International Labour Organization

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ITC International Training Centre

Extending social protection to migrant workers, refugees and their families

A guide for policymakers and practitioners

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Foreword

For the 169 million migrant workers who are contributing to economies and societies, access to social protection is a major challenge. In light of the current migratory landscape, its changing labour market needs and realities and the COVID-19 crisis, the importance of social protection for migrant workers, refugees and their families cannot be overstated.

Exclusion from social protection, including healthcare, is not only a violation of human rights; it also has socio-economic repercussions on migrants, their families and society as a whole. Unprotected migrant workers are more likely to be living in poverty and less likely to send remittances to their home countries. This reduces prospects for socio-economic development in both countries of employment and countries of origin. The COVID-19 crisis has also shed light on abysmal inequalities, discrimination and protection gaps.

These are some of the reasons why access to social protection for all, including migrant workers and refugees, is among the priorities of the United Nations (UN) 2030 Agenda for Sustainable Development and is highlighted in the International Labour Organization (ILO) Centenary Declaration for the Future of Work, 2019 as one of the cornerstones of a brighter future. The Global Compact for Safe, Orderly and Regular Migration, adopted by the UN General Assembly in 2018, also recognizes the importance of protecting workers across borders and ensuring access to and portability of social protection rights and entitlements.

Notwithstanding the existence of a clear international legal framework governing the right to social security, this right does not translate into universal, effective access to healthcare and social security benefits for all migrant workers around the world. On the contrary, in many countries, legal, administrative and other obstacles hinder migrants' access to social protection.

Enabling migrant workers to enjoy and maintain social security rights across borders is an important challenge for developing and industrialized countries alike, yet it is also an opportunity to facilitate labour mobility, return and reintegration. Access to adequate social protection in countries of origin, transit and destination can allow workers to migrate by choice, not out of necessity. It is also key to attracting skilled workers, facilitating migrant women's integration into the workforce, and thus improving the functioning of labour markets.

The idea of adapting social protection policies and schemes to make them more inclusive of migrant workers is gaining momentum at the global level. This Guide named *Extending Social Protection to Migrant Workers, Refugees and their Families: Guide for Policymakers and Practitioners* (hereafter the Guide) seeks to provide policymakers, practitioners, migration specialists, social protection specialists and other stakeholders with practical guidance on how to extend social protection to migrant workers, refugees and their families.

Human rights instruments and ILO Conventions and Recommendations provide a solid legal framework and useful guidance for extending social protection. Involving the social partners in the design and implementation of social security reforms is indispensable to ensuring balanced outcomes and the sustainability of social protection measures. It is also important to consult migrant workers, refugees and their families in order to design policies and agreements that meet their needs.

This Guide provides a variety of policy and administrative options for consideration and adaptation to specific groups and situations, taking the complexity of current migratory movements into account. The policy measures presented are accompanied by selected country and regional practices. The Guide is based on several years of experience by ILO member States – including governments and workers' and employers' organizations – in making the right to social protection a reality for all. It is the outcome of long-standing collaboration between the ILO Social Protection Department and Labour Migration Branch, the International Training Centre of the ILO (ITCILO) and the International Social Security Association (ISSA) and builds on the technical expertise of numerous experts deployed across every region of the world.

The Guide was pilot tested through a number of ILO projects including in the context of the Organization's Flagship Programme on Building Social Protection Floors for All. It also benefited from collaboration with experts from the Office of the United Nations High Commissioner for Refugees (UNHCR). It builds on various training courses offered throughout the world over the past ten years, which enriched its content with valuable exchanges of experiences and country practices. Ultimately, it will be used in ILO training courses on labour migration and social protection and will be incorporated into an interactive learning tool to be developed in collaboration with the ITCILO in 2021.

We hope that the Guide will provide both a valuable tool for practitioners and an evidence-based resource for policymakers, including workers' and employers' representatives, in their efforts to strengthen social protection, promote social justice and foster sustainable development, especially in the field of migration. Together, these efforts will bring the world a step closer to making the right to social security for all a reality.

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The **International Labour Organization (ILO)** was founded in 1919 to promote social justice and thereby contribute to universal and lasting peace. It is responsible for drawing up and overseeing international labour standards and is the only tripartite United Nations agency that brings together representatives of governments, employers and workers to jointly shape policies and programmes promoting decent work for all. This unique arrangement gives the ILO an edge in incorporating "real world" knowledge about employment and work.

The **International Social Security Association (ISSA)** was founded in 1927 under ILO auspices and today has over 320 member institutions from over 160 countries around the world. It promotes excellence in social security administration through professional standards, expert knowledge, research and analysis, services, capacity-building and support and offers a unique opportunity for social security experts and administrators to meet.

The **International Training Centre of the ILO (ITCILO)** was founded in 1964 by the ILO and the Government of Italy as an advanced technical and vocational training institution. It seeks to achieve decent work for all women and men by offering learning, knowledge-sharing and institutional capacity-building programmes to governments, workers' and employers' organizations and development partners. This is enhanced through the Centre's ability to create a forum where development intersects with all forms of knowledge in the world of work, from tripartism to technology.

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List of abbreviations

ACHR	American Convention on Human Rights
ASEAN	Association of Southeast Asian Nations
BLA	Bilateral labour agreement
BLMA	Bilateral labour migration agreements
CAN	Andean Community
CARICOM	Caribbean Community
CAS	Committee on the Application of Conventions and Recommendations (International Labour Conference)
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CFE	Social Security Fund for French Nationals Abroad
CIPRES	Inter-African Conference on Social Insurance
CIS	Commonwealth of Independent States
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CNAV	National Retirement Pension Fund, France
CRRF	UNHCR Comprehensive Refugee Response Framework
CSV	Comma-separated values
DOLE	Department of Labour and Employment, Philippines
EC	European Commission
ECOWAS	Economic Community of West African States
EESSI	Electronic Exchange of Social Security Information
EHIC	European Health Insurance Card
ELS	Employment and Labour Sector
EPF	Employee's Provident Fund, India
EPS	Employee's Pension Scheme, India
EU	European Union
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immunodeficiency Syndrome
HRC	United Nations Human Rights Committee
ICAFE	Costa Rican Coffee Institute
ICCPR	International Covenant on Civil and Political Rights, United Nations
ICESCR	International Covenant on Economic, Social and Cultural Rights, United Nations
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, United Nations
ICT	Information and communications technology
IDWF	International Domestic Workers' Federation
IFC	International Finance Corporation
ILC	International Labour Conference, ILO
ILO	International Labour Organization
IMMS	Mexican Social Security Institute
IOM	International Organization for Migration
ITCILO	International Training Centre of the ILO
IUC	International University College of Turin
ISO	International Organization for Standardization
ISSA	International Social Security Association

IT	Information technology
KIGEP	Transition to Formality Programme, Turkey
KNOMAD	Global Knowledge Partnership on Migration and Development
LGBTI	Lesbian, gay, bisexual, transgender and inter-sex
MERCOSUR	Southern Common Market
MoU	Memorandum/a of understanding
MPI	Migration Policy Institute
NHS	National health system
NPIA	National Policy on Immigration and Asylum, Morocco
OAS	Organization of American States
OAU	Organization of African Unity
ODI	Overseas Development Institute
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OISS	Ibero-American Social Security Organization
OPF	Overseas Pakistanis Foundation
OSH	Occupational safety and health
OWWA	Overseas Workers Welfare Administration, Philippines
OWWF	Overseas Workers Welfare Fund, Sri Lanka
PhilHealth	Philippines Health Insurance
RECs	Regional economic communities
RISDP	Regional Indicative Strategic Development Plan
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SLBFE	Sri Lanka Bureau of Foreign Employment
SPF	Social protection floors
SPIAC-B	ILO Social Protection Inter-agency Cooperation Board
SSA	Social Security Administration, United States of America
SSC	Social Security Corporation, Jordan
SSI	ILO Social Security Inquiry database
SSNIT	Social Security National Insurance Trust, Ghana
SSS	Social Security System, Philippines
SWAP	Seasonal Agricultural Workers Program, Canada
TFWP	Temporary foreign worker programme
UN	United Nations
UNDESA	United Nations Department of Economics and Social Affairs
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNHCR	Office of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNWomen	United Nations Entity for Gender Equality and the Empowerment of Women
XML	Extensible Markup Language

▶ Glossary

This Glossary identifies the basic concepts and definitions in the field of migration and social protection. It does not provide universal definitions; rather, its purpose is to explain the terms and concepts used in the chapters of the *Guide*.

Asylum seeker

An asylum seeker is a person who is seeking international protection but whose claim is still pending and who is thus a candidate for refugee status. Until a decision has been issued by the deciding authority, governments are not permitted to return asylum seekers to their home countries (UN Convention relating to the Status of Refugees).

Bilateral labour agreements (BLAs)

Bilateral labour agreements are labour agreements concluded between countries of origin and destination in order to regulate migration for employment.

Bilateral labour migration agreements (BLMAs)

Bilateral labour migration agreements is a term that is used generically to describe bilateral labour agreements that create legally binding rights and obligations governed by international law; non-binding memoranda of understanding (MoUs) that establish a broad framework of cooperation to address common concerns; and other arrangements, including between specific government ministries or agencies in destination and origin countries. Broader framework or cooperation agreements that include both labour migration and other migration topics, such as irregular migration, readmission, and migration and development, are also included in this typology (ILC 2017, para. 68).

Bilateral and multilateral social security agreements

Bilateral and multilateral social security agreements are treaties designed to coordinate the social security schemes of two or more countries in order to overcome barriers that might otherwise prevent migrant workers from receiving benefits under the systems of any of the countries in which they have worked (Hirose, Nikač and Tamagno 2011, p.19).

Circular migrants

Circular migrants are a subcategory of temporary migrants who move periodically between their countries of origin and destination, mainly for purposes of work or study. The term includes seasonal migrant workers and agricultural workers involved in rural-urban migration.

Documented migrants

Documented migrants are also referred to as migrants in a regular situation. According to Article 5 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), migrant workers are considered to be documented if "they are authorized 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". If they do not meet these conditions, they are considered to be non-documented or in an irregular situation.

Domestic workers

A domestic worker is defined as "any person engaged in domestic work within an employment relationship; (...) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker" (ILO Domestic Workers Convention, 2011 (No. 189), Art. 1(b) and (c)).

Exportability

Exportability refers to the maintenance of acquired rights and payment of benefits abroad.[1] It requires action on the part of only one country. Eligibility for benefits and the level of benefits paid are determined by the social security institution of that country.

Forced or compulsory labour

Forced or compulsory labour is defined as "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 voluntarily" (ILO Forced Labour Convention, 1930 (No. 29), Art. 2(1)).

Gender

Gender "refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys and the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes" (UNWomen n.d. "Concepts and definitions").

Informal economy

The informal economy includes "all economic activities by workers or economic units that are – in law or practice – not covered or not sufficiently covered by formal arrangements, including wageworkers and own-account workers" (ILO Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), para. 2(a)). This is different from the

[1] See, among others, Taha, Siegmann and Messkoub 2015 and Sabates-Wheeler and Koettl 2010.

term "informal sector", which refers to a group of production units (unincorporated enterprises owned by households), including informal own-account and informal employers' enterprises.

International migrants

International migrants are "all residents of a given country who have ever changed their country of usual residence. For the purpose of practical measurement and in line with United Nations recommendations, international migrants may be measured as all persons who are usual residents of that country and who are citizens of another country (foreign population) or whose place of birth is located in another country (foreign-born population)" (ICLS 2018, para. 13).

Internally displaced persons (IDPs)

Internally displaced persons are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border" (Office of the United Nations High Commissioner for Human Rights (OHCHR 2004, Introduction, para. 2).

Labour mobility

Labour mobility refers to the temporary or short-term movement of persons for employment-related purposes, particularly in the context of the free movement of workers in regional economic communities (ILO 2017, para. 6).

LGBTI

The acronym "LGBTI" refers to lesbian, gay, bisexual, transgender and intersex persons. The terms "lesbian", "gay" and "bisexual" refer to sexual orientation, that is, the gender or genders to whom a person is sexually attracted, while "transgender" refers to gender identity, that is, "someone whose gender differs from the one they were given when they were born". Terms like "gender-queer" and "non-binary" refer to people who fall outside the construction of gender as male or female. Intersex people are born with physical or biological sex characteristics, such as reproductive or sexual anatomy, hormones or chromosomes, that do not seem to fit the typical definitions of female or male (UNRISD n.d.).

Memorandum of understanding (MoU)

A memorandum of understanding is a type of agreement that is used where the parties have agreed on general principles of cooperation. It sets out broad concepts of mutual understanding, goals and plans shared by the parties. These are usually non-binding instruments.

A migrant worker

A migrant worker is "a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker" (Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Art. 11(1)). In statistical terms, "international migrant worker" refers to "all persons of working age present in the country of measurement", whether or not they are usual residents and non-resident foreign workers (ICLS 2018). This definition builds on Article 2(1) of the United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, which defines a migrant worker as "a person who is to be engaged or has been engaged in a remunerated activity in a state of which he or she is not a national".

Migrants in an irregular situation

Under international standards, migrants are considered to be in an irregular or non-documented situation unless they are authorised "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" (International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Art. 5). In its General Comment No. 2, the UN Committee on the Protection of the Rights of All Migrant Workers states that "the term 'in an irregular situation' or 'non-documented' is the proper terminology when referring to their status. The use of the term 'illegal' to describe migrant workers in an irregular situation is inappropriate and should be avoided as it tends to stigmatize them by associating them with criminality" (CMW 2013, para. 4).

Migrants in a regular situation

Migrants in a regular situation are persons who are authorized to enter, stay and engage in a remunerated activity in a host state in accordance with its applicable laws.

Non-contributory schemes

Non-contributory schemes are "including non-means-tested and means-tested schemes, [and] normally require no direct contribution from beneficiaries or their employers as a condition of entitlement to receive relevant benefits. The term covers a broad range of schemes, including universal schemes for all residents

(such as national health services), categorical schemes for certain broad groups of the population (such as children below a certain age or older persons above a certain age), and means-tested schemes (such as social assistance schemes). Non-contributory schemes are usually financed through taxes or other state revenues, or, in certain cases, through external grants or loans" (ILO 2016a, p. 194).

Permanent migrant

According to the ILO, a permanent migrant is "a person who enters with the right of permanent residence or with a visa or permit which is indefinitely renewable. Permanent immigrants would generally include marriage immigrants, family members of permanent residents, refugees, certain labour migrants, etc." (ILO 2017, para. 21).

Portability of earned benefits

Portability of earned benefits is a term that has no internationally agreed definition. It usually refers to measures aimed at the maintenance of acquired rights and to the payment of benefits abroad.

Portability of social security rights and benefits

Portability of social security rights and benefits is a term that has no internationally agreed definition. The term "portability" is often used to refer to measures aimed at the maintenance of rights that are acquired or in the course of acquisition and to the payment of benefits abroad (Holzmann et al. 2016, p.1; and Taha, Siegmann and Messkoub 2015). Portability requires cooperation between the host and origin countries.

Posted workers

Posted workers are "employees who are sent by their employer to carry out a service in another jurisdiction on a temporary basis" (ISSA, *Contribution Collection and Compliance*, Guideline 7: Establishing a strategy for mobile workers). According to the European Union, a posted worker is "a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works" (EU 1996, Art. 2(1)).

Refugee

A refugee is a person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is the country of its nationality and is unable or, owing to such fear, is unwilling, to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (Convention relating to the Status of Refugees, Art. 1(2)).

Seasonal workers

Seasonal workers are migrant workers "whose work by its character is dependent on seasonal conditions and is performed only during certain part of the year" (International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Art. 2(1)). The ILO defines seasonal workers as "[...] workers who hold explicit or implicit contracts of employment where the timing and duration of the contract is significantly influenced by seasonal factors such as the climatic cycle, public holidays and/or agricultural harvests" (ILO 1993, para 14(g)).

Social dialogue

Social dialogue includes "all types of negotiation, consultation and exchange of information among representatives of workers, employers and governments on common interests in economic, labour and social policy. Social dialogue is both a means to achieve social and economic progress and an objective in itself, as it gives people a voice and stake in their societies and workplaces. Social dialogue can be bipartite, between workers and employers or tripartite, including government" (ILO 2013b, paras 15-16).

Social insurance scheme

A social insurance scheme is a "contributory social protection scheme that guarantees protection through an insurance mechanism, based on: (1) prior payment of contributions (before the occurrence of the insured contingency); (2) risk- sharing or "pooling"; and (3) the notion of a guarantee. The contributions paid by (or for) insured persons are pooled together and the resulting fund is used to cover the expenses incurred exclusively by those persons affected by the occurrence of the relevant (clearly defined) contingency or contingencies. Contrary to commercial insurance, risk-pooling in social insurance is based on the principle of solidarity as opposed to individually calculated risk premiums" (ILO 2017a, p.194).

Social security

Social security "covers all measures providing benefits, whether in cash or in kind, to secure protection, inter alia, from: lack of work-related income (or insufficient income) caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; lack of (affordable) access to healthcare; insufficient family support, particularly for children and adult dependants; general poverty and social exclusion" (ILO 2017a, p. 195).

Social protection

Social protection "is defined as the set of policies and programmes designed to reduce and prevent poverty, vulnerability and social exclusion throughout the life cycle. Social protection includes nine main areas: child and family benefits, maternity protection,

unemployment support, employment injury benefits, sickness benefits, health protection (medical care), old-age benefits, invalidity/disability benefits, and survivors' benefits. Social protection systems address all these policy areas by a mix of contributory schemes (social insurance) and non-contributory tax-financed benefits (including social assistance)" (ILO 2017a, p. 194). In most ILO documents, the terms "social security" and "social protection" are used interchangeably and encompass a broad variety of policy instruments, including social insurance, social assistance, universal benefits and other forms of cash transfers and measures to ensure effective access to healthcare and other benefits in kind with a view to securing social protection.

Social protection floors (SPFs)

Social protection floors are nationally defined sets of basic social security guarantees that secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion. SPFs should comprise at least the following basic social security guarantees:

- **a.** access to a nationally defined set of goods and services constituting essential healthcare, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality;
- **b.** basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services;
- **c.** basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, particularly in cases of sickness, unemployment, maternity and disability; and
- **d.** basic income security, at least at a nationally defined minimum level, for older persons.

These guarantees should be provided to at least all residents and children, as defined in national laws and regulations and subject to a country's existing international obligations (ILO Social Protection Floors Recommendation, 2012 (No. 202)).

Social transfers

"All social security benefits comprise transfers either in cash or in kind, i.e. they represent a transfer of income, goods or services (for example, health-care services). This transfer may be from the active to the old, the healthy to the sick, or the affluent to the poor, among others. The recipients of such transfers may be in a position to receive them from a specific social security scheme because they have contributed to such a scheme (contributory scheme), or because they are residents (universal schemes for all residents), or because they fulfil specific age criteria (categorical schemes), or specific resource conditions (social assistance schemes), or because they fulfil several of these conditions at the same time" (ILO 2017a, 196–197).

Temporary migration

Temporary migration takes place when individuals migrate for a definite period of time, whether for a short or long period of time. In both cases, the main feature of this type of migration is the migrants' eventual return to their home country. According to the ILO, a temporary migrant is "[a] person of foreign nationality who enters a country with a visa or who receives a permit which is either not renewable or only renewable on a limited basis. Temporary immigrants are seasonal workers, international students, service providers, persons on international exchange, etc." (ILO 2017a, para. 21).

Totalization

Totalization represents the accumulation of qualifying periods under different national social security schemes, so as to allow the aggregation or totalization of periods of insurance, employment or residence that may be necessary for the acquisition, maintenance or recovery of rights and for sharing the costs of benefits paid. The maintenance of rights in the course of acquisition is also referred to as 'totalization' (Hirose, Nikač and Tamagno 2011, 9; 83).

Trafficking in persons

Trafficking in persons is defined as "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" (Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Palermo Convention), Art. 3(a)).

Unilateral social protection measures

Unilateral social protection measures are measures taken by one country, without the cooperation of another country, with a view to extending social protection to migrant workers. These measures can be taken by either the country of origin or the country of destination in order to palliate the lack of social security agreements or to ensure more universal and comprehensive social protection coverage of migrant workers.

Introduction

Globalization, technological developments, improved communication systems and cheaper transportation not only affect the cross-border movements of goods, capital and services; they also facilitate migration between and within regions. The phenomenon touches nearly all countries of the globe and is increasingly diverse and multifaceted with an estimated 272 million international migrants (UNDESA 2019).

In 2019, about 62 per cent of international migrants – 169 million, including 99 million men and 70 million women – were migrant workers (ILO 2021a). In addition, conflicts, persecution and climate change are compelling millions of people and families to leave their communities or countries of origin; 82.4 million individuals, including 26.4 million refugees and 4.1 million asylum seekers, were forcibly displaced in 2020 (UNHCR 2020).

Crises such as the COVID-19 pandemic have also had a major impact on the global labour market and related mobility of workers. Many migrant workers suffer job losses, unpaid wages, worsening working and living conditions that have an impact on their income and remittances, and increasing poverty at the household level, particularly in countries where they have no access to social protection.[2] As a consequence, progress towards achievement of the 2030 Sustainable Development Goals (SDGs) has been lost in many countries (UNDESA 2020).

Although everyone has the right to social security (Universal Declaration of Human Rights, Art. 22), significant coverage gaps persist. Overall, 53.1 per cent of the world's population, including many migrant workers, lack access to social protection (ILO 2021b). Migrants are more likely than nationals who work throughout their life in one country to face legal and practical obstacles to the exercise of their right to social security and effective access to social protection benefits, including healthcare. For example, they may be denied access to social protection coverage in the host country because of their status or nationality, insufficient duration of their periods of employment and residence, inconsistency between social security and migration laws or lack of administrative and financial coordination between the social security schemes of their home and host countries. Their access to social protection may also be hindered by a lack of information about their rights and obligations and by linguistic and cultural barriers. Women migrant workers in particular face multiple forms of discrimination when they seek access to social protection and are at higher risk of exploitation and abuse, including sexual and gender-based violence.

The importance of extending social protection to all, including women and men migrant workers, is reflected in the 2030 Agenda for Sustainable Development, the 2018 Global Compact for Safe, Orderly and Regular Migration and the 2018 Global Compact on Refugees as well as the International Labour Conference Resolution concerning the second recurrent discussion on social protection (social security) (ILO 2021c). Under these international frameworks, States undertake to assist refugees, asylum seekers, and migrant workers at all skill levels.

Social security is a basic human right that is enshrined in the Universal Declaration of Human Rights (1948) and is at the heart of the 1944 Declaration of Philadelphia, an integral part of the ILO Constitution, which seeks to achieve "the extension of social security measures to provide basic income to all in need of such protection and comprehensive medical care" (Art. III(f)). In fulfilment of this mandate, the ILO has adopted several Conventions and Recommendations that give effect to the principle of equal treatment for migrant workers in respect of social security and promote a rights-based approach to labour migration.

The need to invest in social protection systems, including SPFs, has been widely recognized and endorsed in numerous international and regional forums.[3] The ILO's Social Protection Floors Recommendation, 2012 (No. 202) reaffirms the universality of social protection based on social solidarity, non-discrimination, gender quality and responsiveness to special needs. It expressly recognizes that "social security is an investment in people that empowers them to adjust to changes in the economy and in the labour market, and (…) social security systems act as automatic social and economic stabilizers, help stimulate aggregate demand in times of crisis and beyond, and help support a transition to a more sustainable economy" (sixth preambular paragraph).

At the global level, the ILO is taking a leading role in coordinating the global commitment to building sustainable social protection systems, including floors, and efforts in that regard. This commitment is reflected in many international organizations' agendas and in the work of bodies such as the Social Protection Inter-agency Cooperation Board (SPIAC-B), launched in 2012 at the request of the Group of 20; the United Nations Inter-Agency Task Force on Financing for

[2] For more information on the impact of Covid-19 pandemic on migrant workers see: https://www.ilo.org/global/topics/labour-migration/WCMS_748791/lang--en/index.htm

[3] See the thematic page on the ILO Social Protection Platform for endorsements between 2009 and 2012: http://www.socialprotection.org/gimi/gess/ShowWiki.ction?wiki.wikiId=1031andlang=EN.

Development, established in 2015; and the Global Partnership for Universal Social Protection (USP2030), established in 2016, which comprises representatives of intergovernmental agencies such as the UN, the World Bank, the International Monetary Fund (IMF) and bilateral partners.

In response to increasing concern for migrant workers' social protection rights, this Guide seeks to provide policymakers and practitioners with an overview of the legal framework and policy options relating to migrants' and refugees' access to social protection. It also offers practical guidance based on country and regional practices that may inspire countries when engaging in legal reforms, negotiating social security agreements and designing social protection schemes. These country and regional practices were collected over several years; however, some recent developments may not be reflected.[4]

Chapter 1: Rationale for extending social protection to migrant workers and their families

It is essential to ensure that migrant workers benefit from inclusive and equitable access to social protection. In addition to highlighting the benefits of social protection, this chapter provides an overview of the legal and practical barriers that prevent them from accessing social protection in countries of origin and destination. An understanding of these issues and the identification of social protection gaps are useful when designing adapted policy options. In order to overcome these barriers, a variety of policy options and measures are available to policymakers. The subsequent chapters of this Guide will highlight relevant country practices.

Chapter 2: Migrant workers' right to social security and the international legal framework

UN and ILO Conventions and Recommendations provide a solid international legal framework aimed at protecting migrant workers' rights to social protection. Based on the key principles of equality of treatment and non-discrimination, these instruments provide useful guidance on how to extend social protection coverage to migrant workers, including by ensuring the portability of social security rights and benefits across borders. This chapter describes the international and regional instruments that are relevant to migrant workers' social protection, the ratification process for ILO standards and the supervisory mechanisms that monitor their implementation at the national level.

[4] For questions or additional information, please contact MIGRANT@ilo.org.

Chapter 3: Accessing social security: Bilateral and multilateral social security agreements

The conclusion of social security agreements is one of the most commonly used measures for ensuring the coordination of social security schemes and the portability of social security entitlements and benefits between countries. While some 660 such instruments are already in place, many migrants remain unprotected and countries should increase their efforts to broaden the scope of existing agreements and negotiate new ones in order to better protect migrant workers and their families. The rationale, objectives and key elements of these agreements and the eight-step process for their negotiation are outlined in this chapter with examples of existing bilateral, regional and multilateral agreements and institutional, operational and administrative considerations for their implementation.

Chapter 4: Bilateral labour agreements and migrant workers' social protection

This chapter provides information on bilateral labour agreements (BLAs). These are a useful tool for the protection of migrant workers, provided that they are consistent with international human rights instruments and international labour standards. As they seek to regulate labour employment abroad, provisions on the social protection of migrant workers and references to existing or forthcoming social security agreements should be included.

Chapter 5: Unilateral measures in countries of origin and employment

Unilateral measures are receiving increased attention from countries of origin and employment with a view to compensating for the absence of social security agreements or ensuring more universal and comprehensive social protection of workers. This chapter provides an overview of unilateral measures that policymakers may wish to consider, including, among others, national policies and legislation that ensure equality of treatment between migrant workers and nationals, voluntary insurance mechanisms and welfare programmes. Special attention is drawn to national SPFs as a powerful tool for the extension of universal social protection.

Chapter 6: Extending social protection to specific groups of migrant workers

Migrant workers are a heterogeneous group. Their migration status, type of employment contract, duration of stay and various other characteristics influence their access to social protection and should be taken into account when developing and implementing policies and mechanisms aimed at extending social protection. The objective of this chapter is to identify the specific obstacles, international legal framework and policy options that are relevant to migrant domestic workers, migrant seasonal agricultural workers and migrant workers in an irregular situation, who make up a significant proportion of all migrant workers and face particular difficulties in accessing social protection. This chapter also stresses the importance of ensuring that labour and social security laws take these workers into account and of adapting social protection measures to their unique characteristics and needs.

Chapter 7: Extending social protection to refugees and asylum seekers

This chapter emphasizes the importance of extending social protection coverage to refugees and asylum seekers, who face barriers to social protection owing to their often-temporary legal status, unpredictable length of stay, limited history of contributions, lack of social protection from their countries of origin and limited or no access to the formal labour market. The integration of refugees into national social protection systems, including contributory and non-contributory schemes, should take these specificities into account and be based on the principle of equality of treatment. Strengthening social protection systems benefits both refugees and host communities, provides sustainable, cost-effective solutions for moving out of humanitarian assistance and fosters social cohesion.

Chapter 8: Gender, social protection and labour migration

Migration is affected by gender norms and expectations, power relations and unequal rights, which, taken together, shape the migration options and experiences not only of women and girls, but also of men and boys. How these experiences differ, their consequences for social protection coverage and the existing policy options for addressing gender-specific vulnerabilities and inequalities are explained in this final chapter of the Guide.

Each chapter can be read on a stand-alone basis and may be used in the development of training modules, including pedagogical tools and exercises. The conclusion summarizes the various policy options and issues a call for action.


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Chapter 1

Rationale for extending social protection to migrant workers and their families

Key messages

- Social security is a human right which migrant workers should enjoy throughout the migration cycle.
- Extending social protection to all, including migrant workers and their families, is key to ensuring income security for all, reducing poverty and inequality, achieving decent working conditions and reducing vulnerability and social exclusion.
- The underlying causes of the main challenges and obstacles faced by migrants in their effort to access social protection can be traced back to the principle of nationality and territoriality.
- An understanding of the legal and practical barriers that migrant workers face is essential to the identification of appropriate policies, laws and measures.
- Overcoming the difficulties faced by migrant workers and their families when seeking social protection is a major challenge for countries, but a wide range of options exist. These include ratification and application of the relevant ILO instruments, including with regard to the principle of equality of treatment; the signing of bilateral and multilateral social security agreements; the adoption of unilateral measures, such as coverage of migrant workers under national social security legislation; and complementary measures addressing the practical obstacles that these workers face.
- The consistency of migration, employment and social protection policies, laws and strategies is essential if migrant workers are to have effective access to social protection benefits.
- The social partners should be actively involved in planning, designing and monitoring social protection extension strategies, including for migrant workers.

► 1.1 Introduction

In recent decades, the prevalence of migration has increased substantially worldwide. Globalization, technological developments, improved communication systems and cheaper transportation not only affect the cross-border movements of goods, capital and services; they also facilitate migration between and within regions. In addition, conflicts, persecution and climate change are compelling millions of persons and families to leave their communities or countries of origin (UNDESA 2017).

While international migrants comprised only 2 per cent of the global population in 2000, their numbers had increased to 3.5 per cent – an estimated 272 million– by 2019 (UNDESA 2019). In 2019, about 62 per cent of international migrants (169 million) were migrant workers, a 12.7 per cent increase as compared to 2013. (ILO 2021a).

Approximately 69.4 per cent of the working-age population has no or only partial access to comprehensive social protection systems (ILO 2021b). While most developed countries have laws and regulations that protect the rights of migrant workers, especially with regard to social protection, many do not. As such, although migration is widely recognized as "a source of prosperity, innovation and sustainable development" (UN 2018, para. 8), inclusive measures are needed to address the specific obstacles that migrant workers face in the effort to access their right to social protection. These obstacles include both the loss of benefit entitlement in their countries of origin and the restrictive conditions imposed by the host country's system. In a worst-case scenario, these workers may be required to contribute to both their home and their host country's system without reaping the benefits of either.

As social protection measures are both a social and an economic necessity, these obstacles and restrictions must be addressed. By extending social protection coverage to migrant workers and their families, governments not only mitigate poverty, inequality, vulnerability and insecurity across an individual's life cycle; they also ensure political stability, social cohesion and enjoyment of the right to social security. This can be achieved through a number of policy actions, including, among other things, the ratification and implementation of the relevant ILO Conventions and Recommendations, establishment of bilateral or multilateral social security agreements and adoption of unilateral measures.

In light of the foregoing, the objective of this chapter is to highlight the benefits of extending social protection to migrant workers and their families and to identify the many legal and practical obstacles and restrictions that they face in the effort to access social protection in their countries of origin, transit and destination. The chapter concludes with an overview of the main policy options for enhancing migrant workers' social protection, to be further detailed in subsequent chapters.

►1.2 Why extend social protection to migrant workers and their families?

Extending social protection to all, including migrant workers and their families, is key to ensuring income security for all, reducing poverty and inequality, achieving decent working conditions and reducing vulnerability and social exclusion. It has been widely recognized that social protection promotes inclusive growth and sustainable development, as reflected in the 2030 Agenda for Sustainable Development (ILO 2017a, p. 6).

A strong argument in favour of extending social protection to migrant workers and members of their family is made in the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, which states that "[e]veryone, as a member of society, has the right to social security" (Art. 22) and "...to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (Art. 25). The right to social security is also enshrined in the International Covenant on Social, Economic and Cultural Rights (1966), other international and regional human rights instruments and national constitutions. Several ILO Conventions and Recommendations include provisions on the labour and social protection rights of migrant workers. The role that decent work, including social protection, and orderly, safe and responsible migration can play in achieving sustainable development is reflected in the 2030 Agenda for Sustainable Development (ILO 2017a), Goals 1.3, 3.8, 5.4, 8.5, 8.8, 10.4 and 10.7, which emphasize that no one should be left behind.

The aforementioned laws, rights and frameworks laid the foundation for the Global Compact for Safe, Orderly and Regular Migration, which has been called "a milestone in the history of the global dialogue

and international cooperation on migration". While not legally binding, the Compact fosters cooperation among the relevant migration stakeholders and "upholds the sovereignty of States and their obligations under international law" (UN 2018, p.2). It includes provisions on social protection, which build on the principles of non-discrimination and equality of treatment. It also sets out a purpose, a common understanding and a responsibility for States to facilitate access to services, ensure the portability of benefits and conclude reciprocal bilateral/multilateral social security agreements for migrant workers of all skill levels.

Social protection is also a social and economic necessity. Solid national social protection systems act as automatic social and economic stabilizers at the macro, household and individual levels. They smooth household income and domestic consumption, stimulate aggregate demand, inject cash into local markets in times of crisis and beyond, and support the transition to a more sustainable economy by building up people's capabilities and productivity through investment in, among other things, health, education and employment. Their positive impact on preventing households from falling further into poverty and their redistributive effect on incomes, and consequently on economic inequality, builds social cohesion, reduces political instability and promotes equitable societal progress in the long term as a matter of social justice.

At the individual level, the extension of such protection acknowledges that migrant workers, like everyone else, can face contingencies with significant financial consequences. These risks can occur in any of the nine main branches or areas of social protection: "child and family benefits, maternity protection, unemployment support, employment injury benefits, sickness benefits, health protection (medical care), old-age benefits, invalidity/disability benefits, and survivors' benefits". (Social Security (Minimum Standards) Convention, 1952 (No. 102); ILO 2017a, p.2). They may be more serious or more likely to occur in the case of migrant workers than for nationals who spend their entire life in one country. For example, migrant workers may be employed in dangerous working conditions and weaker workplace protections such as in agriculture, construction, fishing and mining and may thus be at higher risk of suffering a serious occupational injury (Orrenius and Zavodny 2012; Pérez et al. 2012; Takala et al. 2014; Preibisch and Otero 2014). The provision of social protection through benefits in any of the aforementioned areas, whether in cash or in kind, can be used to secure protection from the economic and social distress caused by such contingencies.

Many other arguments with regard to various areas of the economy can also support the extension of social protection to migrant workers and their families. These workers can fill labour shortages, particularly in economies with ageing workforces, and can improve the demographics of a country's labour force and the sustainability of its social security system. Extending social protection coverage to migrant workers can facilitate the formalization of the labour market and the regularization of migrant workers. Conversely, formalization and regularization also facilitate the extension of social protection to migrant workers, which in turn gives them an incentive to work in the formal economy.

Allowing migrants to join social insurance schemes helps to build stronger and financially healthier social security systems by growing the tax base, spreading risk across a larger pool of members and enhancing the financial sustainability of these schemes since migrant workers are often net contributors over their lifetime. It also reduces pressure on tax-funded social protection mechanisms in countries of destination, or in their countries of origin upon their return.

In addition, increasing migrants' access to health protection systems plays a critical role in enhancing labour productivity by improving or maintaining workers' health and raising public health indicators. Indeed, the higher the health status of workers, the lower the costs of social assistance for the State, among other benefits. Robust, universal healthcare coverage with preventive policies is particularly important to the health status of nationals and migrants. Furthermore, the inclusion of migrant workers in social security schemes and the option to maintain their rights if they decide to move to another country or return home can facilitate labour mobility, including return and reintegration, and attract the skilled migrant workers needed for the proper functioning of integrated labour markets. Including migrant workers in social protection creates a level playing field with other workers by reducing unfair competition and the perverse incentive to recruit migrant workers as cheap and unprotected labour, potentially avoiding a race to the bottom (ILO 2017b).

Thus, extending social protection to all – including migrants – has a positive impact on individuals and families, communities and local markets, as well as on countries' development, social cohesion and stability at the subregional level.

► Box 1.1 The impact of COVID-19 on migrant workers and the importance of social protection

The need to extend social protection to migrant workers, irrespective of their status, has been underlined across the world by the COVID-19 pandemic. Not only does the virus affect migrants' health; it also has an impact on their socio-economic status, owing to the loss of jobs and closure of businesses, and on society as a whole, owing to higher levels of exposure and spread. These risks are heightened by the fact that many of them work in the sectors hardest hit by the crisis (such as domestic work and hospitality) or entail heightened health risks owing to their provision of essential goods and services to the general population (agriculture, agro-food processing and healthcare). Despite wide recognition of migrant workers' contribution to countries' social and economic development, many are not accorded equality of treatment with national workers even in times of crisis.

Instead, they face challenges that keep them from accessing social protection, including healthcare and income security, and have been exacerbated by the COVID-19 pandemic:

- Migrant workers, and particularly front-line workers such as those in the health and care sectors (many of them women), face health-related risks; they may be more vulnerable to contracting the virus and, once infected, they face challenges in access to healthcare owing to the cost or to their immigration or employment status. They often lack access to social protection, including sickness benefits and paid sick leave, and their socio-economic situation may compel them to work while sick, jeopardizing their own health and that of their co-workers. In addition, low- and medium-skilled migrant workers often live in over-crowded environments, increasing the probability of COVID-19 contagion.
- In view of the socio-economic impact of COVID-19 on national economies, migrant workers may be among the first to lose their jobs and those who continue to work may experience wage cuts, non-payment of wages and deteriorating working conditions. This has a negative impact on the income of migrant families and leaves many migrant workers without access to employment-based social protection. For workers in the informal economy, who are already excluded from social security systems, the pandemic has increased the struggle to meet their basic survival needs. Their potentially irregular status, together with discrimination and stigmatization, may also hinder their access to COVID-19 response measures.

These challenges have exemplified the urgent need to extend comprehensive social protection to migrant workers, irrespective of their status, especially during crises such as the COVID-19 pandemic. To that end, various short-term mechanisms should be implemented. These include adopting unilateral measures, ensuring access to quality healthcare and benefits such as paid sick leave, providing income support through cash and in-kind transfers, and facilitating access to adequate information regarding the protection, prevention and treatment of COVID-19 and on their right to social protection.

In addition to these measures, countries must consider medium- to long-term policy responses in order to build a more inclusive social protection system that allows for better and more sustainable protection of migrants and their families in the future. These include the ratification and implementation of international standards; the development of national social protection strategies, policies and legal frameworks that are inclusive of migrant workers and their families; the extension of social protection to migrant workers in the informal economy or with irregular status; the conclusion of bilateral/multilateral social security or labour agreements; and the mobilization of fiscal resources for social protection.

Source: ILO 2020a, ILO 2020b

▶ 1.3 What are the legal restrictions and practical barriers?

Migrant workers, as compared to nationals who have lived and worked in the same country for their entire life, face major challenges in accessing their social protection rights. The underlying causes can be traced back to the principle of nationality and territoriality. An understanding of the barriers and obstacles that these workers face is essential to the identification and development of appropriate solutions and measures.[5] To that end, the barriers can be divided into two categories: legal relating to the legal framework of the host or origin country, and practical, arising in the effective enjoyment of their rights.

