

ILO Note on the Dignity and Rights of Migrant Workers in an Irregular Situation

The many international labour standards adopted over the years by the International Labour Conference of the International Labour Organization (ILO) are central to the dignity and rights of all migrant workers. From its very inception, the ILO resolved to protect “the interests of workers employed in countries other than their own”¹ with no qualification as to their immigration status. In principle, unless otherwise stated, all international labour standards cover all workers irrespective of their nationality or immigration status. Lack of labour protection for migrant workers in an irregular situation undermines protection generally for lawfully resident migrant workers as well as national workers.

These standards include the fundamental rights conventions of the ILO; standards of general application; instruments containing specific provisions on migrant workers, as well as conventions and recommendations focusing on labour migration and migrant workers.²

ILO Fundamental Rights Conventions

The fundamental rights conventions of the ILO – addressing the abolition of forced labour, the elimination of child labour, trade union rights, and non-discrimination and equality of treatment in employment and occupation³ – have special importance, as recognized by the ILO Declaration on Fundamental Principles and Rights at Work adopted by the International Labour Conference in 1998. The Declaration stipulates that all ILO Members, including those that have not ratified the instruments in question, have an obligation by virtue of their membership “to respect, to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions”.⁴

The universal application of ILO fundamental rights conventions to all persons in the world of work has been underscored by the ILO supervisory bodies (Box 1).

Box 1: Trade Union Rights

In March 2001, the ILO Committee on Freedom of Association concluded that the Spanish Foreigners’ Law 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 the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87). Article 2 reads unequivocally: “Workers and employers, *without distinction whatsoever*, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous

¹ ILO Constitution, 1919, Preamble, recital 2.

² See Annex for a list of the pertinent conventions and recommendations.

³ See Annex.

⁴ International Labour Conference, 86th Session, 1998, ILO Declaration on Fundamental Principles and Rights at Work, para. 2. While the specific instruments relating to labour migration and migrant workers are not considered as ILO fundamental rights conventions, the Declaration underscores the need to devote “special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers ...”. Ibid. recital 4.

authorization” (emphasis added). The Committee stated that Article 2 of Convention No. 87 covers all workers and 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 that 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 overturned the provisions of the Foreigners’ Law and declared unconstitutional the distinction between regular migrants and migrants in an irregular situation as regards a number of rights, including the right to freedom of association and the right to organize.

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 at <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdoff=1>.

Standards of General Application

In addition to the fundamental rights conventions, the widely ratified ILO conventions of general application – such as those dealing with labour inspection, protection of wages, and safety and health at work – are particularly relevant and their specific application to migrant workers in an irregular situation has been the subject of observations by the Committee of Experts (Box 2).

Box 2: Labour Inspection, Protection of Wages and Migrant Workers in an Irregular Situation

With regard to the Labour Inspection Convention, 1947 (No. 81), which has been ratified by 142 ILO Members, the Committee of Experts has remarked on the functions of labour inspectors vis-à-vis immigration enforcement in the context of irregular migration. For example, in an Observation to Italy in 2009, the Committee expressed concerns about the extent of the role played by labour inspectors in immigration enforcement:

“The Committee ... emphasizes the need for the Government to take measures to distinguish with sufficient clarity the powers and working methods of labour inspectors from those of officials of other bodies responsible for combating illegal employment and migration. Such a separation in no way excludes the possibility of establishing a form of collaboration which involves labour inspectors drawing the attention of the competent authorities to employers in breach of the legislation regarding conditions of work and the protection of workers, especially as regards abuses reported with regard to workers whose situation is irregular. ... The Committee requests the Government to indicate in its next report any measures taken or envisaged to re-establish labour inspectors in their duties defined by the Convention and limit their cooperation with the immigration authorities to an extent that is compatible with the purpose of the Convention”.

Prior to the recent conflict in Libya, the Committee of Experts had also addressed on several occasions questions to the government regarding its obligations under the Protection of Wages Convention, 1949 (No. 95) in respect of the alleged non-payment of wages owed to sub-Saharan African migrants – both documented and undocumented – expelled from the country in previous years.

