 Human interest story: monitoring hazardous child labour in Tajikistan**

[...] Safar became the main breadwinner for the family a year ago when his father went to work in Russia and completely abandoned his family back home. This is the tragedy of many broken families in today’s Tajikistan, where the number of external migrants is estimated between 500,000 and 800,000 people – in a country with a population of 7 million.

“80 per cent of working children come from a one-parent family or from a family where the father is a migrant worker”, explains Muhayo Khosabekova, national coordinator of the German-funded ILO-IPEC project “Combating Child Labour in Central Asia – Commitment Becomes Action.”

Besides its positive effect on poverty reduction in Tajikistan, labour migration of men had a serious impact in terms of increased numbers of child labourers. In the absence of men who work abroad, children have to take responsibility over their family income.

Even with his miserable salary Safar holds on to this job. There are no jobs in the villages, and many rural children like him have to move to town in search of work. There they are employed at informal workplaces to wash cars, to transport, load and unload goods and baggage at local bazaars, they work as conductors on shuttle buses, and perform any other subsidiary work.

These days one can easily find these children in every city in Tajikistan. In the city of Khudzhand hundreds of them stand every morning at an informal labour exchange near the local bazaar, ready to take any job. For these children that is the only way to earn a living, and for their adult employers they are just a cheap labour force. "I have been standing here for ten days now, and have hardly earned money to pay for food, and I still have to pay for shelter," complains 13-year-old Ibrahim, lorry-carrier.

Hazardous working conditions, physically demanding work, inadequate rest, malnutrition and unsanitary working conditions inevitably affect the children's health. According to [ILO-IPEC's International Programme on the Elimination of Child Labour] ILO-IPEC, the daily load carried by one child worker may reach 800 kg. [...]

"[Monitoring hazardous child labour in Tajikistan](#)", Geneva, ILO Media Centre, International Labour Office, 2011.

The children of migrants (and refugees) are often particularly vulnerable to "hazardous work" in the agricultural sector, which is characterized by a high incidence of child labour. Worldwide, among child labourers aged 5 – 17, 59 per cent work in that sector, often to help their parents reach quotas impossible for an unaided worker to meet. In some countries, migrant children are employed to produce commodities for export, for instance cocoa and rubber, or to cut flowers. This increases the importance of ensuring that the agricultural sector, often excluded from labour legislation, is effectively regulated. Another key sector is services, which employs 32 per cent of all child labourers, 7 per cent of whom perform domestic work.

A prohibition of child labour is inherently difficult to enforce, and may be especially difficult with migrant children – and of course even more so where they have been trafficked or are otherwise undocumented.

An ILO-IPU handbook for parliamentarians prepared in 2002, [Eliminating the worst forms of child labour: A practical guide to ILO Convention No. 182](#) (No. 3), provides further information and guidance for parliamentary action on this subject.

## 4.5 Movement rights

### 4.5.1 Right to leave, right to return to and free movement within a country

Certain rights with respect to movement within states and across borders have been firmly established in international law. These are the right to move freely within a country where one is lawfully resident, the freedom to leave any state, including one's country of origin, and the right to return to one's own country. These rights often need to be reiterated or reinforced in national legislation and actual practice; the legacies of restrictions on internal and international movement remain well implanted in the laws of numerous countries.

These rights have been explicitly recognized for everyone in the UDHR (Article 13) and ICCPR, which stipulates in Article 12 that:

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his [her] residence.*
2. *Everyone shall be free to leave any country, including his [her] own.*
3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
4. *No one shall be arbitrarily deprived of the right to enter his [her] own country.*

The Human Rights Committee, which monitors State Party application of ICCPR, commented on this article in General Comment No. 27 (1999) on Freedom of Movement, clarifying that the reference to "his [her] own country" in Article 12(4) is a broader concept than "country of nationality" and therefore may also apply to persons who are not nationals of the country in question, such as stateless persons and non-nationals who are long-term residents.

#### **Box 4.22 The right to enter one's own country**

*The wording of Article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country". The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.*

*This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of Article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.*

General Comment No. 27 (1999): Freedom of Movement (Art. 12), Human Rights Committee, UN doc. CCPR/C/21/Rev.1/Add.9 (2 November 1999), para. 20.

The rights to leave any country and to return to one's own country are also explicitly recognized in Article 8 of ICRMW, which is found in Part III of ICRMW and thus applies to all migrant workers and members of their families, including those in an irregular situation:

1. *Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.*
2. *Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.*

These rights are reiterated in regional human rights provisions, such as Article 2 of [Protocol No. 4, 1963 to ECHR, 1950](#), Articles 12(1) and (2) of [ACHPR, 1981](#) and Article 22 of [ACHR, 1969](#). The relevance of these rights has been aptly illustrated in the [Case of Expelled Dominicans and Haitians v. Dominican Republic](#), in which the Inter-American Court of Human Rights (judgment of 28 August 2014, series C No. 282, para. 389) ruled, among other matters, that the Dominican Republic had violated the rights to move freely within a country and to enter one's own country in Article 22 of ACHR by destroying the identity documents of Dominicans of Haitian descent and not admitting those without official documents.

## 4.5.2 Obligations of states to provide protection

Under national sovereignty principles, states retain the authority to regulate immigration, namely to determine who (other than citizens) may enter, visit, reside or work in their territory. This engages two sovereign prerogatives: (1) denying or restricting access to the state territory; and (2) removing non-nationals not authorized to enter or remain in the territory. However, as with other areas of law and state practice,

the regulation of migration is subject to the principles and norms of international law, in particular human rights obligations.

These obligations include adherence to the principle of *non-refoulement* and the presumption that access to the territory should be allowed to persons at risk of torture or other serious human rights violations, as well as persons in need of international refugee protection. Further pertinent obligations are to ensure the right to liberty and security of the person, which is challenged when migrants, particularly those in an irregular situation, are subject to administrative detention; to prohibit arbitrary expulsion, including collective expulsion; and to observe other human rights, such as the right to family and private life. Such obligations clearly limit the sovereign prerogative and discretion of states in these areas.

### 4.5.3 Non-refoulement

*Refoulement* of non-nationals to a country where there are substantial grounds for believing they may be subjected to a real risk of torture or to cruel, inhuman or degrading treatment or punishment is prohibited under international and regional human rights instruments. The [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984](#), contains an explicit provision to this effect in Article 3(1): “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”. The principle of *non-refoulement* is widely recognized as constituting a norm of international customary law. The absolute prohibitions on torture and cruel, inhuman or degrading treatment or punishment in Article 7 of ICCPR and Article 3 of ECHR have been similarly interpreted by the Human Rights Committee and the European Court of Human Rights, respectively. In regard to refugees, international refugee law establishes a prohibition on the return of refugees to any place where they face persecution under Article 33(1) of the 1951 Convention relating to the Status of Refugees.

#### **Box 4.23 Application of Article 3 of ECHR in expulsion cases**

*[I]t is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3 [...], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 [...] in the receiving country. In these circumstances, Article 3 [...] implies the obligation not to expel the person in question to that country.*

**Chahal v. United Kingdom**, Application No. 22414/93, European Court of Human Rights, judgment of 15 November 1996, para. 74.

In a case concerning the interception by the Italian authorities of boats carrying refugees and migrants in the Mediterranean, the European Court of Human Rights has ruled that the state's obligations under Article 3 of ECHR also apply outside the territory of the state, so long as the authorities concerned are exercising exclusive control and thus jurisdiction:

*Whenever the State through its agents operating outside its territory exercise control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 [of the ECHR] to secure to that individual the rights and freedoms [...] of the Convention that are relevant to the situation of that individual. [...]*

*The Court observes that in the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities.*

[Hirsi Jamaa v. Italy](#), Application No. 27765/09, European Court of Human Rights, judgment of 23 February 2012, paras. 74, 81.

#### 4.5.4 Detention of migrants and their criminalization

In a number of countries, migrants – including members of their families – are subject to detention much more readily than are nationals, sometimes under abusive conditions. Undocumented migrants in particular are often arrested, detained and expelled without being able to defend themselves in accordance with due process.

The right of *everyone*, including migrants, to liberty and security of person, and the protection from arbitrary arrest and detention are spelled out in Articles 9 and 10 of ICCPR, which also outline the applicable guarantees with regard to detention and trial. Many of these rights are reiterated in regional human rights instruments. Given the particular situation of migrant workers, and particularly those in an irregular situation, Article 16 of ICRMW is more specific. The UN Committee on Migrant Workers has underscored the importance of this provision with regard to the arrest and detention of migrant workers in an irregular situation and members of their families (see Annex II).

The Special Procedures mandates of the UN Human Rights Council have also raised concerns about the detention of migrants, including those in an irregular situation. The Working Group on Arbitrary Detention has discussed the detention of migrants on several occasions; for example, see [Report of the Working Group on Arbitrary Detention](#), UN doc. A/HRC/10/21 (16 February 2009), paras. 65 – 68.



In his 2012 report to the UN Human Rights Council, the Special Rapporteur on the human rights of migrants also focused on the detention of migrants in an irregular situation, putting forward a number of comprehensive and detailed conclusions and recommendations to UN Member States.

#### **Box 4.24 Detention of migrants in an irregular situation**

##### **Conclusions and recommendations of the Special Rapporteur on the human rights of migrants**

68. Detention for immigration purposes should never be mandatory or automatic. According to international human rights standards, it should be a measure of last resort, only permissible for the shortest period of time and when no less restrictive measure is available. [...]

69. The reasons put forward by states to justify detention should be clearly defined and exhaustively enumerated in legislation. If, as a measure of last resort, a State resorts to detention for immigration-control purposes in an individual case, this should be considered only when someone presents a risk of absconding or presents a danger to their own or public security.

70. Administrative detention should not be applied as a punitive measure for violations of immigration laws and regulations, as those violations should not be considered criminal offences.

71. The Special Rapporteur calls on states to adopt a human rights-based approach to migration and review their legislation and policies on detention of migrants, ensuring that national laws are harmonized with international human rights norms that prohibit arbitrary detention and inhumane treatment.

72. The Special Rapporteur calls on states to consider progressively abolishing the administrative detention of migrants. In the meantime, Governments should take measures to ensure respect for the human rights of migrants in the context of detention, including by:

- (a) Ensuring that procedural safeguards and guarantees established by international human rights law and national law are applied to any form of detention. [...]
- (b) Ensuring that migrants in detention are accurately informed of the status of their case and of their right to contact a consular or embassy representative and members of their families. [...]
- (c) Ensuring that the law sets a limit on the maximum length of detention pending deportation and that under no circumstance is detention indefinite. There should be automatic, regular and judicial review of detention in each individual case. Administrative detention should end when a deportation order cannot be executed.
- (d) Ensuring that migrants under administrative detention are placed in a public establishment specifically intended for that purpose or, when this is not possible, in premises other than those intended for persons imprisoned under criminal law. The use of privately run detention centres should be avoided. [...]

- (e) Ensuring that the [Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment](#) are applied to all migrants under administrative detention. [...]
- (f) Applying the [Standard Minimum Rules for the Treatment of Prisoners](#) to migrants under administrative detention. [...]
- (g) Giving particular attention to the situation of women in detention, ensuring that they are separated from men, and attended and supervised only by women officers, in order to protect them against sexual violence, and avoid the detention of pregnant women and breastfeeding mothers.
- (h) Ensuring that legislation does not allow for the detention of unaccompanied children and that detention of children is permitted only as a measure of last resort and only when it has been determined to be in the best interests of the child, for the shortest appropriate period of time and in conditions that ensure the realization of the rights enshrined in the Convention on the Rights of the Child. [...]
- (i) Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for illegal entry or residence in the country or for the activities they are involved in as a consequence of their situation as trafficked persons. [...]
- (j) Taking into due consideration the particular vulnerabilities of specific groups of migrants including victims of torture, unaccompanied older migrants, migrants with a mental or physical disability and migrants living with HIV/AIDS. [...]
- (k) Applying stateless status determination procedures to stateless migrants, and provide persons recognized as being stateless with a lawful immigration status.

73. The Special Rapporteur would like to remind Governments that alternatives to detention should not become alternatives to unconditional release, whenever such release is a possibility. [...]

74. The Special Rapporteur encourages states to collect disaggregated data on the number of migrants in administrative detention, the number of migrants who are subject to different types of non-custodial measures and the compliance rate with these measures, in order to evaluate their effectiveness. [...]

[Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau](#), United Nations General Assembly, Human Rights Council, 20th Session, UN doc. A/HRC/20/24 (2 April 2012).

The principles discussed above can be summarized as follows:

- Migrants should not be treated as criminals; those who are in an irregular situation have committed, at most, administrative infractions rather than criminal offences.
- Detention of migrants should only be considered a last resort and only with a view to their expulsion from the country.

- Alternatives to detention should be actively sought.
- If detained, migrants should be kept apart from persons detained in the criminal process.
- Migrants should not be detained in prisons.
- Families should not be separated.
- Children should never be detained. Detention of children is incompatible with the principle of the best interests of the child.

### **Box 4.25 Combating the use of detention for migrants: the cases of the European Union and Venezuela**

#### **European Union**

Almost all Member State parliaments in the European Union have enacted legislation requiring governments to pursue measures other than detention in cases concerning migrants in an irregular situation, with detention used only as a last resort. The alternatives include requiring migrants to report to the authorities at regular intervals, reside at a specific address and be released to a care worker. Reports indicate, however, that greater effort is needed to implement these laws fully.

#### **Venezuela**

Venezuela adopted a commitment to similar alternatives to detention in its 2004 immigration law, which went a step further and prohibited the detention of migrants. According to academic sources, Brazil, Peru and Uruguay do not detain migrants as a matter of policy.

## 4.5.5 Protection against arbitrary expulsion, including collective expulsion

International law has gradually evolved to prohibit arbitrary, including collective expulsion. Regional human rights instruments in Europe, the Americas and Africa explicitly proscribe collective expulsion. [Protocol No 4 to the ECHR](#) was the first international instrument to explicitly ban it, stipulating in Article 4 that: "*Collective expulsion of aliens is prohibited*". In the case of [Čonka v. Belgium](#) (Application No. 51564/99, judgment of 5 February 2002), the European Court of Human Rights reiterated its earlier case-law by defining collective expulsion as "*any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group*" (para. 59). This stipulation upholds human rights to due process and fair treatment by requiring individual-case determination by competent authorities in cases where groups of people may be affected.

The widely ratified ACHR clearly provides in Article 22(9) that: “*The collective expulsion of aliens is prohibited*”. In the [Case of Expelled Dominicans and Haitians v. Dominican Republic](#), referred to above, the Inter-American Court of Human Rights (judgment of 28 August 2014, series C No. 282, para. 384) found the Dominican Republic to be in breach of Article 22(9) as it did not examine the cases of three of the expelled individuals on the basis of their particular circumstances, but only in a collective manner. ACHR also includes a prohibition on mass expulsion, in Article 12(5), though expressed somewhat differently: “*The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups*”. In its amicus intervention in the case of [Hirsi Jamaa v. Italy](#), the OHCHR affirmed “*as a central matter, that each person in a group of non-nationals intercepted by a state vessel at sea also enjoys protection against rendering, without his or her consent, to **any** other State, without a prior reasonable and objective examination of the particular circumstances of that particular individual’s case. This due process right ensures that all applicable grounds under international law and national law that may negate the expulsion of that particular individual are duly considered, including, **but not limited to the prohibition of refoulement***” (Amicus brief filed on behalf of OHCHR in the case of *Hirsi Jamaa and others v. Italy* in the European Court of Human Rights, Application no. 27765/09, 4 May 2011).