Addressing legal restrictions requires structural change and political will at both the national and the international level.[6] At the same time, practical barriers must be addressed through administrative and political reforms aimed at facilitating migrants' access to social protection, such as the simplification of administrative procedures; adoption of measures or mechanisms that enhance effective outreach in terms of registration, collection of contributions, delivery of benefits and monitoring; free legal and social services and assistance; anti-discrimination campaigns and policies; measures aimed at facilitating access to financial services; awareness-raising campaigns; and dissemination of information in the relevant languages. The options for addressing these obstacles and extending social protection to migrant workers will be described in further detail in Chapters 3, 4 and 5.

1.3.1 The underlying causes

As mentioned previously, the root causes of migrants' challenges in terms of access to social protection, including healthcare, are primarily associated with a migrant's country of origin and the relationship between that country and the country of destination. The extent to which these two dimensions interact can be demonstrated through two principles: territoriality and nationality (Hirose, Nikač and Tamagno 2011).

The **principle of territoriality** restricts the application of national legislation, including social security legislation, to the territory of the State in which it was enacted. It is a reflection of a State's sovereignty over its own territory and limits interference from other States. This has practical and administrative consequences for the State's ability to verify, monitor and gather information or payments from migrant workers residing in the territory of another State unless both States are parties to a cooperation agreement. As a consequence, migrant workers may face loss of coverage under the social protection scheme of their home country when accepting work in the destination country. The territorial nature of social security may also result in limitations on the portability[7] of benefits earned abroad when migrants leave the territory of a State in which they have acquired rights.

The principle of territoriality also underpins national legislation on the admission and entry to and stay of migrant workers in a country. While the Universal Declaration of Human Rights states that "everyone has the right to leave any country, including his own, and to return to his country" (Art. 13), States may limit the right to enter into or stay in their territory. Policies and legislation in that regard, and the manner in which they are implemented, can result in the selective application of social security rights to certain persons, depending on their migratory status and on the contributory and residence requirements of the scheme (Sojka and Carmel 2017).

The **principle of nationality** can affect migrants' social security rights in destination countries by excluding or limiting their access to benefits because of their nationality. While a number of countries recognize the principle of non-discrimination on the basis of nationality and have provisions on equality of treatment with respect to social security between national and non-national workers in their national legislation (see Chapter 2 and 3 for examples), in others the principle of nationality results in non-national workers being accorded less favourable treatment than national workers under the social security laws.

5 This can be done using the methodology described in ILO 2017c.

6 This may entail legal reforms, changes in legislation, structural changes in the functioning of institutions (their internal regulations) or negotiation of a new bilateral/multilateral social security agreement and other agreements/conventions on freedom of movement and economic areas/zones.

7 For definitions of the term "portability"; see Box 3.4.

1.3.2 Legal restrictions on migrant workers' access to social protection benefits

The following is a non-exhaustive list of barriers arising from institutional and legal frameworks:

- **National legislation may expressly exclude foreign nationals, temporary migrants or migrants on specific visas or residence permits** or establish less favourable conditions for non-national workers under social protection schemes.[8] For example, foreign nationals or temporary residents (including refugees and asylum seekers) and/or their dependants may be prohibited from applying for a work permit and gaining access to the formal labour market and to employment-based social protection schemes. Migrant workers may also be legally excluded from social security schemes because they cannot or do not fulfil some of the conditions, including minimum duration of employment or residence or minimum number of contributory years. Indeed, the duration of stay or the temporary nature of migration (as in the case of seasonal or temporary workers) can deny migrants access to certain short-term (such as unemployment) or long-term (such as pension) benefits. Though migrants often contribute to these schemes, the eligibility criteria may not allow them to benefit from them. For instance, in Singapore, only permanent residents are eligible for contributory social protection benefits. This inequality of treatment or legal exclusion can be traced back to the principle of nationality that is still prevalent in a number of countries around the world (Van Panhuys, Kazi-Aoul and Binette 2017).

- **Certain categories of workers**, such as domestic, self-employed and agricultural workers, may also be legally excluded from social protection. This is quite common in the case of domestic workers (for example, in Indonesia, Malaysia and Thailand). In such cases, both national and migrant domestic workers are excluded from social protection.

- Social security laws and agreements do not usually cover **migrants with irregular status**. These workers may have entered the country of destination in an irregular manner; they may have entered on a regular basis but their status may have become irregular owing to their employment situation (such as expiration of their residence or work permit); or they may not meet the application or renewal requirements for certain types of residence or work permit (for example, an individual on a student permit who is not eligible to apply for a work permit), This inability to meet the application or renewal requirements for a residence or work permit often prevents migrants from accessing social protection benefits.[9]

- Similarly, **migrants who work in the informal economy**, whether they are in a regular or an irregular situation, are often legally excluded from social protection schemes such as contributory social insurance. Migrant workers are often concentrated in low-skilled jobs, particularly in the agriculture, construction and domestic work sectors. These occupations are often temporary or seasonal and may not be covered by labour legislation and labour inspections. In addition, the capacity of labour inspectorates may be limited, both legally and in terms of resources. This is a significant constraint in many countries with a high proportion of workers in the informal economy; for example, according to the ILO (2018a), the percentage of informal employment is 85.8 per cent in Africa, 68.6 per cent in the Arab States and 68.2 per cent in Asia and the Pacific. The lowest percentages are in the Americas and Europe (40 per cent) and Central Asia (25.1 per cent). According to the ILO, the Covid-19 pandemic, including lockdown and restrictions on movement and its socioeconomic consequences have particularly affected migrant workers in the informal economy (ILO 2020b).

- **Lack of social security coordination** owing to the absence of bilateral or multilateral agreements[10] may prevent migrant workers from maintaining social security rights that are acquired or in the course of acquisition when moving from one country to another. Moreover, even where these agreements exist, they may cover only certain branches of social security or categories of migrant workers or may not provide for the portability of social security rights or otherwise facilitate the enjoyment of migrants' right to social protection.[11]

[8] An ILO mapping of 120 countries reveals that only 58 and 62 per cent of countries' national laws provide for equality of treatment between nationals and non-nationals with regard to contributory social security and healthcare, respectively (see van Panhuys, Kazi-Aoul and Binette 2017).

[9] For further information on access to social security by migrant workers in an irregular situation, see ILO Forthcoming.

[10] The differences between social security systems (e.g. social insurance versus provident funds) poses an additional challenge to the negotiation of social security agreements.

[11] Not all of the basic social security principles may be covered by an agreement; see Chapter 2.

In other cases, agreements may not yet have entered into force or may not be enforced in practice for a variety of reasons, including limited institutional capacities, lack of training and information on the content of the agreement and how to implement it or lack of data and information exchange.

- **Lack of effective enforcement and implementation** of social security laws and bilateral or multilateral social security agreements may allow a country's discriminatory practices to persist with impunity. To support effective implementation of the relevant legal provisions, the social security administration and institutions, the judiciary, the labour inspectorate, social workers and other relevant stakeholders must have adequate institutional capacities, be well trained and have sufficient resources to fulfil their role and responsibilities. Cooperation between the labour inspectorate and the immigration authorities should proceed with caution, bearing in mind that the main objective of the labour inspection system is not to enforce the immigration laws but to protect the rights and interests of all workers and improve their working conditions (see ILO 2016, para. 482).

1.3.3 Practical barriers to migrant workers' access to social protection benefits

As described above, even in situations where migrants are legally entitled to social protection, it may not materialize for several reasons, including but not limited to:

- **Lack of social protection programmes or schemes**. Not all countries have programmes or schemes for all social security branches. This is a major barrier for migrant workers as the progressive development of social protection through policies or laws may prioritize coverage of nationals over non-nationals. In addition, social security agreements generally cover only the branches existing in States parties to the agreement.
- **Lack of information or knowledge** of migrants' rights and the administrative procedures for their exercise. Remoteness or isolation of the workplace and home, irregular status, language barriers, discrimination in access to information and illiteracy are additional factors that can prevent migrant workers from receiving adequate information on their entitlements. Lack of information can also lead to asymmetry in negotiations between workers and employers, placing these workers in a disadvantage when advocating for their rights.
- **Administrative procedures** can be complex and time-consuming for both migrant workers and employers. Indeed, various supporting documents can be required for registration, payment of contributions, receipt of payments and requests for reimbursement. Employers in small and medium-sized enterprises and self-employed workers are often required to follow the same procedures as larger enterprises. Moreover, for illiterate migrant workers and those with limited administrative skills, even relatively simple procedures can present an insurmountable challenge. Complex and lengthy administrative procedures also have an impact on the rapidity and efficiency of the delivery of protection by social security administrations. Absent or limited information technology (IT) systems further complicate the administration of and inter-operability among schemes and programmes.
- **Lack of contributory capacity and other financial challenges**. Limited capacity to contribute to social security schemes often results in the exclusion from coverage of certain groups, such as migrant domestic workers. Appropriate

► Box 1.2. Links to country examples

ILO study: Social Protection for Migrant Workers in ASEAN: Developments, Challenges and Prospects

ITC training modules on extending social protection to migrant workers in the ECOWAS region implementation of the General Convention on Social Security

and carefully designed schemes can take different levels of contributory capacity into account and provide lower or subsidized benefits for groups with lower capacity. In addition, short-term (such as occupational injury, maternity and sickness) benefits may be easier to access for migrant workers than long-term (such as old-age pension) benefits as they depend on the current contributory capacity of the member. For pension benefits, contribution conditions may be more difficult to meet as they require a certain contributory capacity over longer periods of time (ILO 2017a). Migrants may also face difficulties under certain healthcare schemes where advance payment (also referred to as out-of-pocket payment) is required.

- **Lack of trust**. Migrant workers as well as their employers may want to avoid paying social security contributions if they believe they cannot expect benefits in return whether real or perceived. This perception might be based on misconceptions, lack of information and/or bad communication, but it can also be based on poor or limited trust in the system or the institutions.

- **Language barriers**. Where information on a social protection scheme or programme is not provided, or legal or social services and assistance are not available, in a language that migrants understand, they are intentionally or unintentionally excluded from access to social protection.

- **Limited fiscal space or investment in social protection** can also restrict access to such protection for migrant workers. Limited fiscal space, which may be an issue in any country and is particularly common in low-income countries, translates into a lack of or limited investment in social protection benefits, social security administrations, well-trained social security staff and effective delivery mechanisms. Failure to invest in social protection, pervasive poverty and the absence of decent work opportunities may also influence migrant workers' decision to leave their country in search of a better future and income security for their families and themselves. On the other hand, investment in social protection raises household consumption and aggregate demand and contributes to a country's economic growth (ILO 2017a).

- **Separation of family members across countries** or where the breadwinner lives in a different country than his or her dependents can be a major obstacle for a migrant's family members. Dependents who remain in the home country may lose coverage because the absent breadwinner can no longer contribute to the national social protection system. In these situations, migrant workers' remittances are often used to cover the healthcare expenses of family members back home.

- **Lack of representation, organization and effective social dialogue** as a result of legal restrictions on migrant workers' fundamental right to freedom of association and collective bargaining can have significant repercussions for their social protection. Failure to effectively consult these workers, together with workers' and employers' organizations, at the development, implementation and monitoring stages may lead to the adoption of laws, policies and schemes that do not meet their needs and create tension between nationals and non-nationals. Social dialogue and greater representation of migrant workers can help build stronger social cohesion and consensus on their social protection, ensure more sustainable extension strategies and ensure the buy-in of potential beneficiaries. Conversely, lack of representation can have a negative impact on their access to information, support and assistance and on their ability to follow complex procedures, overcome language barriers and use justice and complaint mechanisms. Workers' organizations can play a crucial role in ensuring better working conditions, including social security coverage, by providing information about workers' rights and obligations and other services, such as legal advice. They also negotiate collective agreements and monitor their implementation and can help migrant workers to resolve disputes with employers informally (Fudge and Hobden 2018).

- **Geographical barriers** can make it difficult and costly for migrant workers to register and obtain information, particularly where social security offices are far from the enterprise, workplace or home. In many countries, these offices are not available in rural and remote areas and transport to the nearest office may be unavailable or expensive.

- **Access to justice** (or judicial protection) can be difficult for migrant workers, irrespective of their status, owing to a lack of knowledge, means and support. Legal redress, including complaint procedures and mechanisms, should be available to these workers and labour inspectors should have a legal mandate that allows them to fulfil their mandate effectively. The length and cost of legal proceedings are another significant obstacle. High fees can dissuade migrant workers from bringing complaints while those with irregular residence status may be legally excluded from judicial protection or be unable to exercise their right to bring legal proceedings for fear – founded or not

– of expulsion. Migrant workers may not be given sufficient time to pursue complaints and obtain redress, including with regard to social security rights, before returning home and may thus find it even more difficult to gain access to justice and to file claims in the former host country.

- **Gender discrimination and religious and cultural barriers** can significantly hinder the extension of social protection to migrant workers and their families. For example, in certain societies, women have limited access to the labour market for cultural, customary and/or religious reasons and are thus excluded from employment-based social protection schemes. Lack of recognition of certain jobs, such as care and domestic work, as employment can also lead to exclusion from employment-based social protection coverage. In some countries, guardians other than the birth mother – including, for example, the father, adoptive parents and non-biological LGBTI parents – are precluded from accessing parental, paternity and or maternity leave and benefits.

- **Discrimination and stereotypes** can also affect migrants' access to social protection; for example, they may be required to pay higher registration fees than nationals and to provide additional documentation. Discrimination may occur at any stage in either the country of origin or the host country: when information on the scheme's existence is provided during the registration process, when contributions are collected, when benefits are paid or when workers seek access to complaint or redress mechanisms.

- **Lack of data** on migrant workers' coverage under social protection schemes can affect national social protection and migration strategies and policies. Accurate, reliable data on migrant workers' social protection coverage in and across countries is critical in order to identify protection gaps, inform policies on the expansion of coverage, improve the effectiveness of national social protection systems, support the administration and delivery of benefits and monitor progress towards the achievement of SDG Indicator 1.3.1 on social protection floors.

The obstacles or barriers faced by migrant workers are likely to be more acute and prevalent depending on migration pattern[12] or geographical location. Workers who migrate between developing countries usually have very limited access to social security benefits because these countries' social protection schemes are often limited in scope and coverage and because a large share of the migration takes place outside of any legal framework, whereas those who migrate to high-income countries and meet the social security scheme's eligibility requirements in the country of employment can generally access the services and benefits of more developed systems. However, the coordination of social security schemes or lack thereof between countries of origin and destination can make it difficult for even these workers to benefit from certain social security entitlements (such as pension benefits) when they return to their country of origin.

The lack of coherence between migration, employment and social protection laws, policies and strategies can also create significant obstacles to migrant workers' access to social protection. While migration policies may promote the migration of certain categories of workers, such as domestic workers, these workers may be excluded from social protection laws. A whole-of-government approach and political will are crucial to the development and implementation of any policy or measure concerning the extension of social protection to migrant workers, refugees and their families.

▶ 1.4 What are the policy options for extending social protection to migrant workers and their families? The ILO's approach

States should establish, strengthen or extend comprehensive, adequate, sustainable, rights-based and gender responsive social protection systems for all workers including migrant workers. In order to address the various obstacles faced by migrants in accessing healthcare and other social protection benefits, States may opt for a number of policy options, which are not mutually exclusive and will be discussed in further detail in subsequent chapters:

1. ratification and implementation of the relevant ILO Conventions and Recommendations as a first step towards incorporation of the principles and standards established therein into domestic law. For more information, see Chapter 2;

2. conclusion and enforcement of bilateral/multilateral agreements on social security coordination. The content and scope of these agreements, the negotiation process, and country and regional practices are described below. For more information, see Chapter 3;

[12] This refers to the demographics and skill composition of migrant workers.

3. inclusion of social security provisions in bilateral labour agreements (BLAs) and memoranda of understanding (MoUs). For more information, see Chapter 4;

4. adoption of unilateral measures, including equality of treatment and national SPFs, in order to extend social protection to migrant workers and their families. For more information, see Chapter 5;

5. complementary measures addressing the administrative, practical and organizational obstacles faced by migrant workers. For more information, see Chapter 5.

The social partners should be actively involved in the planning, design, implementation and monitoring of these policy options.[13] Social dialogue and consultation "can permit to identify gaps in migration and social security policies in sending, transit and receiving countries and supports the consideration of the specific needs of migrant workers and their families, which is key for the design of migrant-sensitive policies and measures. Their involvement also contributes to ensuring political buy-in and broader public support and acceptance. Workers' organizations can also contribute to address lack of information of migrant workers through sensitization of their members as well as training and vocational guidance" (Van Panhuys, Kazi-Aoul and Binette 2017).

In addition to or in the absence of the foregoing, migrants may consider:

6. private or community-based measures (such as private insurance or health mutuals). For more information, see Chapter 5.

When deciding on policy options for extending social protection, it is important to take into account the specificities and needs of different groups (including migrant domestic workers, migrant seasonal agricultural workers, migrants in an irregular situation, refugees and asylum seekers, seafarers, posted workers and frontier workers) and to prioritize or adapt the various policy options accordingly. For more information on migrant domestic workers, migrant seasonal agricultural workers and migrants in an irregular situation, see Chapter 6; for more information on refugees and asylum seekers, see Chapter 7.

Gender also shapes the migration experience. It may pose additional challenges for specific categories of migrants and requires the development of gender-responsive strategies and schemes. For more information, see Chapter 8.

▶1.5 Conclusion

As shown in this chapter, the extension of social protection to migrants and their families can be life-changing. Not only does it provide income security and decent standards of living and employment for individuals; it also reduces poverty and inequality, promotes sustainable development and inclusive growth and improves social cohesion and justice for countries. To that end, governments should design and implement policies that adhere to international standards and instruments while addressing the underlying challenges and restrictions faced by many migrants around the globe. The fact that millions of these individuals are denied access to such services and programmes shows that more needs to be done in designing and implementing nationally appropriate social protections systems for all as outlined in the SDGs. As argued by the ILO (2017a), the lack of such efforts not only results in high political costs for governments but also harms development efforts and, most importantly, contradicts democratic values.

[13] According to the ILO's Social Protection Floors Recommendation, 2012 (No. 202), such extension strategies should: "(a) prioritize the implementation of social protection floors as a starting point for countries that do not have a minimum level of social security guarantees, and as a fundamental element of their national social security systems; and (b) seek to provide higher levels of protection to as many people as possible, reflecting economic and fiscal capacities of Members, and as soon as possible" (para. 13(1)).

► Box 1.3 ILO action

The ILO is mandated to support the extension of social protection to all who require it, including migrants, and provides technical assistance with its constituents' extension strategies.

The ILO provides technical advice/expertise and capacity-building on:

- the ratification and implementation of ILO Conventions and Recommendations;
- the drafting and negotiation of social security agreements;
- the establishment of comprehensive social protection systems, including national social protection floors, based on social dialogue;
- the drafting or revision of labour migration policies and laws;
- the drafting and negotiation of bilateral labour arrangements and MoUs with provisions on social security;
- the formulation of national social protection policies and legal frameworks that extend coverage to migrant workers (including those in the informal economy) and their dependents in line with international standards and good practices;
- the development, strengthening, implementation and monitoring of new or existing rights-based social protection schemes or mechanisms that enhance access or extend coverage to migrant workers (for example, by providing access to healthcare and income security);
- the establishment of a knowledge base (including statistics) on social security for migrant workers to support evidence-based policymaking and capacity-building;
- the costing and financing of social protection schemes and reforms (such as fiscal space analyses), including those related to the extension of social protection to migrant workers and their families;
- the financial governance of social protection schemes and programmes.

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Chapter 2

Migrant workers' right to social security and the international legal framework

Key messages

- Migrants' right to social security is firmly established in many international human rights instruments. The Universal Declaration of Human Rights (1948) establishes that everyone has the right to social security and to an adequate standard of living and the International Covenant on Economic, Social and Cultural Rights, a highly ratified instrument, enshrines "the right of everyone to social security, including social insurance" (Art. 9).

- The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) establishes migrants' right to equality of treatment in respect of the right to social security and under national legislation and the applicable treaties.

- These rights are also enshrined in a number of regional human rights treaties, including, among others, the American Declaration on the Rights and Duties of Man (1948), the African Charter on Human and Peoples' Rights (1981), the Charter of Fundamental Rights of the European Union (2000) and the Inter-American Convention on Protecting the Human Rights of Older Persons (2015). All of these instruments explicitly or implicitly establish the right to social protection of nationals and/or migrant workers and their families.

- In fulfilment of its mandate, the ILO has adopted several instruments that incorporate key social security principles that are relevant to migrant workers' social protection, namely equality of treatment, determination of applicable legislation, maintenance of acquired rights and provision of benefits abroad and maintenance of rights in the course of acquisition. These include the Social Security (Minimum Standards) Convention, 1952 (No. 102); the Migration for Employment Convention (Revised), 1949 (No. 97); the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); the Maintenance of Social Security Rights Convention, 1982 (No. 157); the Maintenance of Social Security Rights Recommendation, 1983 (No. 167); the Equality of Treatment (Social Security) Convention, 1962 (No. 118); and the Social Protection Floors Recommendation, 2012 (No. 202).

- The ratification of international conventions is an important step towards enhancing migrant workers' enjoyment of their social protection rights. It sets minimum standards for social security and ensures the application of common rules by the various States concerned with migration.

- Notwithstanding ratification, countries can incorporate the rights enshrined in Conventions and Recommendations into their national legislation and ensure equality of treatment with respect to social security for migrants working in their territory.

▶ 2.1 Introduction

Social security is a fundamental human right that is firmly rooted in international law and increasingly reflected in national legislation. It is enshrined in many universally negotiated and accepted human rights instruments, such as the Universal Declaration on Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1976). The 1944 Declaration of Philadelphia, an integral part of the ILO's Constitution, seeks to achieve "the extension of social security measures to provide basic income to all in need of such protection and comprehensive medical care" (Art. III(f)). This effort has recently been reaffirmed in the ILO Social Protection Floors Recommendation, 2012 (No. 202).

Yet despite this universally recognized obligation, only 30.6 per cent of the working-age population are legally covered by comprehensive social protection and only 53.1 per cent, some 4.1 billion people, have no access to any branch of social security and are thereby left unprotected (ILO 2021).

Migrant workers, who move from one country to another and whose protection should be the shared responsibility of their territories of origin and destination, find it particularly challenging to access and benefit from national social protection systems. Restrictive legislation, administrative regulations and practical hurdles such as language barriers and lack of information make it difficult for migrants to access these systems. Thus, social protection coverage remains, in principle, limited to the territory of the state in which the system operates.

An international legal framework based on, among other things, the ILO Conventions and Recommendations helps to safeguard migrants' rights to social protection. Based on the principles of equality of treatment and non-discrimination, these instruments provide countries with useful guidance on extending coverage to migrant workers through bilateral and multilateral agreements or unilateral measures. While the human rights of all migrant workers should be promoted and protected, regardless of their status,[14] some of these Conventions and Recommendations draw a distinction within the spectrum of rights guaranteed to migrant workers,[15] depending on whether they are in a regular or an irregular situation. The first group comprises persons who are authorized to enter, stay and engage in a remunerated activity in a host state in accordance with its applicable laws while the second comprises workers whose legal status is inconsistent with those laws.[16]

This chapter will focus on international human and labour rights instruments and regional treaties of relevance to migrant workers' social protection. Section 1 provides an overview of several international and regional human rights instruments, section 2 focuses on ILO standards related to migrant workers' social protection and section 3 shows how those standards are put into practice, detailing the ratification, compliance and implementation processes at the national level.

▶ 2.2 The right to social security under human rights instruments

As mentioned above, the right to social protection is enshrined in several international and regional human rights instruments. Each of these instruments is associated with a human rights treaty body, a committee of independent experts which monitors implementation of the convention or treaty based on States parties' reports and information received from non-governmental organizations (NGOs).[17]

2.2.1 International human rights instruments

Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights is a milestone in the history of human rights. It stipulates in Article 22 that "Everyone, as a member of society, has the right to social security" and in Article 25 that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". Article 25(2) establishes the right to special care and assistance

[14] Under, for example, the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1976) and the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families

[15] The ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) makes such a distinction: Part I covers all migrant workers, irrespective of their status, while Part II only covers only those who are regularly admitted or are lawfully within a State's territory. It should be noted that States can ratify either or both of these parts. A similar distinction is drawn in the ICRMW.

[16] See the Glossary and Chapter 6, which provides more detailed information on the international legal framework applicable to migrants in an irregular situation.

[17] For more information on the UN treaty bodies, see https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx.

during motherhood and childhood. Although it is not a treaty and thus does not constitute a formal source of international law, the Declaration has been widely recognized as a source of customary law (Kulke 2006).

International Covenant on Economic, Social and Cultural Rights, 1966

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a binding UN treaty that entered into force in 1976 and has 171 States parties as at April 2021. The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors its implementation. The Covenant establishes that everyone has the right to "social security, including social insurance" (Art. 9), to an "adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions" (Art. 11(1)) and to "the enjoyment of the highest attainable standard of physical and mental health" (Art. 12(1)). It also recognizes that "(...) working mothers should be accorded paid leave or leave with adequate social security benefits" (Art. 10(2). The CESCR has noted that this article should be interpreted to cover both women and men, who should be provided with paid maternity, paternity or parental leave and cash benefits (CESCR 2005).

Each State party to the Covenant is required to "take steps (...), to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including in particular the adoption of legislative measures" (Art. 2(1)). One of these rights is the right to social security. There is a strong presumption that retrogression in realization of the right to social security is prohibited under the Covenant (CESCR 2008).

The Covenant imposes three types of obligations on States parties: the obligation to respect, to protect and to fulfil the right to social security (CESCR 2008).

- The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to social security (CESCR 2008, para. 44). In its General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12), the Committee states that the obligation to respect the right to health requires States to refrain "from denying or limiting equal access for all persons, including [...] illegal immigrants, to preventive, curative and palliative health services" and to abstain from "enforcing discriminatory practices as a State policy" (CESCR 2000, para. 34).
- The Covenant also requires States parties to ensure enjoyment of the rights established in the Covenant without discrimination of any kind as to, among other things, national or social origin (Art. 2(2)).[18] However, it acknowledges constraints on available resources and allows developing countries to determine to what extent they guarantee the rights recognized therein (including the right to social security) to non-nationals (Art. 2(3)). As the monitoring body for the Covenant, the Committee has left open the meaning of this provision but has considered it "a restrictive exception to be interpreted narrowly in the light of the object and purpose of the Covenant" (Diller 2011, p. 112). Unlike the obligations laid down in the Covenant that are subject to progressive realization, the prohibition of discrimination constitutes an obligation of immediate effect (CESCR 2008, para. 40).
- The obligation to *protect* requires that "States prevent third parties from interfering in any way with the enjoyment of the right to social security. Third parties include individuals, groups, corporations and other entities, as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures [...] to restrain third parties from denying equal access to social security schemes operated by them or by others and imposing unreasonable eligibility conditions [...]" (CESCR 2008, para. 45).

  Lastly, the obligation to *fulfil* requires sufficient recognition of the right to social security within national political and legal systems. This should entail "adopting a national social security strategy and plan of action to realize this right [and] ensuring that the social security system will be adequate, accessible for everyone, and will cover social risks and contingencies" (CESCR 2008, para. 48); ensuring "that there is appropriate education and public awareness concerning access to social security schemes, particularly [...] amongst linguistic and other minorities" (CESCR 2008, para. 49); and establishing "non-contributory schemes or other social assistance measures to provide support to those individuals and groups who are unable to make sufficient contributions for their own protection" (CESCR 2008, para. 50).

[18] The term "social origin" refers to a person's inherited social status and is relevant to members of a descent-based community (caste) or of a specific economic or social group, for example people living in poverty, homeless people or people living in an informal settlement (CESCR, General comment No. 20: Non-discrimination in Economic, Social and Cultural rights, paras 24–26 and 35).

► Box 2.1 The position of the Committee on Economic, Social and Cultural Rights on migrant workers' entitlement to social security

In its General Comment No. 19 on the right to social security, the Committee states that where "migrant workers have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country" (CESCR 2008, para. 36). With regard to non-contributory schemes, "[n]on-nationals should be able to access income support, affordable access to health care and family support" (CESCR 2008, para. 37). According to the Committee, "any restrictions, including a qualification period, must be proportionate and reasonable" (CESCR 2008, para. 37). Non-nationals and other disadvantaged groups, such as minorities, refugees, asylum seekers, internally displaced persons and returnees, should also be given special attention by States as they face additional hurdles in exercising their right to social security (CESCR 2008, para. 31).

International Covenant on Civil and Political Rights, 1966

While the International Covenant on Civil and Political Rights (ICCPR) does not cover social rights, it establishes several rights that have an indirect impact on the right to social security, such as the right to life (Art. 6 (1)) and to protection of the family (Art. 23) and the child (Art. 24). These rights must be granted without any discrimination based on factors such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Arts 2(1) and 26). Thus, migrant workers fall within the scope of this Covenant.

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

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 in 1990, is the most comprehensive UN treaty on migrant workers. It was drafted to address concerns regarding the clandestine movement of migrant workers to European countries and reports of their exploitation, including forced labour, by reinforcing the link between human rights and migrant workers. The Convention establishes

► Box 2.2 Access to Covenant rights, irrespective of migration or refugee status

In its General Comment No. 15: The Position of Aliens Under the Covenant, the Human Rights Committee (HRC), as the body responsible for monitoring the implementation of this Covenant, stresses that each of the rights established therein "must be guaranteed without discrimination between citizens and aliens" (HRC 1986, para. 2). There are however, exceptions to this principle of non-discrimination: "[I]rregular migrants do not enjoy political rights or, with certain important caveats, freedom of movement" (OHCHR 2014, p. 31). In that regard, the Committee has specified that "[c]onsent for entry may be given subject to conditions relating, for example, to movement, residence and employment. [...] However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant" (HRC 1986, para. 6). "Any other differences of treatment between nationals and non-nationals, including migrants with irregular status, must be based on reasonable and objective criteria".[19] Similarly, in its General comment No. 20 (para. 30), the Committee states that "[t]he 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 healthcare. 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."

[19] Human Rights Committee, *F. H. Zwaan-de Vries v. The Netherlands*, Communication No. 182/1984, Views adopted on 9 April 1987, para. 13, cited in OHCHR 2014.

minimum standards that are applicable to migrant workers and members of their families, irrespective of their migratory status. Nonetheless, certain of its provisions distinguish between migrants in a regular and those in an irregular situation (OHCHR 2005).[20] The Convention states that: "[w]ith respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties" (Art. 27).[21] The Convention also states that: "[m]igrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of [...] [p]rotection against dismissal; [u]nemployment benefits; [and] [a]ccess to public work schemes and alternative employment" (Art. 54).[22] The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is the body of independent experts that monitors States parties' implementation of the Convention. It is important to note that to date, this instrument has been ratified primarily by countries of origin and by very few high-income countries of destination, a fact that significantly limits its effectiveness.[23]

Convention on the Elimination of All Forms of Discrimination against Women, 1979

The Convention on the Elimination of All Forms of Discrimination against Women, which was adopted in 1979 and entered into force in 1981, requires States to take all appropriate measures to eliminate discrimination against women in order to ensure their enjoyment of the right to social security, "particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work and the right to paid leave," and to family benefits (Arts 11(1)(e) and 13(a), respectively); and "to introduce maternity leave with pay or with comparable social benefits without loss of employment, seniority or social allowances" (Art. 11(2b)). In its General Recommendation No. 24 on Women and Health, the Committee on the Elimination of Discrimination against Women, the monitoring body for the Convention, emphasizes that States must eliminate gender discrimination relating to medical care, "particularly in the areas of family planning, pregnancy, confinement and during the post-natal period" (CEDAW 1999, para. 2). The Convention also mentions the social protection of rural women and calls on States to ensure their right "to benefit directly from social security programmes" (Art. 14(2c)) rather than indirectly through their husband's social security, a situation that prevents them from leaving a marriage and increases their vulnerability. Depending on the reasons for rural women's exclusion from social security programmes, States parties should revise their legislation to ensure equality of treatment or implement measures aimed at formalizing the situation of these women, thus giving them access to contributory social security programmes. The establishment of well-designed SPFs can also provide migrant woman with access to social protection, including essential healthcare.

► Box 2.3 Paying attention to the rights of women

In its General Recommendation No. 24, the Committee on the Elimination of Discrimination against Women (CEDAW) stresses that "special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women" (CEDAW 1999, para. 6). In its General Recommendation No. 26 on Women Migrant Workers, it states that countries of destination should "ensure that linguistically and culturally appropriate gender-sensitive services for female migrant workers are available, including [...] health-care services" (CEDAW 2008, para. 26(i)).

[20] For their definitions and an explanation of the distinction between regular and irregular status, see the Glossary.

[21] Article 27 is included in Part III of the Convention, "Human Rights of All Migrant Workers and Members of their Families" and thus, in principle, covers all migrant workers and their families, irrespective of their status.

[22] Article 54 is included in Part IV of the Convention, "Other Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation".

[23] Albania, Algeria, Argentina, Azerbaijan, Bangladesh, Belize, Benin, Bolivia (Plurinational State of), Bosnia and Herzegovina, Burkina Faso, Cabo Verde, Chile, Colombia, Congo, Ecuador, Egypt, El Salvador, Gambia, Guatemala, Guinea, Guinea-Bissau, Guyana, Honduras, Indonesia, Jamaica, Kyrgyzstan, Lesotho, Libya, Madagascar, Mali, Mauritania, Mexico, Morocco, Mozambique, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, Seychelles, Sri Lanka, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Uganda, Uruguay and Venezuela (Bolivarian Republic of) (list available at: http://indicators.ohchr.org/).

Convention on the Rights of the Child (CRC), 1989

Also relevant to the social protection of migrant workers is the Convention on the Rights of the Child (CRC), which was adopted in 1989 and entered into force in 1990. The Convention requires States parties to "recognize for every child the right to benefit from social security, including social insurance"; to "the enjoyment of the highest attainable standard of health"; and to an adequate standard of living (including nutrition, clothing and housing) (Arts 24, 2 and 27, respectively). It prohibits discrimination on the basis of, among other things, children's national origin or that of their parents or legal guardians (Art 2(1)).

International Convention on the Elimination of All Forms of Racial Discrimination, 1965

Lastly, the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted in 1965 and entered into force in 1969, establishes the right of everyone to "public health, medical care, social security and social services" (Art. 5(e)). It protects migrant workers' rights by specifically prohibiting "distinctions, exclusions, restrictions or preferences made by a State Party [...] between citizens and non-citizens" (Art. 1(2)).

2.2.2 Regional human rights treaties

In addition, a number of regional human rights instruments establish the right to social protection. The following is a non-limitative list; for more information on regional social security agreements, see Chapter 3.

The American Declaration of the Rights and Duties of Man (1948) recognizes the right of every person to social security (Art. 16) while the American Convention on Human Rights (ACHR) (1969) focuses on civil and political rights. However, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) further details the provisions of the Declaration with a view to its implementation in respect of economic, social and cultural rights. The Protocol, which establishes the right to social security (Art. 9) and to health (Art. 10), makes a distinction between migrant workers in a regular and those in an irregular situation. Thus, Article 10 states that "[p]rimary healthcare, that is, essential healthcare made available to all individuals and families in the community," applies to both while only migrant workers in a regular situation are entitled to "extension of the benefits of health services".

The African Charter on Human and Peoples' Rights (1981) does not expressly include a provision on the right to social protection. However, it does establish the right to health (Art. 16) and the right of "[t]he aged and the disabled" to special measures of protection (Art. 18(4)). The Protocol on the Right of Citizens to Social Protection and Social Security includes provisions on social protection for migrants, migrant workers, refugees and displaced persons.

► Box 2.4 The rights of non-documented migrants and the Inter-American Court of Human Rights: A landmark decision

In 2003, the Inter-American Court of Human Rights concluded unanimously in a remarkable decision that the principles of non-discrimination and the right to equality were applicable to all residents of a State, regardless of their immigration status and nationality: "The migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment".[24]

The Court ruled that once an employment relationship has been assumed, unauthorized workers are entitled to all of the labour and employment rights available to authorized workers, irrespective of their regular or irregular status in the State of employment, since these rights arise from that relationship.

The Court's recognition that States cannot limit the labour rights of unauthorized workers extends to their right to social protection. States have "the obligation to respect and guarantee the labour human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in employment relationships established between private individuals (employer-worker)" (para. 9). Moreover, the State must take the necessary measures to ensure that workers, including non-documented migrant workers, have all the appropriate means to exercise their labour rights and that these are recognized and exercised in practice.

The decision was the outcome of the Government of Mexico's request for an advisory opinion on the application of the American Convention on Human Rights (ACHR) at the national level. The Government had identified incompatibilities between the human rights system of the Organization of American States (OAS) and the interpretations, practices and enactment of national laws by some States of the region that, in practice, had deprived non-documented workers of their labour rights based on their immigration status.

In the same decision, the Court ruled that it was competent to interpret not only the American Declaration and the American Convention, but also the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), "all [...] instruments that protect human rights and [...] are applicable to the American States" (para. 55). It also ruled that the Advisory Opinion applied to all OAS Member States that had signed the OAS Charter, the American Declaration or the Universal Declaration or had ratified the ICCPR, whether or not they had ratified the ACHR.[25]

The Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (1995) includes provisions on the right to social security (Art. 16), to health protection (Art. 15) and to equal protection of the law without discrimination, including on the grounds of nationality, place of birth or other status (Art. 20). It has been ratified by only four of the Commonwealth States: Belarus, Kyrgyzstan, Russia and Tajikistan.

The European Social Charter (revised) (1996) enshrines all of the rights and guarantees established in the original European Social Charter (1961) and the Additional Protocol (1988) thereto and adds new rights, including the right of employed women to protection of maternity (Art. 8), the right to protection of health (Art. 11), the right to social security (Art. 12), the right to social and medical assistance for anyone without adequate resources (Art. 13) and the right to benefit from social welfare services (Art. 14). It also includes

[24] Inter-American Court of Human Rights, Advisory Opinion OC-1803 of 17 September 2003, requested by the United Mexican States: Juridical Condition and Rights of Undocumentd Migrants, para. 134. https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

[25] Several judgments of the Inter-American Court of Human Rights have followed the reasoning of this advisory opinion: *Vélez Loor v. Panama*, para. 100; *Nadege Dorzema et al. v. Dominican Republic*, para. 154; and *Pacheco Tineo Family v. Plurinational State of Bolivia*, para. 129.

provisions on migrant workers and their families (Art. 19), which stipulate, among other things, that migrant workers who are lawfully within the territory of a State party should be accorded treatment not less favourable than that of nationals of that State party in respect of employment and working conditions and of contributions payable in respect of employed persons.

The Charter of Fundamental Rights of the European Union (2000)[26] recognizes the right to social security and social assistance (Art. 34) and provides that "everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with [European] Community law and national laws and practices". To combat social exclusion and poverty, the Charter "recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources" (Art. 34(3)). It also provides that "everyone has the right of access to preventive healthcare and the right to benefit from medical treatment" (Art. 35) and that "the family shall enjoy legal, economic and social protection" (Art. 33(1)), including "the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave" (Art. 33(2)).

The Arab Charter on Human Rights (2004) provides that "States parties shall ensure the right of everyone to social security, including social insurance" (Art. 36) and that "[e]ach State party shall ensure protection to workers migrating to its territory in accordance with the laws in force" (Art. 34).

The Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (2013) contains provisions on the right to social security (para. 30) and to an adequate standard of living (para. 28). In paragraph 4, it expressly states that "[...] the rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalized groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms".[27] The ASEAN Declaration on Strengthening Social Protection and its Regional Framework and Action Plan also include provisions related to the social protection rights of migrant workers.

The Inter-American Convention on Protecting the Human Rights of Older Persons (2015) states that "[a]ll older persons have the right to social security [...] so that they can live in dignity" and that, in accordance with national legislation, "States parties shall progressively promote, within available resources, the provision of income to ensure a dignified life for older persons through social security systems and other flexible social protection mechanisms" and shall "seek to facilitate, through institutional agreements, bilateral treaties, and other hemispheric mechanisms, the recognition of benefits, social security contributions, and pension entitlements for older migrant persons" (Art. 17).

[26] The Charter is a declaration which was given legal binding force in Article 6 of the Treaty of Lisbon, 2007.

[27] To be read in conjunction with para. 34, among others.

► Box 2.5 International human and labour rights and the COVID-19 crisis

The current COVID-19 pandemic is a major public health crisis which is seriously affecting socio-economic growth in countries of origin, transit and destination and is resulting in violations of human and labour rights. Migrant workers and their families are particularly affected; a number of reports have documented rising levels of discrimination against them, together with issues of food security, worsening of working conditions, layoffs, increased restrictions on movement and forced return (ILO 2020a). Furthermore, a large proportion of these workers face challenges in accessing social protection, including healthcare and income security. Taken together, these factors further heighten their vulnerability.