Committee of Experts on the Application of Conventions and Recommendations, 80th Session, 2009, Labour Inspection Convention, 1947 (No. 81), Italy: Observation, and 78th Session, 2007, Protection of Wages Convention, 1949 (No. 95), Libya: Observation (available from APPLIS – Database on Application of International Labour Standards, <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN>).

Standards containing Specific Provisions on Migrant Workers and ILO Instruments on Labour Migration and Protection of Migrant Workers

A number of ILO standards contain specific provisions on migrant workers, such as those addressing social security and the regulation of private employment agencies.⁵ The most recent standards on domestic workers also fall into this category and are discussed in more detail below.

The ILO has also crafted specific instruments addressing labour migration and the protection of migrant workers. – Migration for Employment Convention (Revised), 1949 (No. 97) and Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)⁶ as well as accompanying recommendations.⁷ Convention No. 143 is particularly relevant because it includes explicit protections for migrant workers in an irregular situation.

That respect for fundamental rights and principles at work is not limited by a worker's nationality or immigration status is reinforced by Article 1 of Convention No. 143, which requires States Parties “to respect the basic human rights of *all* migrant workers”. The ILO Committee of Experts on the Application of Conventions and Recommendations views this provision as referring to “the fundamental human rights contained in the international instruments adopted by the UN in this domain, which include some of the fundamental rights of workers”.⁸ This interpretation is particularly important because it reflects the interdependence between international labour standards and human rights law. In this regard, the Committee of Experts explicitly refers to: the Universal Declaration of Human Rights (UDHR), 1948; the International Covenant on Civil and Political Rights (ICCPR), 1966; the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), 1990. Indeed, labour rights are also human rights. All fundamental labour rights are clearly delineated as human rights in the UDHR, ICCPR and ICESCR, and many of the specific and detailed labour standards are encapsulated by the ICESCR, for example, by: the right to work in Article 6; the right of everyone to the enjoyment of just and favourable conditions of work in Article 7; and the right of everyone to social security in Article 9.

⁵ Conventions No. 102, 118 and 157 and Convention No. 181 respectively (see Annex).

⁶ Convention No. 97 has been ratified by 49 States Parties, including ten EU Member States (Belgium, Cyprus, France, Germany, Italy, Netherlands, Portugal, Slovenia, Spain, United Kingdom) and one European Economic Area (EEA) country (Norway) while Convention No. 143 has been ratified by 23 States Parties, including five EU Member States (Cyprus, Italy, Portugal, Slovenia, Sweden) and one EEA country (Norway).

⁷ See Annex.

⁸ International Labour Conference, 87th Session, 1999, Report III (1B), *Migrant Workers: General Survey on the Reports of the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975*, Geneva, ILO, 1999, p. 108, para. 296.

Convention No. 143 also specifically provides, for equality of treatment for migrant workers in an irregular situation and members of their families in respect of rights arising out of past employment as regards remuneration, social security and other benefits.⁹

The protection of the rights of migrant workers in an irregular situation is facilitated if possibilities exist for them to regularize their status. While there is no obligation on States to regularize such workers in international law in view of the sovereign prerogative of States to determine which non-nationals to admit to their territory, Convention No. 143 expressly stipulates that: “Nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment”.¹⁰ Indeed, regularization of migrant workers in an irregular situation has been and continues to be viewed by a number of European countries as an important step to officially recognize their presence in the labour market and protect their human and labour rights as well as prevent their marginalization, thus increasing the prospects for improved social cohesion.