Article 22 of ICRMW reiterates the prohibition of collective expulsion and delineates specific procedural safeguards to protect the rights of all migrant workers and members of their families who are subject to expulsion on an individual basis. This provision is important because it goes beyond the previous protections afforded by international human rights law to non-nationals in the expulsion process, which were limited to non-nationals “lawfully” in the territory, as reflected in Article 13 of ICCPR:

*An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his [her] expulsion and to have his [her] case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

The full text of Article 22 is reproduced below to facilitate parliamentary review of national law and practice and to serve as a guide for legislation and administrative regulations.

#### **Box 4.26 Protection against expulsion – Article 22 of ICRMW**

1. *Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.*
2. *Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.*
3. *The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.*
4. *Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.*
5. *If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.*
6. *In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.*
7. *Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.*
8. *In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.*
9. *Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.*

## 4.5.6 Practical implications

Despite the explicit provisions in international law referred to above, incidences amounting to “pushing back” migrants at land or sea borders and collective and arbitrary expulsions of migrants have been reported in nearly all regions of the world in recent years. These incidences and their risk of repetition require action by parliamentarians in virtually every country.

Addressing movement rights and prohibiting collective and arbitrary expulsion require parliamentarians to review existing national laws. In reviewing the legislation, regulations and practices on asylum and immigration, they should devote specific attention to ensuring that individual due process safeguards are in place for all deportation and expulsion proceedings, to prevent incidences of collective and arbitrary expulsion.

## Checklist for parliamentarians

### What can parliamentarians do to defend key human rights principles for migrants?

Parliamentarians need to devote their attention to revising existing laws, policies and practices and advocating changes in government and societal attitudes, seeking to ensure that the following human rights are respected, protected and fulfilled in respect of migrants:

- ☑ **Effective recognition of economic, social and cultural rights:**
  - Review legislation in such areas as employment, health, social security, housing and education, and guarantee protection of ESC rights to migrants and nationals alike.
  - Advocate **legal guarantees of non-discrimination and equality of treatment** for all migrants.
  - Avoid designating migrants in an irregular situation as “illegal”, which can serve to justify non-recognition of fundamental rights, including ESC rights, e.g., to health and education.
- ☑ **Freedom of association and the right to collective bargaining:**
  - Review legislation on trade union rights, which apply to everyone and **are subject to narrow restrictions only**: in respect of the armed forces and police or on the grounds of national security, public order or protection of the rights and freedoms of others.
  - Advocate the application in law and practice of the right of all **migrant workers, including those in an irregular situation, to join and form trade unions and to bargain collectively**, with a view to addressing substandard working conditions and wages and preventing abuses against all workers in the labour market.
- ☑ **Elimination of all forms of forced or compulsory labour, including trafficking for forced labour and labour exploitation:**
  - Recognize the specific vulnerabilities of migrant workers to forced labour and trafficking for the purpose of forced labour.
  - Ensure that national labour legislation applies to all employment sectors, including the **domestic and agricultural sectors**, where migrant workers predominate in many countries and are at particular risk of forced labour, because they are hidden from public view.
  - Review migration laws and policies and consider supporting **more regular labour migration channels**, especially for low-skilled workers, which would help to prevent irregular cross-border travel by migrant workers (and the risk of being trafficked) to work in the informal economy, where they are vulnerable to different forms of forced labour.

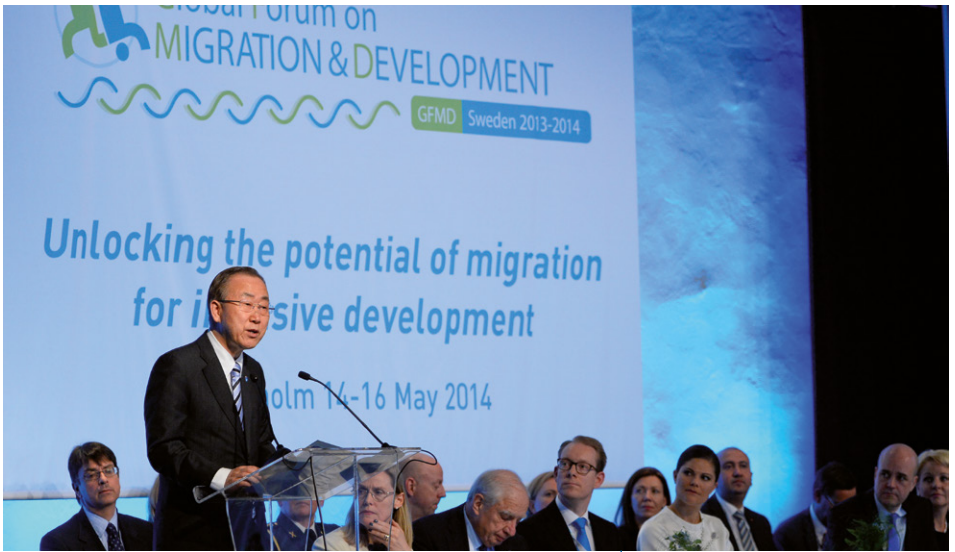
☑ **Migrant children’s rights, including the abolition of child labour:** Children of migrant workers in the destination country and children left behind when parents migrate to provide for them can be at risk of child labour, which is prohibited by international human rights law and international labour standards. Parliamentarians should therefore review the legislation of relevance to child labour and advocate:

- a minimum age for admission to employment;
- appropriate regulation of the hours and conditions of employment for children and young people who are permitted to work;
- special attention to sectors such as agriculture, where children can be subjected to “hazardous” work; and
- appropriate penalties/sanctions to ensure implementation of the relevant provisions.

☑ **Movement rights:** States retain the sovereign authority to regulate immigration, and hence to restrict access to the territory and remove non-nationals. In doing so, however, they have to respect, protect and fulfil certain human rights obligations. Parliamentarians should therefore review immigration laws and policies to make sure that the following principles and rights are ensured in respect of migrants, both within the country and at the international border:

- the principle of *non-refoulement*;
- access to asylum determination procedures;
- the right to respect for family and private life;
- the rights to liberty and security of person and protection from arbitrary arrest and detention, which also apply to migrants in an irregular situation, who should not be criminalized; and
- the prohibition of arbitrary and collective expulsion from the country.





Secretary-General of the United Nations Ban Ki-moon addresses the Global Forum on Migration and Development (GFMD), calling on countries to design policies aimed at optimizing the benefits of migration. © AFP/ Jonathan Nackstrand, 2014

## Chapter 5

# Human rights-based governance of migration

This chapter responds to IPU's call for a human rights-based approach to the governance of migration. That is a concept parliamentarians need to consider carefully when discussing a global phenomenon that has human beings at its centre: migrants and their families, many of whom find themselves in vulnerable situations. This chapter explains the concept of migration governance in a human rights context, with particular reference to the international level, and identifies a number of elements of a human rights-based approach to migration governance. It then considers how the human rights of migrants can best be protected at the national level, including the use of human rights indicators to better understand some of the gaps and challenges in this regard. Such a methodology could help in planning for a human rights-based approach to migration governance and in complying with the international human rights norms and labour standards described in previous chapters.

Given that decent work and the quest for better livelihoods are at the core of much international migration today, this chapter also devotes space to the governance of labour migration, identifying the principal contours and elements of rights-based legislation and policy in this field in countries of origin and destination, and in the context of bilateral as well as regional cooperation. Human rights-based governance

of migration is also explored in the light of recent global-level debates on international migration and development. The chapter draws extensively on the materials produced by both ILO and OHCHR, and particularly the 2013 OHCHR report on [Migration and Human Rights. Improving Human Rights-based Governance of International Migration](#).

## 5.1 Migration governance and human rights

### Box 5.1 Migration and governance

*In the domain of international migration, governance assumes a variety of forms, including the migration policies and programmes of individual countries, interstate discussions and agreements, multilateral fora and consultative processes, the activities of international organizations, as well as the laws and norms.*

[Migration in an interconnected world: New directions for action](#), Global Commission on International Migration (GCIM), October 2005, p. 65.

Reference to the concept of governance in relation to migration and human rights is important for a number of reasons. The term governance implicitly recognizes that migration is a phenomenon involving a wide range of stakeholders and not merely governments or states. A “whole of government” or “joined-up government” approach should be taken to migration because the related issues can best be captured by involving all relevant ministries – including interior or home affairs, foreign affairs, employment/labour, education and health – in all countries (origin, transit and destination). Other important actors in migration governance include parliaments and parliamentarians – who, depending on the country in question, may or may not be closely involved with policymaking in this field – as well as national human rights institutions, local authorities, regional organizations and processes and international organizations. Important non-governmental stakeholders include representative workers’ organizations (trade unions), employers’ organizations and the business sector, which are vital given that they represent the real economy and need to be consulted in the formulation and implementation of labour migration legislation and policies in particular (see Section 5.4), as well as non-government organizations, diaspora and migrants’ associations.

### **Box 5.2 Facilitating direct contact between migrants and parliamentarians: the case of Rwanda**

Parliament can also serve as a conduit for the development of links between migrants and state authorities. According to the [UN Committee on Migrant Workers](#), the Rwandan Parliament has set an example in facilitating such connections, notably by establishing a mechanism allowing migrants to lodge appeals with one of the parliamentary human rights committees. This direct line of communication forges strong connections between migrants and parliament, and the involvement of migrants can encourage greater action towards the protection and promotion of their rights.

The concept of migration governance is thus more inclusive and responsive to the phenomenon of international migration than the concept of “migration management”, which implies that migration is a matter solely for the organs of government.

### **Box 5.3 The levels of migration governance and the role of parliamentarians**

Migration is governed at various levels. Policies in destination countries focus primarily on regulating incoming migration and its economic and social consequences, including the integration of migrants and their treatment in the workplace and in society generally. States also design policies to address the impact of people leaving the country and to harness the economic and social benefits of remittances and diaspora contributions (see Section 5.4). In order to deal effectively with the multidimensional aspects of migration, many states institute mechanisms for coordination between relevant ministries and other stakeholders.

A range of governance arrangements for migration have been developed at bilateral and regional levels. At the bilateral level, states typically conclude formal agreements or non-binding MoUs, covering such matters as the recruitment and treatment of migrant workers in particular sectors of the economy (e.g., domestic work). Concrete policies involving various concessions of sovereignty to a higher level of authority have been developed to facilitate the mobility of people regionally, in such regional political and economic communities as the EU, the CIS, the Eurasian Economic Community (EAEC), ASEAN, MERCOSUR, CARICOM, EAC, ECOWAS and SADC (see also Chapter 2).

Discussions concerning migration at the regional level have been gaining importance over recent years, as have calls to ensure concomitant human rights oversight of their activities. Existing regional economic communities have witnessed a renewed interest in implementing provisions for the free movement of labour and started to focus on the development impacts of migration. The EU, for instance, has not only introduced free movement of its citizens for the purpose of employment, establishment and provision of services, but also developed standards of portability of health care and pensions for migrants moving within the EU, including those from third countries. MERCOSUR and CARICOM have also introduced measures to promote the free circulation of their citizens.

Since the late 1980s, an array of informal regional consultative processes (RCPs) on migration has been developed that often complement regional economic integration mechanisms. RCPs have created a space in which governments can engage in informal and non-binding dialogue, exchange information and build common understandings. They have faced challenges, however, in regard to the full integration of human rights issues on their agendas, as well as in relation to inclusive participation and transparency. Since their *raison d'être* is to provide an informal space for government officials to discuss various aspects of migration, extending this space to other actors appears somewhat counter-intuitive to the processes themselves. Parliamentarians therefore need to be aware of which RCPs the government of their country is involved in and provide appropriate oversight of the participation of relevant officials. Information on current RCPs is provided on the IOM website at <https://www.iom.int/regional-consultative-processes>.

In general, parliamentarians, both those in national and regional parliaments (as in the case of Members of the European Parliament), can therefore play a very important role in tracking migration governance processes at the national, regional and global levels to help ensure that the normative principles agreed at the global level do not undermine or fragment the human rights of migrants at the national and regional levels.

Adapted from [Migration and Human Rights. Improving Human Rights-based Governance of International Migration](#), Geneva, United Nations, 2013, pp. 22 – 23.

### **Box 5.4 An international parliamentary approach to migration: the work of IPU**

As the world organization of parliaments, IPU has collaborated with international and regional partners to play an active role in promoting parliamentary action to address many of the challenges faced by migrants and their families. In this role, IPU has served as a nexus for international collaboration between parliamentarians from around the globe by helping to organize capacity-building seminars and serving as a forum for resolutions proposing action to be taken by members of parliament in their respective legislatures.

- On 24 October 2007, IPU, ILO and OHCHR hosted a capacity-building seminar for members of parliamentary committees working on human rights and migrant issues. The seminar was attended by participants from 31 parliaments around the globe and by a number of international experts; it included the examination of legal frameworks, the employment of a human rights-based approach, and case studies.

See [Summary and Recommendations](#)

- On 18 April 2008, the 118th IPU Assembly (Cape Town, April 2008) [adopted a resolution that called on states and parliaments to undertake a number of measures to promote and protect the human rights of migrants](#), including the signing and ratification of ICRMW, the adoption of ILO standards, the dissemination and promotion of best practices by parliamentarians and the formation of specialized parliamentary committees on migration. The resolution also stressed that measures be adopted to address the situation of migrant women, including with regard to labour, discrimination and trafficking.
- Within the scope of a [resolution on combating organized crime](#), on 1 April 2010 the 122nd IPU Assembly (Bangkok, March – April 2010) called for action to strengthen and better harmonize measures aimed at combating human trafficking, including raising awareness of the issue and supporting the victims of such crimes and their families.

## 5.1.1 Human rights, migration and the role of the United Nations system

Comprehensive and holistic discussions of the normative dimensions of international migration within the formal UN context have been lacking on the whole, with some exceptions. Chapter X of the [International Conference on Population and Development \(ICPD\) Programme of Action](#) (1994) was devoted to international migration, and, as noted in Chapters 2 and 3, the 2001 [Durban Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance](#) and the subsequent 2009 [Durban Review Conference](#) were also important milestones. The Durban Declaration called on states to:

*recognize that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices* (para. 16).

In 2004, during the discussion on labour migration that took place at the 92nd Session of the International Labour Conference concerning a fair deal for migrant workers in a global economy, the ILO tripartite constituents of governments, employers'

organizations and workers' organizations reached a landmark consensus on the need for a rights-based approach to labour migration while recognizing labour market needs. The Conference endorsed a [Plan of Action for Migrant Workers](#), the centrepiece of which was the preparation of a non-binding [Multilateral Framework on Labour Migration](#). The Framework was elaborated by a tripartite meeting of experts in late 2005, and the ILO Governing Body in March 2006 approved its wide dissemination (see Chapter 2).