In order to combat these challenges and ensure the social protection of migrant workers and their families, policymakers must develop policy responses that are in line with international human rights and international labour standards. The ILO's *Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205)* provides member States with useful guidance on ways to generate employment and decent work, including social protection, for purposes of prevention, recovery, peace and resilience in crisis situations arising from conflicts and disasters. It highlights the need for States to ensure basic income security; develop, restore or enhance comprehensive social security schemes; and ensure effective access to healthcare and basic social services (para. 21) and to "establish, re-establish or maintain social protection floors and seek to close the gaps in their coverage, taking into account the Social Security (Minimum Standards) Convention, 1952 (No. 102), the Social Protection Floors Recommendation, 2012 (No. 202), and other relevant international labour standards" (para. 22).

While the pandemic requires an immediate and necessary short-term emergency response "to ensure that all migrant workers have access to healthcare and income protection; suitable working and living conditions, including compliance with occupational safety and health standards; and relevant information on COVID-19", these should, wherever possible, be incorporated into "longer-term strategies that combine them with the existing institutional structures and delivery mechanisms of national social protection systems in order to prevent fragmentation". In order to build sustainable, socially responsive and widely accepted social protection schemes and inclusive Covid-19 response measures, States should also consult with workers' and employers' organizations (ILO 2020b).

► 2.3 ILO standards of relevance to migrant workers' social protection

At the heart of the ILO's mandate is "the extension of social security measures to provide basic income to all in need of such protection and comprehensive medical care" (Declaration of Philadelphia, Art. 3(f)). The right to social security and to related rights, such as the right to health, and to an adequate standard of living[28] are enshrined in recent ILO Conventions and Recommendations,[29] including the Social Protection Floors Recommendation, 2012 (No. 202).

Since its inception, the Organization's work has also included the protection of migrant workers; the preamble to the Declaration of Philadelphia refers to "the interests of workers when employed in countries other than their own". For this reason, and as an expression of the principle of non-discrimination, it should be borne in mind that, unless otherwise stated, all ILO standards apply to migrant workers (ILO 2020c).

Government, Worker and Employer members of the ILO have adopted a number of Conventions and Recommendations with provisions related to the social security rights of migrant workers and their family members. These instruments provide guidance as to the normative content of the right and its corollary obligations for ratifying States. More specifically, as detailed in Table 2.1, they establish the following key social security principles related to the coordination of social security schemes (Hirose, Nikac and Tamagno 2011; ISSA 2014):

[28] For more information, see: (https://socialprotection-humanrights.org/key-issues/relationship-with-other-human-rights/.

[29] For a list of these instruments, see: https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO.

- equality of treatment: to the extent possible, migrant workers should have the same rights and obligations as nationals of the destination country in respect of social security coverage and benefits;
- determination of the applicable legislation to ensure that migrant workers are governed by the legislation of only one country at any given moment. They should normally be subject to the legislation of the country in which they are employed (principle of lex loci laboris). Exceptions to this principle are sometimes made in the case of posted workers, self-employed migrant workers and temporary migrant workers;
- maintenance of acquired rights and provision of benefits abroad (portability of earned benefits):[30] migrant workers who have acquired rights in one territory should be guaranteed those rights in any of the States parties to the relevant instruments. Under this principle, benefits payable under the legislation of one State should be paid abroad and should not be subject to reduction, modification, suspension, cancellation, or confiscation simply because the person resides in the territory of another State party;
- maintenance of rights in the course of acquisition (totalization)[31] provides for the accumulation of qualifying periods under different national social security schemes with a view to the aggregation or totalization of periods of insurance, employment or residence required for the acquisition, maintenance or recovery of rights and for sharing the costs of benefits paid.

It is also critical for social security agreements to include stipulations on the provision of mutual administrative assistance, including data and information exchange.[32]

In addition to these key principles enshrined in ILO instruments (see Table 2.1), social security agreements are often based on the principle of reciprocity, under which each State party to an agreement undertakes to apply the same mechanisms as every other State party in order to make its social security benefits more accessible to migrant workers. However, reciprocity in bilateral agreements can also have a limiting effect, particularly for refugees and during negotiations where the social security systems of two States parties to a bilateral agreement are at different stages of development.

► Table 2.1 Overview of key principles enshrined in ILO Conventions and Recommendations

ILO Conventions and Recommendations	Equality of treatment*	Applicable legislation	Maintenance of acquired rights and provision of benefits abroad	Maintenance of rights in the course of acquisition	Administrative assistance
C19 – Equality of Treatment (Accident Compensation) Convention, 1925 (interim status)	Yes				
C97 – Migration for Employment Convention (Revised), 1949	Yes				
R86 – Migration for Employment (Revised), 1949	Yes		Yes	Yes	
C102 – Social Security (Minimum Standards) Convention, 1952	Yes				
R100 - Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (interim status)	Yes				

30 The provision of benefits abroad is also referred to as the "exportability" of benefits; see Box 3.3.

31 For example, the United States often refers to "totalization agreements"; see Chapter 3.

32 This is recommended by the Equality of Treatment (Social Security) Convention, 1962 (No. 118); the Maintenance of Social Security Rights Convention, 1982 (No. 157); and Migrant Workers Recommendation, 1975 (No. 151).

ILO Conventions and Recommendations	Equality of treatment*	Applicable legislation	Maintenance of acquired rights and provision of benefits abroad	Maintenance of rights in the course of acquisition	Administrative assistance
C118 – Equality of Treatment (Social Security) Convention, 1962	Yes		Yes	Yes	Yes
C121 – Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980]	Yes				
R122 – Employment Policy Recommendation, 1964	Yes				
C128 – Invalidity, Old-Age and Survivors' Benefits Convention, 1967					
C130 – Medical Care and Sickness Benefits Convention, 1969	Yes			Yes	
C143 – Migrant Workers (Supplementary Provisions) Convention, 1975	Yes				
R151 – Migrant Workers Recommendation, 1975	Yes				
C157 – Maintenance of Social Security Rights Convention, 1982		Yes	Yes	Yes	Yes
R167 – Maintenance of Social Security Rights Recommendation, 1983		Yes	Yes	Yes	Yes
C168 – Employment Promotion and Protection against Unemployment Convention, 1988	Yes				
MLC, 2006 – Maritime Labour Convention (as amended)	Yes			Yes	
R201 – Domestic Workers Recommendation, 2011	Yes		Yes	Yes	
R202 – Social Protection Floors Recommendation, 2012	Yes				
R205 - Employment and Decent Work for Peace and Resilience Recommendation, 2017	Yes		Yes	Yes	

** A number of other standards also promote non-discrimination against and equality of treatment of a specific population group. As these groups often include migrant workers, their provisions are of particular relevance: Domestic Workers Convention, 2011 (No. 189) Art. 14; Home Work Convention, 1996 (No. 177), Art. 4; Private Employment Agencies Convention, 1997 (No. 181), Art. 5; Part-Time Work Convention, 1994 (No. 175), Art. 4; Safety and Health in Agriculture Convention, 2001 (No. 184) Art. 17; Indigenous and Tribal Peoples Convention, 1989 (No. 169), Art. 20; and Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), Art. 16-21.*

Source: The text of the respective Conventions and Recommendations. See the ILO's Information System on International Labour Standards (NORMLEX).

2.3.1 ILO social security instruments

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

The Social Security (Minimum Standards) Convention, 1952 (No. 102) is the flagship ILO social security Convention and can serve as a benchmark and reference for the gradual development of comprehensive social security systems at the national level. It establishes minimum standards for all nine branches of social security with respect to the coverage of the population, the level of benefits to be provided by social security schemes for each risk, the conditions for entitlement to those benefits and related statistical requirements for demonstrating compliance. It also sets out the core principles to be observed, irrespective of the type of social security system, including the general responsibility of the State for the due provision of benefits and for proper administration of the institutions and services concerned in securing the provision of benefits; participation of protected persons in the management of social security schemes; collective financing of social security schemes; adjustment of pensions in payment; and the right to appeal refusal of a benefit and to lodge a complaint as to its quality or quantity. In order to ratify the Convention, States must accept at least three of the nine branches of social security. As at October 2021, 60 countries have ratified the Convention (see section 2.4.1 for more details on the supervisory mechanisms and reasons for ratification), which has also served as a benchmark for the development of instruments at the regional level, including the European Social Charter and the European Code of Social Security.

The Convention establishes the principle of equality of treatment between national and non-national residents of countries of employment, which is applicable to all nine branches of social security (Art. 68(1)). It nevertheless allows for two exceptions in the application of this principle. First, a State can establish special rules "in respect of benefits or portions of benefits which are payable wholly or mainly out of public funds and in respect of transitional schemes" (Art. 68(1)). Thus, a State party may require non-nationals to complete a period of residence that would not be required of its nationals. Second, under contributory social schemes, States may limit equality of treatment by applying the relevant Part of the Convention only to the nationals of States parties that have also accepted obligations under that Part (Art. 68(2)). In such cases, equality of treatment may require a bilateral or multilateral reciprocity agreement. In practice, this condition of reciprocity may pose an obstacle to full application of the principle of equality of treatment to migrant workers,[33] refugees or workers in the informal economy.

Social Protection Floors Recommendation, 2012 (No. 202)

In June 2012, the International Labour Conference adopted the Social Protection Floors Recommendation, 2012 (No. 202), an important tool for promotion of the rights of migrant workers and their families. While not binding on ILO member States, the Recommendation provides useful guidance for building SPFs within comprehensive social security systems for all in need. It also calls on member States to extend social protection and progressively ensure higher levels of social security to as many people as possible, guided by the Organization's social security standards: "Subject to their existing international obligations, Members should provide basic social security guarantees to at least all residents and children, as defined in national laws and regulations" (para. 6). Thus, these guarantees should be provided, at least to migrant workers with residence status and to children, irrespective of their status and that of their parents or guardians. The

► Additional information

Toolkit on ILO social security standards, including status of ratification of up-to-date social security Conventions (https://www.social-protection.org/gimi/Standards.action)

Ratification of key international UN or ILO Conventions with respect to migrants' rights to social protection (https://www.social-protection.org/gimi/ShowProjectWiki.action?id=3268&pid=2657)

[33] For instance, the issue of reciprocity can be an important hurdle when concluding a social security agreement between countries whose national social security systems are at different levels of development.

mention of "all" residents emphasizes that all types or categories of residents and residence status as defined under national law, whether permanent or temporary, should be included (ILO 2019a, para. 130).

Social protection floor guarantees can be put in place through a variety of means, including contributory and non-contributory social schemes or transfers. By implementing national SPFs, countries of origin, transit and destination can ensure that emigrant and immigrant workers and their families have, at least, access to essential healthcare and basic income security throughout their life cycle, including for returning migrants and dependents living in a different country from the migrant breadwinner. This also reduces potential pressure on migrant workers to support their families and communities back home, thus limiting the need for remittances and other private initiatives, and ensures equal access to basic social security guarantees.

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

The Equality of Treatment (Social Security) Convention, 1962 (No.118) establishes the obligation of equal treatment, contingent upon reciprocity; this means that the obligation does not concern all non-nationals employed in the territory of a State party to the Convention, but only those who are nationals of another State that has also ratified the Convention (Art. 3).

- Article 3 establishes the principle of equality of treatment under the legislation of a ratifying State, "both as regards coverage and as regards the right to benefits [and] in respect of every branch of social security for which [the ratifying State] has accepted the obligations of the Convention".
- Pursuant to Article 4, equality of treatment must not be limited by a condition of residence imposed solely upon non-nationals (except for certain non-contributory schemes, the duration of which must not exceed the limits set out in the Convention) (Hirose, Nikac and Tamagno 2011, p. 9).
- Article 5 establishes the principle of the provision of benefits abroad, including old-age, invalidity and survivors' benefits, death grants and employment injury pensions.
- With regard to the maintenance of social security rights, Article 7 provides that States that have ratified the Convention must "endeavour to participate in schemes for the maintenance of acquired rights and rights in the course of acquisition under their legislation of the nationals" of States for which the Convention is also in force.

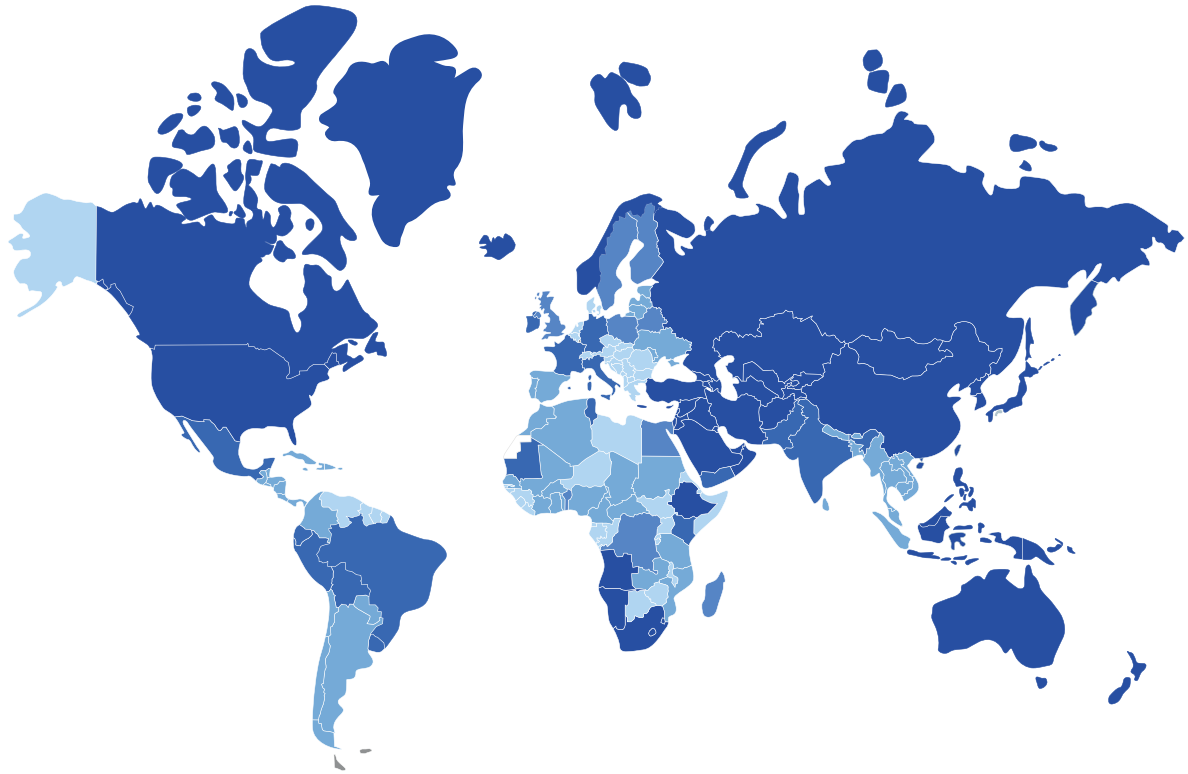
Lastly, the Convention's provisions are applicable to refugees and stateless persons, for whom equality of treatment must be secured without any condition of reciprocity (Art. 10). As at October 2021, there are 38 States parties to the Convention. However, the aforementioned ILO mapping of 120 countries shows that the laws of some States that have not ratified it nevertheless include provisions on equality of treatment. On the other hand, a few States that have ratified the Convention do not provide for such equality in their national legislation.

Box 2.6 Basic social security guarantees for all residents and children (Recommendation No. 202, para. 6): Observations of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) in the 2019 General Survey concerning the Social Protection Floors Recommendation, 2012 (No. 202)

In its 2019 *General Survey*, the CEACR: "Equal treatment in coverage and access to social security should be guaranteed to all members of society, who should stand together, non-nationals and nationals, to provide this protection as an expression of solidarity" (ILO 2019s, para. 142). It also emphasizes that non-discrimination is a key principle on which the right to social security is premised and which "pertains to all persons, irrespective of status and origin" (ILO 2019a, para. 143).

The Committee calls on member States "to establish the principle of equality of treatment to ensure that non-national residents, irrespective of their immigration status, have the same social security rights as nationals" (IL0 2019a, para. 143). It "hopes that member States will make efforts to provide non-nationals, even those in an irregular status, including workers in an irregular situation, with access to basic benefits, and particularly to any medical care that is urgently required" (ILO 2019a, para. 143).

► **Figure 2.1 Countries that grant equality of treatment with respect to social security (excluding healthcare), with an indication of whether they have ratified Convention No. 118**



Maintenance of Social Security Rights Convention, 1982 (No. 157) and Recommendation, 1983 (No. 167)

In the same vein, the Maintenance of Social Security Rights Convention, 1982 (No.157) provides rules for the adoption of national legislation implementing the principles of the maintenance of rights in the course of acquisition and of acquired rights for migrant workers in respect of all branches of social security. As at October 2021, it has been ratified by only four countries: Kyrgyzstan, the Philippines, Spain and Sweden.

The Convention is supplemented by the non-binding Maintenance of Social Security Rights Recommendation, 1983 (No. 167), which includes in annex model provisions for the conclusion of bilateral or multilateral social security instruments and a model agreement for the coordination of such instruments. These model provisions include common definitions and rules on determination of the applicable legislation. They also cover the maintenance of rights in the course of acquisition and acquired rights and provision of benefits abroad, including various methods for the totalization of benefits and provisions concerning the maintenance of rights in relations between or with provident funds (Hirose, Nikac and Tamagno 2011, p.12).

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

Adopted by the ILC in 1925, the Equality of Treatment (Accident Compensation) Convention (No. 19) demonstrates the ILO's role in promoting migrant workers' rights since its inception. The Convention requires that nationals of States parties thereto who suffer personal injury owing to work accidents be accorded "the same treatment in respect of workmen's compensation" as that granted to the nationals of the employment country, without any condition of residence (Art. 1). Although this Convention has interim status and is currently open for denunciation, it remains in force for States that have ratified it and, with 121 States parties, it is one of the most ratified ILO Conventions.

2.3.2 ILO migrant workers instruments

Migration for Employment Convention, 1949 (No. 97) and Recommendation (Revised), 1949 (No. 86)

The Migration for Employment Convention, 1949 (No. 97) was developed in order to facilitate the movement of surplus labour and to protect migrant workers from exploitation and discrimination. It covers immigrants who are lawfully within the territory of a State party. During the discussion leading to its adoption, the CEACR was of the opinion that it "should apply only to migrants for employment, including, of course, refugees and displaced persons migrating for employment, and not to migrants in general" (ILO 2016). The categories excluded are frontier workers, seafarers, members of liberal professions and artists entering employment on a short-term basis (Art. 11(2)).

The Convention enshrines the principle of not less favourable treatment in various areas, including conditions of employment, freedom of association and social security (Art. 6), and encourages the conclusion of labour agreements to regulate migration for employment, whenever desirable, in cases where number of migrants is sufficiently large (Art. 10). It also requires States to facilitate labour migration and to establish free assistance and information services (Annex I, Art. 6).

The Convention is complemented by the Migration for Employment Recommendation (Revised), 1949 (No. 86) and, in annex thereto, the Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons, aimed at helping member States to formulate appropriate clauses when drafting bilateral agreements on the organization of migration for employment. The Model Agreement encourages States to conclude a separate bilateral social security agreement.

Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and Migrant Workers Recommendation, 1975 (No. 151)

The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) complements Convention No. 97 and expands its protection and scope. It was developed to facilitate and regulate migration flows and thus to eliminate irregular migration, suppress the activities of organizers of clandestine movements of migrants and provide minimum protection to all migrant workers.

It is a flexible instrument that allows States to ratify Part I, Part II or both. Part I, on migration in abusive conditions (Arts 1–9), includes provisions on the protection of all migrant workers, irrespective of their migrant status, upon loss of employment; in fact, such loss should not automatically result in loss of residence or work permit (Art. 8(1)). However, this should be distinguished from the right to stay. Migrants in an irregular situation are entitled to equal treatment in respect of rights arising out of past employment with regard to remuneration, social security and related benefits (Art. 9(1) and (2)).

Part II, on equality of opportunity and treatment (Arts 10-14), covers only migrants in a regular situation. The Convention establishes the principle of equality of treatment in respect of social security by requiring States parties to adopt a national policy guaranteeing equality of opportunity and treatment for migrant workers and members of their families who reside lawfully within their territory in respect of employment and occupation, social security, and trade union and cultural rights (Art. 10). It also provides for the conclusion of multilateral or bilateral agreements with a view to resolving problems arising from its application (Art. 15).

The complementary Migrant Workers Recommendation, 1975 (No. 151) guarantees migrant workers and members of their family effective equality of opportunity and treatment with nationals of the host country in respect of "social security measures and welfare facilities and benefits provided in connection with employment" (para. 2). It states that "migrant workers whose position has not been or could not be regularised should enjoy equality of treatment for themselves and their families in respect of rights arising out of present and past employment as regards remuneration, social security and other benefits, among others" (para. 8(3)) and that:

(1) A migrant worker who leaves the country of employment should be entitled, irrespective of the legality of his stay therein--

a. to any outstanding remuneration for work performed, including severance payments normally due;

b. to benefits which may be due in respect of any employment injury suffered;

c. in accordance with national practice--

► **Additional information**

Video 1: The Role of ILO Conventions on Migrant Workers in Realizing Safe, Orderly and Regular Migration

Video 2: ILO Conventions on Migrant Workers: flexibility, validity, relevance and scope

(i) to compensation in lieu of any holiday entitlement acquired but not used;

(ii) to reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements: Provided that where social security contributions do not permit entitlement to benefits, every effort should be made with a view to the conclusion of bilateral or multilateral agreements to protect the rights of migrants. (para. 34).

2.3.3 Other relevant ILO instruments

Domestic Workers Convention, 2011 (No. 189) and Recommendation, 2011 (No. 201)

The International Labour Conference, at its 100th session, adopted the Domestic Workers Convention, 2011 (No. 189), which recognizes that "domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights" (fourth preambular paragraph).

The Convention, which entered into force in 2013 and, as at October 2021, has been ratified by 35 member States, calls on States parties to take appropriate measures "to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection", including maternity benefits.

It is supplemented by the Domestic Workers Recommendation, 2011 (No. 201), which encourages States to adopt additional measures to ensure the effective protection of migrant domestic workers, such as facilitating the payment of social security contributions, concluding bilateral social security agreements and securing access of domestic workers to complaint mechanisms at the national level.

ILO Multilateral Framework on Labour Migration (2006)

The Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-based Approach to Labour Migration (2006) calls for a rights-based approach to labour migration and addresses the need to promote decent work for all. Developed based on the relevant international labour standards and an analysis of policy and of the ILO's mandate, it includes nine sections, 15 principles and some 120 guidelines. With regard specifically to social protection, it promotes the implementation of a national policy ensuring equality of treatment in respect of regular migrant workers and, where appropriate, migrant workers with irregular status and supports the conclusion of social security agreements to ensure the portability of entitlements (Guideline 9.9).

► Box 2.7 COVID-19 and a few examples of countries' response with respect to healthcare

During a pandemic, the most essential aspect of social protection is ensuring nationals' and non-nationals' access to quality healthcare. As such, in line with the international Conventions and rights outlined in the previous sections, countries must ensure that not only their citizens, but also non-nationals present in their territory receive the support required. Some States are extending their social protection mechanisms in the area of healthcare specifically to migrants and their families (ILO 2020b):

France and Spain – These two countries have extended the residence permits of migrants and their families for an additional three months to ensure their access to healthcare.

Portugal – The State has regularized the status of non-nationals, including asylum seekers with pending applications, thus entitling them to healthcare, employment, social support and housing.

Colombia – Migrants and refugees are entitled to free medical consultations, irrespective of their migratory status.

Thailand – Nationals and non-nationals with a valid work permit who contract COVID-19 receive free treatment for the first 72 hours.

Qatar – Free medical services, including medical check-ups and quarantine services, are provided to migrants.

► 2.4 Putting ILO standards into practice: ratification, compliance and implementation at the national level

Ratification is a formal procedure whereby a State accepts a Convention as a legally binding instrument. States are the principal subjects of international law. By ratifying a convention, they assume obligations at the international level and undertake to bring their national law and practice into line with the international standards established therein.

In some countries with a monist legal regime, ratified conventions are automatically incorporated into national law and can thus be applied directly by the national courts. Countries with a dualist regime are required to translate a convention into domestic law before it can be applied by the national courts, after which implementing legislation must be adopted in order to give full effect to the rights set out in the instrument. In practice, the distinction is more complex; countries may have varying degrees of these regimes or a mix thereof. It is, however, important to clarify at the national level the relationship between ratified international or regional human rights instruments and national legislation.

In addition to their obligation to give effect to the provisions of a ratified Convention in national law and practice, States parties are also required to present reports on the application of each Convention on a regular basis pursuant to article 22 of the ILO Constitution.

2.4.1 The ILO's supervisory procedures for ensuring compliance with international labour standards

As a standard-setting organization, the ILO, through the tripartite representatives of its member States, develops and adopts Conventions and Recommendations, a number of which have been outlined in the previous section. Compliance with these international labour standards is monitored through the Organization's regular supervisory system by the ILO's Committee of Experts on the application of Conventions and Recommendations (CEACR) and the International Labour Conference's tripartite Committee on the Application of Conventions and Recommendations (CAS). There are also special procedures, which are described below.

Member States that have ratified an ILO Convention are subject to the regular supervisory procedure and must report periodically on their implementation of the instrument to the CEACR, which can make two kinds of comments: observations and direct requests. Observations are the Committee's notes on whether a State has properly implemented the Conventions and are published in its annual report.[34] They are generally made where there is persistent non-compliance with a particular Convention on the part of a State but can also be used to point out an improvement or a measure taken pursuant to a Convention. The Committee's direct requests concern more technical questions or requests for information and clarification. They are not published and are communicated directly to the Government concerned.

The Committee's comments often reflect general problems that are regularly encountered in the implementation of specific provisions. In the past, as regards social protection, they have concerned the provision of full statistical information, the adjustment of long-term benefits in order to take into account changes in the cost of living and prevent loss of the real value of pensions, and difficulties in the application of Conventions arising from reforms of social security systems (Kulke, Chichon and Pal 2007, p. 21).

For instance, in 2015, while examining Thailand's implementation of the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), the Committee welcomed the efforts of the Thai Social Security Office to facilitate migrant workers' access to benefits from the Workmen's Compensation Fund and requested the Government to provide information on the decisions taken by the Office and the practical impact of those measures on employers' compliance with their obligation to compensate their workers, whether documented or undocumented, for occupational injuries (ILO 2015).

The CEACR publishes an annual General Survey on member States' law and practice with respect to a particular subject, chosen by the ILO Governing Body. The General Survey considers all member States, regardless of whether they have ratified a Convention or adopted a related Recommendation.

The CAS is a standing committee of the International Labour Conference (ILC). It is made up of Government, Employer and Worker delegates and is tasked with tripartite review of the annual report of the CEACR. It selects a few observations from this report for discussion and invites the Governments mentioned therein to provide further information. In many cases, the CAS makes recommendations to the Conference, which may decide to recommend ways in which these Governments can address the issues raised in the observations.

This regular system is different from the ILO's special procedures, which are generally designed to respond to representations and complaints made by employers' and workers' representatives, member States and the Governing Body of the Organization (under, respectively, arts 24–25 and 26–33 of the ILO Constitution) in respect of a State's violation of ILO Conventions.

2.4.2 Why ratify ILO Conventions?

The ratification of Conventions is a key step towards enhancing migrant workers' enjoyment of their social protection rights and, in the context of international labour migration, is beneficial for countries of origin and destination. It is also good practice as it protects both non-national workers and a country's own nationals.

Conventions can guide States in the formulation of labour migration policies at various levels; their ratification sets minimum standards in the area of social security, ensures the application of common rules by the various States concerned with migration and is a strong indicator of a State's commitment to enhancing its national migration laws and policies.

Certain Conventions are flexible, allowing ratifying States to accept one or more of their parts or provisions. States that have ratified a Convention can benefit from international monitoring, guidance and technical assistance provided by the ILO or through its supervisory mechanism in order to support its application.

Furthermore, the ILO's tripartite structure ensures that social security standards and principles are backed by governments, employers and workers alike since they reflect international consensus between governments and the social partners on how a specific problem posed by international labour migration, such as the lack of coordination of social security schemes, can be addressed.

[34] For more information on annual reports since 1932, please visit: https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm.

2.4.3 Status of ratifications in the world

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is widely ratified with 171 States parties as at June 2021. However, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRMW) has been signed by only 68 countries and ratified by 55. The two ILO Conventions that focus specifically on migrant workers are the Migration for Employment Convention (No. 97), 1949 and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). As at October 2021, 53 States have ratified Convention No. 97 (including 28 that have excluded one or more of its Annexes) and 28 have ratified Convention No. 143 (Table 2.2).[35]

Burkina Faso, Tajikistan and Venezuela (Bolivarian Republic of) are the only three countries that have ratified the ICPRMW and the two migrant-specific ILO Conventions without any reservations. Four other countries have also ratified them but have excluded some of their provisions: Albania (Part II of Convention No. 143), Algeria (Annex II to Convention No. 97), Bosnia and Herzegovina (Annex III of Convention No. 97) and the Philippines (Annexes II and III to Convention No. 97).

The most widely ratified social security conventions of relevance to migrant workers are Conventions Nos 19 and 102 with 121 and 60 ratifications, respectively, as at October 2021.

► **Table 2.2 Number of ratifications, by ILO Convention**

ILO Convention	Number of ratifications (as at October 2021)
Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) (interim status)	121
Migration for Employment Convention (Revised), 1949 (No. 97)	53
Social Security (Minimum Standards) Convention, 1952 (No. 102)	60
Equality of Treatment (Social Security) Convention, 1962 (No. 118)	38
Employment Injury Benefits Convention, 1964 (No. 121) [Schedule I amended in 1980]	24
Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128)	17
Medical Care and Sickness Benefits Convention, 1969 (No. 130)	16
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)	28
Maintenance of Social Security Rights Convention, 1982 (No.157)	4
Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168)	8
Maritime Labour Convention (as amended), 2006	98
Domestic Workers Convention, 2011 (No. 189)	35

[35] For current ratification numbers, see the ILO's NORMLEX website: https://www.ilo.org/dyn/normlex/en/f?p=1000:12001:::::.

While the low number of ratifications of these international instruments reflects an important gap in the application of international standards at the national and regional levels, this does not mean that migrant workers have no protection under national legislation and bilateral or multilateral agreements on social protection. For example, at the national level, a State that has not ratified the Conventions establishing the principle of equality of treatment[36] may choose to accord migrants and its nationals the same treatment without being bound by international obligations. The low level of ratification of some of the Conventions that provide for equality of treatment in respect of migrant workers does not signify that equality is not ensured at the national level by non-signatory countries. In fact, many destination countries afford such treatment to non-nationals under their jurisdiction. Moreover, other international and regional agreements can influence national legislation and practice.; For example, the EU's Migration Directives establish the social security rights of EU Blue Card holders and migrant workers who hold long-term residence permits.

▶ 2.5 Conclusion

The right to social security is enshrined in the Universal Declaration of Human Rights (1948) and in several international and regional human rights instruments, including the International Covenant on Economic, Social and Cultural Rights (1966), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), the Charter of Fundamental Rights of the European Union (2000) and the Arab Charter on Human Rights (2004). The ICRMW draws a distinction between migrants in a regular and those in an irregular situation with respect to certain rights yet acknowledges that human rights should apply to all migrant workers.

These rights and protections have been shown to lie also at the heart of the ILO's mandate, which seeks, among other priorities, to protect migrant workers and extend social security measures to all in need of such protection. Key principles related to the coordination of social security schemes and the protection of migrant workers are enshrined in ILO Conventions and Recommendations and include equality of treatment, determination of the applicable legislation, maintenance of acquired rights and provision of benefits abroad, maintenance of rights in the course of acquisition and mutual administrative assistance.

The Social Security (Minimum Standards) Convention, 1952 (No. 102) is the ILO's flagship social security Convention and sets worldwide agreed minimum standards for all nine branches of social security. This Convention, together with the Social Protection Floors Recommendation, 2012 (No. 202), serve as a benchmark and reference for the development of comprehensive social security systems at the national level. Convention No. 102 also establishes the principle of equality of treatment between non-national and national residents across all nine branches of social security with certain exceptions. This principle is also at the centre of the Equality of Treatment (Social Security) Convention, 1962 (No.118). Eight ILO Conventions include provisions on the maintenance of rights in the course of acquisition, acquired rights and the provision of benefits abroad (Table 2.1). It is important to note that the Maintenance of Social Security Rights Recommendation, 1983 (No.167) includes in annex model provisions for the conclusion of bilateral or multilateral social security instruments, as well as a model agreement.

In principle, unless otherwise stated, all ILO instruments apply to migrant workers. In addition, several specific instruments on migrant workers have been adopted. These include, among others, the Migration for Employment Convention, 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), the Migration for Employment Recommendation (Revised), 1949 (No. 86) and the Migrant Workers Recommendation, 1975 (No. 151). A number of instruments, including the Domestic Workers Convention, 2011 (No. 189), include provisions aimed specifically at migrant workers.

Nevertheless, although a substantial array of instruments exists and many countries acknowledge the importance of social protection, large numbers of migrants and their families around the world continue to face challenges in the effort to exercising their rights. The ratification and enforcement of these international instruments is an important step towards the provision of more comprehensive protection to migrant workers. This will, however, require strong political commitment to making the right to social security a reality for all, irrespective of an individual's origin, race, gender, or age.

[36] See Table 2.2

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Chapter 3

Accessing social security: Bilateral and multilateral social security agreements

▶ Key messages

- The conclusion of bilateral or multilateral social security agreements is one of the most effective and commonly used policy options for extending social protection to migrant workers.
- These agreements are treaties designed to coordinate the social security schemes of two or more countries in order to overcome barriers that might otherwise prevent migrant workers from receiving benefits under the system of any of the countries in which they have worked.
- Social security agreements should contain provisions that embody the following key principles:
  - equality of treatment between nationals and non-nationals;
  - determination of the applicable legislation;
  - maintenance of acquired rights and payment of benefits abroad;
  - maintenance of rights in the course of acquisition (totalization);
  - reciprocity; and
  - mutual administrative assistance.
- While bilateral social security agreements between two parties are more common and can be easier and faster to conclude, multilateral and regional agreements between three or more parties have the advantage of setting common standards and rules for coordination in all of the States parties thereto.
- Bilateral and multilateral agreements are not mutually exclusive; they can be complementary and pursued simultaneously.
- Since the aim of concluding social security agreements is primarily to enhance migrant workers' social protection, the choice between pursuing a bilateral or a multilateral agreement should be based on the best interests of the workers and their families.
- Negotiating a social security agreement generally involves eight steps: (1) preliminary discussions; (2) preparation of an initial draft of an agreement by one of the parties; (3) negotiations; (4) review of the agreed text; (5) signing the agreement; (6) approving the agreement; (7) conclusion of an administrative agreement and preparation of application forms; (8) entry into force of the agreement.
- Once an agreement has entered into force, its implementation involves three main tasks: (1) establishing the administrative structures, the business processes and the roles and responsibilities for management of the agreement; (2) putting in place information and communications technology (ICT)-based mechanisms, particularly for exchanging data between institutions; and (3) applying the agreement using the aforementioned mechanisms and ensuring ongoing communication between the liaison offices established therein.
- Social security agreements that are well designed and implemented effectively can contribute significantly to realization of the right to social security for all.
- There are approximately 660 social security agreements worldwide (ISSA 2021).

► 3.1 Introduction

Despite the existence of a clear international legal framework governing the right to social security, this right does not always translate into universal effective access to healthcare and social security benefits for all migrant workers around the world. On the contrary, in many countries legal, administrative and other obstacles hinder migrants' access to social protection.

In order to overcome these obstacles, a variety of policy options and measures are available to policy-makers. The conclusion of social security agreements is one of the most comprehensive and most commonly used options for ensuring the coordination of social security schemes and the portability of entitlements and benefits. With rising levels of migration in recent decades, more States are concluding such agreements, yet their implementation and proper enforcement remains challenging for many countries.

As this chapter will show, effective implementation requires concrete operational mechanisms and close collaboration between the institutions of the States parties to the agreement, especially with regard to the exchange of data (ISSA n.d.). Section 1 presents the rationale for social security agreements, their objective and the key elements that they should contain; section 2 provides current practices and examples, both bilateral and multilateral; section 3 explains the process of negotiating a social security agreement; and section 4 provides an overview of institutional, operational and administrative considerations. The chapter draws on several studies and guidance documents published by the ILO and the ISSA and, in particular, *Social Security for Migrant Workers: A rights-based approach* (ILO 2011).

► 3.2 Bilateral and multilateral agreements: rationale, key elements and challenges

Bilateral and multilateral social security agreements are treaties that are governed by international law and are designed to coordinate the social security schemes of two or more countries in order to overcome, on a reciprocal basis, the barriers that might otherwise prevent migrant workers from receiving benefits under the system of any of the countries in which they have worked (Hirose, Nikac and Tamagno 2011, p.19).

3.2.1 Rationale

Today, most States are either destination, transit, or origin countries; thus, a State may be the country of origin of a large migrant population while hosting workers from abroad. These cross-border movements have an impact on migrant workers' access to social protection and coverage and on the State's responsibility to ensure that they do not lose their acquired entitlement to social protection benefits. Migrant workers are among the most difficult groups to cover as they move from one country to the other. Since they often work in the informal economy, they may not contribute to any social security scheme and may thus not be eligible to benefit from them. Even migrant workers who contribute to such schemes may not be eligible for social protection benefits because they do not meet the relevant legal requirements.

As discussed in Chapter 2, various ILO Conventions and Recommendations,[37] as well as the ILO Multilateral Framework on Labour Migration (2006), call for the conclusion of social security agreements as they are essential to the coordination of social protection benefits across countries, and thus to the enjoyment of migrants' rights to social protection.

► Box 3.1 The ILO Multilateral Framework on Labour Migration

The ILO Multilateral Framework on Labour Migration (2006) provides guidelines for a right-based approach to labour migration and calls for the conclusion of social security agreements

- 9.9 entering into bilateral, regional or multilateral agreements to provide social security coverage and benefits, as well as portability of social security entitlements, to regular migrant workers and, as appropriate, to migrant workers in irregular situation;
- 9.10 adopting measures to ensure that migrant workers and accompanying family members are provided with health care and, at a minimum, with access to emergency medical care, and that regular migrant workers and accompanying family members receive the same treatment as nationals with regard to the provision of medical care [...].

[37] The Equality of Treatment (Social Security) Convention, 1962 (No.118), the Maintenance of Social Security Rights Convention 1982 (No.157) and the Maintenance of Social Security Rights Recommendation, 1983 (No. 167).

This global recognition of the need to establish mechanisms for the portability of social security entitlements has been recognized more recently in the Global Compact for Safe, Orderly and Regular Migration, a non-binding intergovernmental agreement which embodies a common approach to international migration and through which States agree to help migrant workers of all skill levels to access social protection in their countries of destination and to ensure the portability of earned benefits to their countries of origin or of future employment. The Compact sets 23 objectives for better managing migration at the local, national, regional and global levels. Objective No. 22 deals with the extension of social protection to migrant workers.

► Box 3.2 The Global Compact for Safe, Orderly and Regular Migration

OBJECTIVE 22: Establish mechanisms for the portability of social security entitlements and earned benefits

To realize the commitment under objective 22, governments will draw from the following actions:

- a) Establish or maintain non-discriminatory national social protection systems, including social protection floors for nationals and migrants, in line with the ILO Recommendation 202 on Social Protection Floors
- b) Conclude reciprocal bilateral, regional or multilateral social security agreements on the portability of earned benefits for migrant workers at all skills levels, which refer to applicable social protection floors in the respective States, applicable social security entitlements and provisions, such as pensions, healthcare or other earned benefits, or integrate such provisions into other relevant agreements, such as those on long-term and temporary labour migration
- c) Integrate provisions on the portability of entitlements and earned benefits into national social security frameworks, designate focal points in countries of origin, transit and destination that facilitate portability requests from migrants, address the difficulties women and older persons can face in accessing social protection, and establish dedicated instruments, such as migrant welfare funds in countries of origin that support migrant workers and their families."