Non-binding Measures on Labour Migration

The importance of protecting the human and labour rights of migrant workers in an irregular situation is underscored by the *ILO plan of action for migrant workers*, which is found in the Conclusions on a fair deal for migrant workers in a global economy adopted by the International Labour Conference in June 2004. In discussing possible initiatives to better promote ratification of ILO Conventions Nos. 97 and 143, the plan of action underlines that due consideration should be given *inter alia* to the particular problems faced by migrant workers in an irregular situation and the vulnerability of such workers to abuse.¹¹

The centre-piece of the plan of action is the *ILO Multilateral Framework on Labour Migration*.¹² It sets out fifteen principles in nine areas, supported by more detailed guidelines and examples of best practices. The fifth area concerns protection of migrant workers where principle 8 states that

The human rights of all migrant workers, regardless of their status, should be promoted and protected. In particular, all migrant workers should benefit from the principles and rights in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which are reflected in the eight fundamental ILO Conventions, and the relevant United Nations human rights Conventions.

The Domestic Workers Convention and Recommendation, 2011

The most recent ILO standards, the Domestic Workers Convention No. 189 and its supplementing Recommendation No. 201, both adopted in June this year, are the first

⁹ Convention No. 143, Article 9(1).

¹⁰ Ibid. Article 9(4).

¹¹ *Conclusions on a fair deal for migrant workers in a global economy*, paras. 28-29.

¹² *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*, Geneva, International Labour Office, 2006; adopted by a Tripartite Meeting of Experts towards the end of 2005, and approved for publication and dissemination by the ILO Governing Body in March 2006.

ILO instruments specifically dedicated to the protection of domestic workers. The new instruments have a broad scope of application, aiming at the protection of *all* domestic workers.¹³ While the provisions of the Convention and the Recommendation generally do not distinguish between nationals and non-nationals employed as domestic workers, a number of provisions specifically mention migrant domestic workers and/or address issues particularly affecting them. Similar to other ILO instruments, the new Convention and Recommendation on domestic workers do not distinguish between workers on the basis of immigration status.

The provisions of the Convention specifically mentioning migrant domestic workers deal with ensuring the provision of information to workers before they travel to the country of employment and protection against abusive practices by employment agencies.¹⁴ Significantly, Article 3 calls for measures, in relation to domestic workers, to respect, promote and realize the fundamental principles and rights at work. Equally important for migrant workers are the provisions concerning protection from all forms of abuse, harassment and violence (Article 5) and those addressing the particular vulnerable situation of live-in workers which also tend to be migrant workers (Article 9). The Convention further addresses inclusion of domestic workers into minimum wage coverage, protection of wages, working time, occupational safety and health as well as social security. Article 16 requires measures to be taken “to ensure, in accordance with national laws, regulations and practice, that all domestic workers, either by themselves or through a representative, have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally.”

Recommendation No. 201 contains valuable guidance on a range of measures that may be taken to protect migrant domestic workers, such as hotlines, interpretation services, emergency housing, consular assistance, provision of information in their languages, and measures to ensure that migrant workers’ ability to pursue criminal and civil remedies, legal and social services (Para. 21).

¹³ Article 2(1) reads: “The Convention applies to *all* domestic workers,” defined in Article 1(b) as “any person[s] engaged in domestic work within an employment relationship”. Under Article 2(2) ratifying Members may exclude from the scope of the Convention, wholly or partly “(a) categories of workers who are otherwise provided with at least equivalent protection; (b) limited categories of workers in respect of which special problems of a substantial nature arise.”

¹⁴ See Articles 8 and 15 of Convention No 189.

ANNEX

International Labour Standards of Relevance to the Protection of Migrant Workers in an Irregular Situation

Fundamental Rights

Abolition of Forced Labour

Forced Labour Convention, 1930 (No. 29)

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)

Selected Conventions and Recommendations of General Application

Labour Inspection Convention, 1947 (No. 81)

Protection of Wages Convention, 1949 (No. 95)

Employment Policy Convention, 1964 (No. 122)

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

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)

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

Employment Injuries Benefit Convention, 1964 (No. 121)

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)

Labour Migration and Protection of Migrant Workers

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

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

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

Migrant Workers Recommendation, 1975 (No. 151).

The standards listed here can all be accessed from the ILO website at

<http://www.ilo.org/global/standards/lang--en/index.htm>