In December 2003, the [Global Commission on International Migration \(GCIM\)](#) was launched by the UN Secretary-General and a number of governments in Geneva. GCIM was an independent body comprising 19 commissioners given the mandate to provide the framework for formulating a coherent, comprehensive and global response to the issue of international migration. In its October 2005 report on [Migration in an interconnected world: new directions for action](#) (pp. 80 – 81), GCIM recommended that states and other stakeholders address migration issues in a more consistent and coherent manner respecting the legal and normative framework affecting international migrants. Moreover, it recommended that the human rights component of the UN system be used more effectively as a means of strengthening the legal and normative framework of international migration and ensuring the protection of migrant rights. GCIM called for action on irregular migration, to strengthen social cohesion through integration, protect the human rights of migrants and enhance governance, in addition to action on the economic and developmental impact of migration. GCIM closed on 31 December 2005.

Universal human rights principles form a common ground for all states, and the UN has a key role to play under its Charter as a forum for international cooperation, including on migration-related issues. Indeed, the central normative and convening role of the UN has most recently been reiterated in the Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, entitled [A new global partnership: Eradicate poverty and transform economies through sustainable development](#) (2013, p. 11).

The global migration regime comprises a complex, and often fragmented, institutional and legal architecture for international cooperation and dialogue on migration issues. Indeed, there is no single, unified global body or institutional framework with a comprehensive mandate on international migration. In his report [Fair migration: Setting an ILO agenda](#), submitted to the 103rd Session of the International Labour Conference, the ILO Director-General observes: "*What is striking about multilateral work in the field of migration is the high degree of institutional fragmentation*" (p. 17, para. 90). In many ways this is not surprising, given the multidimensional nature of migration and the reality that migration cuts across many different aspects of society, including health, education, justice, gender roles, welfare, social protection, employment and skills, population politics, social and economic development, security, cultural identity and cultural life. Virtually everything to do with migration, as a fundamentally human phenomenon, can be viewed through a human rights lens. This multidimensionality is reflected in the institutional structures of a range of government ministries at the national level as well as many entities of the UN system, other international organizations, regional organizations, the business sector, trade unions and civil society.

A more political explanation for the lack of consensus in this area is the view that determining who crosses a state's borders and who is allowed membership of that state's society are quintessential matters of national sovereignty, and that multilateral engagement on these issues would inevitably diminish it. On the other hand, in proposing a human rights framework for global migration governance, the UN Special Rapporteur on the human rights of migrants has argued that a highly unregulated system with multiple, often competing actors could in fact limit national sovereignty and that migration governance at the global level should be seen as reclaiming sovereignty, not ceding it:

*States have the power to determine who enters and stays in their territory. More governance does not mean giving up this sovereignty. On the contrary, states would have more control if there was more migration governance. More governance simply means improving the coordination and cooperation between states, leading to better-governed migration that would better respect the human rights dimension, thus further protecting states from allegations of human rights abuses against migrants. As the scope and complexities of migration continue to grow, the alternative to more robust global migration governance is a highly unregulated system with a range of uncoordinated actors, including from the private sector. More migration governance would also assist states in combating the exploitation of migrants by, inter alia, traffickers, smugglers, recruitment agencies and unscrupulous employers.*

[Report of the Special Rapporteur on the Human Rights of Migrants](#), UN doc. A/68/283, 5 August 2013, p. 17, para. 90.

Parliamentarians in all countries affected by international migration need to play a greater role in discussions on the governance of migration and related human rights issues. The contemporary reality of international migrants and the challenges entailed in protecting their human rights requires a comprehensive and coordinated effort by all stakeholders, including relevant agencies and entities of the UN system and IOM. An inter-agency Global Migration Group (GMG) composed of 17 UN entities and IOM is in fact tasked with promoting wider application of all international and regional norms relating to migration and ensuring more coherent, comprehensive and better coordinated approaches to international migration.

## Box 5.5 Global Migration Group

In recognition of the need to coordinate the work of the international system on migration, the inter-agency GMG was created in 2006. GMG had been preceded by the Geneva Migration Group, which was established in April 2003 by the principals of ILO, IOM, OHCHR, the UN Conference on Trade and Development (UNCTAD), UNHCR and UNODC. The norm-based focus of GMG's mandate is readily apparent from its terms of reference:

*The GMG is an inter-agency group, meeting at the level of Heads of agencies, which aims to promote the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration.*

GMG has identified as a priority:

*Working to ensure the full respect for the human rights and labour rights of international migrants so as to promote human security and development and, in particular, provide protection to vulnerable migrants, including asylum-seekers, refugees, stranded migrants and victims of exploitation and trafficking. (Global Migration Group, Terms of Reference)*

Since 2006, GMG has undertaken a number of joint activities related to migration and human rights, including a publication on [International Migration and Human Rights](#), issued by GMG to celebrate the 60th anniversary of UDHR in 2008, and joint statements on [“The Human Rights of Migrants in Irregular Situations”](#), [“The Impact of Climate Change on Migration”](#) and [“International Migration and Development”](#) and a joint communiqué on [“Realizing the inclusion of migrants and migration in the post-2015 United Nations development agenda”](#), adopted by GMG principals in September 2010, November 2011, October 2013 and November 2014, respectively. In addition, GMG has organized expert meetings on migration and development, on the human rights of irregular migrants and on youth and adolescents in the context of migration, which led to the publication in 2014 on [Migration and Youth: Challenges and Opportunities](#). GMG has three thematic working groups that pool member agencies' expertise to deliver joint outputs: one on “Human Rights, Gender and Migration”, newly established; one on “Data and Research” and one on “Mainstreaming Migration into National Development Strategies”. The Group has also recently created two task forces, of “Migration and Decent Work” and on “Capacity Development”. Also newly established, a [GMG Multi-Annual Work Plan \(2013 – 2015\)](#) contains a comprehensive set of time-bound tangible outputs and several workstreams relevant to migration and human rights, in such areas as human rights and gender equality, migration and decent work, and the post-2015 UN development agenda.



Recent decisions taken by its principals in the context of the internal review carried out during 2012 – 2013 will enable GMG to be a more visible actor with respect to the migration and human rights agenda, to ensure greater coherence between the work plans and activities of UN system agencies and entities and to function more efficiently and predictably as an internal coordination mechanism of the UN system. In addition to the measures outlined, these decisions include the establishment of a small joint administrative support team, the extension of chairing periods from six months to one year and joint fundraising for specific activities. OHCHR chaired GMG in 2010 (July – December) and ILO in 2014.

**Sources:**

- Global Migration Group website: <http://www.globalmigrationgroup.org>.
- [Migration and human rights: Improving human rights-based governance of international migration](#), Geneva, United Nations, 2013, pp. 28 – 29.

Consequently, GMG is playing an increasingly significant role in ensuring a consistent UN “voice” in respect of the global migration and human rights agenda, although the task of bringing greater coherence to all of the UN governance spaces concerned with migration and human rights remains to be fully realized. More “joined-up” thinking on migration in the work of the UN system is required to ensure that the human rights situation of all migrants is considered in a coherent and comprehensive manner. Accordingly, there is increasing need for a space where Member States and other key stakeholders can interact with each other as well as GMG on a broad range of cross-cutting human rights and migration issues. Some proposals on how such a space could be created are discussed below.

## 5.2 A human rights-based approach to migration

While human mobility has become more global and frequent, traditional distinctions about migration – voluntary or forced, regular or irregular, temporary, seasonal, long-term or permanent – have become less clear-cut. This makes the argument all the more compelling that the rights of all migrants be addressed in a holistic way, regardless of their motives for migrating or their legal status, while at the same time reinforcing the protections that have been built up in relation to specific groups.

Over the years, the international community has identified various groups of non-nationals that are particularly vulnerable to human rights violations in the context of migration, creating specific international and regional legal standards to protect such groups. These have been discussed in previous chapters and those relating to refugees, stateless persons and victims of trafficking are considered in greater depth in other IPU handbooks (see Chapter 2).

The creation of specific standards has strengthened the protection of such groups, but it is still vital to secure and strengthen regimes with respect to refugees and stateless persons, the protection of trafficking victims, the rights of migrant workers and other such regimes in light of the particular situation of each group. It is important to keep in mind, however, that if applied in an uncoordinated manner and without considering

international human rights law, which applies to everyone, such fragmentation or compartmentalization of different categories of migrant may be counterproductive to the purpose of ensuring the human rights of all migrants. For example, one complexity regarding the rights of people crossing international borders stems from the increasingly blurred distinction between forced and voluntary movement. While falling in principle in distinct legal categories, in practice, refugees, stateless persons, asylum-seekers and migrants (including migrants in an irregular situation) often move and live in similar physical spaces and have similar human rights needs – in relation to their right to health or to freedom from arbitrary or prolonged detention, for example. Moreover, the principle of *non-refoulement* protects both refugees, who fear persecution in their countries of origin, and migrants, who fear torture or ill treatment upon their return, including at the hands of smugglers from whom the state will not protect them, or because of lack of access to lifesaving medical treatment.

Furthermore, a strict “categorization” approach to the human rights of migrants is complicated by the cross-cutting nature of these categories: migrant workers, refugees, trafficked persons and smuggled migrants can also be persons with disabilities, children, pregnant women, women who have suffered sexual or other forms of gender-based violence, stateless persons, minorities, indigenous persons, persons with HIV/AIDS, lesbian, gay, bisexual, transgender and intersex persons or victims of torture. Many migrants may be or become vulnerable on more than one ground, and may have suffered abuse of more than one kind. Those who are victims of violence and trauma, including poor people and persons in irregular situations, are more likely to be vulnerable to discrimination and exclusion. Migrants will also pass through various legal categories during their journey, particularly when migratory journeys are long and hazardous.

The realities of human mobility today can therefore make it difficult to neatly separate distinct categories of people. Accordingly, while the international legal obligations of states may appear to guarantee universal human rights to all human beings subject to their jurisdictions, the reality for many migrants may be very different. An important challenge is thus effective implementation and monitoring of the complex jigsaw of normative standards relevant to migration in order to ensure complementarity and coherence.

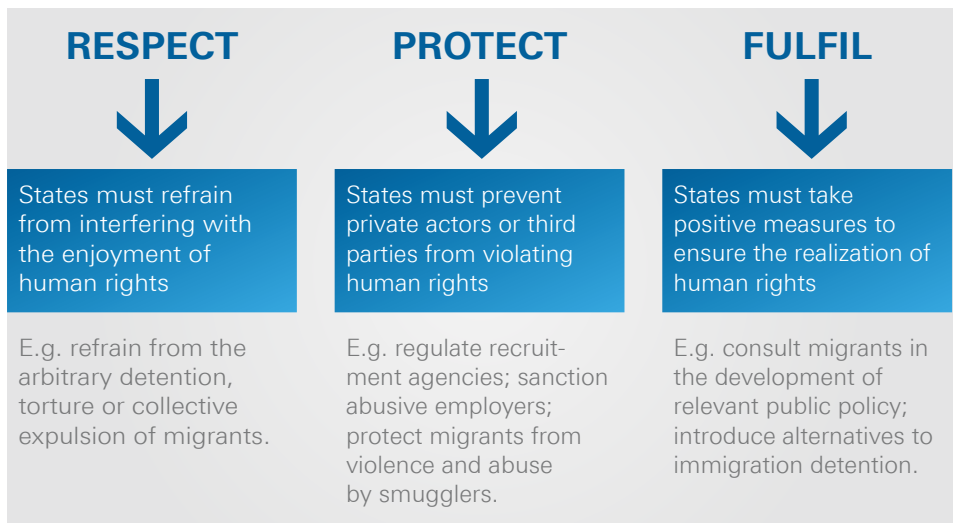
For this reason, a more holistic approach is currently being advocated by OHCHR, ILO, other relevant agencies and entities within the UN system, IOM and civil society actors. It affirms the human rights of all human beings, including migrants, while at the same time recognizing more specific protection needs as they arise. Recognition of the universality and indivisibility of human rights, in tandem with an appreciation of the growing complexity of international migration, could help forge a new consensus on the issue of migration and human rights. The basis of such a consensus lies in a human rights-based approach to migration. As distinct from a “human rights framework”, which asserts fundamental normative principles and requires states to contemplate a range of measures in order to fulfil their obligations, a human rights-based approach provides practical guidance and concrete tools to this end.

A human rights-based approach is normatively based on international human rights and labour standards and operationally directed to respecting, promoting, fulfilling

and protecting human rights. When applied to international migration governance, two principal rationales for implementing a human rights-based approach to migration can be highlighted: (1) the intrinsic rationale, acknowledging that a human rights-based approach is the right thing to do, morally and legally; and (2) the instrumental rationale, recognizing that a human rights-based approach leads to improved and more equitable, inclusive and sustainable outcomes, including in the context of the migration and development nexus discussed at the end of the chapter. In practice, therefore, the reason for pursuing a human rights-based approach will be a blend of these two rationales.

The underlying feature of a human rights-based approach identifies rights-holders, who have a claim to certain entitlements, and duty-bearers, who are legally bound to respect, protect and fulfil the entitlements associated with those claims. Such an approach works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.

### **Respect, protect, fulfil: the scope of human rights obligations**



**Source:** [Migration and human rights. Improving human rights-based governance of international migration](#), Geneva, United Nations, 2013, p. 18.

A human rights-based approach to migration brings the treatment of migrants as human beings to the forefront of all discussion and programming on migration, guided by the fundamental principles of non-discrimination, empowerment, participation and inclusion, and accountability.

The UN system performs at least four major functions in support of migration and human rights: (1) standard setting and normative oversight; (2) provision of a forum for human rights-based dialogue and cooperation; (3) technical assistance; and (4) building up the knowledge base, as described in greater depth below.

## 5.2.1 Standard setting and supervision

The central function of international migration governance from a human rights perspective is the promotion and development of international standards for the protection of the human rights of migrants. This includes the essential task of monitoring and supervising the implementation by states of existing obligations under the international legal framework relating to migration. That framework has been agreed by states within the UN system and, as a consequence, the UN plays a leading role in promoting the adoption and effective application, monitoring and implementation of relevant legal norms by its Member States.

As often happens for other cross-cutting issues, no single organization in the international system has the mandate to provide overall supervision and leadership for the protection of migrants' rights. That function is diffused throughout the UN system as described in Chapter 2. UNHCR performs a supervisory function under international refugee law. Article 35(1) of the [Geneva Convention relating to the Status of Refugees](#) obliges States Parties to “undertake to co-operate with the [UNHCR] in the exercise of its functions, and [...] in particular facilitate its duty of supervising the application of the provisions of [the] Convention”. ILO's mandate extends over the protection of migrant workers and the governance of labour migration. The Preamble to the [Constitution of the ILO](#) specifically mandates it to give attention to the “protection of the interests of workers when employed in countries other than their own” (Preamble, second recital), and ILO's system of supervision of international labour standards in respect of all workers has devoted particular attention to “at risk” groups of workers, including migrant workers. OHCHR is mandated by the international community to promote and protect all human rights and serves as secretariat to the human rights mechanisms, such as the treaty bodies, including the [Committee on Migrant Workers](#); special procedures; and [UPR](#) (see Chapter 2).