Source: UN 2018

3.2.2 Key elements of social security agreements

Social security agreements may include any of the nine branches[38] of social security defined in the ILO's flagship Social Security (Minimum Standards) Convention, 1952 (No. 102); the Recommendation on the Maintenance of Social Security Rights, 1983 (No. 167) offers a model agreement in annex thereto.[39] In practice, social security agreements address the lack of coordination between social security schemes through the inclusion of provisions that enshrine the key principles[40] of equality of treatment, maintenance of rights in the course of acquisition (totalization), maintenance of acquired rights and payment of benefits abroad and determination of applicable legislation.

Box 3.3 Key principles promoted by ILO Conventions and Recommendations with regard to the coordination of social security schemes and the protection of migrant workers

- Equality of treatment: Migrant workers should have, to the extent possible, the same rights and obligations as nationals of the destination country with regard to social security coverage and social security benefits;
- Determination of the applicable legislation by establishing rules to ensure that migrant workers are governed by the legislation of only one country at any given moment. An employed person should normally be subject to the legislation of the country in which he or she is employed (principle of lex loci laboris). Exceptions to this principle are sometimes made in the case of posted workers, self-employed migrant workers and temporary migrant workers.
- Maintenance of acquired rights and provision of benefits abroad: Migrant workers who have acquired rights in one territory should be guaranteed those rights in any of the States parties to the agreement. Under this principle, benefits payable under the legislation of one State party should be paid abroad and should not be subject to any restrictions (reduction, modification, suspension, cancellation, or confiscation) simply because the person resides in the territory of another State party.
- Maintenance of rights in the course of acquisition (also referred to as totalization) provides for the accumulation of qualifying periods under different national social security schemes with a view to the aggregation or totalization of periods of insurance, employment or residence that may be required for the acquisition, maintenance or recovery of rights and for sharing the costs of benefits paid.
- The provision of mutual administrative assistance ensures the coordination and the data and information exchange required for the implementation of social security agreements.

In addition, reciprocity requires each States party to an agreement to apply the same mechanisms as the other States parties in order to make its social security benefits more accessible to migrant workers. However, reciprocity in bilateral agreements can also have a limiting effect, particularly for refugees (since they cannot avail themselves of the protection of their countries of origin) and during negotiations where the social security systems of two States parties to a bilateral agreement are at different stages of development.

[38] These branches may cover both contributory and non-contributory benefits.

[39] ILO n.d. "Social Protection for Migrant Workers".

[40] For an overview of the specific Conventions and Recommendations that promote these key social security principles, see Table 2.1.

Social security agreements commonly include in their first article or clause definitions of the main terms used in the agreement. These definitions are agreed by the parties during the negotiations and used throughout the negotiation of the text and the administrative arrangement. Thereafter, the agreement normally includes a section establishing its personal and material scope; the content may vary as to the category of workers, branches or type of schemes (general or specific) and benefits covered.

The content will also vary as to the key social security principles enshrined therein (Box 3.3). For example, there are a variety of potential apportionment and calculation methods for the maintenance of rights in the course of acquisition. With respect to determination of the applicable legislation, the law of the country of employment generally prevails. In practice, however, provisions on the applicable legislation may vary from one agreement to another and may include a variety of exceptions for different categories of workers and situations (such as posted workers, temporary migrant workers and international transport workers).

Social security agreements include provisions establishing the competent authority – the ministry or institution responsible for social security – and the competent institutions and agencies in each of the States parties.

Some countries have considered harmonizing their national legal frameworks in order to fully align their social protection systems rather than coordinating social security through agreements designed to facilitate the portability of entitlements. However, this approach ignores the substantial challenges of harmonizing social security schemes across countries.

► Table 3.1 Coordination vs. harmonization[41]

Coordination of social protection systems	Harmonization of social protection systems
► "Coordination" means establishing mechanisms and procedures to achieve mutually agreed objectives while maintaining and respecting the rules and definitions of each system. ► Coordination ensures that migrant workers and their families can transfer, maintain and receive their social protection entitlements or benefits when they move from one country to another. ► It also establishes administrative links between different social security systems. ► This is a tried and tested approach that has been widely used for decades by countries around the world.	► "Harmonization" means fully aligning different social protection systems or replacing the definitions and rules of one or both systems with common definitions and rules. ► While harmonization is theoretically feasible, the practical and political challenges are enormous.

[41] Hirose, Nikac and Tamagno 2011, p.24.

3.2.3 Obstacles and challenges

Bilateral and multilateral agreements that are implemented effectively and supported by administrative coordination, common databases and shared information systems are essential to ensuring the portability of social security entitlements and benefits. Nonetheless, they present certain obstacles and challenges.

For instance, the social security scheme of one State party may be insufficiently developed, making it problematic to conclude reciprocal agreements. States may also lack the institutional and administrative capacity to provide social protection benefits and implement the agreement. This disparity between different social security systems, which often reflects economic gaps between countries with different levels of income, may lead to an unequal power balance during negotiations.

Significant differences in social security schemes, for example with regard to the design and level of benefits (such as provident funds or social insurance schemes) may pose a challenge for coordination between them. Contrary to common belief, these challenges are not insurmountable; Recommendation No. 167 provides useful guidance in this regard.

3.2.4 Advantages and disadvantages of bilateral and multilateral social security agreements

International labour standards promote the conclusion of multilateral and bilateral social security agreements, both of which have advantages and disadvantages. And while the conclusion of bilateral agreements may be the basis or the starting point for entering into a multilateral agreement, in some regions the opposite is true. Complementary bilateral and multilateral agreements may also co-exist.

Equal protection versus differences in protection. Multilateral agreements set out equal protection for migrant workers across all States parties while bilateral agreements provide for protection that may vary from one agreement to another. The greatest benefit of a multilateral agreement is that it provides common standards on social protection and rules for coordinating the social security systems of all parties thereto, ensuring, for example, that all specified migrant workers who are nationals of one State party have the same rights when working and residing in another (ILO 2017, p. 42; Hirose, Nikac and Tamagno 2011, p. 38; Kulke 2006; and Holzmann, Koettl and Chernetsky 2005). In the absence of a multilateral agreement, migrant workers employed and residing in a host country may have different rights depending on whether the country of employment has entered into a bilateral agreement with the migrant's country of origin and, if so, what that agreement covers. Thus, migrant workers from country A who work and reside in country B might be able to totalize contribution periods for their pension benefits while migrant workers from country C who work and reside in country B might not have access to those benefits.

Uniformity of procedures and forms. Implementation and administration across States parties to a multilateral agreement is facilitated by common procedures and standard forms. If the same countries conclude various bilateral agreements rather than a single multilateral agreement, their procedures and forms for each agreement will be different, complicating administration of the various instruments.

Time and complexity of the negotiations. Bilateral agreements are considered more flexible and easier and quicker to draft and negotiate than multilateral instruments as there are fewer parties around the negotiating table. An eight-step process is usually necessary to the conclusion of a social security agreement (see section 3.5). However, the complexity and duration of that process can vary considerably depending on the number of countries involved, the political will of the parties, their experience in concluding social security agreements, their social security schemes, the number of branches included in the agreement and the level of development of their social security systems. Negotiations may take less than a year in some cases and more than ten years in others; for example, negotiations on the Southern Common Market (MERCOSUR) Multilateral Agreement on Social Security began in 1994 and the texts were ready and signed by 1997, but the Agreement did not enter into force until 2005 owing to delays in congressional approval. Irrespective of the type of agreement, it is impossible to estimate how much time will be required; however, bilateral agreements usually involve three rounds of negotiations in addition to telephone and email exchanges. Drafting and negotiating bilateral agreements before embarking on a more comprehensive multilateral agreement can help countries with little or no history of negotiating and administering such instruments to gain valuable experience and knowledge. On the other hand, regional dynamics, history and politics can facilitate the negotiation of certain multilateral agreements since "champion" countries may encourage others to follow; solidarity and common interests may foster cooperation between neighbouring countries; a group effect may induce

more reluctant countries to adhere to a common coordination framework; and some countries may assume the role of facilitator or mediator to settle any disputes that arise during the negotiations.

Since the aim of concluding social security agreements is primarily to enhance migrant workers' social protection, the choice between pursuing a bilateral or a multilateral agreement should be based on the best interests of the workers and their families. Other factors to take into consideration include political will and support, institutional capacity, the existing social security schemes and branches of the countries concerned, feasibility, available time and negotiation capacity. However, it is important to emphasize that bilateral and multilateral agreements are not mutually exclusive; countries can conclude both types of agreement with the same countries. These agreements may be complementary; for example, a bilateral agreement might provide a higher level of protection by enshrining more of the basic social security principles or covering different branches or groups of migrant workers, such as self-employed workers and domestic workers. Most agreements include provisions stating which agreement will prevail in the event of a conflict between them; one such example is found in Article 5 of the ECOWAS General Convention on Social Security. As many things may have changed since the signing of the original agreements, a new bilateral or multilateral agreement can also be negotiated to replace an old one. For example, Argentina signed its first agreement with Chile in 1971 and replaced it with a new one in 1996.

Ultimately the success of social security agreements, whether bilateral or multilateral, will rely on effective collaboration and exchange of information between the social security institutions involved and on their administrative and management capacities (see section 4).

► Table 3.2 Bilateral vs. multilateral social security agreements

Bilateral social security agreements	Multilateral social security agreements
► concluded between two countries; ► can result in different rights for migrant workers and their families from different countries; ► easier to conclude than a multilateral agreement although complex issues can arise; ► may be easier to coordinate and implement in practice as there are only two parties involved.	► concluded between three or more countries, often on a regional basis; ► provide a uniform set of rules for all migrants who have worked in the States parties and for their family members; ► ensure freedom of movement and consistency with the objectives of economic regions and trade agreements as they facilitate labour mobility within a (sub) region ► can be more lengthy or complex to negotiate although negotiations may also be facilitated by political leverage to include more reluctant countries within a region.

► Box 3.4 Portability of social security entitlements and earned benefits

ILO Conventions and Recommendations recognize and address the specific disadvantages faced by migrant workers in accessing social security. They call for increased social security coordination between countries through bilateral and multilateral agreements that provide for equality of treatment with the nationals of the host country and appropriate arrangements for the maintenance of migrants' acquired rights and rights in the course of acquisition.

There is no internationally agreed definition of "portability" and none of the ILO Conventions and Recommendation of relevance to migrants' social protection define the term. it is not used in the Equality of Treatment (Social Security) Convention, 1962 (No. 118), the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), the Maintenance of Social Security Rights Convention, 1982 (No. 157), the Social Security (Seafarers) Convention (Revised), 1987 (No. 165), the Migration for Employment Recommendation (Revised), 1949 (No. 86) and the Maintenance of Social Security Rights Recommendation, 1983 (No. 167)); only the Domestic Workers Recommendation, 2011 (No. 201) and the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205) as well as the ILO's 2016 Guiding Principles on the Access of Refugees and other Forcibly Displaced Persons to the Labour Market (para. 19) and Multilateral Framework on Labour Migration (2006) refer to portability, but without clarifying or defining its meaning.

Some scholars use the term "portability" to describe measures aimed at the maintenance of acquired rights and rights in the course of acquisition and the payment of benefits abroad (Holzmann et al. 2016; Taha, Siegmann and Messkoub 2015).

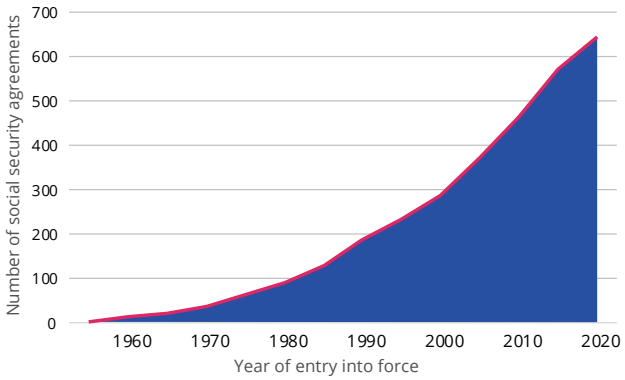
The portability of earned benefits differs from the portability of social security; the former may be understood to refer only to measures aimed at the maintenance of acquired rights and the payment of benefits abroad while the latter has a broader meaning as it also refers to the maintenance of rights (or benefits) in the course of acquisition and, depending on the authors, to the entire range of coordination principles.

Furthermore, it is important to distinguish between portability and exportability in the context of social security rights and benefits. Like "portability", the term "exportability" has no internationally agreed definition. Scholars, including Taha, Siegmann and Messkoub (2015) and Sabates-Wheeler and Koettl (2010), usually speak of the exportability of social security rights and benefits in reference to the maintenance of acquired rights and the payment of benefits abroad. While portability requires cooperation between the host and origin countries, exportability requires action on the part of only one country and the eligibility and level of benefits paid are determined by the social security institution of this country.

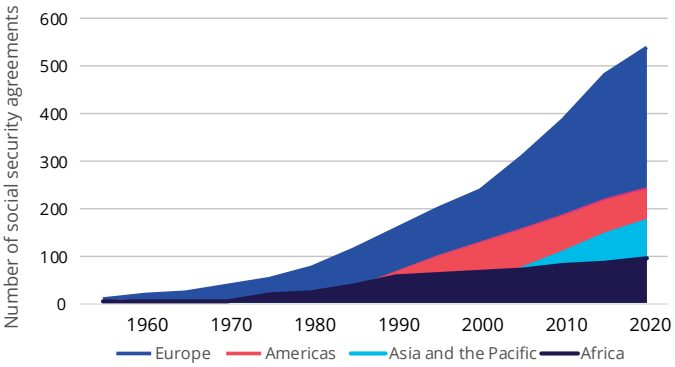
3.2.5 The ISSA database on social security agreements

Since 2018, the International Social Security Association (ISSA) has been collecting information on existing social security agreements worldwide, which will be made publicly available through an online database that will provide information on, among other things, the number of social security agreements, the branches and benefits covered and whether the agreements include provisions on posted workers and on the totalization of benefits. Preliminary results reveal a steady increase in the number of social security agreements signed, from around 100 in 1980 to 660 in 2020. These trends are common to all regions although the greatest number of bilateral agreements have been signed in Europe, followed in descending order by the Americas, Asia and the Pacific and Africa. With regard to the branches covered, almost 90 per cent of the agreements provide for old-age, disability and survivors' benefits while less than 50 per cent include other branches.

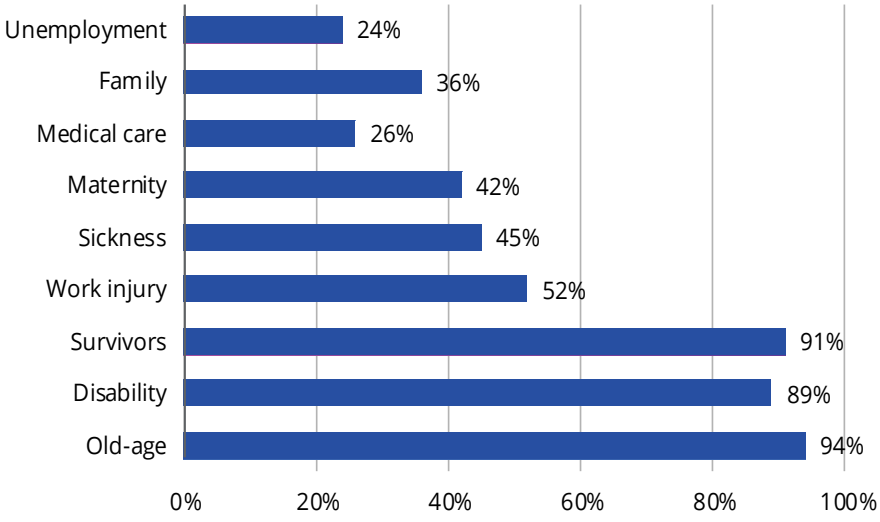
► **Figure 3.1 Change in the number of social security agreements, 1955-2020**



► **Figure 3.2 Increase in the number of bilateral social security agreements for each region, 1960– 2020**



► **Figure 3.3. Branches covered across all bilateral social security agreements as at 2020**



Source: ISSA, 2021

▶ 3.3 Bilateral social security agreements

3.3.1 France – Tunisia[42]

As an important country of immigration, France has concluded over 40 bilateral social security agreements with non-EU countries with a view to ensuring better coordination of social security schemes (EC 2014, p.9). The France – Tunisia social security agreement, which terminated in 1965 and was subsequently replaced by another agreement in 2003,[43] covers all branches of social security (including sickness, maternity, family, employment injury, old-age, invalidity and survivors' benefits) with the exception of unemployment benefits. It applies to salaried and self-employed workers, certain categories of civil servants, dependents of workers in these categories and "persons who are not undertaking an activity as employed or self-employed" (Art. 2(1c)).[44] By virtue of the principle of equality of treatment, Tunisian workers in France are entitled to the same social security benefits as French citizens. With respect to the applicable legislation, Tunisian workers in France are, in principle, subject to French social security legislation. In the case of workers who are employed in both France and Tunisia, the agreement allows for membership in both countries' social security regimes (Art. 5(1)). Tunisian workers who are temporarily posted to France by their employer for work purposes are subject to the legislation of Tunisia, provided that the period of posting does not exceed three years (Art. 5(2)). For Tunisian workers who have worked in both States, maintenance of rights in the course of acquisition is ensured through aggregation of the contributions applicable in the territory of each States party. Thus, insurance periods completed under the other party's legislation can be taken into account for the purpose of qualifying for benefits. Under this agreement, insurance periods of all contingencies can be totalized except in the case of employment injury benefits. The agreement also provides for the portability of benefits to the territory of the other State party. Hence, employment injury, old-age, survivors' and invalidity benefits acquired while working in France can be exported to Tunisia (EC 2014, p. 37).

3.3.2 Spain – Morocco[45]

Spain, another important EU immigration country, has concluded over 20 bilateral social security agreements with non-EU countries, including Ecuador, Mexico, Morocco, the Philippines, Tunisia and Peru.[46] An important feature of these bilateral agreements is that they guarantee equality of treatment with nationals as regard to access to social security benefits. This means that both healthcare and social security benefits should be accessible by nationals and non-nationals under the same conditions. One example is the agreement signed with Morocco in 1979, which is comprehensive in respect of the key social security principles and branches and the groups of migrant workers covered. It applies to workers who are or have been subject to the social security legislation of either State and to their dependents and survivors (Art. 3(1)). In addition, the agreement covers all contingencies provided for under the general social security scheme and includes specific categories of workers covered by the special schemes of Spain's social security system, such as agricultural workers, coal miners, seafarers, domestic workers and self-employed workers (Art. 2(1A)).[47]

3.3.3 Canada – Mexico

The Agreement on Social Security between Canada and Mexico[48] is another example of a bilateral social security agreement that incorporates the key social security principles. It was concluded in 1996 with the aim of improving the coordination of long-term benefits under Canada's Old Age Security Act[49] and the Canada Pension Plan.[50] Mexican workers account for a large proportion of Canada's migrant workers, many of them hired under the Seasonal Agricultural Workers Program (SWAP). By virtue of the principle of equality of treatment enshrined in the agreement, Mexican

42 This case study is a summary based on research conducted for Van Panhuys, Kazi-Aoul and Binette 2017.

43 It is complemented by a general administrative arrangement of 26 November 2004, as amended by an administrative arrangement of 16 January 2008.

44 Original: "*les personnes n'exerçant pas une activité salariée ou non salariée.*"

45 This case study is a summary based on the research conducted for Van Panhuys, Kazi-Aoul and Binette 2017.

46 Additional information is available at: http://www.seg-social.es/Internet_1/Normativa/index.htm?C1=1001andC2=2013.

47 In 2009, Spain also signed a bilateral social security agreement with Ecuador, which applies to all contributory benefits provided through the Spanish social security system and covers all categories of workers with the exception of civil servants and members of the military (Social Security Agreement between Spain and the Republic of Ecuador, Art. 2(1)(B)).

48 Agreement on Social Security between Canada and the United Mexican States, in force since 1 May 1996 (http://laws-lois.justice.gc.ca/eng/regulations/SI-96-32/page-2.html). Article 4 provides for equality of treatment between nationals and non-nationals of the States parties.

49 Old Age Security Act (R.S.C., 1985, c. O-9), available at: http://laws-lois.justice.gc.ca/eng/acts/O-9/.

50 Canada Pension Plan (R.S.C., 1985, c. C-8), available at: http://laws-lois.justice.gc.ca/eng/acts/C-8/.

workers are entitled to the same social security benefits as those granted to Canadian citizens and permanent residents. With regard to the portability of benefits, the Agreement stipulates that the rights acquired "shall not be subject to any reduction, modification, suspension, cancellation or confiscation by reason only of the fact that the person resides in the territory of the other Party, and they shall be paid in the territory of the other Party" (Art. 5(1)); thus, Mexican workers can collect long-term benefits acquired in Canada after their return to Mexico. In the event that they return to a country other than Mexico, a similar provision guarantees the payment of benefits in that country under the same conditions and to the same extent as nationals of Canada residing in that third State (Art. 5(2)). The Agreement includes provisions ensuring the maintenance of acquired rights and rights in the course of acquisition.

3.3.4 Malawi – Zambia[51]

The social security agreement between Zambia and Malawi, concluded in 2003 in order to address the lack of social protection of Malawian migrant workers in Zambia, is the only instrument in the Southern African Development Community (SADC) region that can be described as a social security agreement. However, it is not based on the principle of reciprocity since its provisions cover only Malawian migrant workers in Zambia, not Zambian migrant workers in Malawi. It provides for the payment of benefits abroad, thus allowing Malawians who have retired and returned to Malawi to receive their benefits in their home country rather than having to claim them in Zambia. The agreement guarantees healthcare benefits, including medical examinations, to temporary workers from Malawi – which is particularly important for mine workers – through the Zambian Workers Compensation Fund and includes coordination measures such as visits from the social security officials of both countries. It also provides for the establishment of a Joint Permanent Commission of Cooperation and a mechanism to facilitate the payment of social security benefits through the Malawi High Commission in Zambia.

3.3.5 Slovenia – Bosnia and Herzegovina

The bilateral social security agreement between Slovenia and Bosnia and Herzegovina, signed in 2007, is a comprehensive instrument that covers several branches of social security, including healthcare, old age, disability, survivors' pensions, occupational injury and illness, unemployment insurance, parental (including maternity leave) and child allowances. It contains provisions on determination of the applicable legislation, equality of treatment, the maintenance of rights in the course of acquisition (totalization), the maintenance of acquired rights and payment of benefits abroad, and administrative coordination. It also has provisions for posted workers, who are subject to the legislation of the State party where the employer is established if they stay for less than 48 months. Independent workers may remain subject to the legislation of the State party in which they carry out their activity if they stay for less than 24 months.

In an observation adopted in 2011, the CEACR found that Slovenia's application of the Agreement was not in full compliance with Convention No. 97. Article 5 of the Agreement raised issues with regard to equality of treatment since the majority of migrant workers from Bosnia and Herzegovina were prevented from exercising their right to unemployment benefits because they were not permanent residents. As a result, the States parties amended the Agreement in 2011, enabling migrant workers from Bosnia and Herzegovina with temporary residence status to qualify for unemployment benefits in Slovenia.

3.3.6 India – Japan[52]

One of the difficulties in negotiating bilateral agreements on social security arises where the States parties have different social security systems, as in the case of India and Japan. While India has a national system that includes the Employee's Provident Fund (EPF), the Employee's Pension Scheme (EPS) and deposit-linked insurance scheme.[53] Japan has a social insurance system based on, among other plans, a national pension programme with a flat-rate

[51] Mpedi and Nyenti, 2017.

[52] For more information, see the Japan Pension Service website (https://www.nenkin.go.jp/international/english/international/notesindia.html) and the India Ministry of External Affairs website (https://www.mea.gov.in/bilateral-documents.htm?dtl/26465/Social_Security_Agreements).

[53] See the SSA-ISSA Country Profile of India, available at: https://www.ssa.gov/policy/docs/progdesc/ssptw/2018-2019/asia/india.pdf.

benefit and a pension insurance programme with an earnings-related benefit.[54] Differences between national social security systems present a coordination challenge with respect to, among other things, the totalization of contribution periods.

Notwithstanding these differences, India and Japan signed a bilateral social security agreement in 2012 with entry into force as from 2016. The agreement seeks to ensure that migrant workers do not pay social security contributions twice. It covers old-age, disability, and survivors' pensions and provides for determination of the applicable legislation, equality of treatment, totalization of contribution periods, payment of benefits abroad and administrative collaboration. It is not a reciprocal agreement as the benefits provided by the two countries differ. The agreement also stipulates that in order to remain covered under the national social security system of the home country, employees must obtain a Certificate of Coverage and claim exemption from the host country's social security legislation. The agreement regulates the situation of posted workers and provides that the Certificate of Coverage can be obtained for up to five years and may be extended for a maximum of three more years, provided the relevant authorities of the two countries agree. The crews of ships and aircraft are also regulated. Self-employed workers are not included in the agreement as India has no mandatory pension system for this category of workers.

With regard to the Indian pension system, it is worth noting that for purposes of the totalization of pension benefits, the agreement does not apply to the EPF, which pays a lump-sum benefit at the time of retirement. The EPF, is however, subject to the provisions on the avoidance of dual coverage and on the payment of benefits. More specifically, Japan's old-age pension system requires 25 years of coverage; the coverage periods of workers who do not meet this requirement may be aggregated, provided that there are no overlapping periods between the two countries. On the other hand, the EPS requires a coverage period of ten years and allows workers who do not meet this requirement to add their periods of coverage under the Japanese pension system provided, once again, that there are no overlapping periods. Workers whose aggregated period of coverage in India and Japan is less than ten years are entitled to a lump-sum benefit under the EPS but may not totalize their EPS coverage period where the related benefits have already been paid.

In addition to old-age benefits, the agreement authorizes the early withdrawal of EPF contributions paid by Japanese workers in India upon completion of assignment with the possibility of a direct refund deposited in their foreign bank accounts.

3.3.7 Moldova – various countries[55]

In 2016, the ISSA recognized the Republic of Moldova's National Office of Social Insurance for its good practices in social security and awarded it a Certificate of Merit based on its extension of coverage to migrant workers through the conclusion of bilateral social security agreements with the main destination countries of Moldovans working abroad. In 2019, the country had close to 626,000 emigrants (UNDESA 2019).

Moldova has signed agreements on pension rights with other members of the Commonwealth of Independent States (CIS), including Belarus, Russia, Ukraine and Uzbekistan in 1995 and Azerbaijan in 1997. It has also signed bilateral social security agreements with 13 European countries: Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Germany, Hungary, Lithuania, Luxembourg, Poland, Portugal, Romania and Turkey.

Under these agreements, Moldovan migrant workers are entitled to the same rights, obligations and social security benefits as the nationals of these countries, including the right to receive their foreign pensions when they return home. The agreements include determination of the applicable legislation, totalization of contribution periods and payment of benefits abroad; most of them cover old age, invalidity and survivors' benefits and some also provide for sickness, maternity, occupational injury and disease, unemployment and family benefits.

The ILO provided technical support through the Republic of Moldova: Building Capacity for Coordination of Social Security for Migrant Workers project, which

[54] See the SSA-ISSA Country Profile of Japan, available at: https://www.ssa.gov/policy/docs/progdesc/ssptw/2018-2019/asia/japan.pdf.

[55] For more information, see the ISSA and ILO project webpage (https://www.ilo.org/global/topics/labour-migration/projects/WCMS_232848/lang--en/index.htm).

sought to improve the social security entitlements of Moldovan migrant workers by enhancing the Government's capacity for the negotiation, adoption and implementation of bilateral social security agreements. The project helped to improve the impact of migration on development and on poverty reduction by entitling Moldovan migrant workers and their families to social security benefits. During the project's timeframe (2009–2011), the country signed four of the aforementioned 13 social security agreements (with Bulgaria, Luxembourg, Portugal and Romania) and two administrative arrangements[56] (with Bulgaria and Portugal). In addition, negotiations were completed with five more countries and preliminary steps were taken with two countries (Austria and Estonia).

3.3.8 United States of America – various countries

Agreements signed by the US are statutorily mandated to be solely bilateral and to be concluded only with countries that have social security systems similar to its own (sect. 233 of the Social Security Act). The US has concluded 28 totalization[57] agreements since 1978: 18 with EU members (Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Spain and Sweden) and ten with non-European countries (Australia, Brazil, Canada, Chile, Japan, Norway, the Republic of Korea, Switzerland, the United Kingdom and Uruguay).[58]

These agreements provide for old-age pensions and survivors' and disability benefits but do not apply to Medicare, the US health insurance programme. They cover US citizens and residents employed abroad by a US employer or one of its foreign affiliates, regardless of the duration of the assignment. Employees of foreign affiliates of a US employer are, however, only covered under US social security if the employer has entered into an agreement with the US Treasury Department (sect. 3121 (I) of the Internal Revenue Code).

While all of these totalization agreements have common features, the complexity of and variations in the signatory countries' social security laws make each agreement unique. However, the principle of applicable legislation governs every agreement and provides that migrant workers are subject to the social security law of the country in which they are working. If the services are performed in the United States, US law mandates compulsory social security coverage for regular migrant workers, regardless of their citizenship, country of residence and length of stay. With the exception of the agreement with Italy, all of them include an exception for posted workers, who remain covered only by the country from which they were sent and are exempt from the obligation to contribute to the social security system of the host country for a maximum of five years. Self-employed workers are also covered under most totalization agreements, but their situation varies under each of them.

The agreements allow migrant workers who have not met all of the basic requirements for social benefits under one country's system to totalize (aggregate) their US and foreign entitlements, provided that the worker has at least six credits (approximately one and a half years of work in total) under the U.S social security system, and to qualify for a partial benefit in the US based on the proportion of the worker's total career spent in the country of payment. Similarly, workers may need to make a minimum contribution under another country's system in order for their US benefits to be aggregated for purposes of foreign benefit requirements.

► 3.4 Multilateral social security agreements

3.4.1 Andean Community (CAN) Instrument on Social Security

The CAN is a South American regional body comprising Bolivia, Colombia, Ecuador and Peru. During the creation and development of the Andean South Market, social protection for migrant workers was considered critical to labour migration in the region. In 2004, CAN Member States approved Decision No. 583, which replaced previous instruments on social security. The Ibero-American Social Security Organization (OISS) supported the adoption of the Decision No. 583, which was based on the EU regulations on social security and the MERCOSUR Multilateral Agreement. In fact, the Instrument's provisions were designed to be equivalent to the MERCOSUR Multilateral Agreement. The contingencies covered include healthcare, old age, survivorship and disability. Posted and self-employed workers are not included. The Instrument is a complement to the previously adopted Decision No. 545 on Andean labour migration.

[56] For more information on administrative arrangements, see section 3.5 under "Step 7".

[57] As stated above, the maintenance of rights in the course of acquisition is also referred to as "totalization": the accumulation of qualifying periods under different national security schemes with a view to the aggregation (or totalization) of insurance, employment or residence periods required for the acquisition, maintenance or recovery of rights and for sharing the costs of benefits paid.

[58] For more information, see the U.S. Social Security Administration (SSA) website (https://www.ssa.gov).

According to the transitional provisions of Decision No. 583, implementing regulations for the Instrument were to be adopted within six months of the Decision's issuance, but this has yet to be done. As a result, the Instrument cannot be effectively applied by CAN Member States. Decision No. 545 is also in need of implementing regulations.

3.4.2 Caribbean Community (CARICOM) Agreement on Social Security

The CARICOM Agreement on Social Security was signed in 1996 with entry into force as from 1997. It applies to 13 of the 15 CARICOM Member States[59] and to the five CARICOM associate members from British Overseas Territories.[60] In pursuit of CARICOM's goal of facilitating labour migration within the region, the instrument seeks to ensure that nationals of CARICOM countries and territories and their family members have access to social protection benefits while working in another CARICOM country or territory. The Agreement was signed with a view to harmonizing these States' social security legislation in order to promote regional cooperation, coordination, unity and integration.

The Agreement makes explicit reference to ILO Conventions in its preamble and is based on the principles of equality of treatment for residents of CARICOM Member States under their national social security systems; maintenance of rights acquired (with payment of benefits abroad) or in the course of acquisition (including totalization of contribution periods); protection and maintenance of such rights, regardless of any change of residence among the respective countries; and administrative assistance. It follows the model provisions for the conclusion of multilateral social security agreements, contained in annex to the ILO Maintenance of Social Security Rights Recommendation, 1983 (No 167).

The instrument covers invalidity, disability, old-age and survivors' pensions and death benefits. It applies to insured migrant workers who are or have been subject to the national legislation of one or more CARICOM Member States (generally the legislation of the State in which they work) and to their dependants and survivors, regardless of nationality. Its provisions also establish the applicable legislation, including for certain categories of insured persons (such as posted workers; the staff of diplomatic missions, consulates and international organizations; and seafarers). In the case of self-employed workers who reside in a CARICOM State other than the one in which the services are provided, the Agreement provides for application of the legislation of the former State unless otherwise stipulated in the latter's legislation. Benefits are paid in the currency of the host country. The instrument also includes provisions on the settlement of disputes.

3.4.3 Inter-African Conference on Social Insurance (CIPRES) Multilateral Convention on Social Security

CIPRES comprises 16 French-speaking countries[61] in West and Central Africa and the Indian Ocean.[62] Its Multilateral Convention on Social Security was adopted in February 2006 in order to better protect the social security rights of migrant workers in the region.

The Convention[63] covers all workers, members of their families and their survivors who are nationals of a State party to the Convention and are or have been subject to the social security scheme of any of the parties. It includes both in-cash and in-kind benefits and provides for old age, disability, death, employment injury, maternity, sickness and family benefits under all statutory social security schemes.[64] Its Preamble affirms the principles of equality of treatment with the nationals of the host country and maintenance of acquired rights and rights in the course of acquisition. The Convention's ratification by Senegal, one of the main migrant-receiving countries of the region (together with Gabon and Cameroon), in 2014 was an important milestone in ensuring enhanced access to social security benefits for migrant workers in these countries.

[59] Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Granada, Guyana, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago, but not Suriname or Haiti.

[60] Anguilla, Bermuda, the Cayman Islands, Turks and Caicos and the British Virgin Islands.

[61] Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, Comoros, the Congo, Côte d'Ivoire, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Madagascar, Mali, the Niger, Senegal and Togo.

[62] For more information, see: http://www.lacipres.org/.

[63] http://www.lacipres.org/presentation/article/traite.

[64] For more information, see: http://www.lacipres.org/prevoyance-sociale/article/prevoyance-sociale-en-afrique.

3.4.4 Economic Community of West African States (ECOWAS) General Convention on Social Security

Because the ECOWAS Member States[65] adopted the General Convention on Social Security in 2012 as a Supplementary Act to the revised ECOWAS Treaty (1993), it does not require ratification. It replaces all previous social security conventions between ECOWAS Member States with the exception of more advantageous bilateral and multilateral agreements.

The Convention is based on ILO Conventions No.118 and No.157; the ECOWAS Treaty and its Protocol on Free Movement of Persons (1993), the Right of Residence and Establishment (1979) and supplementary protocols thereto; and the African Union Migration Policy Framework for Africa (2006). The establishment of the Convention was intended to enhance the effective implementation of the ECOWAS Free Movement Protocols in Member States and to better coordinate their national social security systems. The Convention applies to migrant workers who are nationals of any ECOWAS Member State and who are or have been subject to the legislation of one or more of those States; their family members and survivors; and refugees and stateless persons who have acquired social security rights in the territory of an ECOWAS Member State and are residents thereof. It covers all nine social security branches and applies to general and special compulsory social insurance schemes, including employers' contributions and provident fund schemes.

It also includes all of the key social security principles: non-discrimination and equality of treatment between nationals and non-nationals of any ECOWAS Member State; maintenance of acquired rights (with payment of benefits abroad in the currency of the country in which the migrant works or resides); maintenance of rights in the course of acquisition (totalization of employment or contribution periods); and determination of the applicable legislation. With a few exceptions, such as posted and international transport workers, migrant workers are subject to the legislation of the country in which the service is provided. In terms of administrative assistance, ECOWAS Member States must share information on measures taken with a view to application of the Convention and on their legislation and legal reforms, as well as statistical information on beneficiaries and the amount of the benefits provided under the Convention. Their authorities and institutions must assist one another as if they were applying their own legislation.

The Convention also established the Committee of Experts on Social Security, whose tasks include handling all administrative matters concerning and questions arising from its application and fostering and developing cooperation between States parties with regard to social security for migrant workers and their families. It establishes a mechanism for the settlement of disputes between ECOWAS Member States concerning the interpretation or application of the Convention: initial negotiations, followed by arbitration by a jointly appointed body of three ECOWAS Member States (Art. 53). The Administrative Arrangements annexed to the Convention set out detailed procedures for its application.

3.4.5 The European Union Experience

The EU rules on coordination of social security apply to all 27 EU Member States, as well as Iceland, Liechtenstein, Norway and Switzerland[66], and cover all nine branches of social security. They are based on two main legal instruments, both of which came into force in 2010: Regulation (EC) No. 883/2004 [EU 2004]; and Regulation (EC) No. 987/2009 [EU 2009], also known as the 'Implementing Regulation'. These instruments replaced previous regulations, including Regulation No. 1408/71 and its Implementing Regulation No. 574/72, and any other social security convention applicable between EU Member States who fall under these new regulations (with some exceptions, detailed in Annex II to Regulation (EC) No. 883/2004). While the EU rules are legally binding regulations, they do not replace or harmonize national social security systems but provide for their coordination.

The right to social security is also established in Article 34 of the Charter of Fundamental Rights of the European Union (2000), which states that "[e]veryone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices".

These rules constitute one of the most extensive multilateral social security agreements in terms of

[65] ECOWAS has 15 Member States: Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

[66] With regard to the United Kingdom, two agreements with provisions on social security entitlements were signed in 2020. These agreements safeguard previously-acquired social security benefits and those in the course of acquisition and, with some exceptions, extend them beyond 30 December 2020. For more information see: Questions and Answers on the United Kingdom's withdrawal (europa.eu), FAQ - Brexit (cleiss.fr).

scope, not only because of the number of countries involved (32) but because they cover several categories of migrants and their families when moving within Europe:

- nationals of EU Member States, Iceland, Liechtenstein, Norway and Switzerland who are or have been insured in one of these countries, as well as their family members;
- stateless persons and refugees residing in the EU Member States, Iceland, Liechtenstein, Norway and Switzerland who are or have been insured in one of these countries, as well as their family members and survivors (Regulation (EC) No 883/2004, Art. 2).
- nationals of non-EU countries, with the exception of Denmark, who legally reside in the territory of the EU and have moved between these countries, and members of their families (Regulation (EU) 1231/2010).

With the exception of certain specified schemes, the regulations apply to both general and special social security schemes, whether contributory or non-contributory, including schemes based on employer liability and some forms of social assistance (Art. 3). Each Member State coordinates only the benefits provided under its own legislation; States are not required to introduce all of the benefits set out in Article 3 if their national social security system does not include them. Thus, a migrant who had worked in three countries would receive three separate old-age pensions.[67] Article 10 prevents the overlapping of benefits. An example of coverage is the European Health Insurance Card (EHIC), which entitles people staying in an EU country other than their country of residence to receive medical benefits during that stay on the same terms and at the same cost as the people insured in that country. Nationals of third countries are also covered except in Denmark, Iceland, Lichtenstein, Norway and Switzerland.[68]

The EU regulations contain detailed provisions giving effect to the principles of equality of treatment, maintenance of acquired rights and rights in the course of acquisition and portability of benefits. Most of the provisions determining the applicable legislation are based on the principle of lex loci laboris, under which migrant workers are subject to the legislation of the Member State in which they work. A few cases, such as posted workers and self-employed persons, are exempt from this rule.[69] With regard to equality of treatment between third-country nationals (nationals of non-EU countries[70]) and EU nationals, a period of residence may be required but should be no longer than five years pursuant to EU Directive 109/2003.

Regulation (EC) No 883/2004 includes a reference to the principle of good administration, which establishes a duty to share information and to cooperate in ensuring proper implementation of the regulation. It also establishes an Administrative Commission to interpret the provisions of the Regulation, promote cooperation between Member States and facilitate cross-border cooperation activities. The Electronic Exchange of Social Security Information (EESSI), an IT system database, was introduced in order to help Member States' social security institutions to exchange information more rapidly and securely. In the past, most exchanges were paper-based but since July 2019, all Member States have been required to finalize their implementation of the database and connect their social security institutions to the cross-border electronic exchanges.