In addition, a number of entities of the international system carry out various important activities relevant to the legal framework, including promotion of and advocacy for the various human rights instruments relevant to migrants. For instance, the [Steering Committee of the Global Campaign for Ratification of the Convention on the Rights of Migrants](#) has played an important role in advocating the ratification and implementation of ICRMW. The Steering Committee consists of international organizations, namely OHCHR, ILO, IOM and UNESCO, in addition to international and regional NGOs, trade unions and other civil society organizations. As noted in Chapter 2, the Steering Committee has published a [Guide on Ratification of the ICRMW](#).

## 5.2.2 Platform for dialogue and cooperation

A second function carried out by the UN system is to promote dialogue and cooperation on migration and human rights issues. Considerable progress has been made in recent years towards a genuinely global dialogue on migration issues. In addition to the two High-Level Dialogues on International Migration and Development (see below), the UN General Assembly (Third Committee) has negotiated and adopted a series of resolutions concerning the protection of migrants and of women migrant

workers. The Second Committee of the General Assembly has considered the issue of international migration and development in a separate process, while the Member States of the Human Rights Council adopt an annual resolution on the human rights of migrants, in addition to adopting resolutions on related issues such as birth registration and the right of everyone to recognition everywhere as a person before the law. The UPR has created a platform for all UN Member States to engage with each other on human rights issues, including migration (see Chapter 2). During the first cycle (2006 – 2011) all UN Member States were reviewed and urged to ratify instruments relating to the human rights of migrants, in particular ICRMW. Recommendations included the improvement of data collection on the human rights situation of migrants, enhancement of their access to health care and other services, the release of migrant children from detention, and the implementation of national action plans to protect migrants from discrimination. Moreover, as noted above, ILO's International Labour Conference in 2004 adopted a rights-based approach to labour migration. In November 2013, an ILO [Tripartite Technical Meeting on Labour Migration](#) endorsed this approach and issued detailed [Conclusions](#) setting out ILO's agenda of work for the coming years, including the effective protection of migrant workers, particularly low- and middle-skilled workers.

As noted above and in Chapters 2 and 3, landmark international conferences related to migration, such as the [International Conference on Population and Development](#) and the [World Conference against Racism](#), and the follow-up processes initiated in the aftermath of these conferences, have also played an important role in moving forward the agenda on migration and human rights.

### 5.2.3 Service provision and technical assistance

At the operational level, a number of international organizations have extensive programmes of service delivery in support of the human rights, including labour rights, of migrants. Several UN agencies and IOM have developed a broad range of activities in this regard, offering support to states on such issues as pre-departure orientation; recruitment of migrant workers; medical screening; assistance with the provision of travel documents; facilitation of family reunification; labour market assessments to determine the demand for migrant workers; measurement of discrimination against migrants; assistance for migrants, such as migrant domestic workers, in the informal economy; emergency assistance for stranded migrants or migrants in crisis situations; assistance for migrants returning home, including with their reintegration; and facilitation of migrant access to criminal justice systems and labour tribunals. Several organizations assist states with the integration of migrants in destination countries, including in the labour market; the recognition of skills, diplomas and qualifications; the promotion of fair labour recruitment frameworks; social protection coverage for migrants, including the portability of social security benefits; assistance for victims of trafficking in persons and smuggled migrants; the transfer of remittances; and initiatives targeting negative stereotypes and xenophobia against migrants. A number of such issues are very relevant to a comprehensive system of labour migration governance, and these are elaborated below. Agencies also carry out activities aimed at

those who do not move, such as families left behind in countries of origin and children born to migrant parents in countries of destination.

Agencies also provide technical assistance and capacity-building support to states and other stakeholders, including training for migration officials; support for the review, adoption or amendment of relevant legislation, with related legal training; and capacity-building support for, and partnerships with, a range of ministries, regional authorities, national human rights institutions, non-governmental organizations, and workers' and employers' organizations concerned with the governance of migration.

#### 5.2.4 Developing the knowledge base on migration and human rights: data collection and indicators

The UN system has an important knowledge development and dissemination function in relation to data on migration and human rights issues. The formulation and effective implementation of human rights-based migration policy requires the availability of relevant, valid and reliable data, international comparative analysis and rigorous monitoring of results and outcomes.

Several agencies and entities, as well as the GMG Working Group on Data and Research, have made progress in data collection on issues relating to human rights and migration. For example, MigrantInfo is a flexible database system of the UN Department of Economic and Social Affairs (Population Division) that displays estimates of the international migrant stock to facilitate data sharing in a uniform format. Developed by UNICEF in partnership with UN DESA and the University of Houston, the database allows users to generate tables, graphs and maps using the latest available estimates of the international migrant stock, disaggregated by age and gender. UNODC produces biennial global reports on trafficking in persons, analysing trafficking flows and patterns across the globe and maintaining a public global database of human trafficking cases in national criminal justice systems. OHCHR has recently developed a publication entitled [Human rights indicators: A guide to measurement and implementation](#), which can assist in the monitoring and implementation of human rights at the national and local levels. The role such indicators can play in protecting the human rights of all migrants is discussed in a separate section below.

#### 5.2.5 Gaps and challenges

In each of the four functions described above there has been clear progress in advancing the migration and human rights agenda in recent years. There remain, however, continuing challenges and gaps.

There is a significant knowledge gap in relation to migration and human rights. For example, most official data systems fail to capture either the number or the circumstances of men and women migrants, and much international data on migration do not accurately account for migrants in an irregular situation. Where data are available, they can be incomplete. The data on migrants subject to state action – on arrests or even deaths at border control points, numbers in immigration detention

and return figures – are rarely indicative of the total population of migrants, men and women, in an irregular situation. Population censuses, the main source of statistics on migrant populations, are of limited value in tracking irregular and marginalized migrants. Another data gap relates to temporary migrant workers, who are frequently more at risk of poor treatment in the workplace given the sectors in which they are often employed (e.g. agriculture, construction). While the numbers of temporary migrant workers in a regular situation are recorded by many governments, they will only be captured by the global estimates of international migrants if they have been in the country one year or more.

A human rights perspective can also help to reorient the collection of data beyond traditional sources, and to analyse such sources as population statistics or economic indicators with an eye on vulnerability, discrimination and exclusion. In addition, providing a more accurate and rights-based picture of migration – by documenting the economic and social contributions of migrants, investigating the wider public impact of denying them access to essential services and conducting more research on the human rights and social impact of remittance flows, for example – can help to improve public perceptions of migration and combat xenophobia. A number of these gaps relating to data were discussed in greater detail at the [Day of General Discussion of the Committee on Migrant Workers on the role of migration statistics for treaty reporting and migration policies](#) in April 2013.

In relation to the standard-setting and monitoring functions in various parts of the UN system, a lack of overview and of coherence among the various monitoring mechanisms could lead to unnecessary duplication and gaps, particularly where mandates are haphazard or diffuse. Similarly, while there is an impressive array of programmes and projects currently being undertaken to protect and promote the human rights of all migrants, in practice, the sheer number of actors, with sometimes overlapping mandates related to migration and human rights has resulted, as noted earlier, in a somewhat fragmented institutional picture at the international and regional levels. Such a picture can make it difficult for Member States and other stakeholders, including parliamentarians, to identify the agencies and entities with the most relevant and appropriate mandate for the technical assistance being sought. Finally, despite the important space provided to norm-based migration issues by the UN, it is a reality that global discussion on the human rights aspects of migration has tended to be more subdued, with a tendency to focus prominently on the more economic dimensions of migration and its development implications (see below). The lack of a comprehensive, inclusive, participatory and accountable global dialogue on migration and human rights remains an important governance gap.

### **Box 5.6 OHCHR recommendations on improving human rights-based governance of international migration**

As relevant, Member States, the UN system and IOM, and other stakeholders should

- (a) Continue to strengthen and promote the coordination function of the Global Migration Group (GMG) in relation to migration and human rights, particularly in order to support the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration.

The GMG should ensure that states and other stakeholders seeking technical assistance on migration and human rights issues are provided with a clear entry point to the different parts of the UN system and IOM working on such issues, to match competence and expertise according to the different mandates of the agencies involved.

- (b) Strengthen discussions on migration and the human rights of migrants within the deliberations of the Human Rights Council, and specifically to:
  - (i) enhance and strengthen the examination of migration and human rights issues within the universal periodic review;
  - (ii) include consideration of the human rights of migrants within its annual panel discussions on, inter alia, the rights of the child and women's human rights;
  - (iii) hold an annual panel discussion on the human rights of all migrants.
- (c) Establish a UN-led multi-stakeholder initiative on indicators on migration and human rights. Human rights indicators are necessary in order to build capacity to develop rights-based policy at the national and local levels, and to develop tools for monitoring, implementation, capacity-building and advocacy. What is needed is a methodology to highlight the human rights norms and principles, spell out the essential attributes of the rights enshrined in international instruments and translate this narrative into contextually relevant indicators and benchmarks for implementing the human rights of migrants at country level. Such an initiative could:
  - (i) develop a set of human rights indicators, specifically concerned with migrants and migration with a focus on the most vulnerable [see below]. The indicators could be targeted to inform emerging debates related to the Post-2015 UN Development Agenda;
  - (ii) elaborate guidelines for more reliable and accurate data collection on the human rights aspects of migration, including disaggregation by age, sex and sector of employment and where possible by legal status;
  - (iii) enhance knowledge on and monitoring of the human rights situation of migrants, through disseminating the indicators through the universal periodic review process and the work of other relevant human rights mechanisms, and producing publicly available information to address popular concerns surrounding migration.

Migration and human rights: Improving human rights-based governance of international migration, Geneva, United Nations, 2013, pp. 42 – 43.



## 5.3 Application of international law at the national level

### 5.3.1 Human rights indicators

As noted in the previous section and in the recommendations above, the development of indicators on migration and human rights could play a significant role in advancing the protection of the human rights of migrants at the national level. OHCHR publication on [Human rights indicators: A guide to measurement and implementation](#) (2012) defines human rights indicators as “*specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights*” (p. 16). The methodology developed for human rights indicators by OHCHR can assist states and other relevant stakeholders, including parliamentarians, in building national capacity for human rights planning and implementation in relation to migrants. The framework focuses on quantitative as well as qualitative indicators and offers a structured and consistent approach to facilitate dialogue among stakeholders, translating universal human rights standards into indicators that are contextually relevant at country level.

#### Box 5.7 Human rights indicators

Extracts from the Foreword by Navi Pillay, the former UN High Commissioner for Human Rights, to [Human rights indicators: A guide to measurement and implementation](#), pp. iii – iv:

The human rights journey from standard-setting to effective implementation depends, in large measure, on the availability of appropriate tools for policy formulation and evaluation. Indicators, both quantitative and qualitative, are one such essential tool. [...]

Popular uprisings and demonstrations in other parts of the world, including in relatively well-off countries, remind us of the necessity to place the human being at the centre of our development policy and to adjust our analytical lens accordingly. They compel us to review existing analytical, methodological and legal frameworks to ensure that they integrate real attention to freedom from fear and want, and to discrimination; assess the extent of public participation in development and in the fair distribution of its benefits; strengthen accountability and embrace methods empowering people, especially the most vulnerable and the most marginalized.

Policy management, human rights and statistical systems are closely interrelated and thus need to be in tune with each other for promoting the well-being of people. Devising a policy or statistical indicator is not a norm or value-neutral exercise. Yet, integrating human rights in these processes is not only a normative imperative, it also makes good practical sense. Failing to do so can have real consequences.

I believe that this Guide will represent an important reference and resource from this perspective. There is a long way to go in improving our capacities for human rights implementation. There are numerous challenges in the collection and dissemination of information on human rights. What to monitor, how to collect information and interpret it from a human rights perspective, and the inherent danger of misusing data, are but some of the concerns addressed in this publication. The Guide also reminds us of the limitations that are intrinsic to any indicator.

In particular, it cannot and should not be seen as a substitute for more in-depth, qualitative and judicial assessments which will continue to be the cornerstones of human rights monitoring. Instead, the indicators and methods described in this Guide are primarily meant to inform more comprehensive assessments and are neither designed nor suitable for ranking the human rights performance of states. The primary objective here is to highlight the human rights norms and principles, spell out the essential attributes of the rights enshrined in international instruments and translate this narrative into contextually relevant indicators and benchmarks for implementing and measuring human rights at country level. [...]

I trust that the continued engagement, dialogue and cooperation among all stakeholders, including the human rights and development communities, will truly help foster human rights-based and people-centred development at country level. Indicators are in this sense a potential bridge between the human rights and the development policy discourses.

Most importantly, we should never forget that behind every piece of statistical data are human beings who were born free and equal in dignity and rights. We must strive to make their human rights stories, especially those of the powerless, visible through robust indicators and to use them in constantly improving our human rights policies and implementation systems to bring positive change to people's lives.

OHCHR methodology attaches specific characteristics or attributes to each human right to capture its full meaning. The attributes of human rights identified by OHCHR for the general population can be adapted for specific groups, including migrants and their families. For example, there are five attributes of the right to health: (i) sexual and reproductive health; (ii) child mortality and health care; (iii) natural and occupational environment; (iv) prevention, treatment and control of diseases; and (v) accessibility to health facilities and essential medicines ([Human rights indicators: A guide to measurement and implementation](#), p. 90). These have been adapted for migrants as follows: (i) accessibility to health facilities, services and goods; (ii) cultural adaptability of health services; (iii) mental health; (iv) sexual and reproductive health; and (v) child health care. To each attribute, the methodology attaches *structural*, *process* and

*outcome* indicators. These make it possible to consider: (1) the commitments that states have made in terms of the legal and policy framework; (2) key process issues, such as the scope and application of the legal and policy framework, programme implementation, financing and remedial action; and (3) the individual and collective outcomes of those commitments. Indicators also pick up cross-cutting principles, including accountability, prohibition of discrimination, and rights to equality, participation, and access to justice ([Human rights indicators for migrants and their families: Overview](#), p. 5).

Under the auspices of the World Bank's [Global Knowledge Partnership on Migration and Development \(KNOMAD\)](#) and its Thematic Working Group on Migrant Rights and Social Aspects of Migration, OHCHR, UNICEF and Migrant Forum in Asia are collaborating with ILO and other partners in developing human rights indicators for migrants and their families, with an initial focus on the rights to education, health and decent work. See the recent publication on [Human rights indicators for migrants and their families](#), KNOMAD Working Paper No. 5, April 2015.

### **Box 5.8 Examples of human rights indicators for migrants and their families in the context of accessibility to rights**

Accessibility is a critical attribute, which determines the development outcomes for individuals, their families and countries of origin and destination. Migrants who enjoy rights on paper often face barriers to their enjoyment in practice. Laws, policies and practices are needed to ensure accessibility. Below are some examples of indicators for the accessibility attributes of the rights to education, health and decent work.