3.4.6 Ibero-American Multilateral Convention on Social Security

In 2007, Spain and Portugal signed the Ibero-American Multilateral Convention on Social Security with 13 Latin American countries; the number of States parties had increased to 15 by 2020. However, the Convention is operational only in Argentina, Bolivia, Brazil, Chile, Ecuador, El Salvador, Spain, Paraguay, Peru, Portugal, the Dominican Republic and Uruguay. Where bilateral social security agreements between two States parties are in place, the provisions more favourable to the interested party apply. The Convention, which replaces a network of social security agreements among Latin American countries, covers the following contingencies: employment injury, old age, death and invalidity. It provides for equality of treatment, and for application of the principles of maintenance of acquired rights and rights in the course of acquisition.

[67] For more information, see https://ec.europa.eu/social/main.jsp?catId=860andlangId=en.

[68] These regulations were also applicable to the United Kingdom until the end of the transition period (December 2020). https://ec.europa.eu/social/main.jsp?catId=470andlangId=en).

[69] Posted workers may remain subject to the social security system of the country from which they are sent, provided that the duration of the work does not exceed two years and that they are not sent to replace other workers who have completed their posting. Similar exceptions apply to self-employed workers.

[70] Nationals of non-EU countries are not covered by the EU regulations.

Several steps were taken to ensure effective implementation of the Convention. In March 2012, an Administrative Technical Committee was established, as provided in the Convention, to facilitate harmonized implementation on matters relating to administrative issues, ICTs, data exchange and the regular modernization of procedures. Separate technical committees on economic benefits and pensions, health, work injury, social services and pension funds were also established.[71]

3.4.7 MERCOSUR Multilateral Agreement on Social Security

The MERCOSUR Multilateral Agreement on Social Security and its implementing regulations were signed in 1997 and entered into force in 2005, replacing previous bilateral agreements between the founding MERCOSUR States: Argentina, Brazil, Paraguay and Uruguay. It did not involve changes in national social security systems, most of which were public and contributory with a few individual capitalization systems. The Agreement seeks to integrate MERCOSUR Members' social security systems through coordination mechanisms that guarantee workers' access to social protection when moving between MERCOSUR States. It covers the healthcare, old age, disability and survivors' benefits that each country provides under its national law.

The Agreement plays a key role in facilitating labour migration while ensuring migrants' rights and is thus an exemplary case of application of the social security principles established in ILO Conventions:

- The principles of equality of treatment and non-discrimination are expressly incorporated. Indeed, the Agreement recognizes migrant workers' right to social protection while performing services within any MERCOSUR Member State, a right that extends to their families and dependants, regardless of nationality (Art. 2.1).
- The principle of applicable legislation also applies. Migrant workers are subject to the national legislation of the country in which the service is provided, except for a few cases set out in Article 5 (posted workers; the staff of diplomatic missions, consulates and international organizations; and seafarers), who are exempt from the payment of contributions in the host country for up to two years. Self-employed workers are not covered under the Agreement.
- Maintenance of workers' acquired rights and rights in the process of acquisition is ensured. The Agreement requires a 12-month minimum contribution period in a country before residency is changed to another country. As a rule, paying into the social security system of one MERCOSUR country for a period greater than 12 months counts towards the vesting of long-term benefits in any of the other Member States. Where a worker's total contribution period is less than 12 months, the State in which contributions were paid may decide whether to pay benefits. Non-overlapping periods during which insurance premiums or contributions are paid in any of the MERCOSUR Member States are considered for purposes of benefit entitlement. The Agreement even permits the totalization of benefits earned in a third State, provided that it has an agreement on social security with any MERCOSUR State . If only one MERCOSUR State has such an agreement with a third State, the former must recognize the worker's service as rendered within its own territory for totalization purposes. Benefits are paid on a pro rata temporis basis; in other words, each MERCOSUR Member State calculates the benefit amount based on the applicable rate and the length of the contribution period in each country.

Box 3.5 ILO project: Extending access to social protection and portability of benefits to migrant workers and their families in selected Regional Economic Communities (RECs) in Africa

Project web page: https://www.ilo.org/africa/technical-cooperation/WCMS_646607/lang--en/index.htm

ECOWAS: A Capacity-building toolkit, available at: https://www.itcilo.org/en/areas-of-expertise/labour-migration/ecowas

ILO 2019, Social Protection for Migrant Workers and their families in ECOWAS States https://www.ilo.org/wcmsp5/groups/public/---africa/documents/publication/wcms_714335.pdf

[71] For more information, see: http://www.sisalril.gov.do/pdf/publicaciones/BIOISS_N_49_especial_congreso.pdf.

Not only has the Agreement reduced the legal barriers to migrant workers' access to social protection in their host countries; it has also improved administrative coordination and the delivery of benefits between MERCOSUR Member States through:

- implementation, in 2008, of a Data Transfer and Validation System (DTVS) (ISSA 2009) administered by the OISS. This System has greatly facilitated the transfer, recording and verification of social security data on workers in MERCOSUR Member States and has improved not only the security of the pension application process and the payment of retirees' benefits, but also the efficiency of these processes by significantly reducing waiting time and paperwork (ISSA 2014). The system is bilingual (Spanish and Portuguese).
- the introduction of a system for the payment of benefits in the local currency of the country in which the migrant worker resides, avoiding the extra costs associated with currency exchange and banking fees.
- creation of the Multilateral Standing Committee on Social Security (COMPASS), which advises the relevant authorities, interprets the provisions and implementation of the Agreement and takes decisions by consensus.

3.4.8 Southern African Development Community (SADC) frameworks and policies on social security

The SADC has established non-binding frameworks such as the 2003 Charter of the Fundamental Social Rights in SADC (the Social Charter), which seeks to establish and harmonize social protection schemes, and, in 2007, the Code on Social Security in the SADC. The Code seeks "to provide SADC and Member States with an effective instrument for the coordination, convergence and harmonization of social security systems in the region" (Art. 3.3) and calls on them to "work towards the free movement of persons" (Art. 17.1),"ensure the facilitation of exportability of benefits, including the payment of benefits in the host country" (Art. 17.2(d)) and ensure that migrant workers can "participate in the social protection security schemes of the host country [and] enjoy equal treatment" (Art. 17.2(a) and (b)).

In 2015, in the context of implementation of the SADC Regional Indicative Strategic Development Plan (RISDP), the SADC Employment and Labour Sector adopted an Employment and Labour Protocol. The Heads of States and Government approved the Protocol and it is now open for ratification by the Member States, after which it will be binding.[72] Article 19 of the Protocol focuses on labour migration and states that "States parties shall endeavour to [...] ensure that fundamental rights are accorded to non-citizens, in particular labour/employment and social protection rights; [...] harmonise national migration legislation and policies; and adopt a regional migration policy in accordance with international conventions [...]". As part of this regional migration policy, States must "adopt measures to facilitate the coordination and portability of social security benefits, especially through the adoption of appropriate bilateral and multilateral agreements providing for equality of treatment of non-citizens, aggregation of insurance periods, maintenance of acquired rights and benefits, exportability of benefits and institutional cooperation" (Art. 19(f)). In addition, provision is made for the establishment of an autonomous regional agency to address issues such as the streamlining and facilitation of the portability of social protection benefits across borders.

In May 2016, the SADC Minsters of Employment and Labour adopted the non-binding SADC Regional Policy Framework on the Portability of Accrued Social Security Benefits. More recently, the Employment and Labour Sector (ELS) Ministers and the social partners proposed pilot sectors (mining, agriculture and financial services) and countries and commissioned three studies to inform a portability framework for the SADC region. In May 2019, the SADC Member States and the social partners agreed on a roadmap towards a binding instrument on the coordination and portability of social security benefits. The proposed instrument was prepared with ILO support and discussed at a meeting of the ELS-Joint Tripartite Technical Subcommittees in November 2019. The draft instrument then evolved into the Guidelines on Portability of Social Security Benefits in SADC (SADC 2018), endorsed at a March 2020 meeting of the ELS Ministers and the social partners. The Member States undertook to implement these Guidelines through bilateral and multilateral arrangements and Eswatini, Lesotho, Malawi, South Africa and Zimbabwe volunteered to pilot their implementation. The Guidelines should facilitate the coordination of national social security schemes within

[72] By 2018, nine member States had signed the Protocol but none had ratified it. In 2020, the development of a draft protocol on employment and labour was approved by the Heads of States and Government and the social partners in order to expedite the development of a coordinated and harmonized regional labour market. For more information, see https://www.tralac.org/images/docs/12814/2018-sadc-els-draft-record.pdf and https://www.sadc.int/files/1815/8365/4970/EMPLOYMENT_AND_LABOUR_MEETING_MEDIA_STATEMENT.pdf.

the SADC in order to progressively overcome the barriers that prevent migrant workers and members of their families from receiving benefits under the social security systems of any of the countries in which they have worked.[73]

► 3.5 How to negotiate a social security agreement

Negotiation processes vary in length, content and intention. The ILO has often been requested to support the negotiation and development of multilateral or bilateral social security agreements. Based on the Organization's experience and that of experts and former negotiators, an eight-step process that can be of use to any country that wishes to negotiate or renegotiate a social security agreement has been identified and is generally followed. At each step, the key elements to be discussed and negotiated are highlighted. This list is not exhaustive and should be adapted to the specific situation and context.

3.5.1 Prior to the negotiation process

Before entering into negotiations on a social security agreement with another country, governments should gather the relevant social, economic and policy information on migration and social protection in their own country and in the country with which they seek to negotiate in order to establish their negotiating position beforehand. For instance, data on migrant stocks and migration flows between the two countries, including the demographics of the migrant populations, should be considered. Each negotiating partner should also examine its counterpart's record of ratification of international instruments on social security for migrant workers and the social security agreements that it has concluded. Lastly, governments should decide which specific social security benefits they might be willing to negotiate, their material and personal scope and the extent to which they recognize the principle of equality of treatment.

3.5.2 The negotiation process

During the negotiations, countries should bear in mind that these instruments aim to coordinate the social security schemes of different countries. They are designed to eliminate barriers that might prevent migrant workers and their families from receiving social benefits under the system of any of the countries in which they have worked, and to ensure that migrant workers do not have to contribute to multiple social security systems for the same work. These agreements are often based on or guided by the overarching principle of reciprocity, meaning that the negotiating countries agree to apply the same mechanisms and assume a reasonable comparability of obligations. Reciprocal agreements may also reflect an unequal power balance between the two negotiating parties. Even in such cases, the social security agreement should seek to ensure the greatest possible equality of treatment, thus reflecting the basic principles of equality and non-discrimination that are enshrined in human rights instruments and international labour standards.

An eight-step process

Negotiating a social security agreement generally involves eight steps: (1) preliminary discussions; (2) preparation of an initial draft agreement by one of the parties; (3) negotiations; (4) review of the agreed text; (5) signing the agreement; (6) approving the agreement; (7) conclusion of the administrative arrangement and preparation of application forms; and (8) entry into force of the agreement. Each of these steps will be discussed in greater depth in the following subsections.

[73] Discussions and documents shared within the framework of the ILO project, "Extending access to social protection and portability of benefits to migrant workers and their families in selected Regional Economic Communities (RECs) in Africa" (see Box 3.5).

► **Figure 3.4 An eight-step process**

► Step 1. Preliminary discussions

Preliminary discussions are often based on informal meetings or email exchanges between technical social security experts working in the relevant ministry or social security institution of each country. The composition of the delegation depends on the branches to be negotiated. When a country has several pension schemes, such as provincial or sectoral, there should still only be one negotiator to deal with the international agreement and then internal coordination. Usually someone from the Ministry of Foreign Affairs is also involved. These discussions involve exchanging information on the countries' respective national social security systems, particularly the branches of social security for which each country has schemes in place; the personal and material scope of its legislation; its eligibility requirements for benefits; and any other information that will allow other countries to understand its social security system. The exclusion of specific branches of social security from the draft agreement should be explained by the experts of each country. Preliminary discussions are also an opportunity for countries to inform each another of their preferences for application of the five key principles of social security agreements (Box 3.3). The experts normally explain their countries' procedure for concluding social security agreements, discuss the time frame for negotiating the next steps and decide which country will prepare the initial draft of the agreement or whether they will each prepare a draft.

► Step 2. Preparation of an initial draft agreement

A country's delegation often comprises technical officials from its Ministries of Health, Labour, Welfare, Social Protection, Social Affairs and Foreign Affairs and/or other government agencies and social security institutions and may include representatives of the tripartite boards of concerned social security funds. The team involved in the negotiations is usually the same as the one involved in the preliminary discussions. Preparation of the initial draft agreement is the starting point of the negotiations and if the negotiating countries have not agreed as to which country will prepare the draft, they should do so at this stage. Where this is not possible, an exchange of correspondence may be initiated.

The draft should reflect the countries' preferences as to which of the five key social security principles (equality of treatment, maintenance of acquired rights, payment of benefits abroad (export of benefits), determination of the applicable legislation, maintenance of rights in

the course of acquisition (totalization) and administrative assistance) will be included in the agreement. Specifically, the draft should include the material (legislation) and personal scope of the agreement, stipulating whether any types of workers are excluded; the branches of social security and benefits covered under the countries' national social security systems; eligibility criteria for the benefits; general provisions (a glossary); and miscellaneous and transitional provisions (administrative arrangements and dispute resolution systems). If the experts have indicated different preferences, additional options reflecting each country's preferred wording should be provided.

Rather than having one country prepare the draft for discussion, each country may prepare its own draft; this is common where the countries have very different positions or when one country has special non-standard provisions for its social security agreements. It is advisable that the draft(s) be submitted to all of the negotiating countries well in advance of the negotiations so that their respective experts can analyse the provisions and make recommendations. Countries may wish to prepare alternative proposals or counter-proposals for problematic provisions. Guidelines for drafting a social security agreement can be found in the two annexes to the *Maintenance of Social Security Rights Recommendation, 1983 (No. 167)*; Annex I includes model provisions for the conclusion of bilateral or multilateral social security instruments and Annex II contains a model agreement for coordinating bilateral and multilateral social security instruments.

- **Step 3. Negotiations**

The purpose of the negotiations is to establish the text of the social security agreement. The negotiating countries' experts, usually their Ministers of Labour, Health and Foreign Affairs and other government officials, conduct a detailed review of the preliminary draft(s), including the title and preamble. For instance, agreeing on the wording of a clause can be contentious; it may not be immediately accepted by the negotiating countries or may require further consultation with national authorities. The discussion of differences may be postponed to the next round of negotiations or resolved through a subsequent exchange of correspondence. Once the countries have agreed on its wording, the clause and the changes made to the initial draft of the agreement should be included in a revised draft that is attached to the minutes of the negotiations.

Negotiating an agreement may require one round or several. The outcome of the discussions during each round should be summarized in minutes, which should also contain an annex with the revised draft of the agreement, a list of the participants and any other relevant material agreed by the parties. It is common practice for the country hosting the negotiations to draft the minutes, which are prepared and shared at the end of each round of negotiations and must be agreed upon by all of the participating countries. The scope of the minutes will depend on the practices of the countries involved and the content of the negotiations. If the meaning or intent of a provision is not entirely clear, or if a provision was contentious and subject to significant compromise, it may be useful to include in the minutes an explanation or clarification of the provision and its objective. An example of the need for explanatory notes is the CARICOM Agreement on Social Security (1997); its unusual or highly technical legal language (in comparison to the wording of most other multilateral and bilateral agreements) has made it difficult to understand its provisions (Hirose, Nikac and Tamagno 2011). Despite the explanatory notes provided, Article 18 of the Agreement was ultimately amended for greater clarity in the Protocol adopted in 2009.

When the negotiations have been completed and the text agreed upon, the heads of the respective country delegations initial the text as a sign of their formal consent. This does not, however, preclude subsequent changes after further review of the text, provided that all of the negotiating parties agree to the modifications.

- **Step 4. Review of the agreed text**

Once the negotiations have ended, the draft agreement must be reviewed by the relevant authorities of each negotiating country, usually the Ministry of Justice, the Ministry of Foreign Affairs, and others as appropriate. At this stage, the parties review their national laws and treaty practice, including constitutional issues as these fall outside the knowledge and competence of the ministries responsible for social security. This stage should not serve as an opportunity to reopen the negotiations. Modification of the agreed text resulting from the review should be kept to a strict minimum and should be agreed by all of the negotiating countries. In the event that there is no agreement, the negotiating parties either: (1) repeat the previous step and continue the negotiations; (2) temporarily suspend the process with the intention to resume negotiation

at a later date; (3) abandon the process or (4) officially cancel the process. Non-social-security issues that do not fall within the mandate of the negotiation team, such as entry and exit visas and diplomatic channels, may be addressed outside of the negotiation process.

- **Step 5. Signing the agreement**

Once the draft text has been reviewed and the suggested modifications agreed by all of the negotiating countries, the agreement is ready to be signed. If the countries do not speak the same language, they will have to agree on the official language(s) of the agreement and have it translated into their national language(s) if necessary. With regard to the language to be used during application of the agreement, it is common practice for the authorities and institutions of each of the signatory countries to communicate with each other and with migrant workers directly in its official language. Copies of the agreement are usually provided by the country in which it is signed. An original copy of the signed agreement should be retained by each negotiating country and deposited in the treaty registry of its Ministry of Foreign Affairs. If an agreement is signed by an official other than the country's Head of State, Head of Government or Minister of Foreign Affairs, the country should provide an instrument of full powers certifying that the official is authorized to sign the agreement on the country's behalf.

- **Step 6. Approval of the agreement**

An agreement usually enters into force following its approval or ratification by each of the countries concerned. Ratification or approval depends on the national procedure that each country has established for the purpose, such as parliamentary vote, approval by the Council of Ministers or enacting legislation (see also Chapter 2, section 4).

- **Step 7. Conclusion of the administrative arrangement**

The administrative arrangement is fundamental to the implementation and administration of a social security agreement and should preferably be concluded before the agreement enters into force. It complements the social security agreement by regulating in greater detail all relevant aspects of administrative assistance with its application, the legislation to which it applies and the operational procedures that each country must follow. It is usually, but not always, incorporated into a different instrument; for example, the CARICOM Agreement on Social Security (1997) includes the administrative and operational provisions in the same instrument. The difference between the two is that a social security agreement establishes the legal framework for coordination of the parties' national social security systems, modifies their social security legislation and sets out the principles for administrative assistance between them whereas an administrative arrangement focuses on how this administrative assistance will be delivered.

The focus of the administrative arrangement should never be confused with the substantive provisions of the agreement, which establish the parties' rights and obligations, and should be limited to the relevant administrative and operational issues. Gaps, omissions or imprecisions regarding the rights and obligations established in the agreement cannot be corrected or amended through the administrative arrangement.

Authorization to conclude an administrative arrangement should be included in a provision of the agreement, which should mention the "competent authorities" that will negotiate it. If these were not expressly named in the agreement, they should be specified in the administrative arrangement, which normally identifies the national institution(s) of each State party that will serve as its liaison agency for implementation of the agreement. The relevant operational and administrative procedures are usually agreed between the parties' competent authorities/institutions and liaison agencies during their implementation discussions. Because administrative arrangements usually do not require congressional approval, they are more flexible instruments.

In practice, social benefit applications must be made by filling out administrative forms, which are often issued in all official languages of the States parties. The personal data requested include details such as name, age, gender, national insurance number, nationality, marital status, domicile and dates of entry into, stay in and departure from the country. Depending on the social benefit, additional information, including the date of incapacity or medical treatment for invalidity pensions, relationship to the contributor for death benefits, employment status and declaration of activities, may be requested. Medical reports are required for health benefits and invalidity pensions. Administrative forms may also provide important information on methods of payment and on the documentation to be submitted and include provisions on the use and maintenance of data and data protection.

- **Step 8. Entry into force**

The agreement enters into force when it has been approved or ratified and the administrative arrangement has been signed. The date of its entry into force is usually stated in one of its provisions. It is common for agreements to enter into force on or after the date on which the instruments of ratification or notifications that national requirements have been met are exchanged. If the countries have not included such a provision in the agreement, they can agree on the date through direct discussions between their foreign ministries or exchange of diplomatic notes.

▶ 3.6 Putting agreements into practice: Institutional, operational and administrative considerations

After a social security agreement has been signed, the relevant institutions must establish the processes, roles and responsibilities and ICT systems required for its implementation.

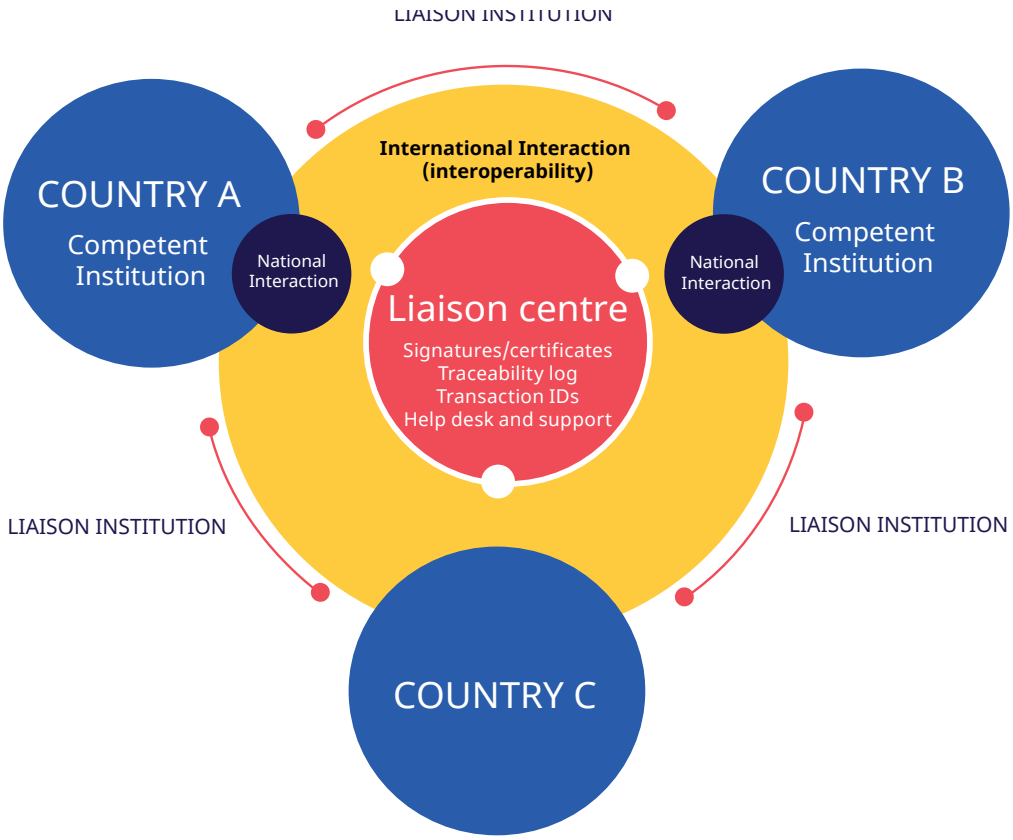
First, they must identify organizational structures at the international, national and institutional levels in order to manage the policy, regulatory and procedural aspects of the agreement and their relationship with other social security services. In addition, the implementation of international agreements requires reliable mechanisms for data exchange between the parties' institutions and liaison offices. This includes, among other things, specifying the data to be exchanged, the authentication mechanism (electronic signature or other), the protocol for request-response exchanges and the implementation of ICT systems to support these operations. It also involves operational implementation of the agreement, through automated processes where possible; this consists primarily of receiving and sending requests for information and processing benefit claims.

Nevertheless, putting into practice efficient implementation processes, particularly for the exchange of data between the States parties' institutions, can be challenging. In the absence of standards and reusable solutions, systems must be developed from scratch and this process becomes less effective and more costly as the number of agreements and the requirements for additional types of data exchange grow. It is therefore important to: (i) achieve efficient, secure interconnection at the international, national and institutional levels; (ii) ensure the reliability, security and authentication of exchanges, including the reliability of institutions' data and users' identification and the traceability of operations; (iii) define and agree on data models and processes; and (iv) establish an organizational structure with roles and responsibilities.

In order to achieve these objectives and operationalize the agreement, the following steps must be taken:

- Outline the governance and management aspects of the agreement by establishing first the mission, roles and governance structure for its operational implementation and then a strategy and action plan.
- Identify the operational processes and information models of the implementing institutions. Depending on the type of data to be exchanged, these models may include personal data: birth, death, marriage, separation, labour records, information on, social security benefits received in the host or origin country, income declarations and expenses associated with procedures in individual cases. The use of standardized information models improves the efficiency of the agreement's implementation. It is important to note that while these models are established at the international level, operational processes (or subprocesses) may need to be developed at the national and institutional levels.
- Develop security and authentication features, address key issues for authentication of the agreement, comply with the relevant data protection regulations and create a secure environment for the interaction between institutions.
- Implement the ICT-based data exchange system, including by:
  - developing an architecture at the international, national and institutional levels. The goal is to identify the components that enable effective and secure interaction between institutions. This is one of the first and most important steps in the implementation of an international agreement (see Figure 3.5);
  - developing interoperability techniques in order to connect the systems of different institutions, particularly at the international level; this is one of the essential technologies available to support the implementation of international social security agreements;
  - setting up a data exchange workflow and an environment for daily ICT operations. While the former involves implementing a software system, the latter requires an appropriate ICT infrastructure and human resources to perform the necessary operations and meet the service quality standards.

► **Figure 3.5 Architecture and types of interaction for a multilateral agreement**



3.6.1 Governance and management

Each institution should define the roles and governance structures required for operational implementation of the international social security agreements under its mandate in order to protect the social security rights of migrant workers, including the institution's participation in the inter-organizational bodies, committees and working groups that manage the agreement at the international and national levels.

Institutions should also establish a strategy and an action plan in order to implement the operational activities required under international agreements. These activities should be aligned with the institution's overarching strategic plan. The strategy may include some of the following elements:

- the institution's goals for improving the operational effectiveness of the implementation of agreements. These may include improving programme integrity, minimizing errors and undue payments and reducing delays in operations and disputes with other institutions;
- the institution's policies on ICT security, data protection and the authentication of operations;
- incremental implementation of the agreement in coordination with the other States parties' institutions, starting with a subset of functions and branches and with pilot projects. For example, implementation of the agreement could begin with one branch of social security;
- carrying out parallel training activities for the staff members to be involved in the agreement's ICT-based operations.

Lastly, in order to manage key operations and resources, the institution should take into consideration:

- the internal authorization procedures and delivery responses for processing requests from other institutions. Certain requests must be validated before they can be processed; for example, benefit approvals may require special authorization.

- the personal identification mechanisms used by the institution and the country (national identification document, passport number, internal identification issued by the institution and so on).
- the periodicity of and procedures for notification of other institutions relevant to the agreement (for example, automatically when a change occurs or at specified intervals);
- the reciprocity rules governing expenses arising from application of the agreement;
- the institution's use of digital signatures and management of the authorizations required for operations under the agreement;
- the traceability requirements for follow-up (including keeping a record of operations, particularly between institutions).

3.6.2 Operational processes and information models

The institution, in coordination with the other institutions involved in implementing the international agreement, should specify the processes that enable its application in specific cases.

One of the key processes to be specified is accurate identification of the persons covered by the agreement in the various countries in which they have lived, based on the forms of personal identification which each country uses for social security procedures and which may be requested for operations such as benefit applications and registration of detached workers.

Other common procedures to be specified include:

- collecting the personal data of persons covered by the agreement;
- registering a detached worker;
- claiming a benefit under the agreement;
- requesting past labour history/records (for pensions);
- requesting medical records (to assess disabilities);
- inquiring about current employee status (for detached workers);
- inquiring about entitlements in a host country (for medical services);
- inquiring about a beneficiary's life status (to prevent undue payments);
- granting or rejecting a benefit claim.

The institution, in coordination with the other institutions involved in implementing the agreement, should specify the data exchange models for replies to requests, administrative communications and notifications. This may include information on personal data, labour records, life and marital status, birth, benefits received in the host or origin country, income declarations, expenses associated with procedures in individual cases and declarations of detached workers.

The data exchanged should have common personal identification attributes (or unique identifiers) in order to ensure comparability and monitor events occurring in a person's life (such as marriage, death and disability). One such attribute is the personal identification document or number used in each country for social security procedures.

The use of standard forms and unique identifiers for data exchange also reduces the complexity and cost of implementing international social security agreements. A generic model agreed by the institutions concerned enables institutions to select the data to be exchanged in their chosen language and allows for data transfers through a specified data package (for example, Extensible Markup Language (XML) or comma-separated values (CSV) files), thus facilitating timely implementation of the international agreement.

Two examples of data exchange systems are the systems used to implement the MERCOSUR Multilateral Agreement on Social Security and Regulation (EC) No. 883/2004. Using different ICT architectures, both systems follow common information models for the exchange of data between States parties and common procedures for the benefits and conditions covered.

3.6.3 Security and authentication

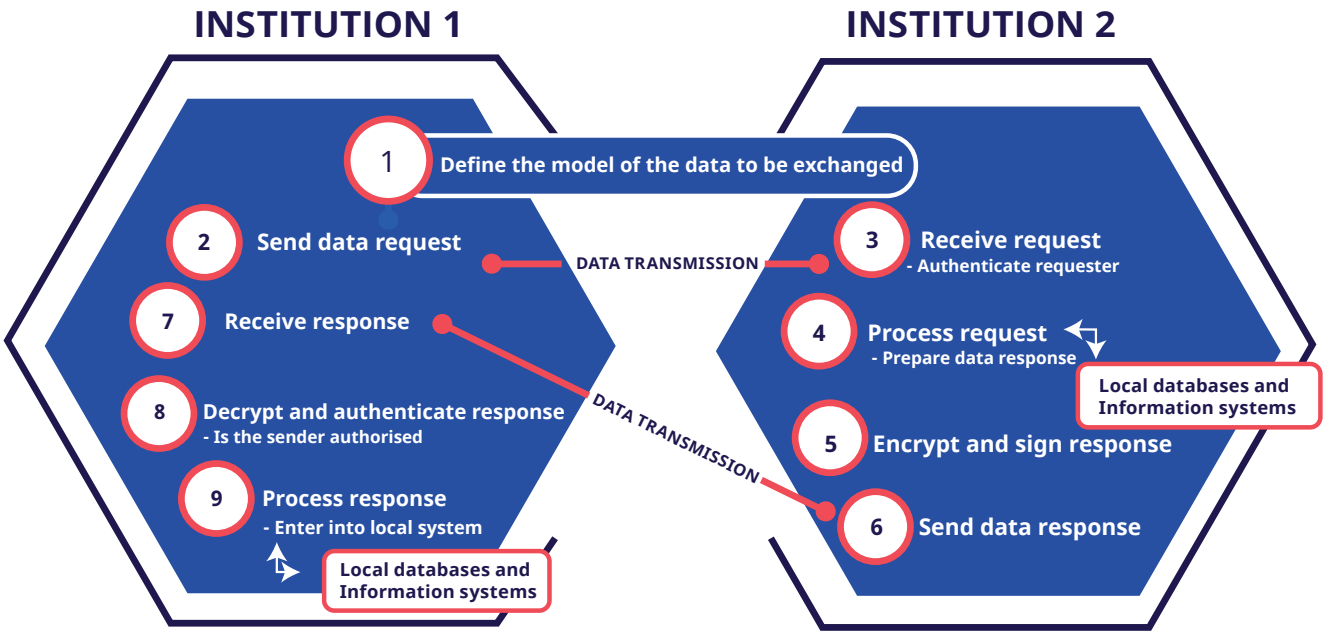
Given the operational processes to be put in place and the vast amount of sensitive data to be exchanged, the security of data and the authentication of beneficiaries are paramount in ensuring that benefits reach the correct individuals and are therefore a critical feature of the systems that implement international social security agreements; this is particularly important in view of the cross-border, inter-agency nature of these systems. For this reason, applying security and data protection policies and regulations should be one of the first priorities of implementing institutions, a goal that can be achieved by encrypting communication channels and the data exchanged.

Another priority is the validation of operational authenticity, including the establishment of an authentication framework agreed by all participating institutions, to ensure that transactions are carried out securely, legally and efficiently. This requires replacing the handwritten signatures used in paper-based transactions[74] with electronic signatures based on passwords, biometrics and even digital certificates wherever possible and implementing measures to enforce the data protection regulations governing transactions under international agreements and digital certificates. These measures should be based on the relevant national regulations and on the conditions established in the agreement. Institutions should follow the recommendations contained in ICT security standards such as International Organization for Standardization (ISO) 27001) and their staff should use electronic signatures systematically. The *ISSA Guidelines on Information and Communication Technology* and related materials[75] provide further guidance on these matters.

3.6.4 ICT-based data exchange systems

A data exchange system between two institutions for the purpose of implementing a social security agreement consists largely of the workflow shown in Figure 3.6. As explained previously, the initial step is to determine the type of data to be exchanged. Once this has been agreed by both institutions, they can exchange data requests. The receiving institution should first validate the authenticity of the requester and then prepare the response by obtaining data from local databases and information systems. The final step is to encrypt and sign the response and send the information to the requesting institution, which should decrypt and authenticate the response and enter the data into its databases and information systems.

► **Figure 3.6 Typical data exchange workflow between two institutions under an international social security agreement[76]**



74 Many countries still use paper forms to exchange information.

75 See the chapters of the *ISSA Guidelines on Information and Communications Technology* on the implementation of international social security agreements and data security and privacy in social security. See also the ISSA Technical Report on Interoperability in social security.

76 This Figure was produced by ISSA.

With a view to effective and secure handling of the data exchange workflow, the establishment of an overarching architecture is a key step in the implementation of an international agreement. This includes:

- the international architecture, which handles interaction between the liaison agencies of different countries at the international level;
- the national architecture, which handles interaction between the liaison agency and the competent institutions of a single country at the national level; and
- the institutional architecture, which handles the interaction between institutions' internal ICT systems and other entities at the national and international levels.

It should be noted that the characteristics of an agreement determine the type of architecture required. While the international architecture of multilateral agreements requires common services and a trusted third organization, bilateral agreements may be based on point-to-point connections[77] between the liaison agencies (for example using web service protocols). A national architecture is only useful where several national institutions must coordinate with each other; it is not necessary where, as is often the case, only one institution is involved in implementing the agreement:

Connections between the systems of different institutions, particularly at the international level, rely on interoperability technologies. These technologies, and particularly web services, are therefore essential to the implementation of international social security agreements. Each institution, in coordination with the others involved in implementing the agreement, should establish an interoperability framework. The ISSA *Guidelines on Information and Communication Technology* and related materials provide further guidance on these matters (ISSA 2019 and 2012 and Ruggia-Frick 2016).

3.6.5 Additional considerations

After a social security agreement has entered into force, the States parties may wish to modify it. Changes must be negotiated and agreed by all of the signatories. New negotiations can lead to:

- modification of certain provisions through a supplementary agreement amending the original instrument (for example, the 1990 Supplementary Agreement amending the Agreement on Social Security between Canada and the Netherlands);
- replacement of the original agreement by a new one (for example, the Germany – India Social Security Agreement of 2017, which replaced the Agreement of 2008) or conclusion of supplementary instruments, such as protocols or administrative arrangements;
- conclusion of a more comprehensive bilateral or multilateral agreement. In such cases, where two or more agreements have overlapping provisions, those that provide higher levels of protection prevail. For example, the 2012 ECOWAS General Convention replaced all social security conventions previously concluded between ECOWAS countries with the exception of more advantageous bilateral and multilateral agreements which the States parties wished to maintain (Art. 5). The Ibero-American Multilateral Convention on Social Security stipulates that countries must inform each other if a better condition within a bilateral agreement is applicable (Art. 8);

► Table 3.3 Criteria for the architecture of international agreements

	Bilateral	Multilateral
Only one national institution implementing the agreement	1. Point-to-point connections between the only national institution and the other liaison agenc(y/ies)	1. A full international architecture (including common services and a trusted third organization) connecting the national institutions and the liaison agenc(y/ies) of the other States parties
Several national institutions implementing the agreement	1. National architecture connecting the institutions using point-to-point mechanisms or integration middleware. 2. International point-to-point connections between national liaison agencies and those of other States parties.	1. A full international architecture (including common services and a trusted third organization) connecting the national liaison agencies. 2. A full national architecture connecting the national institutions.

[77] A point-to-point connection is a secured private and closed connection between two or more locations.

- termination of the agreement if negotiations aimed at modifying it are unsuccessful (for example, the Australia – UK Agreement on Social Security of 1990 was terminated in 2001 in accordance with Article 26 thereof).

3.7 Conclusion

In an increasingly globalized world, it is important for countries to ensure access to and maintenance of social protection coverage across borders. This includes ensuring the portability of social protection entitlements and benefits acquired or in the course of acquisition in order to prevent their loss when the migration experience ends or continues in a successive country of destination.

The importance of multilateral and bilateral agreements is recognized in the *Global Compact for Safe, Orderly, and Regular Migration* and is emphasized in various ILO Conventions and Recommendations, including Convention No. 118 and Recommendation No. 167, and in the ILO Multilateral Framework on Labour Migration (2006). These agreements eliminate the legal barriers that hinder migrant workers' access to social protection by ensuring the coordination of social security schemes through the inclusion of provisions establishing some or all of the key social security principles (equality of treatment, maintenance of acquired rights and those in the course of acquisition, payment of benefits abroad and determination of applicable legislation). The choice between pursuing a bilateral or a multilateral agreement should be based on the best interests of migrant workers and their families. Bilateral and multilateral agreements can also be pursued in parallel; they are not mutually exclusive and may be complementary.

There are approximately 660 social security agreements worldwide (ISSA 2021), of which most are bilateral as they are generally more flexible, easier and quicker to negotiate. Examples include the agreements between Canada and Mexico (1996), France and Tunisia (2003) and Malawi and Zambia (2003). Multilateral agreements have the advantage of setting common standards and rules across all of the States parties thereto, thereby ensuring that all migrant workers who are nationals of those States enjoy the same rights and benefits. Examples include the CARICOM Agreement on Social Security (1997), the MERCOSUR Multilateral Agreement on Social Security (2005) and the ECOWAS General Convention on Social Security (2012).

Negotiating a new social security agreement or renegotiating an existing one generally involves eight steps: preliminary discussions, preparation of an initial draft, several rounds of negotiations, final review, signature, approval, conclusion of an administrative arrangement and, lastly, the entry into force of the agreement.

The effective implementation of multilateral and bilateral agreements depends on factors such as political will, existing schemes and branches covered in each country, effective collaboration and exchange of information between the social security institutions concerned, and their administrative and management capacities. The operationalization of social security agreements requires that the countries involved: (1) outline the governance and management aspects of the agreement; (2) determine the operational processes and information models of the implementing institutions; (3) develop security and authentication features; and (4) establish an ICT-based data exchange system. It is important to note that while information models are established at the international level, operational processes (or subprocesses) may need to be developed at the national and institutional levels.

The conclusion of social security agreements is the most protective and most commonly used policy option as it ensures migrant workers' access to protection and the portability of their social protection rights and benefits.

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Chapter 4

Bilateral labour agreements and migrant workers' social protection

Key messages

- Bilateral labour agreements[78] (BLAs) can be useful tools for extending the rights of migrant workers, including social protection rights, provided that they are drafted and implemented in accordance with the international legal framework for the protection of migrant workers.
- Crises such as the global COVID-19 pandemic may require additional measures to protect these workers' social security and other rights. Well-designed BLAs should therefore include provisions that take into account the impact of the crisis before, during and after migration.
- Social security provisions can be incorporated into temporary labour migration programmes and bilateral labour agreements in line with international labour standards. A model agreement is available in the Annex to the Migration for Employment Recommendation, 1949 (No. 86) and UN guidance on bilateral labour migration arrangements (BLMAs), including a section on social protection, will be published in 2021.
- Equality of treatment between nationals and non-nationals is the guiding principle of all international labour standards and is applicable to social security. In order to give effect to this principle, BLAs should include provisions ensuring that migrant workers are treated not less favourably than national workers.
- BLAs should include mention of separate social security agreements (existing or forthcoming) in order to ensure the portability of social protection entitlements and set out in detail the methods for applying social security to migrant workers.
- The scope of social protection afforded to migrant workers by BLAs depends on the social security branches included in the agreement and the specific groups of migrant workers covered (domestic workers, self-employed, migrant seasonal agricultural workers and so on) and on the related provisions of national legislation and other agreements to which the State is a party.

[78] In this *Guide*, the terms BLA and BLMA are used interchangeably.

▶ 4.1 Introduction

BLAs concluded between countries of origin and destination in order to regulate migration for employment can be useful tools for protecting migrant workers' rights, including social protection rights, provided that they reflect the principles enshrined in international human rights instruments and international labour standards. Their importance is emphasized in the Global Compact for Safe, Orderly and Regular Migration, which refers to these instruments as a means to "enhance availability and flexibility of pathways for regular migration" (Objective 5); it also stresses the importance of integrating social security entitlements and provisions into labour migration agreements (Objective 22). More specifically, the Compact encourages its signatories to:

> [d]evelop human rights-based and gender-responsive bilateral, regional and multilateral labour mobility agreements with sector-specific standard terms of employment in cooperation with relevant stakeholders, drawing on relevant ILO standards, guidelines and principles, in compliance with international human rights and labour law (para. 21(a)).

BLAs have been in use for over a century and the CEACR, in its 2016 *General Survey Concerning the Migrant Workers Instruments*, notes that they are still relevant and are widely used by States around the world (ILO 2016). In contrast to unilateral approaches to labour migration, the conclusion of social security agreements allows for the formalization of shared responsibilities between countries of origin and destination and ensures social security coordination at each stage of the migration cycle from pre-departure to transit, working and living abroad, return and reintegration.

This chapter will present the objectives, forms and scope of BLAs; the guidance provided by the relevant international labour standards; the remaining obstacles, protection gaps and challenges to the adoption of these agreements; and specific countries' experience with their use in order to extend social protection coverage to migrant workers.

▶ 4.2 Objectives, form and scope of BLAs

BLAs can have multiple objectives, including:

- meeting demand for labour in countries of destination;
- ensuring migrant workers' access to overseas labour markets;
- matching the supply of and demand for labour;
- protecting the rights and promoting the welfare of migrant workers;
- reducing irregular migration;
- strengthening linkages between migration and development;
- promoting cultural ties.

These agreements can take a number of forms, the most common of which are the following (Wickramasekara 2015):

- bilateral agreement (BA): a treaty between two States which creates legally binding rights and obligations governed by international law. The agreement establishes in detail the specific responsibilities of each party and the actions that they should take in order to achieve the agreement's goals;
- memorandum of understanding (MoU): a less formal, usually non-binding instrument which sets out a broad framework of cooperation in order to address common concerns (ILO 2017). Countries of employment tend to prefer this form as they are easier to negotiate, implement and modify.

In terms of scope, BLAs may apply to all migrant workers from a State party or to a specific occupation or category (such as domestic or seasonal workers).

Key issues to cover in these agreements include gender-responsive measures aimed at ensuring the exchange of information between States, fair recruitment, decent working and living conditions and equality of treatment between migrant workers and nationals. Model employment contracts can also be annexed to BLAs in order to provide details on the rights and obligations of workers and employers.

Given the importance of social protection in employment relationships and the fact that migrant workers face a number of challenges in accessing social protection coverage, BLAs should include provisions designed to prevent migrant workers who are successively or alternately covered by the schemes of two or more countries from losing their social security rights. They also aim to reduce and, whenever possible, eliminate restrictions on access to coverage where a worker who had previously been covered by a country's social security system leaves that country.

Social protection coverage can be addressed in BLAs by:

- including specific provisions providing for equality of treatment of migrant workers and nationals in respect of social protection. These provisions should establish the scope of benefits applicable to migrant workers and determine the applicable legislation in order to ensure that they are not required to pay contributions to the social security systems of two countries for the same work;
- referring to separate existing or forthcoming bilateral or multilateral social security agreements in order to ensure the portability of social security entitlements.

► 4.3 The international legal framework

All three migrant-worker-specific Conventions and Recommendations and the non-binding ILO Multilateral Framework on Labour Migration (2006) refer to the use of BLAs as a means of enhancing international cooperation on labour migration. Their importance has been emphasized by the CEACR, which has stated that bilateral agreements and other arrangements can play an important role in ensuring that migrant workers are able to benefit from the protections contained in ILO Conventions, including, by implication, those that concern social security (ILO 2016, para. 163):

► **Table 4.1 International legal frameworks that mention the importance of BLAs**

International legal framework	Supporting evidence
Migrant-worker-specific ILO Conventions and Recommendations	
Migration for Employment Convention (Revised), 1949 (No. 97)	**Article 10** "In cases where the number of migrants going from the territory of one Member to that of another is sufficiently large, the competent authorities of the territories concerned shall, whenever necessary or desirable, enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of this Convention."
Migration for Employment Recommendation (Revised), 1949 (No.86)	**Paragraph 21(1)** "Members should in appropriate cases supplement the Migration for Employment Convention (Revised), 1949, and the preceding Paragraphs of the present Recommendation by bilateral agreements, which should specify the methods of applying the principles set forth in the Convention and in the Recommendation."
Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143)	Article 15 "This Convention does not prevent Members from concluding multilateral or bilateral agreements with a view to resolving problems arising from its application."
Migrant Workers Recommendation, 1975 (No. 151)	**Paragraph 34(1c)** "In accordance with national practice – [...] (ii) to reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements: Provided that where social security contributions do not permit entitlement to benefits, every effort should be made with a view to the conclusion of bilateral or multilateral agreements to protect the rights of migrants."
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990	**Preamble** "Recognizing also the progress made by certain States on a regional or bilateral basis towards the protection of the rights of migrant workers and members of their families and the importance and usefulness of bilateral and multilateral agreements in this field [...]."
ILO employment Conventions and Recommendations	
Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169)	**Paragraph 44** "Members, both countries of employment and countries of origin, should, when it is necessary, taking fully into account existing international labour Conventions and Recommendations on migrant workers, conclude bilateral and multilateral agreements covering issues such as right of entry and stay, the protection of rights resulting from employment, the promotion of education and training opportunities for migrant workers, social security, and assistance to workers and members of their families wishing to return to their country of origin."
Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205)	**Paragraph 42** "In preparing for and responding to crisis situations, Members should strengthen cooperation and take appropriate steps through bilateral or multilateral arrangements, including through the United Nations system, international financial institutions and other regional or international mechanisms of coordinated response. Members should make full use of existing arrangements and established institutions and mechanisms and strengthen them, as appropriate."

► Box 4.1. Articles relating to social security in the ILO Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons

"Article 1. Exchange of Information

1. The competent authority of the territory of immigration shall periodically furnish appropriate information to the competent authority of the territory of emigration concerning:

[...]

(c) [...] social security systems and medical assistance [...].

3. The competent authority of the territory of emigration [...] shall periodically furnish appropriate information to the competent authority of the territory of immigration concerning:

[...]

(c) the social security system; [...]

Article 4. Validity of Documents

1. The parties shall determine the conditions to be met for purposes of recognition in the territory of immigration of any document issued by the competent authority of the territory of emigration in respect of migrants *and members of their families* [...] concerning —

[...]

(e) participation in social security systems.

Article 17. Equality of treatment

[...]

2. Such equality of treatment shall apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within the territory of immigration in respect of the following matters:

(a) in so far as such matters are regulated by laws 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 [...]

[...]

(b) employment taxes, dues, or contributions payable in respect of the persons employed;

[...]

Article 21. Social Security

1. The two parties shall determine in a separate agreement the methods of applying a system of social security to migrants and their dependents.

2. Such agreement shall provide that the competent authority of the territory of immigration shall take measures to ensure to the migrants and their dependents treatment not less favourable than that afforded by it to its nationals, except where particular residence qualifications apply to nationals.

3. The agreement shall embody appropriate arrangements for the maintenance of migrants' acquired rights and rights in course of acquisition framed with due regard to the principles of the Maintenance of Migrants' Pension Rights Convention, 1935, or of any revision of that Convention.

4. The agreement shall provide that the competent authority of the territory of immigration shall take measures to grant to temporary migrants and their dependents treatment not less favourable than that afforded by it to its nationals, subject in the case of compulsory pension schemes to appropriate arrangements being made for the maintenance of migrants' acquired rights and rights in course of acquisition."

In addition to encouraging their use, ILO standards and other international human rights instruments also provide substantial guidance for developing rights-based BLAs, including on the protection of social security rights. The guiding principle of international labour standards with respect to social security is equality of treatment between nationals and non-nationals. This principle arises from the right to equality and non-discrimination that is enshrined in several human rights instruments.[79] BLAs should therefore ensure that migrant workers are treated no less favourably than nationals in respect of social security benefits. Conditions for accessing benefits, such as residency requirements, may be imposed in so far as they apply to nationals, with some exceptions. Furthermore, if migrant workers leave the country of employment, they should not automatically lose their right to benefits.[80] This is of particular importance to women migrant workers, who may lose their maternity benefits if they leave the country or be required to leave the country if they are pregnant.

- The ILO Model Agreement on Temporary and Permanent Migration for Employment, annexed to the ILO Migration for Employment Recommendation (Revised), 1949 (No. 86), contains a number of model provisions on the aforementioned social security rights (Box 4.1). In addition to setting out the key social security principles, these provisions call for practical measures such as the conclusion of separate social security agreements and the regular exchange of information between States with regard to their respective social security systems.

BLAs should also include provisions that take into account the possible onset of crises such as those arising from conflict, health crises such as the COVID-19 pandemic, and climate-related disasters as these may require additional measures for the protection of migrant workers' social security and other rights. In these situations, BLAs can serve to clearly establish responsibility for the provision of healthcare, income support and other measures to ensure the welfare of migrant workers during their time abroad and upon return to their country of origin.

- The Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205) encourages States to "strengthen cooperation and take appropriate steps through bilateral or multilateral arrangements" when preparing for and responding to crisis situations (para. 42).

Lastly, a number of UN agencies have jointly or individually issued guidance regarding BLAs, including model provisions on social protection for migrant workers.

- The UN Network on Migration's thematic Working Group on Bilateral Labour Migration Agreements is developing global guidance on these agreements, including with regard to the inclusion of social security provisions (forthcoming 2021).

▶ 4.4 Obstacles, protection gaps and challenges

Although BLAs can be a useful tool for the protection of migrant workers, in practice they have often fallen short of expectations in terms of promoting and protecting the rights of migrant workers; migrant workers who emigrate on a temporary basis are rarely granted anything beyond health and accident benefits, with little or no provision for long-term benefits such as pensions. An ILO study analysing the text of 144 BLAs and MoUs around the world found that just 30 per cent of them included provisions on social security, including health benefits (Wickramasekara 2015). Those that did mainly involved countries in Europe and the Americas; agreements with Gulf Cooperation Council countries, where large numbers of migrant workers are employed, often do not ensure the social security coverage of migrant workers.

Even BLAs that include provisions on social security often include a number of limitations on coverage, including:

- limited material scope, meaning that they do not apply to all benefits or branches of social security;

[79] In its General Comment No. 19 on the right to social security, the UN Committee on Economic, Social and Cultural Rights mentions the "obligation of States parties to guarantee that the right to social security is enjoyed without discrimination [...]. The Covenant thus prohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security" (para. 29).

[80] These rights are embodied in ILO Conventions Nos 118, 97(6)(1)(b) and 143(10); ILO Recommendation No. 151, para. 34(1)(b); and ICRMW, Art. 27(1).

- limited personal scope in so far as they exclude from coverage certain groups of migrants, such as domestic, self-employed and seasonal agricultural workers. These exclusions affect women migrants in particular as they are overrepresented in domestic work and non-standard forms of employment;[81]
- the absence of key social security principles (see Chapter 2), particularly the portability of benefits and entitlements.

Given the limitations of social security coverage under BLAs alone, separate social security agreements are needed in order to ensure the maintenance of rights in the course of acquisition, determine methods of benefit calculation and address other issues with a view to the full coordination of social security benefits between the two States parties. In order to gain a complete picture of migrant workers' access to social protection, the provisions of BLAs should be read concomitantly with those of national legislation, existing bilateral or multilateral social security and other agreements and related jurisprudence (van Panhuys, Kazi-Aoul and Binette 2018).

Lastly, even where social security rights are clearly set out in a BLA, a number of practical barriers may limit their full enjoyment. First, the agreement's content and the rights and obligations established therein may not be made readily available and comprehensible to migrant workers and other stakeholders, such as employers and social security administrators. Second, BLAs often fail to establish concrete mechanisms for monitoring their implementation and complaint mechanisms allowing migrant workers to seek justice if their social security rights have been violated. Third, the administrative procedures for accessing social security rights can be particularly difficult to navigate for migrant workers, who may face language barriers or difficulties in meeting documentation requirements.

▶ 4.5 From right to reality: Country practices

While not yet common practice, a number of countries have concluded BLAs that mention equality of treatment between migrants and nationals in respect of social security. For example, Article 7 of the 2005 MOU between Egypt and Italy states: "Migrant workers enjoy the same rights and the same protection accorded to workers who are nationals of the receiving State, including social security, in accordance with the regulations of the receiving States".[82]

Similarly, Article 1 of the MoU on labour mobility partnership between the Republic of India and the Kingdom of Denmark (2009) states: "The workers shall enjoy full rights and privileges accorded to any worker in Denmark in accordance with the provisions of the labour and social security laws of that country and as set out in Article 1.3" (Wickramasekara 2018).

Article 5 of the Migration Agreement between the Republic of Argentina and Ukraine (1999) also establishes the principle of equality of treatment and refers to a separate agreement on social insurance:

> Immigrants and members of their families shall enjoy in the territory of the receiving countries the same rights and freedoms as citizens of the host country, including the right to education, paid work, to travel freely in the host country, to have social security, legal aid, legal defence and have the same civil obligations as citizens of the host country according to the laws of that country. Social insurance of immigrants and their family members shall be governed by specific agreements.[83]

A number of other BLAs refer to separate bilateral agreements that establish the specific methods for applying social security to migrant workers in line with Article 21 of the ILO Model Agreement on Temporary and Permanent Migration for Employment. Several BLAs between African and European countries state that such agreements exist or will be concluded subsequently; examples include agreements between Cabo Verde and Portugal (1997), France and Tunisia (1963) and Spain and Morocco (2001) (Monterisi 2014).

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[81] The term "non-standard forms of employment" has no official definition. It typically refers to work that falls outside the scope of the standard employment relationship, understood to mean full-time, indefinite work in a subordinate employment relationship. The following forms of non-standard employment may be considered: (1) temporary employment; (2) temporary agency work and other contractual arrangements involving multiple parties; (3) ambiguous employment relationships; and (4) part-time employment (ILO 2015).

[82] Agreement between the Government of the Republic of Italy and the Government of the Arabic Republic of Egypt on cooperation in the field of bilateral migratory flows for labour purposes, 2005.

[83] Migration Agreement between the Republic of Argentina and Ukraine, signed 29 April 1999.

Article 2 of the Cabo Verde–Portugal agreement stipulates that "[f]or workers hired under this Protocol, the provisions of the Social Security Convention in force between Cabo Verde and Portugal apply, with the exception of the right to retirement pensions".[84]

Other BLAs contain in annex model employment contracts that require employers to provide social security in accordance with the legislation and regulations of the destination country. In practice, this is often limited to short-term benefits such as healthcare and employment injury benefits. For example, the model contract annexed to the BLA between Bangladesh and Qatar (2008) stipulates that employers are responsible for providing free medical treatment to their workers and for ensuring that workers are paid indemnities for labour accidents, disability or death in accordance with Qatar's labour laws (Wickramasekara 2018).

▶ 4.6 Conclusion

Although ILO standards and other international instruments encourage States to conclude BLAs in order to regulate and facilitate migration for employment and ensure migrant workers' enjoyment of their rights, in practice these agreements do not always include provisions on social protection. As this is a key aspect of employment conditions, it is essential to include such provisions.

Equality of treatment between nationals and non-nationals is the guiding principle of international labour standards with respect to social security,[85] but the mere inclusion in a BLA of a provision mandating equality in access to social security does not ensure the full enjoyment of migrant workers' social protection rights; there may also be limitations in terms of the branches and specific groups of migrant workers covered. BLAs must be read in conjunction with national legislation, other agreements and jurisprudence in order to determine whether migrant workers have full access to their social protection rights in a given country.

In light of the foregoing, the following actions are recommended in order to ensure the fullest enjoyment of social protection rights by migrant workers:

1. Ensure that the BLAs concluded include provisions on the social protection of migrant workers, including access to healthcare. Such provisions should, at a minimum, provide for equality of treatment between migrant workers and nationals and guarantee their eligibility for social security benefits, including in response to crisis or emergency situations, under the same conditions.

2. Conclude separate bilateral or multilateral agreements on social security that provide for the portability of migrant workers' social security entitlements and state how these are to be calculated.

3. Involve the social partners and other stakeholders in the design, negotiation, implementation and monitoring of BLAs to ensure that they accurately reflect the realities of the world of work and respond to the protection needs of migrant workers, making them more effective instruments.

4. Ensure that the content of BLAs is made widely accessible and understandable to migrant workers and other stakeholders, such as employers, recruitment agencies, labour inspectors and social security administrators.

[84] Protocol regarding the Temporary Emigration of Cabo Verde Workers for employment in Portugal, 18 February 1997.

[85] See the Equality of Treatment (Social Security) Convention, 1962 (No. 118). In addition, Conventions Nos 97 and 143 mandate equality of treatment, including with regard to social security. The ILO Model Agreement annexed to Recommendation No. 86 also provides useful guidance in this respect.

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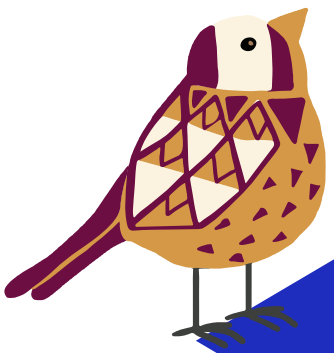
Chapter 5

Unilateral measures in countries of origin and employment



▶ Key messages

1. States may decide to unilaterally extend social protection to migrant workers in order to compensate for a lack of bilateral or multilateral social security agreements or to ensure more universal and comprehensive social protection.

2. Including migrant workers in national social protection responses in line with international human rights and labour standards plays an important role in mitigating the effects of COVID-19 and supports a swifter recovery.

3. While countries of transit and destination can unilaterally extend social protection to migrant workers and their dependents who live or work within their borders, a country of origin may also unilaterally extend such protection to its nationals and their dependents while working and living abroad or upon their return.

4. National policies and legislation can ensure equal treatment of migrant and national workers with respect to social protection based on the principles of equality of treatment and non-discrimination and in line with international human rights instruments and international labour standards.

5. No single measure can give migrant workers full access to their social protection rights; a progressive approach combining several unilateral measures is needed in addition to the conclusion of bilateral and multilateral social security agreements.

6. The conclusion of bilateral and multilateral social security agreements between two or more countries remains the most effective protection measure and is necessary in order to ensure and facilitate the maintenance of acquired rights and rights in the course of acquisition.

7. The planning, design, monitoring and implementation of unilateral social protection measures for migrant workers should be based on social dialogue and States should support their representation in workers' organizations.

8. Policy coherence with national migration laws and regional policies with an impact on migrant workers is important in order to avoid protection gaps and ensure that social protection laws, polices and measures effectively include all migrant workers.

9. To address the practical barriers that migrant workers may face in accessing social protection, complementary measures should be considered. These include, among others, communication and information campaigns, harmonization and simplification of data collection, shared procedures, facilitation of access to complaint or conflict resolution mechanisms and enhancement of fiscal space or investment in social protection.

10. While private microinsurance schemes, whether community-based or not, may be considered by migrant workers who are not eligible for public social protection schemes, these do not relieve the State of its responsibility to provide all residents and their children with, at a minimum, a set of basic social security guarantees that secure their protection in accordance with the ILO Social Protection Floors Recommendation, 2012 (No. 202).

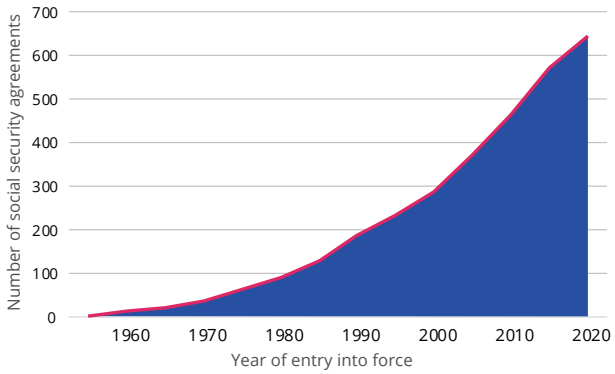
▶ 5.1 Introduction

Although the 169 million migrant workers, out of a total of 272 million international migrants worldwide (ILO 2021, UNDESA 2019), contribute to the economies of their countries of origin and destination, they are among the most excluded in terms of social protection; all too often, they do not even receive basic coverage under social protection schemes and instruments. Not only do they risk losing their social security entitlement in their home country owing to their absence; they may also encounter restrictive conditions under the system of their country of destination.

As a result, some States have concluded social security agreements in order to ensure the protection of their workers abroad and ensure the portability of their entitlements; there has been an exponential increase in the number of these agreements worldwide over the past six decades (Figure 5.1) and there are currently some 660 bilateral and multilateral social security agreements (ISSA 2021). However, these agreements cover a limited number of migrant workers, since they exclude most workers in the informal economy and those with irregular status, and may be limited with respect to the social security branches, types of migrant workers and level and type of benefits that they cover.

▶ Figure 5.1 Change in the number of social security agreements, 1955–2020

Source: ISSA 2021



In addition to State-to-State cooperation processes, the options available to policymakers include the adoption of unilateral social protection measures by countries of employment or origin who wish to ensure migrant workers' enjoyment of their right to social security.

In an effort to eliminate protection gaps and facilitate labour migration, States have considered a variety of unilateral measures. The labour migration landscape, the type of employment (industry, sector or the informal economy) and the migratory status (temporary or seasonal) of migrant workers in a given country are major factors that influence the policies or measures adopted. In order to ensure that these measures are sustainable and socially responsive, it is important to provide for social dialogue during their planning, design and implementation.

Efforts to mitigate the COVID-19 crisis have shown the importance of providing social protection, including access to healthcare, to migrant workers and their families. Many countries have adopted unilateral measures for this purpose (ILO 2020).

In light of the foregoing, this chapter will provide an overview of the available measures that countries of employment and origin can take in order to extend social protection to migrant workers and their families on a unilateral basis. The measures that can be put in place by countries of destination include (i) ensuring equality of treatment; (ii) allowing for flexibility in the design of the scheme and support with regard to qualifying conditions and minimum requirements; (iii) providing lump sum payments or reimbursement of contributions for workers who leave a scheme; and (iv) considering non-contributory unilateral social protection measures. Steps that can be taken by countries of origin include (i) allowing migrant workers to retain membership in a social security scheme or to maintain their rights thereunder; (ii) allowing for flexibility in the design of the scheme and assistance with regard to qualifying conditions and minimum requirements; and (iii) giving returning migrants and their dependents access to social protection floor benefits.

This chapter provides concrete country examples, including a few unilateral measures adopted in response to the COVID-19 crisis. It also briefly mentions complementary measures and presents a selection of non-state measures and initiatives that migrants may wish to consider in the absence of public social protection schemes or in order to qualify for higher benefit levels and enhanced protection. The chapter concludes with a set of policy recommendations, based on international human rights and labour standards that countries may wish to consider when extending social protection to migrant workers on a unilateral basis.

► 5.2 Unilateral measures

States may decide to extend social protection unilaterally to migrant workers in order to ensure a more universal and comprehensive social protection coverage of all workers, compensate for the absence of bilateral or multilateral social security agreements or fill gaps in their ratification of ILO Conventions on the protection of migrant workers' social security rights.

Before considering the unilateral measures and schemes adopted first by countries of employment and then by countries of origin, it is important to bear in mind that for the purpose of this chapter, application of the principle of equality of treatment[86] in respect of social protection benefits is an overarching framework rather than a unilateral measure. In other words, the principle of equality of treatment and non-discrimination on the basis of nationality, which seeks to ensure that migrant workers are not treated less favourably than national workers, should apply to all public measures. However, international labour standards allow for some exceptions in the case of social protection measures financed partly or wholly out of public funds and specific categories of migrant workers, including those in an irregular situation.[87]

It should be borne in mind that these unilateral measures are not mutually exclusive; for example, countries of origin can both establish a voluntary insurance scheme with old-age benefits for their workers abroad and provide certain benefits to family members who remain in the worker's home country.

In order to ensure a more coherent and comprehensive approach, such measures can be part of a national social protection extension strategy. The Social Protection Floors Recommendation, 2012 (No 202) calls on member States to formulate and implement such strategies based on social dialogue, prioritize the implementation of SPFs as a fundamental element of their national social security systems and seek to provide higher levels of protection in line with international labour standards. The purpose of national SPFs, which may include contributory and non-contributory schemes or a mix thereof, is to ensure, at a minimum, basic social protection and access to essential healthcare for all residents and their children.

While countries of employment can unilaterally extend social protection to migrant workers and their dependents who live or work within their borders, countries of origin can also unilaterally extend social protection to their nationals and the latter's dependents while working and living abroad or upon their return, as well as to any dependents who remain in the country of origin.

5.2.1 Countries of employment

Various measures can be taken by countries of employment, preferably as part of a national strategy for ensuring more universal and comprehensive coverage of migrant workers. For the purpose of this chapter, these measures have been divided into two categories: contributory social protection (social insurance) and non-contributory tax-financed social protection measures (social assistance).[88] It should be borne in mind that these measures may overlap and/or involve a combination of contributory and non-contributory social protection schemes. For example, the basic and emergency healthcare available to migrant workers, including those in an irregular situation, may be partly State- financed and still require a contribution from the workers.

The following list provides an overview of options; it is not intended to be limitative or comprehensive.

[86] The principle of equality of treatment is enshrined in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Equality of Treatment (Social Security) Convention, 1962 (No. 118) and other international labour standards (see Chapter 2).

[87] Social Security (Minimum Standards), Convention, 1952 (No. 102), Art. 68 (1).

[88] For more details on these terms, see the Glossary.

► Box 5.1 Unilateral measures: A non-limitative list of policy options for countries of destination

With respect to contributory social protection:

1. Ensuring equality of treatment between nationals and non-nationals with respect to social protection, including by:
   - enshrining migrant workers' right to social security in national constitutions and/or equality-of-treatment provisions in national legislation, and allowing migrant workers to enrol in national social protection schemes;
   - allowing the payment of benefits abroad to non-nationals and nationals who qualify for benefits offered by the country of employment (exportability);
2. Flexibility in the design of the scheme and assistance with regard to qualifying conditions and minimum requirements by:
   - allowing retroactive payment of missed contributions periods;
   - incorporating flexibility or exceptions into the qualifying requirements applicable to certain categories of workers or economic sectors, such as reduction of the minimum number of contributory years that migrant seasonal workers require in order to qualify for a pension;
   - pro rata temporis payment of benefits (proportionate to the time worked);
   - exceptions to the obligation to enrol in a social security scheme in the country of employment if a migrant worker is already covered in the country of origin, thus ensuring that these workers are not required to pay contributions in both countries;
3. Providing lump sum payments or reimbursement of contributions for workers who leave a scheme.

With respect to non-contributory social protection:

1. Ensuring equality of treatment between nationals and non-nationals with respect to non-contributory schemes financed from public funds;
2. Facilitating access to healthcare for migrant workers and their families, including those in an irregular situation;
3. Providing flexibility with regard to residence or other qualifying requirements for specific categories of migrant workers (such as seasonal workers) or economic sectors.

5.2.1.1 Ensuring equality of treatment

The principle of equality of treatment is a fundamental human right and is enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other international human rights instruments.[89] It underpins the universally recognized notion that human beings should enjoy the same rights, irrespective of their nationality.

With respect to social protection, this principle seeks to ensure that nationals and non-nationals have the same rights and obligations, without discrimination on grounds of, among other things, nationality, race or sex. Exceptions are possible, for example with regard to non-contributory benefits and migrants in an irregular situation.[90]

Recognizing the social and economic development benefits of extending social protection to migrant workers, countries of employment may adopt unilateral measures based on the equality of treatment principle. More specifically, these measures may include:

- enshrining migrant workers' right to social security in national constitutions and equality-of-treatment provisions in national legislation and allowing them to enrol in national social protection schemes;
- allowing the payment of benefits abroad to non-nationals and nationals who qualify for benefits offered by the country of employment (exportability);
- reducing or limiting the qualifying criteria or minimum conditions for certain benefits (detailed in section 5.2.1.2).

Including migrant workers in host countries' national social protection schemes is essential to the promotion of equality between workers who do the same job and creates a level playing field by reducing unfair competition between migrant workers and nationals. Excluding migrant workers from contributory social security schemes may create a perverse incentive to recruit them as cheap and unprotected labour with the risk of social dumping and a consequent race to the bottom.

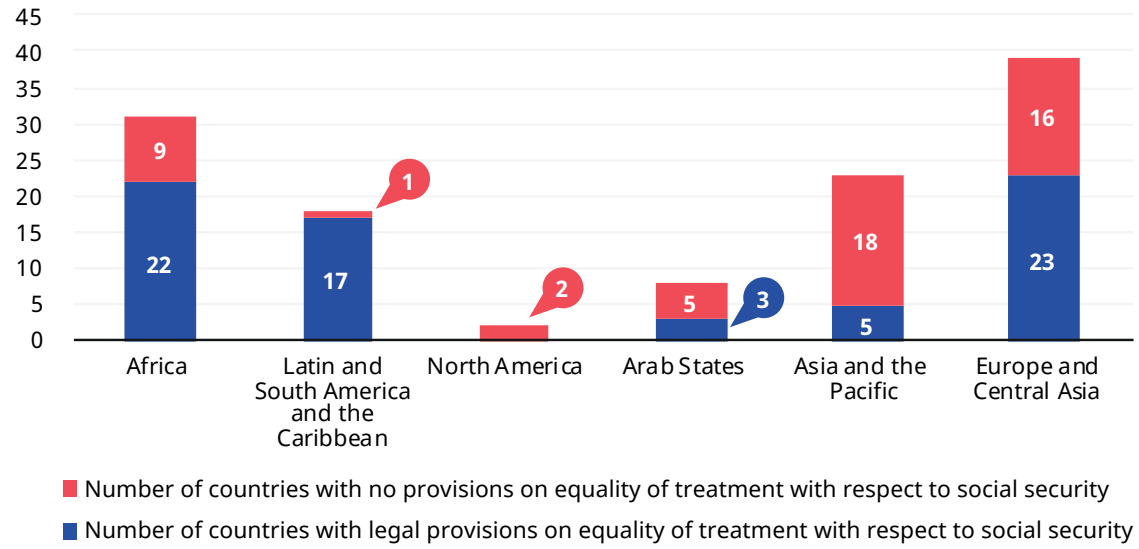
The aforementioned ILO mapping of 120 countries (Van Panhuys, Kazi-Aoul and Binette 2017) found that:

- 58 per cent of countries have national laws with provisions granting equality of treatment between nationals and non-nationals in respect of contributory social security (Figure 5.2);
- 62 per cent of countries have national laws with provisions granting equality of treatment between nationals and non-nationals in respect of healthcare (Figure 5.3).

[89] This principle is also enshrined in various international labour standards; see Table 2.1.

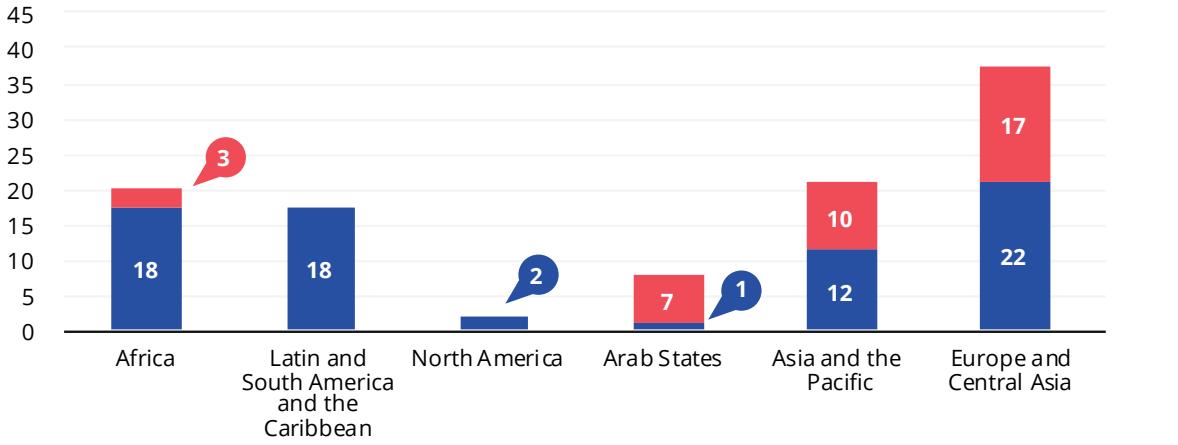
[90] Social Security (Minimum Standards), Convention, 1952 (No. 102), Art. 68(1).

► **Figure 5.2 Number of countries per region with legal provisions on equality of treatment with respect to social security[91]**



Source: Van Panhuys, Kazi-Aoul and Binette 2017.

► **Figure 5.3 Number of countries per region with legal provisions on equality of treatment in respect of access to healthcare**



Source: Van Panhuys, Kazi-Aoul and Binette 2017

[91] Note: For the purposes of this study, Africa includes Algeria, Angola, Benin, Burkina Faso, Cameroon, Cabo Verde, Chad, Côte d'Ivoire, the Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Kenya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Senegal, Tanzania, Togo, South Africa, Sudan, Tunisia and Zambia; North America includes the United States and Canada; Latin and Central America and the Caribbean includes Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay; the Arab States include Iraq, Jordan, Kuwait, Lebanon, Oman, Qatar, the United Arab Emirates and Yemen; Asia and the Pacific includes Afghanistan, Australia, Bangladesh, Cambodia, China, India, Indonesia, Iran, Israel, Japan, the Republic of Korea, the Lao People's Democratic Republic, Malaysia, Mongolia, Myanmar, New Zealand, Pakistan, the Philippines, Singapore, Sri Lanka, Thailand and Vietnam; and Europe and Central Asia includes Albania, Armenia, Austria, Belgium, Bulgaria, Georgia, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Kazakhstan, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom of Great Britain and Northern Ireland.

In the aforementioned CEACR *General Survey Concerning the Migrant Workers Instruments*, "a large number of countries reported that their social security legislation did not distinguish between nationals and foreign residents and generally covered everyone who was lawfully resident or working in the country.[92] This was particularly the case with respect to contributory benefits, which were granted equally to all employed workers fulfilling the conditions of entitlement" (ILO 2016, para. 396).[93]

It is important to note that the existence of legal provisions on equality of treatment between nationals and non-nationals does not mean that migrant workers have the same access to social protection as nationals who have lived and worked in their country of origin for their entire life. Access to social protection may be limited by factors such as: (i) how the term "migrant worker" is defined at the national level; (ii) the type of permit held; (iii) the authorization to work; and (iv) the length of stay. Equality of treatment may be granted only to certain categories of migrant workers, such as permanent residents, and may only be made available to temporary migrants under special provisions and international agreements (OECD 2018). In addition, migrant workers often do not fully benefit from equality-of-treatment provisions in their countries of employment because they are not eligible until a specified length of time after their arrival has passed.

In Australia, for example, access to social services differs for temporary and permanent migrants; the former, with some exceptions, have no immediate access to social security benefits while the latter have access to the full range of social services after 104 weeks of residence (Australia, Department of Social Services 2019).

- Enshrining migrant workers' right to social security in national constitutions and provisions on equality of treatment in national legislation

Countries may include general provisions on equality of treatment and non-discrimination in their constitution and provisions on equality of treatment with respect to social security in their labour, social security, migration and healthcare laws or in laws governing specific social security schemes.

In national constitutions, such provisions may vary from a provision establishing the right to social security for ''everyone" to a statement that foreign nationals have the same rights as nationals, including in respect of social security.

- For example, the "constitutions of nearly all Central and South American countries have extensive social security provisions" (ILO 2012, para. 238). Colombia's Constitution establishes that all inhabitants have an inalienable right to social security (art. 48) while Costa Rica's states that foreign nationals have the same rights as nationals. In Asia, the Constitutions of Bangladesh, India, Pakistan and Sri Lanka are other examples of constitutional commitment to social security (ILO 2012, para. 240).
- Article 27 of South Africa's Bill of Rights enshrines the right of "everyone" to have access to healthcare services, sufficient food and water and social security, including social assistance. However, according to the jurisprudence of the country's Constitutional Court, only permanent residents have access to the same social security benefits as South African nationals and temporary migrants have limited access to social protection (Van Panhuys, Kazi-Aoul and Binette 2017).

In national legislation, this principle may be established in various forms and in various types of law and may provide for equality of treatment of migrant workers in general, or specifically with respect to social security.

- In Spain, the social security legislation (Royal Legislative Decree No. 1/1994 and Organization Act No. 4/2000) enshrines the principle of equality of treatment between nationals and non-nationals.

92 The examples given include Argentina, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Finland, France, Luxembourg, the Netherlands, Montenegro, Panama, Suriname, Sweden, Switzerland, the United States, Uruguay and Venezuela (Bolivarian Republic of).

93 The examples given include Bangladesh, Costa Rica, Germany, Hungary, India, Latvia, Lithuania, the Netherlands, Pakistan, Poland, Spain, Turkey and Turkmenistan.

► Box 5.2 Migration and social security as two fundamental rights enshrined in the 2008 Constitution of Ecuador

Over the past 15 years, new migration flows have had an impact on the demographic landscape of South America. This has led to several legal and policy changes that have broadened social protection for nationals and extended social benefits to migrants. The case of Ecuador is particularly striking as it constitutes one of the strongest legal frameworks for the protection of migrant workers' rights in the region.

As part of a comprehensive national policy on human mobility and universal citizenship, Ecuador is the only country in the region to have elevated the right to migrate to the constitutional level. Articles 40 and 392 of the 2008 Constitution, which apply to both Ecuadorians living abroad and immigrants residing in the country, expressly recognize and guarantee the right to migrate, stating that no human being shall be identified or considered illegal because of his/her migratory status. They also recognize the right to asylum and sanctuary and prohibit arbitrary displacement. Ecuador has ratified the primary international instruments on migration.

The Constitution also enshrines the principle of equality of rights and duties in respect of all foreign nationals on Ecuadorian territory (art. 9) and prohibits all discrimination on grounds of place of birth or migratory status (art. 11.2).

Among the rights granted to everyone, including migrants, are the right to work and to social security (arts 33 and 34). The right to social security has a dual constitutional recognition: as one of the prime duties of the State (art. 3) and as a right that cannot be waived (art. 34). Social security is governed by the principles of solidarity, universality, equity and efficiency. The Constitution also speaks of "the right to a decent life", a concept that includes employment, social security and other necessary social services for all (art. 66).

Since the adoption of its 2008 Constitution, Ecuador's legal framework on migrant workers' rights has been expanded by other legislation upgrading public policies, including the 2017 Organization Act on Human Mobility, which establishes that migrants have the same right to work and to social protection as Ecuadorians. They can work in the private sector without special government permission and can even work in the public sector or be self-employed (IOM 2018). Executive Decree No. 1182 (2012), which regulates asylum procedures in the country, provides that refugees and asylum seekers shall have access, in accordance with the national regulations, to all government programmes for economic and social inclusion (Art. 62).

► Authorizing the payment of benefits abroad (exportability)

National policymakers can also adopt measures to ensure that migrant workers receive the benefits to which they are entitled when they leave their countries of employment. In that regard, it is important to differentiate between the concepts of portability and exportability. Countries of destination may authorize the payment of acquired social protection benefits abroad (exportability)[94] to non-nationals on an equal basis with nationals. The exportability of benefits does not require cooperation between countries and is understood to refer to the maintenance of acquired rights and payments of benefits abroad, one of the key social security principles established in Convention No. 157, among others (see Chapter 3). In such cases, the eligibility criteria and level of benefits are determined by the country of employment and only its legislation applies.

Under the principle of equality of treatment, non-nationals should have access to the payment of benefits abroad on an equal footing with nationals. In practice, however, a certain reticence persists for various reasons, including the difficulty of verifying eligibility criteria and processing payments, lack of access to data protection technologies, negative public perceptions and concerns regarding the financial sustainability of the scheme.

This is of particular importance to women migrant workers, who may lose their maternity benefits if they leave the country or be required to leave the country if they are not actively working, depriving them of maternity benefits in practice.