#### **The right to education and accessibility of education facilities and services**

Examples of indicators that track the degree to which states ensure access to compulsory and non-compulsory education in accordance with international human rights standards.

##### **Structural**

- Does legislation explicitly establish the right to compulsory education for all migrants, regardless of migration or residence status?
- Do legislation or policy address practices that, formally or practically, hinder or prevent enjoyment of the right to education (by requiring students to possess a residence permit, or teachers and other officials to report migrants to migration authorities, for example)?

##### **Process**

- What proportion of the migrant population is enrolled in educational institutions (disaggregated by migration or residence status, age, gender, sex, ethnic origin, nationality, nationality of parents, place of residence and length of residence)?

## **Outcome**

- What percentage of migrant children and adolescent migrants complete compulsory education? What percentage of children with migrant parents (whether classified as foreign or national) complete compulsory education? How do these figures compare with the percentage of nationals who complete compulsory education? (Figures to be disaggregated by migration or residence status, age, gender, sex, ethnic origin, nationality, nationality of parents, place of residence and length of residence.)

## **The right to health and accessibility of health facilities, services and goods**

Examples of indicators that track the degree to which states ensure access to health facilities, services and goods.

### **Structural**

- Does legislation affirm the right of migrants to access health services? Is their access to certain services legally restricted? Is access conditioned in law by migration or residence status?
- Do public policies bar health services from levying fees that are determined by migration or residence status?

### **Process**

- How many awareness-raising activities and campaigns for health workers, health authorities and civil servants linked to health facilities have focused on the right of migrants to health care and services that operationalize the right?
- What proportion of migrants are covered by health insurance schemes, disaggregated by migration or residence status, age, gender, sex, ethnic origin, nationality, nationality of parents, place of residence, length of residence and (public or private) insurance provider?

### **Outcome**

- What is the rate of (a) mortality, (b) morbidity, (c) life expectancy and (d) prevalence of diseases, disaggregated by migration or residence status as well as age, gender, sex, ethnic origin, nationality, nationality of parents, place of residence, length of residence and specific health conditions?

## The right to decent work and access to just and safe working conditions

Since migrant workers are very often exploited, the degree to which working conditions are just and safe is a critical attribute of the right to decent work. Access to justice and official enforcement of labour rights, in both cases regardless of migration or residence status, are also vital because, in the absence of these protections, employers may dismiss, deport or intimidate workers who challenge exploitative conditions.

Examples of indicators that track the degree to which states ensure just and safe working conditions.

### Structural

- Does the law (including case law) recognize and protect the labour rights of migrant workers, regardless of their migration or residence status?
- Do administrative entities receive complaints from migrants about violations of labour rights regardless of migration or residence status?

### Process

- What proportion of labour inspections were carried out in employment sectors which are known to contain a high number of migrant workers (e.g. agriculture, construction, domestic work), disaggregated by sector?
- What proportion of the workplace inspections that resulted in administrative action or prosecution addressed the labour rights of migrant workers?

### Outcome

- What proportion of migrants, and migrants in an irregular situation, did not receive their full wages, compared to the national average?

Adapted from [Human rights indicators for migrants and their families: Overview](#), UNICEF, OHCHR, World Bank, Migration Forum in Asia, ILO (pp. 6 – 7); document prepared for KNOMAD's Thematic Working Group 7: Migrant Rights and Social Aspects of Migration.

## 5.3.2 Role of human rights institutions

Although not part of the UN, regional and national human rights systems are key instruments for the protection and promotion of human rights at country level. There are several regional intergovernmental organizations that have set human rights standards and established monitoring mechanisms, and a brief overview of these is provided in Chapter 2. National human rights institutions (NHRIs) are national bodies established for the protection and promotion of human rights. There are many types of NHRIs (e.g. ombuds offices, human rights commissions, advisory bodies and research-based institutes).

## **Box 5.9 Parliaments introduce children’s rights commissioners and ombudspersons: the cases of Norway and New Zealand**

### **Norway**

The Norwegian Stortinget created the first ombudsperson’s office for children, titled the Children’s Commissioner, in the [1981 Children’s Act](#). The Commissioner is tasked with promoting and protecting the human rights of children and ensuring that domestic legislation is in line with international conventions. In addition to the intrinsic benefits resulting from its establishment, the office paved the way for the creation of similar positions around the world.

### **New Zealand**

One example is New Zealand, whose parliament adopted the [Children’s Commissioner’s Act in 2003](#). The Act’s major functions are monitoring residential and foster care services for children, reviewing reports on the deaths of children and serious crimes involving young people, raising awareness and understanding of the United Nation’s Convention on the Rights of the Child, which encompasses the rights of migrant and refugee children, and advocating for all New Zealand children under the age of 18. One concrete measure that resulted from the Act was the creation of a children’s rights helpline.

In December 1993, the UN General Assembly adopted the [Principles relating to the Status of National Institutions \(Paris Principles\)](#) (resolution 48/134) to guide the work of NHRIs. The Paris Principles also form the basis for their accreditation by the [International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights \(ICC\)](#), for which OHCHR serves as the secretariat ([Human rights indicators: A guide to measurement and implementation](#), p. 16).

## **Box 5.10 The accreditation of NHRIs under the rules of procedure of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights**

### **Definition**

An NHRI is an independent administrative body set up by a State to promote and protect human rights. Compliance with the Paris Principles [...] is the basis for NHRI accreditation. The process is conducted through a peer review by the International Coordinating Committee’s Sub-Committee on Accreditation. There are three types of accreditation:

A: compliant with Paris Principles

B: observer status – not fully compliant with the Paris Principles or insufficient information provided to make a determination

C: not compliant with the Paris Principles

Accreditation by the International Coordinating Committee entails a determination of whether the NHRI is compliant, both in law and in practice, with the Paris Principles, the principal source of the normative standards for NHRIs, as well as with the General Observations developed by the Sub-Committee on Accreditation. Other international standards may also be taken into account by the Sub-Committee, including the provisions related to the establishment of national mechanisms in the [Optional Protocol to the Convention against Torture](#) as well as in the [Convention on the Rights of Persons with Disabilities](#). Likewise, the Sub-Committee looks at any NHRI-related recommendation from the international human rights mechanisms, notably the treaty bodies, the universal periodic review (UPR) and the special procedures. The effectiveness and level of engagement with international human rights systems are also considered.

A global directory of NHRI status accreditation is available at [www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx](http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx). This global directory is updated every six months, after the Sub-Committee on Accreditation submits its report. This information can be accessed at any time.

### **Rationale**

The creation and fostering of an NHRI indicates a State's commitment to promoting and protecting the human rights set out in international human rights instruments. The Paris Principles vest NHRIs with a broad mandate, competence and power to investigate, report on the national human rights situation, and publicize human rights through information and education. While NHRIs are essentially State-funded, they are to maintain independence and pluralism. When vested with quasi-judicial competence, NHRIs handle complaints and assist victims in taking their cases to courts, making them an essential component of the national human rights protection system. These fundamental functions of NHRIs and their increasing participation in the international human rights forums make them important actors in the improvement of the human rights situation. In addition, the better its accreditation classification, the more the NHRI is shown to be credible, legitimate, relevant and effective in promoting human rights nationally.

Adapted from, [Human rights indicators: A guide to measurement and implementation](#), United Nations, pp. 146 – 148 (Annex I, Indicator 5).

NHRIs established in accordance with the Paris Principles can play a crucial role in advancing the rights of all migrants and ensuring a human rights-based approach to migration. As noted above, the UN Secretary-General encourages cooperation and constructive relationships between NHRIs and governments, parliaments, civil society and other national institutions concerned with the promotion and protection of human rights. Given that NHRIs are established by legislation and required to report on their activities, parliamentarians can play an important role in ensuring that the mandates and work of NHRIs give due consideration to the specific situation of migrants and their families.

### **Box 5.11 The role of NHRIs in promoting and protecting the rights of migrant workers**

NHRIs are a vital part of strong national human rights protection systems. They also play a key role in linking the international and domestic human rights systems. Their mandate enables them to engage with all relevant actors at the national level, as well as interact with regional and international mechanisms, to advocate laws, policies and practices that bolster protection for vulnerable groups, including migrant workers and members of their families.

Although NHRIs have broad mandates which require them to protect and promote all human rights for all people, the particular vulnerability of migrant workers – whether documented or in an irregular situation – requires NHRIs to pay consistent and focused attention to the human rights issues they face.

Promoting and protecting the rights of migrant workers is a priority for NHRIs in all parts of the world, with many international and regional meetings of NHRIs convened over the past decade to discuss emerging issues, exchange good practice and develop individual and shared programmes of action. The 8th International Conference of National Institutions for the Promotion and Protection of Human Rights, held in October 2006, specifically addressed the role of NHRIs in promoting and protecting the rights of migrants. The Santa Cruz Declaration, adopted at the conclusion of the conference, highlights the critical importance of NHRIs using all aspects of their mandates to promote positive change for migrants and migrant workers, including advocacy, research, monitoring, investigation, reporting and public education functions (Santa Cruz Declaration, [8th International Conference of National Institutions for the Promotion and Protection of Human Rights](#), Santa Cruz, Bolivia, 23 – 27 October 2006).

Given the complex and transnational nature of the issues involved, NHRIs are also encouraged to develop “strategic partnerships” with a broad range of national stakeholders, including civil society, as well as cross-country cooperation with NHRIs in “neighbouring countries and sending, transit and receiving states” (para. 18).

A key recommendation of the 8th International Conference, as well as other regional meetings, is that NHRIs develop a comprehensive strategy to promote ratification of ICRMW. NHRIs are also encouraged to promote ratification of other key international human rights treaties and ILO conventions, as well as relevant regional human rights standards.

Adapted from [Promoting and protecting the rights of migrant workers: The role of national human rights institutions](#), Asia Pacific Forum of National Human Rights Institutions, Sydney, Asia Pacific Forum, August 2010, pp. vi – vii.



## 5.4 Governance of labour migration

Given the centrality of employment for international migration today, ensuring fair and effective governance of labour migration is particularly important. This part of the chapter provides a concise overview of key areas that need to be subject to legislation and policies in countries of origin and destination. It also discusses the critical role of international cooperation at the bilateral, regional and global levels. As observed in Chapter 1, the distinction between origin and destination countries is no longer as marked as before, and given the increasing labour migration within the global South, many countries today are at the same time countries of origin, transit and destination. Consequently, the policy areas described below will be of relevance to many countries. A much more comprehensive treatment of labour migration governance can be found in the [Handbook on establishing effective labour migration policies](#), prepared by OSCE, IOM and ILO in two editions, in 2006 and 2007 (Mediterranean edition); [International labour migration: A rights-based approach](#), published by ILO in 2010; and IOM's World migration report 2008 on [Managing labour mobility in the evolving global economy](#).

The need to ensure that labour migration is governed in a fair and effective manner has again been underscored in a report from the ILO Director-General, [Fair migration: Setting an ILO agenda](#), presented to the 103rd Session of the International Labour Conference in May-June 2014. The report comes in the wake of an [ILO Tripartite Technical Meeting on Labour Migration](#), held in Geneva in November 2013, which adopted [Conclusions](#) to guide the International Labour Office in its future work in the areas of labour migration and development, effective protection of migrant workers, sound labour market needs assessments and skills recognition, and cooperation and social dialogue for well-governed labour migration and mobility. The key elements of an agenda for fair labour migration, as outlined in the ILO Director-General's report, are provided in the box below.

### Box 5.12 An ILO agenda for fair migration

#### 1. Promoting decent work in countries of origin, including the contribution of migrants

116. The creation of more decent work opportunities in countries of origin is key to making migration an option rather than an obligation. It is also crucial to sustainable development. [...]

#### 2. Formulating orderly and fair migration schemes in regional integration processes

118. Member States will make their own decisions about the levels of ambition in respect of the extent and nature of the labour mobility that they wish to build into the integration processes in which they are engaged. They may vary from far-reaching measures to promote free circulation of workers to more limited initiatives targeting specific issues, such as social security entitlements and the accreditation of qualifications. [...]

### **3. Promoting bilateral agreements for well-regulated and fair migration between Member States**

119. The work being undertaken to collect and analyse the many agreements already concluded by Member States to regulate the movement of workers between them should be the basis for increased cooperation in this area to promote fair migration practices. [...]

### **4. Instituting fair recruitment processes**

121. The very extensive involvement of private agencies in the recruitment of workers for employment in other countries has all too frequently been associated with serious abuses.

122. There is clear need for renewed efforts and cooperation with governments to ensure the adequate regulation of such agencies, and to offer workers who are victims of malpractice access to remedies. The ILO's services should be available to its Member States to this end. [...]

124. One response is the [...] [Fair Recruitment Initiative](#), an interdepartmental initiative whose main objectives are to:

- strengthen global knowledge on national and international recruitment practices;
- strengthen laws, policies and enforcement mechanisms in line with ILO Convention No. 181 and other standards;
- promote fair business standards and practices; and
- foster social dialogue and partnerships and promote good practices within the industry and beyond.

125. Key benchmarks and guidance will be made available for global use to improve oversight and regulation, grounded in international standards. Ratification of Convention No. 181 will be promoted while working with stakeholders to put effective mechanisms in place regardless of ratification status.

### **5. Countering unacceptable situations**

126. The disadvantages experienced by a considerable proportion of migrant workers in labour markets are well recorded. In the worst cases, these may extend into violations of the fundamental rights which are inalienable and to be enjoyed by all workers. Such situations may arise not only from the inadequacy or absence of protection mechanisms, but also when migration systems are themselves defective and so induce such abuse. [...]

## 6. Realizing the rights-based approach

128. It is the ILO's particular responsibility to advance the rights-based approach to migration issues. It can draw on the full range of its Conventions and Recommendations to do so. Conventions Nos. 97 and 143 have obvious and particular relevance to this task precisely because they address these issues directly. Changes in the nature of migration in the decades since these Conventions were adopted, and the level of and trends in their ratification, could legitimately lead to consideration of whether the ILO's current standards constitute a sufficiently solid platform for the much needed rights-based approach to migration. [...]

## 7. Contributing to a strengthened multilateral rights-based agenda on migration

130. The ILO has already been given clear guidance on how it should work with its partner organizations to strengthen the multilateral system's work on migration, to orient it to a clearly rights-based approach, and to make it more responsive to the role of tripartism. Some of that guidance relates specifically to its chairing of the GMG during 2014, but it is evident that the ILO's contribution will have to continue well beyond this year, and to be framed in a rapidly evolving multilateral context. [...]

131. In the light of these developments, the ILO should commit to an active role in the multilateral system as an important means of advancing its specific agenda on migration and that of the system as a whole.

## 8. Tripartism, knowledge and capacity-building as cross-cutting issues

132. In its work on migration, the ILO should ensure that it highlights the role of tripartism, embodies it in all activities and promotes it in the work of others.

133. In addition, [...] the ILO will need to reinforce its statistics and knowledge base in respect of migration. That base can then be used as a foundation for improved research and analytical work, which in turn should contribute to improved, evidence-based policy advice.