[94] There is no internationally agreed definition of "exportability", nor do ILO Conventions and Recommendations refer to this term explicitly. Some authors understand the exportability of social security benefits to mean the payment of benefits abroad; see Taha, Siegmann and Messkoub (2015); Sabates-Wheeler and Koettl (2010); and Hirose, Mikac and Tamagno (2011).

Examples:

- In the United States, nationals of a country in North, Central or South America (except Paraguay and Suriname) who live outside the United States and have contributed to social security benefits in the United States may be able to receive their monthly retirement or disability benefits abroad if they are eligible for them and meet certain requirements. This also applies to survivors' benefits paid to the dependent(s) of such a worker (US 2008; US n.d.).
- In New Zealand, the public superannuation benefit is exportable only for nationals of the Pacific islands; for other foreign nationals, a social security agreement allowing for the exportability of benefits is required (Sabates-Wheeler 2009).
- In Germany, Deutsche Post pays public pensions to German nationals abroad and to foreign nationals who have worked in Germany and contributed to the system through the German pension scheme, a platform for the disbursement of funds within Germany and in 200 other countries around the world. It makes 25 million pension payments per month,[95] including 1.5 million abroad. The services provided include the maintenance of inventory data; payments made at home and abroad; annual collection of life certificates from pensioners abroad; and automatic monthly death data comparison with various countries (foreign pensions).

Portability, on the other hand, requires cooperation between the social security institutions of the countries of origin and employment within the framework of a social security agreement with a view to joint determination of benefit levels for a particular migrant worker.[96] This is necessary because a country's social security legislation may expressly prohibit all payment of benefits abroad in the absence of a multilateral or bilateral agreement or may impose more stringent requirements or require payment of an additional tax for receipt of those benefits abroad.[97]

5.2.1.2 Flexibility in the design of the scheme and assistance with regard to qualifying conditions and minimum requirements

The social protection coverage of migrant workers depends, to a large extent, on the conditions under which they migrate and on their country of employment. Notwithstanding the inclusion of equality-of-treatment principles in national legislation, migrant workers may still face legal obstacles when seeking access to their social protection rights and benefits. For example, length-of-stay or employment requirements and types of employment contract or work permit may prevent them from qualifying for certain benefits.[98] It is therefore important to consider and address their specific needs and the challenges that they face.

The design of policies, laws and schemes typically varies from one country to another and may include:

- allowing retroactive payment of missed contributions periods;
- incorporating flexibility or exceptions into the qualifying requirements applicable to certain categories of workers or economic sectors, such as reduction of the minimum number of contributory years that migrant seasonal workers require in order to qualify for a pension;
- pro rata temporis payment of benefits (proportionate to the time worked);
- exceptions to the obligation to enrol in a social security scheme in the country of employment if a migrant worker is already covered in the country of origin, thus ensuring that these workers are not required to pay contributions in both countries.

This list is non-exhaustive as each law and scheme must take into account the specificities and heterogeneity of the relevant country's labour migration landscape.

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[95] These pensions may be classified into several subcategories, including old-age pensions for severely disabled people, old-age pensions for long-term-insured persons, old-age pensions for particularly-long-term-insured persons, regular retirement pensions, partial / full disability pensions, widow's / widower's pensions and orphan's pensions.

[96] The conclusion of a social security agreement also enables migrant workers and their family members to qualify for benefits from the countries in which they have worked by adding together, or totalizing, their periods of coverage under the social security systems of all of the States parties to the agreement in order to meet the minimum qualifying period.

[97] For further information and examples, see Chapter 3.

[98] For a more in-depth explanation on the legal and practical barriers to the social protection of migrant workers, see Chapter 1.

5.2.1.3 Lump-sum payment or reimbursement of contributions when leaving a scheme

In its *General Comment No. 19: The Right to Social Security*, the Committee on Economic, Social and Cultural Rights states that "where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country" (CESCR 2008, para. 36).

Similarly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families states: "Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances" (ICRMW 1990, Art. 27(2)).

A "lump-sum payment" in the context of social protection is an amount of money paid on one occasion when, for example, migrant workers leave their countries of employment, and thus the scheme. The calculation of this amount varies by scheme and by country and often takes into account the contributions paid by the worker and the employer (UNDESA 2018). A "reimbursement" is a payment (in instalments or as a lump sum) of the precise amount of the contributions that the worker made to the scheme while employed. It often excludes the employer's contributions.

International labour standards on social security authorize lump-sum payments instead of the periodic payments of benefits where the national system's state of development is insufficient; in the case of employment injury benefits; where the degree of incapacity of the worker is slight; and in the interests of the insured person (see, for example, Conventions Nos 17, 102 and 121). With respect to migrant workers, Convention No. 157 recognizes that where the payment of benefits abroad is impossible owing to, for example, the lack of a bilateral social security agreement, a lump sum may be considered.

Lump sum payments for employment injuries must be the actuarial equivalent of the benefit owed (Convention No. 121, Art. 15). The related Recommendation No. 121 provides further guidance and states that for those with a limited (less than 25 per cent) loss of capacity, a lump-sum payment is warranted if the amount is equitable and not less than the periodic payments that the person would have received over a three-year period (para. 10).

The amount of the lump-sum payment or reimbursement may also vary according to the applicable tax and/or interest rates and administration fees. In the absence of a bilateral or multilateral social security agreement allowing for the maintenance of migrant workers' social security entitlements and benefits (acquired or in the course of acquisition), some countries provide for full or partial reimbursement of contributions or for a lump-sum payment when migrant workers leave their employment or country of employment and are not eligible for the full benefit. In some countries, these are known as "end-of-service benefits".

Examples:

- An ILO study found that countries with retirement provident funds schemes, such as Brunei, Malaysia, Indonesia and Singapore, allow migrant workers to withdraw their accumulated pension contributions in the form of a lump sum when they leave the country (Olivier 2018).
- In Thailand, recently-unemployed migrants may only remain in the country for seven days and thus do not meet the eligibility criteria for unemployment benefits. At the end of their contract, their contributions are refunded through a single lump-sum payment (Olivier 2018; Hall 2012).
- In the Lao People's Democratic Republic, migrant workers may only work in the country for five years and are therefore unable to meet the minimum pension requirement of 15 years of contributions. Instead, they are entitled to a lump sum payment upon departure (Olivier 2018).[99]
- In Japan, migrant workers who have lived in the country for a short period of time and contributed to the National Pension System or the Employees' Pension Insurance system for at least 6 months can apply for a "lump-sum withdrawal payment" within two years of their departure. The National Pension System provides a "basic pension" covering old age, disability, and death (Japan 2020).

However, lump-sum payments provide limited income security as compared to periodic payments (such as pension benefits for the remainder of a person's life or employment injury benefits for the duration of the injury).

[99] The 2014 Labour Law (art. 72) provides for old-age benefits.

These lump-sum payments are usually taxed. Depending on the tax (and exchange) rate,[100] this may place migrant workers at an additional disadvantage as compared to national workers.[101] In Australia, for example, the superannuation contributions that temporary migrant workers can claim upon leaving the country are taxed at a rate of 35–65 per cent (OECD 2018). In addition, many social security funds and schemes do not allow for the payment of a lump sum (ILO 2018).

► Box 5.3 Ghana

Ghana has developed a social protection strategy (2013) and a national social protection policy (2014) with a view to the establishment of a national social protection floor, including universal access to healthcare and basic income security for older persons and children, as well as for the active and vulnerable populations. The policy also extends social insurance and assistance to all categories of workers.

The national social insurance scheme covers public and private sector, self-employed, informal and migrant workers based on the principle of equality of treatment. It has three tiers: a Mandatory Basic National Social Security Scheme (Tier 1) which covers salaried and, on a voluntary basis, self-employed workers and includes old-age and invalidity pensions, employment injury benefits and survivors' pensions; a Mandatory Occupational Pension Scheme (Tier 2), which covers salaried workers and provides old-age pensions as a lump-sum benefit; and a Voluntary Provident Fund and Personal Pension Scheme (Tier 3) for informal economy workers who are excluded from the mandatory pension scheme and self-employed and salaried workers in the formal sector.

In Ghana, migrant workers can decide to choose either a lump-sum payment or monthly payments for the remainder of their life (OHCHR 2014).

According to the Social Security National Insurance Trust of Ghana (SSNIT), as at June 2019, 94,954 migrant workers were registered under the social security scheme, 3,411 migrants were receiving a pension as residents of Ghana and 417 non-resident migrant retirees who had contributed to the scheme in Ghana were receiving benefits abroad. (ILO Forthcoming).

In addition, all residents, including migrant workers, have access to the National Health Insurance Scheme (NHIS) for the duration of their employment and retirement upon payment of a contribution of 2.5 per cent of their wage. With the NHIS card, they have access to healthcare without advance payment.

► Box 5.4 Viet Nam

In 2016, there were an estimated 83,046 migrant workers –about 0.15 per cent of the labour force – in Viet Nam (Viet Nam 2018). The Government embarked on a reform of the existing social security system that will extend certain benefits to migrant workers; as from January 2022, they will be required to participate in the national social insurance scheme [102] and will thus have access to old-age, disability, survivors', sickness, employment injury and maternity benefits. The scheme covers public- and private-sector employees; voluntary coverage is also available for self-employed workers (Viet Nam 2018). Previously, these were available only to Vietnamese citizens.

The new old-age and survivors' lump-sum benefits will be paid to migrant workers if "they do not meet the contribution requirements for an old-age pension at the normal retirement age, qualify for a foreign pension, are diagnosed with a terminal illness, permanently leave Vietnam, or lose their legal work authorization" (Viet Nam 2018).

To qualify for the old-age pension, 20 years of contributions are required. Workers who have not met this requirement can opt for a lump-sum payment, which is also payable to the survivors of migrant workers living outside of Viet Nam (exportability of the benefit).

[100] Currencies suffering from convertibility issues or severe devaluation can pose a serious obstacle to the export of cash benefits.

[101] Although nationals may also be required to pay taxes, these may be lower than those imposed on migrant workers.

[102] Decree No. 143/2018/ND-CP.

5.2.1.4 Non-contributory unilateral social protection measures

Convention No. 102[103] stipulates that States may limit migrant workers' access to non-contributory tax-financed social protection benefits if they are financed in whole or in part from public funds. Such restrictions are widespread throughout the world and migrant workers are often effectively excluded, particularly where benefits are based on long residency periods. However, according to Recommendation No. 202,[104] under the universality principle all workers, including migrant workers, should have access to at least a minimum level of social protection and access to essential healthcare.

- Ensuring equality of treatment between nationals and non-nationals with respect to non-contributory schemes financed from public funds

Access to tax-financed, non-contributory social protection schemes is often need-based and/or contingent on a minimum residence period. While the principle of equality of treatment between national and non-nationals is contrary to limitation of access on the basis of nationality, countries are entitled to limit access based on residency or other conditions (such as resources).

Examples:

- In France, both nationals and non-nationals have access to the non-contributory healthcare scheme (Protection Universelle Maladie (PUMA)). However, in order to be eligible a person, regardless of nationality, must have – among other requirements – resided in France for a minimum of three consecutive months (France 2019).
- In Canada, all residents, including most migrant workers with the exception of migrant seasonal agricultural workers, have access to the tax-financed universal pension, healthcare benefits and the earnings-based pension.
- A number of countries (including Canada, Estonia, Germany and the United Kingdom) give refugees and asylum seekers access to limited social protection benefits and services (ILO 2019). In the United Kingdom, asylum seekers are, however, eligible only for temporary housing and financial support (ILO 2019).

- Flexibility with respect to residence or other qualifying requirements for specific categories of migrant workers or economic sectors (such as seasonal migrant workers)

In order for migrant workers to have access to social protection on an equal basis with nationals, it may be necessary, to adapt the qualifying conditions to their specific situation. For example, non-contributory benefits often have residence requirements and a degree of flexibility can ensure that all migrant workers have access to a minimum level of social protection as called for in the Social Protection Floors Recommendation, 2012 (No. 202).

Example:

- In the United States, certain categories of foreign nationals (humanitarian immigrants, refugees and survivors of human trafficking) do not need to wait five years to access certain public benefits (ILO 2019).

- Facilitating access to healthcare for migrant workers, including those in an irregular situation

Migrants' right to health is firmly grounded in international human rights instruments,[105] which require States parties to guarantee, at a minimum, access to emergency healthcare. However, the extent of coverage varies widely between countries depending upon the types of services provided (from emergency care to a full range of services) and the funding arrangements (full coverage under the national health system, voluntary insurance coverage or emergency assistance). According to the United Nations Development Programme (UNDP), in more than 60 per cent of the developed countries sampled, migrants

[103] Article 68 of Convention No. 102 specifies that: "1. Non-national residents shall have the same rights as national residents: Provided that special rules concerning non-nationals and nationals born outside the territory of the Member may be prescribed in respect of benefits or portions of benefits which are payable wholly or mainly out of public funds and in respect of transitional schemes. 2. Under contributory social security schemes which protect employees, the persons protected who are nationals of another Member which has accepted the obligations of the relevant Part of the Convention shall have, under that Part, the same rights as nationals of the Member concerned: Provided that the application of this paragraph may be made subject to the existence of a bilateral or multilateral agreement providing for reciprocity".

[104] Article 3 of the Social Protection Floors Recommendation, 2012 (No. 202), states: ''Recognizing the overall and primary responsibility of the State in giving effect to this Recommendation, Members should apply the following principles: (a) universality of protection, based on social solidarity [...]''.

[105] The 1948 Universal Declaration of Human Rights (Art. 25), the International Covenant on Economic, Social and Cultural Rights (Art. 12) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Art. 28).

with irregular status had no access to preventive care and in about 35 per cent of those countries they had no access to emergency care; in developing countries those figures are 70 and 30 per cent, respectively (UNDP 2009). Thus, entitlement to healthcare under national legal systems is often at odds with the rights of migrants with irregular status as established in international human rights instruments.

In addition to being legally excluded, migrants in an irregular situation may face other barriers to effective access to healthcare; it may not be affordable or they may not seek treatment for fear of deportation (see Chapter 6.3). Countries should therefore consider the financial capacities of migrant workers, including those in an irregular situation (ILO 2020b), who should, at a minimum, have access to essential healthcare as part of national SPFs in line with Recommendation No. 202 and with the relevant international human rights instruments.[106]

In its 2019 *General Survey on the Social Protection Floors Recommendation*, the CEACR states that 35 governments had reported that emergency medical care was available for persons other than residents, irrespective of their immigration status.

Examples:

- In the Czech Republic, "extraordinary immediate assistance" is provided to non-residents in the event of a health-related emergency.
- In Denmark and New Zealand, migrants with irregular status have access to urgent, state-financed medical care.
- In Finland, municipalities may decide to grant extensive health services to migrants in an irregular situation (ILO 2019, para. 140).

In 2011, migrants in an irregular situation had access to emergency healthcare in only 19 of the 27 EU countries, to emergency and primary healthcare in only one country (the United Kingdom) and to "emergency, primary and secondary healthcare and specialist and in-patient treatment" in only 6 countries (Belgium, France, Italy, the Netherlands, Portugal and Spain) (UNDESA 2018). Not all of these systems are fully tax-financed and in most cases migrants, including those in an irregular situation, must pay. In 8 of the aforementioned 19 countries, migrants do not have to pay for emergency care (UNDESA 2018). In some countries where healthcare is not free of charge (such as Belgium, Hungary and the Netherlands), the State may reimburse healthcare providers under certain circumstances (Spencer and Hughes 2015). Even in countries where migrants with irregular status have access to primary and secondary care, they must provide documentation (an ID and proof of residence) in order to meet the qualifying conditions. A study by the European Observatory on Access to Healthcare revealed that in 11 countries (Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden, Switzerland and the United Kingdom), the majority of the migrants in an irregular situation surveyed said that the healthcare that they had received was not adequate and 14 per cent reported that they had been denied healthcare, including while pregnant (FRA 2011).

Under Switzerland's mandatory health insurance system, migrants in an irregular situation are entitled to register with the basic health insurance scheme at the same subsidized rate as nationals in a modest economic situation. The benefits of this scheme include outpatient and inpatient medical treatment, prescribed medications, maternity care and treatment in the event of an accident. Article 12 of the Federal Constitution enshrines the right to basic healthcare, irrespective of nationality, residence or insurance status. In practice, however, services vary from one municipality to another as there is some flexibility as to the definition of "basic healthcare" (Switzerland, 2020; ILO Forthcoming).

In August 2013, the Government of Thailand set up a low-cost health insurance scheme that is available to all migrants, irrespective of migration status. In 2015, a total of 1.3 million migrants were enrolled, each paying an annual contribution of 2,200 Baht (equivalent to approximately US$ 73). A supplementary special insurance policy costing 365 baht per year (US$ 10) is available for migrant children up to the age of seven. This package, which includes immunization services and antiretroviral drugs, is identical to the one received by Thai citizens under the Universal Health Coverage Scheme. However, the contribution levels do not cover the real annual cost; hospital expenses are, on average, higher than the capitation[107] received for coverage of migrants. In addition, the fact that hospitals' reimbursement under the Universal Health Coverage Scheme takes three to four months can place them in difficulty (Tangcharoensathien, Thwin and Patcharanarumol 2016; ILO, forthcoming).

[106] In a number of countries, including Argentina, the Republic of Korea, Thailand and 20 EU Member States, migrant workers with irregular status have access to, at a minimum, basic or emergency healthcare.

[107] Capitation is a payment arrangement for healthcare service providers whereby they receive a set amount for each enrolled person assigned to them over a given period of time, whether or not that person seeks care.

In 2004, Argentina adopted a Migration Act (Act No. 25,871/04) reaffirming that migrant workers, including migrants with irregular status, are entitled to healthcare (ILO 2014; Cavaleri 2012; OHCHR 2014). Trinidad and Tobago has also established universal access to healthcare for all migrants in its territory, regardless of status (OHCHR 2014). In the Republic of Korea, migrants in an irregular situation can receive emergency care in hospitals. In principle, this care is free of charge but as the reimbursement process is lengthy, hospitals often ask migrants to pay at the time of service (OHCHR 2014).

Guaranteeing access to emergency and other healthcare for all migrants, including those in an irregular situation and their families, has numerous advantages not only for them, but also for the country of destination; it improves their health status, reduces their vulnerability and social exclusion, enhances their resilience, employability and productivity and is the first step towards regularization. It also benefits society as a whole by reducing both public health risks (including the transmission of communicable and respiratory diseases such as COVID-19) and the infant and child mortality rates (ILO 2020a).

5.2.2 Countries of origin

Access to social protection in countries of origin may be legally restricted under the principle of territoriality, which limits the application of social security legislation to the national territory. In such cases, nationals working abroad are not covered by the relevant legislation and are therefore not entitled to benefits.

Countries can, however, provide some level of protection to their nationals working abroad. This is particularly important where the country of employment is neither in a position to provide social protection benefits nor willing to negotiate a new social security agreement or to address gaps in an existing one (for example, where the agreement only covers pensions).

5.2.2.1 Allowing nationals working abroad to join or retain membership in the social security system of their country of origin or to maintain the rights acquired there

In order to extend social protection to their nationals working abroad, some countries allow their migrant workers to retain membership in their national insurance schemes. Countries of origin may wish to:

► Box 5.5 Unilateral measures – a non-limitative list of policy options for countries of origin

1. States can allow their nationals working abroad, together with their dependents, to acquire or retain membership or maintain rights acquired in their country of origin. Thus, countries of origin may wish to:
   - allow their nationals working abroad to join or retain membership in an existing general social protection scheme on a voluntary basis;
   - establish a voluntary or mandatory specific scheme for certain groups of workers (self-employed migrant workers) or for migrant workers alone;
   - establish a specific mechanism, such as a welfare fund, to provide certain social protection benefits and facilitate registration, and thus access to existing general or specific schemes;
   - ensure the payment of benefits abroad (exportability) to nationals and their dependents.
2. States can be flexible in the design of the social security schemes to allow migrants to meet the qualifying conditions and minimum requirements by:
   - allowing migrants to make retroactive payments for missed contribution periods;
   - exempting migrants from the qualifying conditions and minimum requirements for social security;
   - authorizing lump-sum payments or reimbursement of contributions for nationals who move abroad and leave the scheme;
   - providing subsidies for certain categories of workers (such as returning migrants) to compensate for missed contribution periods.
3. States can give nationals who have returned to their country of origin access to their national social protection floor benefits.

- allow their nationals working abroad to join or retain membership in an existing general social protection scheme on a voluntary basis;
- establish a voluntary or mandatory specific scheme for certain groups of workers (self-employed, independent or migrant workers) or for migrant workers alone;
- establish a specific mechanism, such as a welfare fund, to provide certain social protection benefits and facilitate registration, and thus access to existing general or specific schemes;
- ensure the payment of benefits abroad (exportability) to nationals and their dependents.

Giving nationals working abroad access to a general social protection scheme

Migrant workers may wish to retain membership in the social protection schemes of their countries of origin for various reasons (ISSA 2014):

- Availability of schemes (for specific branches) may be limited in the country of employment.
- The conditions and benefit levels of the country of origin's scheme may be more advantageous; in such cases, migrants may wish to complement the insurance available in the employment country with additional insurance in their country of origin that provides higher benefit levels.
- Migrants, and particularly temporary, seasonal or circular migrant workers and workers who frequently move from one country to another, may wish to benefit from continuity of service.
- Migrants may wish to ensure that their dependents living in the country of origin remain covered there.
- Migrants who frequently move from one country to another may wish to minimize administrative procedures.

Examples:

- In Myanmar, nationals working abroad may contribute voluntarily to the funds covered by the 2012 Social Security Law (ILO 2018; ILO 2015).
- In 2014, the Government of Colombia issued a decree on social protection mechanisms for nationals working abroad, which allows them to enrol voluntarily in the General Pension System as independent workers with a contribution of 2 per cent of their monthly wage. It also gives members of their families who remain in the country of origin access to some social benefits. The relevant administrative procedures must be performed through the compensation fund (Caja de Compensación) of the family's place of residence.
- Nationals of the United Kingdom who are working abroad and have previously contributed to the social security system in the UK can retain membership in the national pension system on a voluntary basis and under certain conditions, regardless of whether they are members of such a scheme in the country of employment (ISSA 2014).
- In Mozambique, the 2004 Law on Social Protection allows nationals working abroad who are not covered by the mandatory social security system of their countries of employment to enrol in Mozambique's mandatory social security scheme on a voluntary basis. However, the more limited scheme for self-employed persons applies to them.
- In Ukraine, nationals working abroad have access to the state pension system on a voluntary basis (IOPS 2009).
- The Philippines provides social security coverage to overseas Filipino workers through voluntary insurance under the Social Security System (SSS), the supplementary pension savings (SSS Flexi-Fund) and the Overseas Workers Programme (OWP) of the Philippine Health Insurance Corporation (PhilHealth). The SSS provides social security insurance with disability, sickness, maternity, retirement and death (including funeral expenses) benefits.
- Jordanian nationals employed abroad who do not have mandatory coverage in the country of employment, as well as non-working nationals (including housewives and students) who live abroad, are entitled to voluntary coverage (old-age, disability and survivors' benefits) under Jordan's social security system (US 2014).

- Tunisian workers who are employed abroad and are not covered in their country of employment or under a reciprocal social security agreement may enrol in Tunisia's social security scheme on a voluntary basis (Maddouri 2011).

- In Switzerland, as part of the first pillar, Swiss and nationals of EU Member States who are working outside the EU or the European Free Trade Agreement (EFTA) zone may retain membership in the voluntary old age and survivors' insurance scheme under certain conditions, including the requirement that they have been insured for at least five consecutive years in Switzerland (CCO 2020).

It is of the utmost importance for returning migrant workers to be able to maintain rights acquired in the country of origin.

Example:

- As at 2019, Spain has a contributory unemployment benefit scheme for returning Spanish nationals who have contributed to the country's social security scheme for a minimum of 360 days during the six years prior to departure.

- Migrant-specific voluntary and mandatory social protection schemes

Countries of origin may decide to create a specific scheme for certain groups of workers (such as self-employed migrant workers) or for migrant workers in general. This has certain disadvantages over the incorporation of these workers into a general social protection scheme; experience has shown that the larger the contribution base of a social protection scheme, the more financially sustainable it will be. Moreover, it is essential to ensure that the (potential) beneficiaries have confidence in the proposed scheme, particularly where enrolment is voluntary. The small number of nationals working abroad; their types of contracts, jobs and working conditions; and their limited contributory capacity pose challenges in terms of the feasibility, proper functioning and sustainability of a scheme devoted solely to this group whereas a social protection scheme based on solidarity and large risk pooling is both consistent with the relevant international standards and more financially and administratively sustainable.

Example:

- The French Social Security Fund for Nationals Abroad (Caisse des Français de l'Étranger (CFE)) allows French nationals working abroad to maintain their French social security benefits. It covers sickness, maternity, disability and employment injury, provides access to old-age benefits managed by the National Retirement Pension Fund (Caisse Nationale d'Assurance Vieillesse (CNAV)) and ensures the continuity of entitlements with no waiting period and no lost contribution quarters with respect to the old-age pension.[108] As at 2020, more than 200,000 individuals are covered by the CFE worldwide.

- Establishing overseas welfare funds, which may include social protection benefits

During the 1970s oil boom, the demand for foreign labour increased in Middle Eastern countries. Following reports of abuse and exploitation of migrant workers and concerned with the lack of social protection of their nationals abroad, countries of origin explored options for protecting them. In order to address the obstacles to social protection that migrant workers encounter in destination countries (such as legal status or nationality, insufficient duration of employment and residence and lack of social security agreements) and the exclusion of specific categories of workers (such as domestic workers) from the scope of application of national laws,[109] a number of countries have established overseas welfare funds. The Philippines did so in 1977 (see below), followed by Bangladesh, Pakistan, Sri Lanka, Nepal and India.

[108] For more information, see: https://fr.april-international.com/en/your-cover-abroad/la-caisse-des-francais-de-l-etranger-cfe.

[109] For instance, "domestic helpers" are excluded from the personal scope of application of the Saudi Arabia Labour Law (art. 7(2)) and its Social Insurance Law, which regulates old-age, disability and survivors' benefits, does not cover "domestic servants" (art. 5(1e)).

Overseas welfare funds have received increased attention[110] and are often cited as unique unilateral measures. However, the social protection benefits that they provide are often limited in terms of both scope and level.

Institutional arrangements. Overseas welfare funds are often supported by a dedicated ministry and/or specialized statutory body responsible for protecting the interests of the country's overseas workers. Bangladesh, India, Nepal, the Philippines and Sri Lanka have such arrangements.

Examples:

- The Philippines – The Overseas Workers Welfare Administration (OWWA), which operates under the Department of Labour and Employment (DOLE), has developed responsive programmes and services for the social protection of overseas Filipino workers and their dependents. Its organizational structure includes a Board of Trustees, a tripartite body of government, management and overseas workers comprising land-based, sea-based and women's sector representatives. Its secretariat includes many welfare officers based in regional and field offices in 27 countries.
- Pakistan – Pakistan's welfare fund is managed by the Overseas Pakistanis Foundation (OPF).
- Sri Lanka – The Overseas Workers Welfare Fund (OWWF) is administered by the Sri Lanka Bureau of Foreign Employment (SLBFE), which has total responsibility for overseas employment and the social protection of migrants and is managed by a Board of Directors appointed by the Minister of Foreign Employment Promotion and Welfare. In 2012, the SLBFE recorded 282,331 departures for foreign employment, the highest number to date (SLBFE n.d.).

Legal basis. The creation of welfare funds based on a law or decree contributes to their sustainability over time.

Examples:

- The mandate of the Philippines' OWWA has its legal basis in Letter of Instruction No. 537 (1977) and subsequent presidential decrees and executive orders. It was further strengthened by the Migrant Workers and Overseas Filipinos Act (1995) (Act No. 8042).
- Pakistan's Emigration Ordinance, adopted in 1979, provides for establishment of the OFP.
- Sri Lanka's OWWF was established based on the Bureau of Foreign Employment (1985) (Act No. 21), subsequently amended in 1994 and 2009.

Financing. Welfare funds are membership institutions and registration requires the payment of a membership fee (see Figure 5.4), usually by the migrant worker. They can also be financed from "the initial capital investments or contributions of foreign employers, [and] recruitment agencies" (ILO 2015).

► Figure 5.4 Membership fees for registration with welfare funds

OWWA (Philippines)	OWWF (Sri Lanka)
US$ 25 contribution for 2 years	Contribution of up US$ 75, depending on the prospective salary of the migrant
Mandatory contribution	Mandatory contribution
Renewal of membership after two years	Renewal of membership after two years while working for the same employer
	Fee to be paid before deployment

Source: SLBFE n.d.; OWWA n.d.

Services and benefits. Overseas welfare funds can provide services and benefits during all stages of the migration cycle and may include legal counselling, pre-departure orientation, training, loans, education grants, burial and repatriation support, repatriation and reintegration programmes, psycho-social counselling and consular support in countries of employment. They may also provide social protection benefits such as death, disability and survivors' benefits and facilitate access to health insurance (such as PhilHealth in the Philippines) and other existing social protection schemes (such as the Sesetha Pension scheme in Sri Lanka). In certain cases, they also provide benefits to migrants' dependents who remain in the country of origin; for example, the overseas welfare funds of Sri Lanka and the Philippines[111] award scholarships to the children of migrant workers (Del Rosario 2008).

[110] Cambodia, the Lao People's Democratic Republic and Myanmar, among others, are interested in setting up a welfare fund. For more information, see: https://www.social-protection.org/gimi/RessourcePDF.action?id=55654.

[111] "The Education for Development Scholarship Program provides grants of US$ 1,200 per year to deserving and qualified dependents of [overseas foreign workers] attending college-degree courses. The Skills-for-Employment Scholarship Program pays for one-year technical and six-month vocational courses reflecting the technical skills requirements of overseas jobs. The Seafarer's Upgrading Program targets seafarers and aims to develop their skills by providing between US$24 to US$150 per course" (Ruiz and Agunias 2008).

► **Figure 5.5 Services provided by the welfare funds of Sri Lanka and the Philippines**

Welfare funds	Services provided to migrant workers
Sri Lanka The Sri Lanka Bureau of Foreign Employment (SLBFE) and its Overseas Workers Welfare Fund (OWWF)	pre-departure services (such as training, loan facility, orientation and registration); welfare assistance from the OWWF: Scholarships for children compensation to the family in the event of death; compensation for partial and total disability; repatriation.
The Philippines The Overseas Workers Welfare Administration (OWWA)	"social benefits" (disability benefit for injuries sustained owing to an accident while working abroad, death benefits and burial benefits); education and training benefits; welfare assistance programmes (psycho-social counselling, conciliation, airport assistance, legal assistance); repatriation and reintegration programmes.

Challenges and limitations. While welfare funds aim to provide protection to migrant workers, this protection is often insufficient and may not take into consideration the needs and characteristics of migrant workers throughout the migration process (IOM 2015; MPI 2007; Olivier 2018; OSCE 2006; Del Rosario 2008; Ruiz and Agunias 2007).

Examples:

- The fee paid by beneficiaries of the scheme is often uniform, regardless of the variety of risk profiles across destinations, occupations, sectors, skill levels, contributory capacity, residence, or employment duration.
- In many cases, benefits can only be enjoyed by migrants upon their return to their country of origin.
- Benefits must often be claimed within a limited number of months after return to the country of origin.
- Some funds do not contain provisions for dependent family members who remain in the country of origin.
- Beneficiaries are often not involved in the design, coordination and monitoring of the welfare fund.
- There is often a lack of information and communication on the available services and benefits and how to access them (IOM 2015).
- Processing times may be lengthy and cumbersome.
- Conditions for repatriation support may be restrictive; for example, pregnancy alone may not be sufficient unless there is violence or harassment involved (SLBFE n.d.).
- Migrant workers who change employment or extend their contract may lose coverage or be charged a renewal fee.
- There are no in-depth impact evaluation studies of welfare funds.

► Payment of benefits abroad for nationals and their dependents

Countries of origin may authorize the payment of benefits in the country of employment to their nationals who work abroad. While national legislation often makes such payment conditional on the existence of a bilateral or multilateral social security agreement, this is unnecessary. Countries may unilaterally decide to permit the payment of benefits abroad (see section 5.2.1.1).

Examples:

- Old-age pension benefits administered by Jordan's Social Security Corporation can be paid to Jordanian nationals abroad (US 2016).
- Nationals of the United States may receive their social security payments abroad, so long as they are eligible for them (US 2008; US n.d.).

5.2.2.2 Flexibility in the design of the scheme and assistance with qualifying conditions and minimum requirements

Countries of origin that allow their migrant workers to join or retain membership in a contributory or non-contributory social protection scheme in their home country should also ensure that these workers can meet the qualifying conditions. Their migration experience, type and length of contract, residence in the country of employment, length of stay and contribution period before departure or upon return may affect their access to or level of social protection benefits.

The following measures might be considered with a view to allowing migrant workers to meet such qualifying conditions, thus ensuring their access to social protection:

- Allowing migrants to make retroactive payment for missed contribution periods. For example, workers who receive a lump-sum payment of their accrued social security contributions upon leaving their country of employment can use it to make retroactive voluntary contributions for the missing periods, also known as "buy back". This option is also useful for workers who move from a country with a provident fund system to one with a social insurance system (ILO 2018, p.119). In countries where the laws do not permit voluntary contributions, an exception to these provisions would prevent migrant workers from losing the total amount of their accrued benefits (Olivier 2018). This is particularly important in the absence of social security agreements.
- Exemptions from qualifying conditions and minimum requirements for migrants. Reduction of the minimum number of contributory or residence years needed in order to qualify for certain benefits is common practice for certain categories of workers (such as those employed in sectors with challenging working conditions in terms of safety and health). These exceptions could also be considered for migrant workers, who may have worked and contributed for their entire working life without being able to benefit from a pension owing to the absence of social security agreements allowing them to totalize their contributory years. An exception to the minimum number of contributory years required would thus take into account the specific challenges that migrant workers face in their efforts to meet the qualifying conditions.
- Lump-sum payments or reimbursement of contributions for nationals who move abroad and leave the scheme. This is particularly important for migrant workers who permanently leave the country of origin and establish themselves elsewhere or who move from a country with a provident fund to a country with a social insurance scheme or vice versa.
- Provision of subsidies for certain categories of workers (such as returning migrants) to compensate for missed contributions periods. Migrant workers may find it financially challenging to pay retroactively for missed contribution periods, even where this is allowed. It is important for countries of origin to ensure that all migrant workers have access to at least a minimum level of income security by allowing them to access non-contributory social protection benefits or subsidizing contributions to contributory schemes in line with the ILO Social Protection Floors Recommendation, 2012 (No 202).

5.2.2.3 Allowing nationals who return to their country of origin to access national social protection floor benefits.

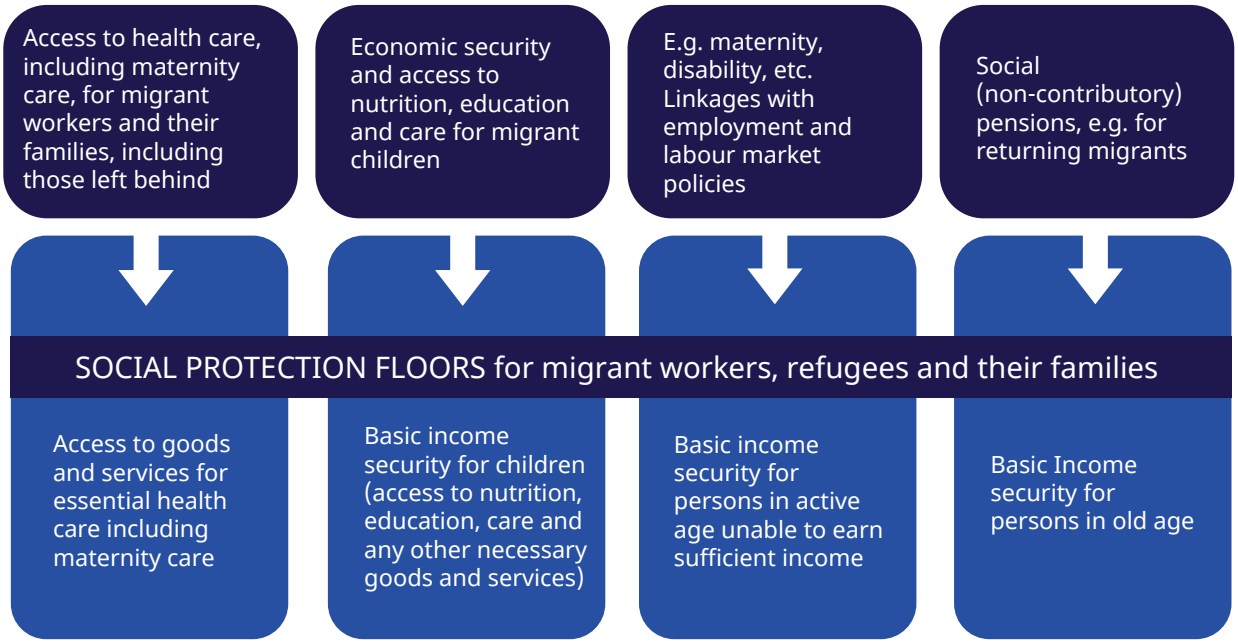
The ILO Social Protection Floors Recommendation, 2012 (No. 202) provides member States with guidance in the formulation and implementation of national social security extension strategies, based on social dialogue, which prioritize the establishment of SPFs as a fundamental element of their national social security systems and extend social protection to the unprotected, the poor and the most vulnerable, including migrants and their families.

To that end, countries of origin should consider establishing or strengthening their SPFs, which should include, at least, the following guarantees:

- access to essential healthcare, including maternity care;
- basic income security for children and access to nutrition, education, care and any other necessary goods and services;
- basic income security for persons of active age who are unable to earn sufficient income, particularly in the event of sickness, unemployment, maternity and disability; and
- basic income security for older persons.

The aforementioned social security guarantees should be provided to at least all residents and children as defined in national laws and regulations, subject to states' existing international obligations (ILO 2012, para.6). In accordance with Recommendation No. 202, these guarantees should, at least, be provided to migrant workers with residence status and to children, irrespective of their status and that of their parents or guardians. The reference to "all" residents (para. 6) emphasizes that all types and categories of residents and residence status defined under national law, whether permanent or temporary, should be included (ILO 2019, para. 130).

► **Figure 5.6 Social protection floors for migrant workers throughout their life cycle**



By implementing national SPFs,[112] countries of origin can provide the necessary guarantees to ensure that migrant workers and their families, including returning migrants and dependents living in a different country from the migrant breadwinner, have, at a minimum, access to essential healthcare and basic income security throughout their life cycle (see Figure 5.6).

This may help to reduce the need for migrant workers to rely on private social protection initiatives in order to support their families and communities back home (see section 5.4).

In Mexico, there are two types of public healthcare scheme. The Mexican Social Security Institute (*Instituto Mexicano del Seguro Social* (IMMS)) operates a mandatory social insurance scheme for all Mexicans working in the formal sector. Migrant workers in the country, whether temporary or permanent residents, and Mexicans working abroad can enrol on a voluntary basis. The People's Insurance (*Seguro Popular*) programme provides access to healthcare for households that have no members currently registered with a Mexican social security institution. It benefits unemployed and underemployed persons and workers in the informal economy and allows the voluntary enrolment of nationals living abroad and foreign nationals employed temporarily in Mexico; however, health services must be provided in Mexico, not abroad. Returning migrants can apply for membership in the programme locally and Mexicans working abroad can register their family members who have remained in Mexico at any Mexican consulate. The programme is free of charge for the poorest households; others must pay an annual fee. In practice, however, very few households pay a premium. While the programme is funded by the Federal Government and managed by State authorities, health services are delivered by municipal governments (Lopez-Garcia et al. 2019).

[112] The Recommendation promotes a set of principles that should be applied during its implementation under the overall and primary responsibility of the State. Of particular relevance to migrants' rights are the following: entitlement to benefits prescribed by national law; universality of protection based on social solidarity; protection of beneficiaries' rights and dignity; non-discrimination, gender equality and responsiveness to special needs; progressive realization; and tripartite participation and consultation with representatives of persons concerned, including migrants in so far as their interests are affected.

► Box 5.6 Unilateral measures implemented in response to the COVID-19 pandemic

In light of the emergence of the COVID-19 pandemic, a number of countries of origin and destination have taken measures, including unilaterally, to protect not only their own nationals but migrants in their territory, irrespective of status.