Extracts from [Fair migration: Setting an ILO agenda](#), Report of the Director-General, International Labour Conference, 103rd Session, Report 1(B), Geneva, International Labour Office, 2014, pp. 21 – 24 (footnotes omitted).

### 5.4.1 Countries of origin

A priority concern for all countries of origin is to ensure protection for the rights and well-being of migrant workers, the payment of decent wages and other basic provisions. While there are no perfect systems of regulation or a "one-size fits all" approach, countries of origin have a range of policy strategies which, taken together, can extend the scope and improve the efficiency of their regulatory mechanisms and support services. In addition to working to foster the protection of their nationals employed abroad, countries of origin also need to ensure that their policy on labour migration is consistent

with national employment policies and development strategies, and that the parts of the government tasked with administering the policy have the capacity and resources to do so. The key regulatory policies and practices for migrant origin countries, which can be and often are mandated and enabled by legislation, include:

- Close government supervision and monitoring of employment agency recruitment activities, to minimize malpractice and abuses against nationals recruited for employment abroad;
- Criminal proceedings against serious offenders and revocation of their licences if registered;
- Supervision of the recruitment and deployment of workers especially vulnerable to malpractices and abuses, such as female domestic workers and low-skilled workers;
- Pre-employment orientation seminars and intensified information campaigns, to help prospective migrants make informed decisions;
- Support services such as pre-departure orientation and a welfare fund;
- Accurate and reliable information on the rights of migrant workers and support for community-based organizations, to empower migrant workers and help make their voices heard in policy design and implementation;
- Activities to raise workers' skill levels to higher standards to improve their employment opportunities abroad, taking into account any concerns relating to the depletion of human resources at home ("brain drain");
- Training and deployment of labour attachés to countries where nationals are employed to provide them with the necessary support and services;
- Measures to monitor and enforce employment contracts at foreign worksites, in particular through labour attachés and arrangements with host country governments;
- Steps to ensure that the transaction costs of remittances sent home by their nationals to support families and communities are as low as possible and, while recognizing that remittances are private funds, enhance their productive investment, including towards creation of small enterprises; and
- Inter-state cooperation between countries of origin and destination, including the adoption and effective implementation of bilateral agreements or MoUs in conformity with the international human rights and labour standards described in previous chapters of this handbook.

### **Box 5.13 Human interest story: migrant workers get the short end of the stick**

Pakistani migrant workers have very little information about the law in their own country or the destination country. They are given no pre-departure briefings or any information about how their embassy can support them once they leave. As a result, they are left to rely on recruitment agencies, which, being largely unregulated, can be quite unscrupulous.

“... [B]ut I’d paid for and been assured of an automobile driver’s job,” Maqbool protested when his employer (kafeel) in Abu Dhabi told him that he would be driving a herd of sheep, not a vehicle.

“I couldn’t turn round and go home as the employer wouldn’t return my travel documents and sign my exit permit,” says Maqbool, who had sold his mother’s jewellery and other assets to go abroad to materialize his dream of earning enough wealth to wash away the poverty his family had been facing since generations.” [...]

Noor Elahi, a graduate in mechanical engineering from the University of Engineering and Technology (UET), Lahore, has a similar story of deception to tell. “For the first two months they paid me the salary agreed upon in the contract but, later, forced me to accept just 1,500 riyals,” he [said].

He had been assured of 4,000 riyals a month salary in Saudi Arabia. However, at the time of departure, he did not notice that the work permit he had been given mentioned him as a craftsman much below the status his qualifications deserved.

“The employer was forcing me to accept even less than half of the contract amount as salary, telling me that the visa doesn’t mention me as a mechanical engineer so I have to be content with what was being offered as a technician.”

It is encouraging to see, then, that countries across the region are finally thinking seriously on how to address these issues. The government of Punjab with the support of the ILO Office in Pakistan recently concluded a three-day South Asia Labour Conference where all SAARC countries’ representatives met to discuss, amongst other things, possibilities of regional cooperation on labour migration with the technical support of the International Labour Organization. [...]

“[Migrant workers get the short end of the stick](#)”, ILO Country Office for Pakistan, Feature Articles, International Labour Office, 2014.

As noted above, most of these measures can and should be mandated and shaped by legislation. Labour migration legislation and policies for origin as well as destination countries need to include measures to prevent abusive practices and promote decent and productive work for women and men migrants in conditions of freedom, equity, security and human dignity. It is important that legislation, policies and programmes recognize the similarities and differences in the migration experiences of different categories of women and men and aim at eradicating all forms of discrimination and gender inequality, as well as tackling other vulnerabilities, violations and their consequences. They should also take into account that women migrants are more at risk of finding themselves in irregular situations, in unregulated sectors of the economy or as victims of traffickers and subject to many forms of violence and abuse.

As in destination countries, establishing and implementing a comprehensive policy framework is an essential exercise. It needs to incorporate and reflect the concerns of multiple stakeholders across government, workers’ and employers’ organizations (social partners) and other civil society actors. Given that labour ministries are the principal part of government charged with employment matters, and that employers’ and workers’ organizations are at the “frontline” of the real economy, sufficient attention needs to be

devoted to the role of social dialogue in shaping the formulation and implementation of labour migration policy. Indeed, as discussed in Chapter 2, ILO standards directly concerned with the protection of migrant workers and labour migration governance specifically recognize the important role of workers' and employers' organizations in this regard. Such a policy would normally address the components identified above and explicitly link the outward and inward migration of labour and skills with the functioning of the national labour market and the consequences for economic and social development.

An institutional locus for overseeing preparation, deployment abroad and foreign employment is essential. A growing number of countries of origin have an office of foreign employment charged with such tasks as:

- Screening recruitment agents to prevent exploitative and fraudulent practices;
- Setting minimum standards for the payment of wages and terms of employment abroad;
- Negotiating with host countries to extend their labour and other laws to all categories of migrant workers;
- Facilitating emigration processes;
- Settling disputes between migrants and recruiters;
- Collecting information about employment opportunities and examining future opportunities for employment abroad; and
- Producing statistics and conducting research on labour migration to improve the knowledge base and evidence needed for policymaking in this field.

Where possible, such agencies or bodies need to be located within the labour ministry, to ensure coherence with the priorities for employment, training and skills in the overall national labour market.

## 5.4.2 Countries of destination

In the destination countries where migrants reside and work, labour markets must be regulated to ensure coherency and the productive employment of foreign and national labour and skills, as well as protection for workers and social cohesion. Interdependent measures are generally required in six areas:

- Labour market regulation, including access to employment, job mobility and the recognition of qualifications and skills;
- Protection of migrant (and national) workers in the employment context: freedom of association and the right to collective bargaining, equality of treatment and non-discrimination in respect of terms and conditions of employment, wages, occupational safety and health, and access to vocational training, language and integration courses;
- Promotion of social cohesion through measures to prevent discrimination and xenophobia, facilitate family unity and assist with integration;

- Social welfare, including health care, education, housing and community organizing;
- Provision for social security coverage and portability of social security benefits; and
- Avoiding the detention and criminalization of migrants (see Chapter 4).

Labour market coherency and the productive engagement of foreign skills and labour are closely tied to ensuring the minimum guarantees of protection for migrant workers in destination countries provided under the framework of international human rights law and international labour standards. The protection of migrant workers in destination countries is best secured through legislation in those countries, finding its appropriate place in the labour code, employment-related legislation, human rights law and other provisions for the protection of foreign nationals. Special attention needs to be devoted to the protection of migrant workers under temporary (or circular) migration schemes.

### Box 5.14 Scrutinizing and improving circular migration in Sweden

The Parliamentary Committee for Circular Migration and Development was established in 2009 to examine the relationship between circular migration – when migrants leave their country of origin and subsequently return – and development. The Committee released its [final report on the topic in 2011](#); it affirmed a view of migration as being of intrinsic benefit to the state, recommended that measures be enacted to remove obstacles to several forms of circular migration, and emphasized the protection of rights and individual choice in policies. The report also expressed a broad view of circular migration that applied to all migrants, including temporary foreign workers, foreign permanent residents and Swedish citizens who are migrants to other countries. Its recommendations proposed reforms covering all such categories, and included the need for greater flexibility on work permits, increased efforts to combat abusive employers, greater aid for international students, measures to reduce transaction costs associated with remittances, and more research. The report contributed to changes in policy that took effect in 2014, including allowing permanent residents to reside in another country for up to two years without losing their Swedish residence permits.

In some instances, as noted above, national legislative measures adopted in countries of origin may also help to protect workers and their families while living and working abroad, although this responsibility rests primarily with the destination country.

### 5.4.3 International cooperation

By definition, given its transnational character, fair and effective governance of international labour migration requires cooperation among all relevant actors. And that is happening at bilateral, regional and global levels. Parliamentarians have an important role to play to ensure that the representatives of their countries adopt clear, consistent and coherent positions that also reflect a human rights-based approach to the governance of migration, and labour migration in particular.

It is therefore vital that bilateral agreements or MoUs relating to labour migration conform to international human rights and labour standards, reflect the actual situation of labour migration between the countries concerned, and are effectively implemented. The principal elements that need to be taken into account in preparing such bilateral agreements are outlined in Chapter 2. A role for social partners in the design and application of such agreements appears to be absent in some countries. On the other hand, the existing arrangements for some important migration corridors are increasingly being supplemented by agreements between trade unions in countries of origin and destination, based on a [Model Trade Union Agreement on Migrant Workers' Rights](#), prepared by the [ILO Bureau for Workers' Activities \(ACTRAV\)](#).

At the regional level, labour migration or mobility is increasingly seen as a vital part of economic development in regional integration spaces, as examined in Chapter 2. Social partners are also playing their part in such spaces, for instance in the [Southern African Development Community \(SADC\)](#), in the formulation of the draft [Regional Labour Migration Policy Framework for SADC](#), and in the [Association of Southeast Asian Nations \(ASEAN\)](#), through the [ASEAN Forum on Migrant Labour](#). The governance of labour migration is also the subject of discussions in less formal regional consultative processes, as described above. Most notable among these is the [Colombo Process](#), which brings together 11 Asian countries of origin, and the [Abu Dhabi Dialogue](#), which includes these same countries as well as destination countries belonging to the Gulf Cooperation Council (GCC), Yemen, Malaysia and Singapore.

Labour migration and mobility – and key areas such as the role of international standards, ways to reduce the costs of labour migration (e.g. remittance and recruitment costs), recognition of qualifications and skills, and portability of social security – also feature prominently in the global debates on migration and development. This is hardly surprising given that employment and decent work lie at the intersection of the migration and development nexus. These discussions occur primarily at the intergovernmental but also the inter-agency level within the [Global Migration Group](#). The key elements are presented below.

## 5.5 Migration and development

Migration in the context of globalization brings opportunities but also vulnerability and discrimination. If migrants are deprived of their human, including labour, rights, their ability to benefit from migration and contribute to the development of their host societies is compromised. The promotion of migrants' human rights, social inclusion and integration enables them to lead economically productive as well as culturally and socially enriching lives. Only when conceived in terms of human rights can migration truly fulfil its potential as an enabler of development, for states and for migrants individually, as human beings. As GMG has pointed out in a [Statement on the Human Rights of Migrants in Irregular Situation](#) in September 2010: "Protecting [human] rights is not only a legal obligation; it is also a matter of public interest and intrinsically linked to human development".

The [first UN General Assembly High-level Dialogue \(HLD\) on International Migration and Development in September 2006](#) provided an opportunity for countries to address these



multidimensional aspects of international migration. It devoted one roundtable session to an examination of “Measures to ensure respect for and protection of the human rights of all migrants, and to prevent and combat smuggling of migrants and trafficking in persons”. The [Chairperson’s summary of the Dialogue](#) recognized the intrinsic interconnections between international migration, development and human rights:

*Participants recognized that international migration, development and human rights were intrinsically interconnected. Respect for the fundamental rights and freedoms of all migrants were considered essential to reap the full benefits of international migration. Many noted that some vulnerable groups, such as migrant women and children, needed special protection. Governments were called upon to ratify and implement the core human rights conventions and other relevant international instruments, including the [ICRMW]. Participants underlined the need for concerted efforts on the part of Governments to combat xenophobia, discrimination, racism and the social exclusion of migrant populations (para. 10).*

The main outcome of the first HLD was the establishment of the [Global Forum on Migration and Development \(GFMD\)](#), which has provided a broad platform for states to conduct informal dialogue and cooperation on migration and development issues, based on identified state practice.

### **Box 5.15 Global Forum on Migration and Development**

*The Global Forum on Migration and Development is a voluntary, inter-governmental, non-binding and informal consultative process open to all States Members and Observers of the United Nations. UN agencies and other international and regional bodies may be invited as observers. It was created upon the proposal of the UN Secretary-General at the September 2006 General Assembly High Level Dialogue on International Migration and Development. The Forum was initiated by Belgium and is led by governments. Its purpose is to address, in a transparent manner, the multidimensional aspects, opportunities and challenges related to international migration and its inter-linkages with development, to bring together government expertise from all regions, to enhance dialogue and cooperation and partnership and to foster practical and action-oriented outcomes at the national, regional and global levels. National Focal Points have been designated by participating governments to coordinate Forum-related preparations at the national level.*

[Operating Modalities, GFMD.](#)

As a non-binding and informal consultative process, GFMD has explicitly steered away from producing negotiated outcomes or “normative decisions”. While GFMD informal exchanges are giving increased attention to migration and human rights issues, the discussions have not been framed from a comprehensive human rights perspective. That and the absence of a human rights-based approach in GFMD, particularly in relation to participation, has raised some concerns. It is nevertheless important to acknowledge the role GFMD has played in building trust and confidence among states.

In 2012, the UN General Assembly requested Member States, the UN system, international organizations, civil society and all relevant stakeholders – especially the High Commissioner for Human Rights, the Special Rapporteur on the human rights of migrants and GMG – to ensure that the second HLD “analyses the linkage between migration and development in a balanced and comprehensive manner that includes, among others, a human rights perspective” (A/RES/67/172).

The [second UN General Assembly HLD on International Migration and Development](#) was held in New York on 3 – 4 October 2013. The UN Secretary-General’s report on [Migration and Development](#) to HLD contains an eight-point agenda for action. Significantly, the first action point concerns the protection of the human rights of all migrants. Member States are urged to ratify all relevant instruments relating to international migration and to eliminate discrimination against migrants. Special attention is devoted to migrant children in respect of their access to education and health as well as the avoidance of their administrative detention. The need to protect migrants in irregular status is also underlined and it is recognized that enhancing labour migration channels based on actual and projected labour market needs can play an important role in this regard. The second action point is concerned with reducing the high costs of labour migration, understood broadly to refer to remittance transfer costs and recruitment fees, but also costs associated with the non-portability of social security benefits and the non-recognition of migrants’ diplomas, qualifications and skills. The remaining six points are all relevant in one way or another to better governance of international migration, ensuring improved protection for the human rights, including labour rights, of all migrants.

### **Box 5.16 UN Secretary-General’s eight-point agenda for action on international migration and development**

#### **V. Making migration work: an eight-point agenda for action**

##### **1. Protect the human rights of all migrants**

111. Member States should be encouraged to ratify and implement all relevant international instruments related to international migration, including the core international human rights instruments, relevant ILO conventions, the protocols against human trafficking and migrant smuggling and the Convention relating to the Status of Refugees. Alternatives to the administrative detention of migrants should be explored, while the detention of migrant children should be avoided. Countries should eliminate all discrimination against migrants with regard to working conditions and wages and with regard to fundamental economic, social and cultural rights. Migrant children should have equal access to education, and all migrants should have access to essential health services.

112. Member States should commit to protecting and promoting the human rights of migrants at all stages of the migration process, including migrants having an irregular legal status. Access to legal migration channels should be enhanced, reflecting actual and projected labour market needs while taking into account human capital requirements in countries of origin and facilitating family unity.

## **2. Reduce the costs of labour migration**

113. There are enormous gains to be made by lowering costs related to migration, such as the transfer costs of remittances and fees paid to recruiters, especially by low-skilled migrant workers. In addition, countries can strengthen the benefits of migration by enhancing the portability of social security and other acquired rights, and by promoting the mutual recognition of diplomas, qualifications and skills.

## **3. Eliminate migrant exploitation, including human trafficking**

114. Member States should commit to the elimination of all forms of exploitation affecting migrants, especially trafficking in persons and other forms of modern-day slavery. Areas of action include discouraging the demand that fosters human trafficking, ensuring the protection of victims, prosecuting offenders and ensuring that companies eliminate forced labour from their global supply chains.

## **4. Address the plight of stranded migrants**

115. The plight of migrants unable to return to their country of origin as a result of humanitarian crises in their country of destination or transit has often been overlooked. Member States should strengthen their capacities to assist migrants and their families in crisis situations through better preparedness, expanded consular assistance and assisted voluntary evacuation, return and reintegration. [...]

## **5. Improve public perceptions of migrants**

116. There is a need to combat discrimination, xenophobia and intolerance against migrants and their families by creating greater public awareness about the situations migrants experience and the contributions they make to countries of origin and destination. Such efforts could be promoted through a partnership of the private sector, labour unions, the media, educational institutions and migrants themselves, based on the latest available evidence and highlighting the rights and responsibilities of both migrants and non-migrants.

## **6. Integrate migration into the development agenda**

117. Migration is a test of relevance for the development debate and of fair and effective governance, demanding coordinated action not only among states but at all levels of government. Member States should mainstream migration into national development plans, poverty reduction strategies and relevant sectoral policies and programmes. The international community should define a common set of targets and indicators to monitor the implementation of measures aimed at enhancing the benefits and addressing the challenges of international migration, for consideration in the framework of the post-2015 development agenda. [...]

## 7. Strengthen the migration evidence base

119. Member States should promote evidence-based policymaking and invest in data collection, research and capacity development with respect to migration and its impacts on individuals, communities and societies. [...] The use of measurable targets and indicators for monitoring the protection of migrants and violations of their rights should be promoted.

## 8. Enhance migration partnerships and cooperation

120. No country can manage international migration alone. Stakeholders have developed many ideas for how governments, the private sector and civil society can build partnerships relating to mobility policies that reduce discrimination against migrants and protect their rights; lower the human, social and economic costs of migration; expand opportunities for migrants to invest their earnings more productively and share their knowledge; and enlist migrants and diaspora organizations in enhancing development in their communities of origin and destination.

121. Cooperation and dialogue on migration involving the United Nations, IOM and regional economic communities should be strengthened. The Global Forum on Migration and Development and regional consultative processes can be a useful complement to those formal intergovernmental mechanisms.

[International Migration and Development](#), Report of the Secretary-General, UN General Assembly, 68th Session, UN doc. A/68/190 (25 July 2013), pp. 20 – 22.

At the HLD itself, the General Assembly adopted a landmark consensus Declaration (see Annex III) clearly recognizing the human rights dimensions of international migration. In the Declaration, Member States *“reaffirm the need to promote and protect effectively the human rights and fundamental freedoms of all migrants, regardless of their migration status, especially those of women and children, and to address international migration through international, regional or bilateral cooperation and dialogue and through a comprehensive and balanced approach”* (para. 10). They also *“emphasize the need to respect and promote international labour standards as appropriate, and respect the rights of migrants in their workplaces”* (para. 14).

The second HLD also came at an important moment in preparations for the post-2015 UN development agenda. The [UN Millennium Declaration](#) called on states to *“take measures to ensure respect for and protection of the human rights of migrants, migrant workers and their families”* (8 September 2000, A/RES/55/2, para. V. 25, fifth indent). As observed above, in the Declaration of the HLD, Member States *“acknowledged the important contribution of migration in realizing the Millennium Development Goals, and recognize that human mobility is a key factor for sustainable development which should be adequately considered in the elaboration of the post-2015 development agenda”* (para. 8). Another recent expression of consensus on the need for the effective protection of the human rights of all migrants and for international cooperation in this respect is found in [The future we want](#), the outcome document of the Rio+20 [UN Conference on Sustainable Development](#). This document called upon states:

*to promote and protect effectively the human rights and fundamental freedoms of all migrants regardless of migration status, especially those of women and children, and to address international migration through international, regional or bilateral cooperation and dialogue and a comprehensive and balanced approach, recognizing the roles and responsibilities of countries of origin, transit and destination in promoting and protecting the human rights of all migrants, and avoiding approaches that might aggravate their vulnerability (27 July 2012, A/RES 68/288, Annex, para. 157).*

It is critical, therefore, to firmly anchor the debate on international migration and development to three fundamental principles of the post-2015 development agenda: *human rights, equality and sustainability*. These principles were recognized in the report, [Realizing the future we want for all](#) (pp. 23 – 25), submitted by the UN System Task Team on the Post-2015 UN Development Agenda to the Secretary-General in June 2012. The GMG Working Group on Migration, Human Rights and Gender, co-chaired by OHCHR, UNICEF and UN Women, and with the participation of other such agencies as ILO, IOM, UNHCR, the United Nations Educational, Scientific and Cultural Organization (UNESCO), UNODC and the World Health Organization (WHO), prepared a position document on [Including migrants in the post-2015 development agenda](#), making the case for such inclusion based on the three aforementioned fundamental principles.

## **Box 5.17 Including migrants in the post-2015 UN development agenda**

### **I. A three-prong approach for including migrants in the post-2015 UN development agenda**

The new development agenda should be universally valid, and leave no one behind. It should incorporate a focus on promoting and protecting the human rights of all marginalized groups, including through empowering and including migrants regardless of their status or circumstance.

- *The post-2015 agenda could promote equality as a stand-alone goal, with particular attention to the most marginalized groups, such as migrants at risk of discrimination and exclusion, in order to achieve more inclusive and truly sustainable development.*
- *The post-2015 agenda could develop specific migrant-sensitive targets under relevant goal areas.*
- *The post-2015 agenda could ensure systematic disaggregation of indicators by migrant status (i.e. nationality and migration status), in addition to disaggregation by age and sex in all relevant goals.*

The post-2015 UN development agenda must ensure that goals are aligned with the concept of freedom from fear as well as freedom from want, incorporating a focus on personal security, administration of justice and public participation. Importantly, the outcome document of the [UN Conference on Sustainable Development](#) (2012) also recognized that sustainable development requires the meaningful involvement and active participation of all affected groups including migrants (para. 43).

## **II. Why should migrants be included in the post-2015 UN development agenda?**

An inclusive and equal society is more likely to be sustainable. Inequalities and exclusion are harmful not just for the individuals who are disadvantaged, but for society as a whole. Highly unequal societies tend to grow more slowly than those with low income inequalities, are less successful in sustaining growth and recover more slowly from economic downturns. Excluding large numbers of people from accessing productive resources and assets, health, adequate food, clean water and sanitation, quality education, decent work, skills and technology and cultural life, will result in a reduction and waste of human potential. By addressing directly particular inequalities and their causes, the dynamics of power and exclusion which underlie poverty can be tackled. [...]

Discriminatory laws, policies, social norms and attitudes exclude certain groups from participating fully and equally in all aspects of life. While not all migrants are marginalized or excluded, the lack of citizenship attachment to the country of residence, coupled with other factors such as discrimination based on nationality, legal status, sector of work as well as on sex, age, linguistic or religious identity and other circumstance such as statelessness renders certain migrant groups and individuals more vulnerable to unequal treatment and exclusion from development. While the exact dimensions and features of inequalities vary from country to country, a recurrent picture of inequalities for many migrant groups, including migrants in an irregular situation, low-skilled migrant workers, migrant women at risk including those who work in particular sectors such as domestic work, migrant workers in such sectors as construction, fisheries and agriculture, and child and adolescent migrants is quite clear for almost all regions.

Abuse and exploitation of migrants in particularly vulnerable situations is often prevalent, and migrants in need of protection are likely to be denied access to effective mechanisms including asylum procedures. Inequalities are also a key driver for precarious migration (from countries of origin, as well as in terms of onwards movements from countries of transit), which can have severe, and often tragic, consequences for the human rights of migrants on the move. Redressing discrimination and inequalities will be essential if global opportunities for progress are to be shared by those most in need of its benefits.

Finally, and in order to ensure the effective inclusion of migrants, the sustainable development agenda should be concerned with the human rights-based governance of migration. While international agreements are often drawn up to facilitate the movement of goods and capital across borders, the movement of people across borders is less well governed and often takes place in the absence of effective rights-based regulations. [...] Sufficient channels for the regular movement of migrants should be put in place, which respond adequately to the demand inter alia for migrant workers and for family reunification. Such policy measures could reduce the necessity for migrants to seek out irregular channels and the risk that they will fall prey to traffickers and other abusive facilitators of movement.

### III. A question of data

A critical lack of data collection and disaggregation by migrant status conceals exclusion and inequalities and makes it difficult to measure progress and dismantle entrenched patterns of discrimination. Where a group of people is socially, economically or politically excluded, or where chronic human rights violations are not recognized by the state, the relevant data tends not to be systematically collected, leading to vicious cycles of exclusion. Experience has shown that issues relating to migrants tend to become blind spots when priorities are set, policies defined or budgets allocated with resulting gaps in monitoring and accountability. [...] It is important that a new sustainable development agenda encourages stakeholders to seek out new and innovative data sources to measure and monitor the development progress of all migrants, including migrants in an irregular situation. Moreover, to ensure the visibility of both men and women in migration, all data should be sex disaggregated.

[Including migrants in the post-2015 development agenda](#), GMG, Working Group on Migration, Human Rights and Gender, Position Document, May 2014 [footnotes omitted].

### Box 5.18 Migration and the 2030 Agenda for Sustainable Development

Migration features in the sustainable development goals (SDGs) of the post-2015 UN sustainable development agenda. Specifically, in SDG 8 on the promotion of sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all, target 8.8 is concerned with the need to “protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment”. Two other explicitly migration-related targets are found in SDG 10 on reducing inequality within and among countries:

- Target 10.7 - facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies;

- Target 10.c – by 2030, reduce to less than 3 per cent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 per cent.

SDG 17 on strengthening the means of implementation and revitalizing the global partnership for sustainable development contains target 17.18 on enhancing “capacity building support to developing countries [...] to increase significantly the availability of high-quality, timely and reliable data disaggregated by [inter alia] migratory status”.

The SDGs also contain other targets equally relevant for migrants and enjoyment of their rights to social protection (1.3), safe, nutritious and sufficient food (2.1), health (3.8), education (4.1 – 4.5), safe and affordable drinking water and adequate and equitable sanitation and hygiene (6.1 – 6.2), full and productive employment and decent work (8.5), and equal access to justice (16.3), in a non-discriminatory and participatory way (10.2 – 10.3). The use of inclusive language in these targets (namely, the references to “all”) underscores that no one, including migrants, should be left behind.

Moreover, the financing for development action agenda also recognizes inter alia:

- The positive contribution of migrants for inclusive growth and sustainable development in countries of origin, transit and destination, with specific reference to the role of migrant worker remittances;
- The need for international cooperation to ensure safe, orderly and regular migration, with full respect for human rights; and
- The need to promote and protect effectively the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their migration status.

**Sources:**

- [Transforming Our World: The 2030 Agenda for Sustainable Development](#), Finalised text for adoption (1 August).
- [Outcome document of the Third International Conference on Financing for Development: Addis Ababa Action Agenda](#), Addis Ababa, 13 – 16 July 2015, A/CONF.227/L.1 (15 July 2015), paras. 40 and 111.



# Conclusion

Multilateral discussions on international migration governance over the years have tended to focus on its repercussions for development. But while the discussions on that track have been fruitful, the importance and centrality of the human rights perspective should not be overlooked. Viewing migration through that lens is crucial in its own right as well as in the context of the migration-development nexus, because human rights are intrinsic to all human beings, regardless of their instrumental value as “units of labour” or “agents of development”. This is expressed most eloquently in one of the principles enshrined in the [Declaration of Philadelphia](#) (see Chapter 2), adopted 70 years ago as an annex to the ILO Constitution: “labour is not a commodity”. In this context, it is important to remember the central challenge for the post-2015 development agenda as identified in the report of the UN System Task Team on the Post-2015 UN Development Agenda, [Realizing the Future We Want For All](#): “to ensure that globalization becomes a positive force for all the worlds’ peoples of present and future generations” (p. i). Parliamentarians can thus play an important role in ensuring that this agenda and its implementation give due attention to the inclusion of migrants and that human rights principles are adequately reflected in the governance of international migration.

## Checklist for parliamentarians

### What action can parliamentarians take to improve the human rights-based governance of migration at the local, regional, national and international level?

- ☑ Parliamentarians need to recognize the importance of and promote an **inclusive dialogue on migration**:
  - Governance of migration is not only a matter for governments or states but engages a variety of actors, such as relevant ministries (e.g. labour, foreign affairs, interior, education and social affairs), parliamentarians themselves, national human rights institutions, local and regional authorities, international organizations and non-governmental stakeholders, such as representative worker and employer organizations. Non-government organizations, diaspora and migrants' associations should also be consulted.
  - Parliamentarians should **communicate with as many actors as possible**.
- ☑ Parliamentarians should advocate **more migration governance**. Improving cooperation and coordination on migration does not limit national sovereignty; on the contrary, sovereignty could in fact be limited more by insufficient migration governance and a highly unregulated and fragmented system with multiple and often competing actors.
- ☑ Parliamentarians should propose, be kept informed of discussions on, and be required to endorse the following tools of migration governance, with due regard to human rights considerations:
  - Bilateral agreements or less formal non-binding MoUs, such as those on labour migration, including the recruitment and treatment of migrant workers in particular sectors of the economy (e.g. domestic work).
  - Agreements and policies at the regional level to facilitate the mobility of people within a region or sub-region, including for the purpose of employment.
- ☑ Parliamentarians also need to be aware of and receive regular reports from governments regarding their participation in informal governmental processes on migration, such as RCPs and GFMD.
- ☑ Parliamentarians can play an important role in encouraging governments to discuss migration within the UN system, enabling them to benefit from:
  - standard setting and normative oversight of UN and ILO supervisory mechanisms;
  - human rights-based dialogue and cooperation on migration;
  - technical assistance and capacity development; and
  - a knowledge base.
- ☑ Parliamentarians need to support the work of national human rights institutions and advocate the introduction of indicators on the human rights of migrants,

thus helping to plan for and improve the implementation of international human rights law and international labour standards at the national level with regard to all migrants irrespective of their migration status.

- ☑ Parliamentarians are encouraged to advocate the inclusion of targets with respect to migrants and migration under the relevant post-2015 sustainable development goals (e.g. decent work, reducing inequality, peaceful societies) and the systematic disaggregation of indicators by migrant status (including nationality), and to ensure that implementation of the post-2015 development agenda gives due attention to the protection of the human rights of migrants.



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# Annex I:

## ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

[...] **RECALLING** also the Universal Declaration on Human Rights [...], as well as other appropriate international instruments which all the ASEAN Member Countries have acceded to [...];

[...] **CONFIRMING** our shared responsibility to realise a common vision for a secure and prosperous ASEAN Community by improving the quality of life of its people and strengthening its cultural identity towards a people-centered ASEAN through, among others, measures on the protection and promotion of the rights of migrant workers;

**RECOGNISING** the contributions of migrant workers to the society and economy of both receiving states and sending states of ASEAN;

**RECOGNISING** further the sovereignty of states in determining their own migration policy relating to migrant workers, including determining entry into their territory and under which conditions migrant workers may remain;

**ACKNOWLEDGING** the legitimate concerns of the receiving and sending states over migrant workers, as well as the need to adopt appropriate and comprehensive migration policies on migrant workers;

**ACKNOWLEDGING** also the need to address cases of abuse and violence against migrant workers whenever such cases occur; [...]

**HEREBY DECLARE AS FOLLOWS:**

### GENERAL PRINCIPLES

1. Both the receiving states and sending states shall strengthen the political, economic and social pillars of the ASEAN Community by promoting the full potential and dignity of migrant workers in a climate of freedom, equity, and stability in accordance with the laws, regulations, and policies of respective ASEAN Member Countries;
2. The receiving states and the sending states shall, for humanitarian reasons, closely cooperate to resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented;
3. The receiving states and the sending states shall take into account the fundamental rights and dignity of migrant workers and family members already residing with them without undermining the application by the receiving states of their laws, regulations and policies; and
4. Nothing in the present Declaration shall be interpreted as implying the regularization of the situation of migrant workers who are undocumented.

## **OBLIGATIONS OF RECEIVING STATES**

Pursuant to the prevailing laws, regulations and policies of the respective receiving states, the receiving states will:

5. Intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers; [...]
7. Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving state;
8. Promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers;
9. Provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states; and
10. Facilitate the exercise of consular functions to consular or diplomatic authorities of states of origin when a migrant worker is arrested or committed to prison or custody or detained in any other manner, under the laws and regulations of the receiving state and in accordance with the Vienna Convention on Consular Relations.

## **OBLIGATIONS OF SENDING STATES**

Pursuant to the prevailing laws, regulations and policies of the respective sending states, the sending states will:

11. Enhance measures related to the promotion and protection of the rights of migrant workers;
12. Ensure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers;
13. Set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin; and
14. Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.

## **COMMITMENTS BY ASEAN**

For purposes of protecting and promoting the rights of migrant workers, ASEAN Member Countries in accordance with national laws, regulations and policies, will:

15. Promote decent, humane, productive, dignified and remunerative employment for migrant workers;
16. Establish and implement human resource development programmes and reintegration programmes for migrant workers in their countries of origin;

17. Take concrete measures to prevent or curb the smuggling and trafficking in persons by, among others, introducing stiffer penalties for those who are involved in these activities;
18. Facilitate data-sharing on matters related to migrant workers, for the purpose of enhancing policies and programmes concerning migrant workers in both sending and receiving states; [...]
22. Task the relevant ASEAN bodies to follow up on the Declaration and to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers, [...]

**DONE** at Cebu, Philippines [13 January 2007].



## Annex II:

# Article 16 of the ICRMW and its application to migrant workers and members of their families in an irregular situation

### Protection against arbitrary arrest and detention

23. Article 16 protects the right of migrant workers and members of their families to liberty and security of person (para. 1), and provides that identity controls of migrant workers must comply with the procedure established by law (para. 3). Article 16, paragraph 4, complements Article 9, paragraph 1, of the International Covenant on Civil and Political Rights, adding that migrant workers and members of their families shall not be subjected “individually or collectively” to arbitrary arrest or detention. In order not to be arbitrary, arrest and detention of migrant workers and members of their families, including those in an irregular situation, must be prescribed by law, pursue a legitimate aim under the Convention, be necessary in the specific circumstances and proportionate to the legitimate aim pursued.

24. The Committee considers that crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime. [...] While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security. [See report of the Special Rapporteur on the human rights of migrants to the Human Rights Council (A/HRC/20/24), para. 13] [...]

26. In the Committee’s view, any custodial or non-custodial measure restricting the right to liberty must be exceptional and always based on a detailed and individualized assessment. [...] The principle of proportionality requires States Parties to detain migrant workers only as a last resort, and to give preference to less coercive measures, especially non-custodial measures, whenever such measures suffice to achieve the objective pursued. In all such cases, the least intrusive and restrictive measure possible in each individual case should be applied.

27. Administrative detention of migrants that is initially lawful and non-arbitrary may become arbitrary if it continues beyond the period for which a State party can provide proper justification. To prevent such a situation from occurring, a maximum period of administrative detention shall be established by law, upon expiry of which a detainee must be automatically released in the absence of such justification. [...] In cases where an expulsion order cannot be executed for reasons beyond the detained migrant worker’s control, he or she shall be released in order to avoid potentially indefinite detention.

28. Article 16, paragraph 5, requires States Parties to inform migrant workers and members of their families who are arrested of the reasons for their arrest at the time of

arrest and, as far as possible, in a language they understand. Moreover, they must be promptly informed of the charges against them in a language they understand. [...]

29. Under Article 16, paragraph 6, the guarantees of certain rights of migrant workers and members of their families in custody and pretrial detention are applicable to anyone suspected of committing or having committed a crime.

30. Article 16, paragraph 7, provides for the right of migrant workers who are deprived of their liberty to communicate with the consular or diplomatic authorities of their State of origin or those of a State representing the interests thereof. [...]

32. Article 16, paragraph 8, provides for the right of all migrant workers and members of their families who are deprived of their liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of their detention. If the court finds that the detention is unlawful, it must order the release of the detained migrant worker.

33. The Committee considers that anyone arrested and detained solely for immigration purposes should be brought promptly before a judge or other officer authorized by law to exercise judicial power to review the lawfulness of the arrest and/or detention and the continued necessity of such arrest or detention; and to order unconditional release and/or less coercive measures, if warranted. [...] The migrant worker must have access to legal representation and advice, if necessary free of charge, to challenge the lawfulness of detention. Children, and in particular unaccompanied or separated children, should never be detained solely for immigration purposes.

34. Article 16, paragraph 8, of the Convention provides for the right of migrant workers attending such proceedings to an interpreter, if necessary, without cost to them, if they cannot understand or speak the language used. [...]

35. Article 16, paragraph 9, provides for an enforceable right to compensation for migrant workers and members of their families who have been victims of unlawful arrest or detention. [...]

[General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families](#), Committee on Migrant Workers, UN doc. CMW/C/GC/2 (28 August 2013).

# Annex III:

## Declaration of the High-level Dialogue on International Migration and Development

*The General Assembly,*

*Adopts the following Declaration:*

Declaration of the High-level Dialogue on International Migration and Development

We, representatives of States and Governments, gathered at United Nations Headquarters in New York on 3 and 4 October 2013 on the occasion of the High-level Dialogue on International Migration and Development,

1. Recognize that international migration is a multidimensional reality of major relevance for the development of origin, transit and destination countries, and in this regard recognize that international migration is a crosscutting phenomenon that should be addressed in a coherent, comprehensive and balanced manner, integrating development with due regard for social, economic and environmental dimensions and respecting human rights;
2. Acknowledge the important contribution made by migrants and migration to development in countries of origin, transit and destination, as well as the complex interrelationship between migration and development;
3. Decide to work towards an effective and inclusive agenda on international migration that integrates development and respects human rights by improving the performance of existing institutions and frameworks, as well as partnering more effectively with all stakeholders involved in international migration and development at the regional and global levels;
4. Reaffirm our commitment to address the opportunities and the challenges that international migration presents to countries of origin, transit and destination;
5. Recognize the need for international cooperation to address, in a holistic and comprehensive manner, the challenges of irregular migration to ensure safe, orderly and regular migration, with full respect for human rights;
6. Recognize the need to strengthen synergies between international migration and development at the global, regional and national levels;
7. Recognize the efforts made by the international community in addressing relevant aspects of international migration and development, through different initiatives, both within the United Nations system and other processes, particularly the Global Forum on Migration and Development and regional processes, as well as in drawing on the expertise of the International Organization for Migration and other member agencies of the Global Migration Group;

8. Acknowledge the important contribution of migration in realizing the Millennium Development Goals, and recognize that human mobility is a key factor for sustainable development which should be adequately considered in the elaboration of the post-2015 development agenda;
9. Acknowledge the important role that migrants play as partners in the development of origin, transit and destination countries and recognize the need to improve public perceptions of migrants and migration;
10. Reaffirm the need to promote and protect effectively the human rights and fundamental freedoms of all migrants, regardless of their migration status, especially those of women and children, and to address international migration through international, regional or bilateral cooperation and dialogue and through a comprehensive and balanced approach, recognizing the roles and responsibilities of countries of origin, transit and destination in promoting and protecting the human rights of all migrants, and avoiding approaches that might aggravate their vulnerability;
11. Recognize that women and girls account for almost half of all international migrants at the global level, and the need to address the special situation and vulnerability of migrant women and girls by, inter alia, incorporating a gender perspective into policies and strengthening national laws, institutions and programmes to combat gender-based violence, including trafficking in persons and discrimination against them;
12. Emphasize in this regard the need to establish appropriate measures for the protection of women migrant workers in all sectors, including those involved in domestic work;
13. Express the commitment to protect the human rights of migrant children, given their vulnerability, particularly unaccompanied migrant children, and to provide for their health, education and psychosocial development, ensuring that the best interests of the child are a primary consideration in policies of integration, return and family reunification;
14. Emphasize the need to respect and promote international labour standards as appropriate, and respect the rights of migrants in their workplaces;
15. Note the contribution of applicable international conventions, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, to the international system for the protection of migrants;
16. Strongly condemn the acts, manifestations and expressions of racism, racial discrimination, xenophobia and related intolerance against migrants and the stereotypes often applied to them, including on the basis of religion or belief, and urge States to apply and, where needed, reinforce the existing laws when xenophobic or intolerant acts, manifestations or expressions against migrants occur, in order to eradicate impunity for those who commit those acts;
17. Reiterate our commitment to prevent and combat trafficking in persons, protect victims of trafficking, prevent and combat migrant smuggling, and protect migrants from exploitation and other abuses, stress the need to establish or upgrade, as appropriate, national and regional anti-human trafficking policies, and to reinforce cooperation on prevention, the prosecution of traffickers and the protection of victims of trafficking,



and encourage Member States to ratify, accede to and implement relevant international instruments on preventing and combating trafficking in persons and smuggling of migrants;

18. Encourage Member States to cooperate on mobility programmes that facilitate safe, orderly and regular migration, including through labour mobility;

19. Recognize the particular vulnerabilities, circumstances and needs of adolescents and young migrants, as well as their potential to build social, economic and cultural bridges of cooperation and understanding across societies;

20. Recognize also all efforts made by Governments, all relevant bodies, agencies, funds and programmes of the United Nations system, other relevant intergovernmental, regional and subregional organizations, including the International Organization for Migration and other organizations within the Global Migration Group, and non-governmental stakeholders, including the private sector, in addressing international migration and development for the benefit of both migrants and societies; and bearing this goal in mind, further emphasize the need to strengthen partnerships among all relevant stakeholders;

21. Stress the need to deepen the interaction between Governments and civil society to find responses to the challenges and the opportunities posed by international migration, and recognize the contribution of civil society, including non-governmental organizations, to promote the well-being of migrants and their integration into societies, especially at times of extreme vulnerable conditions, and the support of the international community to the efforts of such organizations;

22. Acknowledge the complexity of migratory flows and that international migration movements also occur within the same geographical regions, and, in this context, call for a better understanding of migration patterns across and within regions;

23. Recognize the importance of coordinated efforts of the international community to assist and support migrants stranded in vulnerable situations and facilitate, and cooperate on when appropriate, their voluntary return to their country of origin, and call for practical and action-oriented initiatives aimed at identifying and closing protection gaps;

24. Underline the right of migrants to return to their country of citizenship, and recall that States must ensure that their returning nationals are duly received;

25. Recognize the need to consider the role that environmental factors may play in migration;

26. Recognize the necessity to consider how the migration of highly skilled persons, especially in the health, social and engineering sectors, affects the development efforts of developing countries, and emphasize the need to consider circular migration;

27. Recognize that remittances constitute an important source of private capital, and reaffirm the need to promote conditions for cheaper, faster and safer transfers of remittances in both source and recipient countries;

28. Emphasize the need for reliable statistical data on international migration, including when possible on the contributions of migrants to development in both origin and

destination countries; this data could facilitate the design of evidence-based policy- and decision-making in all relevant aspects of sustainable development;

29. Acknowledge that the Global Forum on Migration and Development has proved to be a valuable forum for holding frank and open discussions, and that it has helped to build trust among participating stakeholders through the exchange of experiences and good practices, and by virtue of its voluntary, informal State-led character;

30. Acknowledge that the United Nations system can benefit from the discussions and outcomes of the Global Forum on Migration and Development, in order to maximize the benefits of international migration for development;

31. Call upon all relevant bodies, agencies, funds and programmes of the United Nations system, other relevant intergovernmental, regional and subregional organizations, including the International Organization for Migration and other Global Migration Group members, and the Special Representative of the Secretary-General on International Migration and Development, within their respective mandates, to strengthen their collaboration and cooperation to better and fully address the issue of international migration and development, in order to adopt a coherent, comprehensive and coordinated approach, and to consider migration issues in their contributions to the preparatory process that will establish the post-2015 development agenda;

32. Welcome the recent efforts made by the Global Migration Group to undertake measures to enhance its functioning and to promote coherence and coordination among its member organizations, and in this regard stress the importance of regular interaction between the Global Migration Group and Member States;

33. Request the Secretary-General to continue his substantive work on international migration and development and, in collaboration with the United Nations system and relevant organizations, including the International Organization for Migration, to continue assessing the progress made in the field of migration and development;

34. Also request the Secretary-General, in the elaboration of his report on international migration and development to be submitted to the General Assembly at its sixty-ninth session, to give due consideration to the results and deliberations of this High-level Dialogue.




[Resolution 68/4. Declaration of the High-level Dialogue on International Migration and Development](#), UN General Assembly, 68th Session, adopted on 3 October 2013.





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