As mentioned throughout this Chapter, countries may adopt unilateral short-term prevention, protection, treatment and informational measures based on the principle of equality of treatment and non-discrimination. Access to quality healthcare is of the utmost importance during a pandemic, particularly in the case of COVID-19 since testing and treatment is essential to the health of a country's population.

Examples:

- France and Spain have extended migrants' residence permits for three additional months in order to ensure broad access to healthcare.
- Portugal has regularized the status of non-nationals, including asylum seekers with pending applications, entitling them to, among other things, healthcare, social support, employment and housing. The Government has also given foreign residents equal access to treatment under the National Health Service on the same basis as regular beneficiaries.
- The province of British Columbia in Canada has given short-term migrant workers access to the country's Medical Service Plan.
- Colombia is providing free medical consultations to migrants and refugees with COVID-19 symptoms, regardless of their migration status.
- Qatar is providing migrants with medical services, including COVID-19 testing and quarantine services, free of charge.

Countries can also expand the scope of their contributory and non-contributory schemes, provide **income support** and ensure that migrant workers are aware of protection, prevention and treatment measures and of their social protection rights during the COVID-19 crisis.

Examples:

- As part of its COVID-19 economic response package, New Zealand has announced that international seasonal migrant workers are entitled to government funding if they fall ill, must isolate themselves while working in New Zealand (from the start date of their contract) or cannot work because their employer's business is affected by the lockdown.
- Italy's online JUMA portal provides refugees and asylum seekers with access to information on COVID-19 in 15 languages.
- Brazil is providing unemployed, self-employed and informal workers, including migrant workers with irregular status, with up to three months of emergency basic monthly income.

Source: ILO 2020a

► 5.3 Complementary measures

In addition to legal barriers and exclusions, including in the administration and delivery of social protection benefits, migrant workers may face practical barriers that hinder their effective access to social protection. Statutory coverage through unilateral measures, bilateral/multilateral social security agreements, bilateral labour agreements and MoUs should be complemented by measures to address these barriers (identified in Chapter 1).

In order to address a lack of information or understanding, countries can:

- raise awareness of migrant workers' social protection rights;
- conduct communication and information campaigns on ways to access available social protection schemes and benefits;
- translate information materials, forms, websites and other relevant information into the appropriate languages;

- provide pre-departure training and briefings upon arrival and return;
- make information available through migrant resource centres, embassies/consulates, televisions, radio and social media.

In order to address cultural barriers, discrimination and stigmatization, countries can:

- consider anti-discrimination and zero-tolerance campaigns and actions challenging negative stereotypes and stigmatization;
- mainstream gender and non-discrimination issues into social protection strategies and schemes relevant to migrant workers (such as entitlement to parental leave);
- recognize domestic work as work covered by the labour laws in line with the ILO Domestic Workers Convention, 2011 (No. 189).

In order to address lengthy and complex administrative procedures and geographical barriers, countries can:

- consider initiatives designed to reach out to groups such as migrant agricultural workers in remote areas using, among other things, boats, buses, mobile phones, radio and social media;
- harmonize and simplify procedures and data collection/sharing through, among other things, the use of innovative IT systems;
- provide services that help migrant workers to register for and claim benefits;
- ensure an adequate number of well-trained social security administration staff, labour attachés and consular staff, social and healthcare workers and other stakeholders who provide services to migrant workers.

In order to compensate for the failure to enforce policies, laws and agreements and to ensure migrants' access to justice, countries can:

- facilitate access to complaint or conflict resolution mechanisms;
- provide pro bono legal support and free advice and services;
- strengthen the capacities of labour inspectors, the judiciary and other enforcement officers.

In order to address a lack of contributory capacity or other financial challenges, countries can:

- enhance fiscal space or investment in social protection (ILO 2015; Ortiz, Cummins and Karunanethy 2017);[113]
- subsidize the contributions of migrant workers or refugees, including from external resources (international solidarity).

In order to address the lack of policy coherence and evidence-based implementation, countries can:

- collect data and statistics, including on migrant workers' social protection through, for example, the ILO Social Security Inquiry (SSI);[114]
- ensure monitoring and evaluation and conduct impact assessments;
- exchange good practices and facilitate South-South learning;
- conduct rapid assessments during crises such as the COVID-19 pandemic in order to gain knowledge and a better understanding of the impact of the crisis on the social protection of migrant workers.

In order to address a lack of representation, organization and effective social dialogue, countries can:

- enable freedom of association and collective bargaining;
- support workers' organizations that lobby for better working conditions – including social security coverage – and provide their members with information about workers' rights and obligations and other services;
- consult migrant workers and workers' and employers' organizations during the development, implementation and monitoring of laws, policies and schemes relating to migrant workers' social protection;
- facilitate effective social dialogue in order to build consensus on migrant workers' social protection, ensure more sustainable extension strategies and forge stronger social cohesion;

[113] Options include reallocating public expenditure, increasing tax revenue, expanding social security contributions, reducing debt/debt servicing fees, curtailing illicit financial flows, increasing aid, tapping into fiscal reserves and introducing a more accommodative macroeconomic framework.

[114] For more information, see: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/presentation/wcms_secsoc_14063.pdf.

- facilitate cooperation with relevant civil society organizations as appropriate in order to enhance the representation of migrant workers.

Examples:

- In 2019, the Jesuit Service for Migrants, a Chilean NGO that promotes the social inclusion of migrant workers and refugees, conducted an information campaign on the social protection rights of migrant workers with a focus on the country's national pension funds. The campaign, entitled "Social Protection without Distinction", was funded by the Fund for Pension Education. Through tutorial videos, brochures in various languages, radio spots and a website with online resources, the campaign raised awareness of the importance of migrant workers' social protection and of the principle of equality of treatment between nationals and non-nationals. It provided information on the existing legal framework and explained how to access social benefits and the benefits for migrants of paying contributions under the national social security system.

- In the Philippines, the OWWA offers pre-departure training for migrant domestic workers, including language instruction and information on workers' rights and obligations and the culture of the country of employment.

- In 2013, the Moldovan Government launched a communication campaign on bilateral social security agreements in order to raise migrant workers' awareness of their social security rights through information leaflets and video spots (ILO 2014).

- The Jordan Social Security Corporation (SSC) has established a network of medical centres abroad for migrant workers who require a medical examination in order to register with the national social security scheme. It also provides e-payment cards to facilitate payments at designated banks (Hempel 2010).

5.4 Other initiatives

In order to extend social protection to migrant workers, policymakers may wish to consider the various policy options presented in this and other chapters of this *Guide*. In the absence of state-led social protection mechanisms, migrant workers may decide to contribute to private insurance mechanisms, including community-based schemes such as health mutuals, and in some cases may opt for private insurance in order to complement their benefits under public social security schemes.

For many migrant workers, it is important to ensure that family members who remain in their country of origin can also benefit from social protection coverage by sending a portion of their income to their relatives[115] in order to cover, among other things, the costs of healthcare. It is important to stress that reliance on remittances to support the social security systems of countries of origin shifts the burden of coverage from the State to the migrants, who should not be responsible for the provision of minimum services in their home countries. Excessive reliance on remittances from both the country of origin and the families can place an additional burden on migrants who are already required to pay taxes and contributions under the host country's system. Moreover, because remittances are private resources, they can increase inequality in the country of origin if, in practice, only the families of migrants have access to social security. Financial education programmes can help these workers and their families to make informed decisions on the use of remittances and other sources of funds, including for social protection contributions.[116]

The ILO has carried out research[117] on migrant workers' remittances, microfinancing and the feasibility of using a portion of their remittances to develop health microinsurance products in origin countries such as Comoros, Mali and Senegal in order to see whether these initiatives can complement state-led measures and fill protection gaps for specific groups of migrant workers and their families.

While migrant workers who lack access to national public social protection schemes may wish to consider private and microinsurance schemes, whether community-based or not, these do not relieve the State of its responsibility in that regard.[118]

[115] In cooperation with the ILO's Labour Migration Branch and Social Protection Department in Geneva, the ILO Regional Office for Africa implemented a project on extending social security coverage to African migrant workers (MIGSEC) with financial support from the Government of Germany. For more information, see: https://africa-eu-partnership.org/en/success-stories/migsec-project-extending-social-protection-migrant-workers-and-their-families-africa.

[116] The ILO has developed financial training tools and programmes in order to help migrant workers to make informed choices and develop the knowledge and skills required for responsible budgeting, including spending, saving, borrowing and investing. Financial education can help migrants in destination countries to manage their budgets and provide useful support to their families back home.

[117] For more information, see: http://www.impactinsurance.org/projects/lessons/feasibility-resource-mobilization-migrant-health and https://www.social-protection.org/gimi/gess/ShowTheme.action?id=2325.

[118] Paragraph 3 of the ILO Social Protection Floors Recommendation, 2012 (No. 202).

▶ 5.5 Conclusion

As shown throughout this chapter, countries of origin and employment can unilaterally extend social protection to migrant workers in the absence of bilateral or multilateral social security agreements or in order to ensure more universal and comprehensive social protection coverage of workers, including migrant workers. This can be done in a number of ways.

Countries of destination may consider measures classified as contributory, non-contributory or a mixture of both based on the principle of equality of treatment enshrined in various human rights instruments and ILO Conventions. Contributory measures may include: (i) establishing the right of migrant workers to social security through national Constitutions and provisions on equality of treatment in national legislation; (ii) allowing migrant workers to enrol in national social protection schemes on the basis of equality of treatment; (iii) authorizing the payment of benefits abroad to qualifying non-nationals (exportability) on an equal basis with nationals; and (iv) reducing or limiting the qualifying criteria or minimum conditions for certain benefits. Non-contributory measures seek to ensure equality of treatment between nationals and non-nationals in respect of non-contributory schemes financed from public funds (such as healthcare) or flexibility with respect to residence or other qualifying requirements for specific categories of migrant workers or economic sectors.

It is important to include migrant workers in national social protection schemes and to ensure equality of treatment. Such measures reduce unfair competition between migrant workers and nationals by establishing a level playing field whereas excluding migrant workers from contributory social security schemes may create a perverse incentive to recruit them as cheap labour, thus, increasing the risk of social dumping.

Countries of origin may also consider contributory and non-contributory measures in order to provide a degree of protection to their nationals abroad, returning migrants and family members who have remained in the home country. These include (i) allowing migrant workers and their dependents to enrol or retain membership in a social security scheme by establishing voluntary/mandatory schemes or welfare funds; (ii) allowing these workers to maintain the rights acquired in their country of origin and authorizing the payment of benefits abroad; (iii) ensuring flexibility in the design of the scheme and assistance with qualifying conditions and minimum requirements; and (iv) allowing migrants to access national social protection floor benefits in line with the guidance provided by the ILO Social Protection Floors Recommendation, 2012 (No. 202). In so doing, countries of origin provide the necessary guarantees to ensure that migrant workers and their families, including returning migrants and their dependents have access to essential healthcare and basic income security throughout their life cycle.

International labour standards provide essential guidance on the design and implementation of such unilateral measures. Unilateral measures vary widely from one country to another and depend on the characteristics of the migrant workers to be covered. There is no single measure that provides comprehensive protection, but rather a menu of complementary options that should be considered. It is also important to ensure that such measures fill social protection gaps in the absence of coordination agreements or where the existing agreements have limited scope and reach. Lastly, each of the measures adopted should be designed, managed, financed and implemented through social dialogue.

When developing unilateral measures, it is essential to:

- ensure that national policies and legislation accord equal treatment to nationals and non-nationals based on the principles of equality of treatment and non-discrimination and in line with international human rights instruments and international labour standards;
- aim for a progressive approach combining several unilateral measures in addition to the conclusion of bilateral and multilateral social security agreements since no single measure can give migrant workers full access to their social protection rights;
- consider the conclusion and enforcement of bilateral and multilateral social security agreements since these agreements are the most effective way to ensure that migrant workers have full access to their social protection rights and are the only mechanism that ensures the maintenance of rights in the course of acquisition;
- plan, design, monitor and implement unilateral social protection measures for migrant workers based on social dialogue and support these workers' right to freedom of association and collective bargaining;
- take into account the needs and characteristics of specific groups of migrant workers, including, among others, domestic workers, seasonal agricultural workers, workers in an irregular situation (see Chapter 6), refugees and other forcibly displaced persons (see Chapter 7), seafarers, posted workers and frontier workers;
- ensure policy coherence and coordination with the relevant national immigration laws and regional policies in order to avoid protection gaps and ensure that social protection laws, polices and measures are effectively inclusive of all migrant workers;
- address practical barriers that migrant workers face in accessing social protection through complementary measures.

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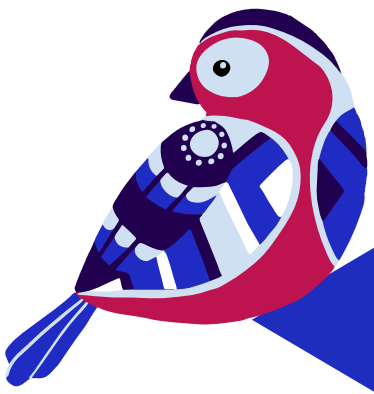
Chapter 6

Extending social protection to specific groups of migrant workers



▶ Key messages

- Migrant workers are a heterogeneous group. Their migration status, type of employment contract, duration of stay, skills set, income level and demographic characteristics, as well as the industry or sector in which they work, influence their access to comprehensive social protection.
- Many international human rights instruments and international labour standards establish the social security rights of migrant workers, including migrant domestic workers, seasonal agricultural migrants and migrants in an irregular situation who face particular difficulties in accessing social protection.
- The unique characteristics and needs of these groups should be taken into account when developing and implementing policies or mechanisms aimed at extending social protection. States should also ensure coherence between migration, employment and social protection policies and strategies.

Migrant domestic workers

- The Domestic Workers Convention, 2011 (No. 189) and the Domestic Workers Recommendation, 2011 (No. 201) are designed to ensure domestic workers' access to decent work and enjoyment of their social protection rights. Both instruments include explicit provisions on migrant domestic workers. A number of other instruments[119] are also relevant to migrant domestic workers' social protection.
- Migrant domestic workers face specific barriers to social protection, including exclusion from coverage under labour and social security laws, failure to recognize domestic work as work, inability to meet eligibility criteria, limited organization and representation, and other administrative problems linked to the nature of their work (multiple employers, private households, unpredictable working hours and lack of written contracts).
- There is limited monitoring and enforcement of compliance with respect to domestic work, including through labour inspections. This exacerbates the vulnerability of these workers, particularly the foreign nationals among them, and promotes an environment that subjects them to labour law and human rights abuses such as physical violence, forced labour and trafficking.
- In order to adequately extend social protection to migrant domestic workers, countries must ensure the coverage of all domestic workers under labour and social security laws and/or social security and labour agreements.
- The implementation of national SPFs in countries of origin and destination would give migrant domestic workers' at least a minimum level of social protection and a higher level of benefits in line with the relevant ILO instruments.
- It is particularly important to simplify and adapt eligibility criteria and administrative procedures in order to ensure that domestic workers have effective access to social protection.

Migrant seasonal agricultural workers

- The ILO Safety and Health in Agriculture Convention, 2001 (No. 184) and Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168) include provisions that are relevant to migrant seasonal agricultural workers; the former reaffirms the principle of equality of treatment between agricultural workers and other workers in access to social security and the latter states that they should enjoy protection from unemployment.

[119] Social Security (Minimum Standards) Convention, 1952 (No. 102), Social Protection Floors Recommendation, 2012 (No. 202), Equality of Treatment (Social Security) Convention, 1962 (No. 118), Maintenance of Social Security Rights Convention, 1982 (No. 157), Maintenance of Social Security Rights Recommendation, 1983 (No. 167), Medical Care and Sickness Benefits Convention, 1969 (No. 130), Maternity Protection Convention, 2000 (No. 183), Maternity Protection Convention (Revised), 1952 (No. 103), Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Migration for Employment Convention (Revised), 1949 (No. 97), Migrant Workers Recommendation, 1975 (No. 151), Private Employment Agencies Convention, 1997 (No. 181) and Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204).

- Migrant seasonal agricultural workers face various specific obstacles in their efforts to access social protection owing to the unpredictable, informal and temporary nature of their work, which may prevent them from meeting the minimum requirements for certain benefits, even though they contributed to the relevant schemes.
- Policy options for the extension of social protection coverage to these workers and their families include:
  1. the conclusion and enforcement of social security agreements that ensure equality of treatment and the portability of acquired rights and rights in the course of acquisition across countries;
  2. the inclusion of social security provisions in temporary workers programmes or bilateral labour agreements;
  3. the adoption of flexible, unilateral measures that ensure equality of treatment and allow these workers to meet the qualifying conditions and minimum requirements of the scheme. These may include retroactive payment of missed contributions; allowing the totalization of non-consecutive periods, lump-sum provisions and the reimbursement of contributions upon exit from the scheme;
  4. complementary measures that address the numerous administrative, practical and organizational obstacles that these workers face, including remote workplaces, long working hours and short stay in the country of destination.

Migrants in an irregular situation

- Many international instruments, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), state that everyone – including, by implication, migrants with irregular status and workers in the informal economy – is entitled to social security as a human right. This is supported by Part III of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which establishes that all migrants, irrespective of their legal status, have the right to social security.
- The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Migrant Workers Recommendation (No. 151) are relevant to migrant workers in an irregular situation; they establish that the principle of equality of treatment is applicable to migrant workers and members of their families, who should be able to enjoy the basic human rights and certain other rights arising out of past employment.
- Migrant children in an irregular situation are a particularly protected category; their right to full social protection even in the absence of legal residence status is affirmed in the Social Protection Floors Recommendation, 2012 (No. 202) and has been mentioned on several occasions by the UN Committee on the Rights of the Child.
- The right to health of migrants in an irregular situation is firmly rooted in international human rights instruments (UDHR, ICESCR), which require States parties to guarantee, at a minimum, access to emergency healthcare.
- Migrant workers in an irregular situation are often forced to work in the informal economy without access to social protection. They also face a higher risk of exploitation and hazardous working conditions.
- In order to provide a minimum level of social protection, and particularly access to essential healthcare, to these workers, countries may wish to consider the unilateral extension of one or more benefits, including coverage under national SPFs. Regularization campaigns are another option to be pursued.

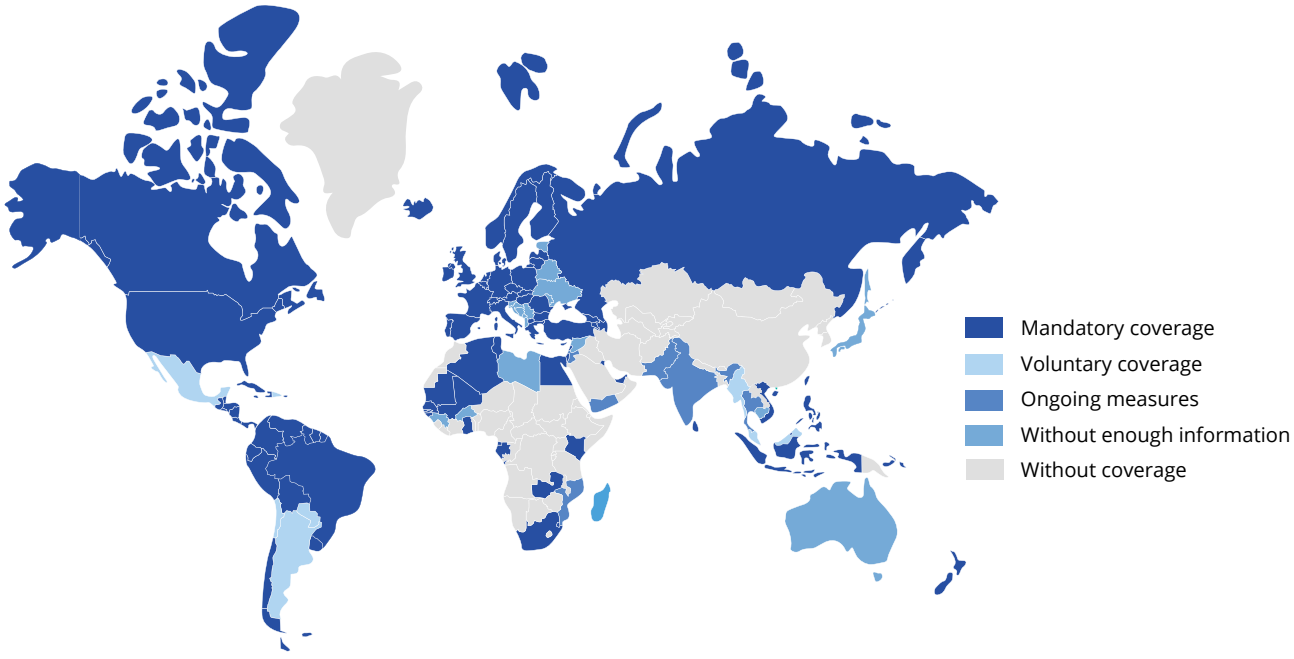
► Introduction

Migrant workers are a heterogeneous group. Their migration status, type of employment contract, duration of stay, skills set, income level and demographic characteristics, as well as the industry or sector in which they work, influence their access to comprehensive social protection. The unique characteristics and needs of these different migrant groups should be taken into account when developing and implementing policies or mechanisms aimed at extending social protection. Migrant domestic workers, seasonal agricultural workers and migrant workers in an irregular situation represent a significant proportion of migrant workers and face particular difficulties in accessing social protection. The objective of this chapter is to identify the specific obstacles, international legal framework and policy options of relevance to these three groups of migrant workers.

► 6.1 Migrant domestic workers[120]

According to ILO estimates, in 2013 there were 11.5 million migrant domestic workers accounting for approximately 7.7 per cent of all migrant workers and 17.2 per cent of all domestic workers worldwide (ILO 2015a). With ageing societies and changing family structures, labour market demand for domestic workers, and thus for migrant domestic workers, is likely to continue to grow. The ILO estimates that 49.9 per cent of domestic workers are legally covered for at least one social security benefit, however 81.2 per cent of domestic workers are currently not contributing to social security (ILO 2021d). This work, performed mainly in private households, has features that can to some extent explain the difficulty of extending coverage to domestic workers, who are likely to have multiple employers, no written contract and unpredictable hours of work and payment of wages. In many countries, the lack of political will to address protection gaps is another major constraint that is reflected in the limited coverage of domestic work under national labour laws. In addition, limited monitoring and enforcement of the regulations governing domestic work, including through labour inspections, makes these workers highly vulnerable.

► **Figure 6.1 Global situation of the statutory coverage of social security for domestic workers (2021)**

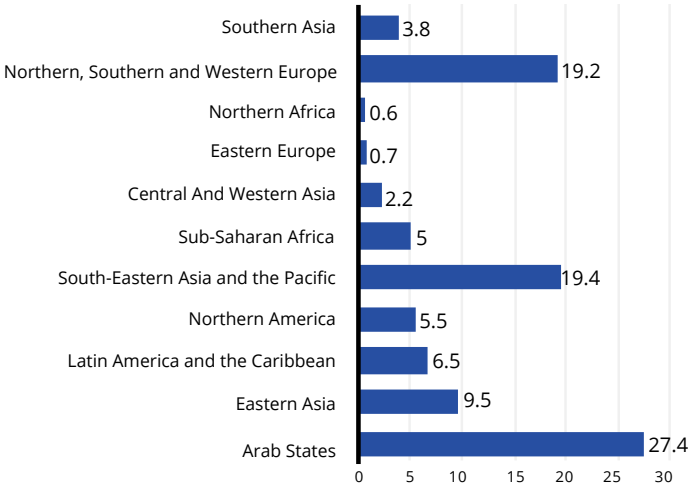


Source: ILO 2021c

[120] The information contained in this section is also available in a policy brief format: Expanding Social Security Coverage to Migrant Domestic Workers (ILO 2016b).

A breakdown by region (see Figure 6.2) shows that in 2013, the largest percentage of migrant domestic workers were employed in South-East Asia and the Pacific (19.4 per cent), followed by Northern, Southern and Western Europe (19.2 per cent), the Arab States (27.4 per cent) and East Asia (9.5 per cent). For absolute numbers, see Figure 9 below.

► **Figure 6.2 Number of migrant domestic workers, by subregion (2013)**

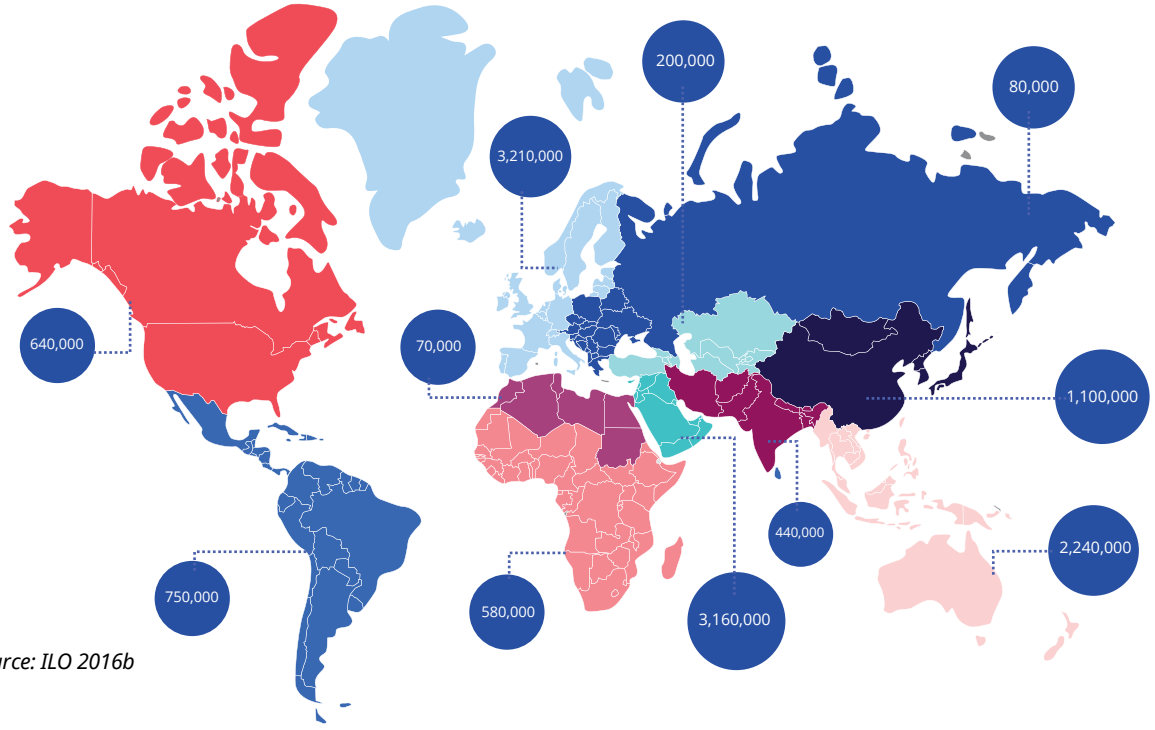


Source: ILO Global estimates on migrant workers 2015

The challenges faced by domestic workers with regard to social protection coverage are even more acute for migrant domestic workers. Indeed, "approximately 14 per cent of countries whose social security systems provide some type of coverage for domestic workers do not extend the same rights to migrant domestic workers" (ILO 2016b). These workers may also face obstacles to coverage owing to application of the principle of territoriality or nationality, their migration status or the temporary nature of their employment. Under these circumstances, extending social protection does not simply contribute to their economic and social welfare; it is an indispensable component of strategies aimed at gender equality, poverty reduction and combating social exclusion.

Sustainable Development Goal (SDG) No. 1.3 "Implement appropriate national social protection systems for all, including [social protection] floors [...]"[121] specifically recognizes the importance of social protection policies that cover women and, more specifically, domestic workers (Target 5.4). The establishment of national SPFs has been endorsed not only by the UN but by, among others, the Group of 20 and the tripartite representatives of the ILO member States when adopting the Social Protection Floors Recommendation (No. 202) in 2012.

► **Figure 6.3 Number of migrant domestic workers per region, 2013**



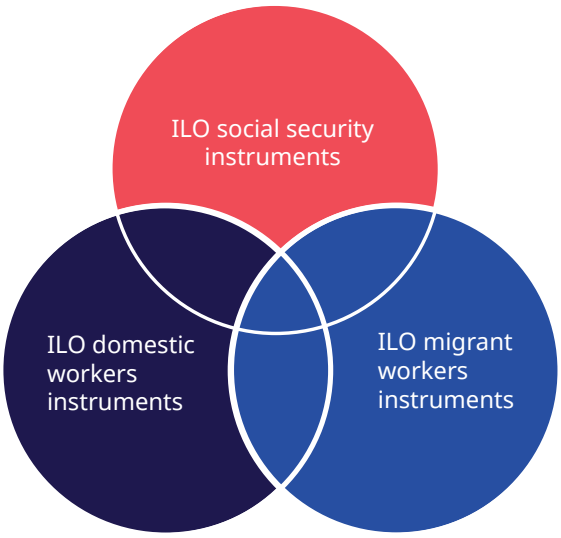
Source: ILO 2016b

[121] For more information, see: SDG 1.3. Social Protection Systems for all, including and Floors, Key to Eradicating Poverty and Promoting Prosperity.

6.1.1 The international legal framework as it applies to migrant domestic workers

The ILO standards include Conventions, which impose legally binding obligations on ratifying member States, and Recommendations, which provide general or technical guidelines. Both contribute to achieving the ILO's objective of extending social protection to all. Although there is no specific instrument aimed at securing social security rights for migrant domestic workers, there is an existing framework of overlapping technical provisions on the expansion of social security coverage to include them.

► **Figure 6.4 Intersecting provisions on migrant domestic workers under ILO instruments**



6.1.1.1 ILO instruments on the protection of domestic workers

Since domestic workers are indeed workers, all ILO instruments cover and protect them unless otherwise stated.[122] The following instruments contain non-exhaustive provisions of relevance to the social protection of migrant domestic workers.

The **Domestic Workers Convention, 2011 (No. 189)** establishes that domestic workers should enjoy the same rights as other workers with respect to terms of employment, minimum age of employment, working conditions, hours of work, wages, social protection, access to justice and living conditions. The Convention provides for the progressive extension of social security to domestic workers, including migrant domestic workers. It also includes measures to protect domestic workers from violence, harassment and other abusive practices such as retention of wages, confiscation of identification documents, long working hours, lack of rest periods, un-decent living and working conditions and lack of access to healthcare and social protection benefits, which can lead to exploitive situations and forced labour. Article 1 defines "domestic work" as "work performed in or for a household or households" and "domestic worker" as "any person engaged in domestic work within an employment relationship" on an "occupational basis". Article 8(3) states that "[m]ember States shall take measures to cooperate with each other to ensure the effective application of the provisions of this Convention to migrant domestic workers" and Article 14 establishes that "each Member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social protection, including with respect to maternity".

The **Domestic Workers Recommendation, 2011 (No. 201)** emphasizes the need for equality of treatment regarding social security and access to entitlements for migrant domestic workers and calls for bilateral, regional and multilateral cooperation among member States in order to ensure migrant domestic workers' enjoyment of their social security rights.

The **Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204)** specifically includes migrants and domestic workers among the groups that are "especially vulnerable to the most serious decent work deficits in the informal economy" (para. 7(i)), thus recognizing that domestic and migrant domestic workers often lack regular employment status or a formal contract. The Recommendation promotes building and maintaining national SPFs and the progressive extension to all workers, in law and practice, of social security, maternity protection, decent working conditions and a minimum wage. It expressly refers to the Domestic Workers Convention (No. 189) and Recommendation (No. 201), 2011.

[122] Domestic Workers Convention, 2011 (No. 189), sixth preambular paragraph.

6.1.1.2 ILO Social Security Instruments

The ILO has developed various instruments on social security that establish the principle of equality of treatment between nationals and non-nationals. In practice, however, migrant domestic workers may be excluded from national legislation and from the personal scope of social security agreements. The **Social Security (Minimum Standards) Convention, 1952 (No. 102)** is one of the benchmark ILO instruments that provide for the extension of comprehensive social security systems**.** Part XII of the Convention expressly calls for equality of treatment of non-national and national residents through bilateral and multilateral cooperation agreements.

The **Social Protection Floors Recommendation, 2012 (No. 202)** complements Conventions Nos 102 and No. 189. It calls for support for disadvantaged groups and individuals in the formal and the informal economy and for the extension of social security coverage to all, including, at least, all residents and all children (paras 6 and 15).

The **Equality of Treatment (Social Security) Convention, 1962 (No. 118)** calls on member States to grant equality of treatment under their national social security legislation to the nationals of any other member State for which the Convention is in force (Art. 3(1)).

The **Maintenance of Social Security Rights Convention, 1982 (No. 157)** and its accompanying **Maintenance of Social Security Rights Recommendation, 1983 (No. 167)** promote the maintenance of acquired rights and rights in the course of acquisition in respect of social security for migrant workers.

The **Medical Care and Sickness Benefits Convention, 1969 (No. 130)** provides for equality of treatment in respect of non-nationals who normally reside or work in the territory of a signatory member State.

The **Maternity Protection Convention, 2000 (No. 183)** and the **Maternity Protection Convention (Revised), 1952 (No. 103)** include provisions on health and employment protection, minimum maternity leave and non-discrimination for all employed women, including domestic workers and others in atypical forms of dependent work.

6.1.1.3 ILO instruments on migrant workers

Various specific ILO instruments cover migrant workers and can thus be used to protect migrant domestic workers.

The **Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)** seeks to ensure equality of opportunity and treatment between migrant workers lawfully admitted to the country and nationals on a number of matters, including social security. It also stipulates that migrant workers whose situation cannot be regularized in the country of destination should be accorded equality of treatment in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

The **Migrant Workers Recommendation, 1975 (No. 151)** recalls the provisions of Convention No. 143; it reiterates the principle of equality of opportunity and treatment of migrant workers in a regular situation and members of their families, including with regard to social security, welfare and benefits provided in connection with employment. It also expands on the principle of equality of treatment in respect of rights arising out of present and past employment (remuneration, social security and other benefits) for migrant workers who are lawfully resident in the territory of a member State or whose position has not been or cannot be regularized. Migrant workers who leave their country of employment, irrespective of the legality of their stay, should be entitled to any outstanding remuneration for work performed, including severance payments normally due; to benefits which may be due in respect of any employment injury suffered; and, in accordance with national practice, to reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements (Art. 34).

The **Migration for Employment Convention (Revised), 1949 (No. 97)** contains clauses on the acquisition by non-national workers of "social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, are covered by a social security scheme)" (Art. 6(1)(b)).

The **Private Employment Agencies Convention, 1997 (No. 181)** is particularly relevant as it calls for the adequate protection of workers in relation to, among other things, statutory social security benefits. This includes migrants employed by private employment agencies, which recruit large numbers of migrant domestic workers in many regions.

6.1.2 Obstacles, protection gaps and challenges

While there is an array of ILO instruments that can be used to protect migrant domestic workers, numerous obstacles hinder the extension of social protection to them. These may include legal exclusion, complex procedures and lack of monitoring and inspection, information and coordination between countries.

6.1.2.1 Legal exclusion

The main challenges to the extension of social security coverage to migrant domestic workers often lie in the limitations of national legislation. In many countries, domestic workers are expressly excluded from coverage under the labour and social security laws (ILO 2019a; ILO 2021a); for example, Thailand's Social Security Law (1990) does not cover domestic work. Other countries provide for mandatory health coverage of domestic workers yet exclude them from other benefits such as maternity, employment injury and unemployment protection or pensions (ILO 2017). Migrant domestic workers may also be subject to specific exclusions based on job-related factors; many countries deny them social protection if their earnings or working hours per household fall below a minimum threshold (ILO 2019a; ILO 2021a).

Migrant domestic workers may also be excluded from social protection owing to the length of their stay in the country, the fact that they work in the informal economy or due to the irregularity of their status. Because the principle of territoriality limits the application of social security legislation to the country in which it was enacted, these workers may lose coverage under the social security system of their countries of origin and have limited or no coverage in their country of employment; in the absence of effective bilateral or multilateral social security agreements, they may also lose coverage when they return to their home countries (ILO 2011).

6.1.2.2 Complexity or absence of appropriate procedures

Social security registration and contribution collection procedures are often designed with enterprises in mind, yet households are the main employers of domestic workers in most countries. Procedures that are time-consuming and difficult to understand raise transaction costs for all parties concerned. Thus, the inadequacy of administrative mechanisms is often a deterrent to social security registration for both employers and workers (ILO 2019a).

6.1.2.3 Lack of monitoring and inspection

Domestic workers work in a sector that is not easily monitored and inspected owing to a lack of adequate policies, laws and tools and to the fact that domestic work is primarily performed in private households (ILO 2019a). The latter, in particular, complicates inspections as many countries' legislation requires the head of household's consent or prior judicial authorization before an inspection can be carried out. Moreover, labour inspectors are seldom instructed on the particularities of the sector and do not have a good understanding of the best practices for intervention, especially where (migrant) domestic work is excluded from the applicable legislation. These challenges, together with a lack of the resources required for the adequate performance of inspections fosters an environment that subjects domestic workers, particularly those of foreign origin, to labour and human rights abuses such as physical violence, forced labour and child labour (ILO n.d.). In Namibia, for example, although domestic workers employed for at least one day per week and their employers are required to register with the Social Security Commission, less than 20 per cent of all domestic workers in the country are registered (ILO 2013a).

6.1.2.4 Lack of information

Information on migrant domestic workers' rights may be unavailable or available only in languages that they cannot read. As a result, they may not be aware of existing social protection schemes and entitlements and how to access them. Furthermore, the fact that these workers often work long hours and have limited resting periods does not give them the necessary time and resources to access information (ILO 2019a). This situation can lead to asymmetry in negotiations with employers, place migrant domestic workers at a disadvantage when advocating for their rights and increase their vulnerability to exploitation and forced labour. Disseminating information on the risk of abusive and exploitative situations through the media, trade unions and other sources can increase migrant domestic workers' awareness of the risks that they may encounter. A lack of accurate information on the number of migrant domestic workers and their demographic and socio-economic profiles can also make it difficult for national administrations to develop a strategy for providing them with social security coverage.

6.1.2.5 Lack of representation

While workers' organizations have played an important role in raising awareness of rights and negotiating for the extension of protection, domestic workers are rarely represented by trade unions. In addition to the usual legal, political and other obstacles that national workers face, isolation is a serious barrier to domestic workers' unionization. Nevertheless, there are several domestic workers' organizations around the world (Fudge and Hobden 2018); for example, the International Domestic Workers' Federation (IDWF) has 80 affiliates in 62 countries as at January 2021[123]. In Italy, a national collective agreement on domestic work, signed by four unions and two employers' organizations in 2013, specifically recognizes the social security rights – including sickness, occupational injury and disease and pension benefits – of domestic workers (D'Andrea 2020).

6.1.2.6 Lack of coordination between countries

Migrant domestic workers face multiple barriers to social security coverage. Even where bilateral and multilateral social security agreements exist, they rarely mention migrant domestic workers as a specific group. General references to workers in international social security agreements often lead to the exclusion of migrant domestic workers, especially in countries where they are not covered under the national legislation. Nevertheless, bilateral or multilateral agreements have proved an efficient mechanism for recognizing, retaining and administering migrant workers' right to accumulated benefits in countries of destination.

6.1.3 From right to reality: Extending social protection to migrant domestic workers

Various types of workers, including vulnerable groups such as migrant workers, engage in full-time, part-time, live-in or live-out domestic work. States can opt for various policy options, which are not mutually exclusive, in order to address the obstacles faced by migrant domestic workers.

First and foremost, coverage under the national labour and social security legislation should be extended to all workers, specifically ensuring the recognition of domestic work as work and of domestic workers as workers (ILO 2019a), by expanding coverage under the existing legislation to include migrant domestic workers or adopting new legislation that specifically targets them.

When extending social protection specifically to migrant domestic workers, States can opt for:

- ratification and application of the relevant ILO Conventions and Recommendations. The principles and standards established therein, including the principle of equality of treatment, can be incorporated into domestic law (see section 1.1);
- conclusion and enforcement of bilateral or multilateral social security agreements with a view to ensuring social security coordination. Good practices for multilateral social security agreements in respect of migrant workers, including migrant domestic workers, can be identified (see Chapter 3).

► Box 6.1 Barriers to the extension of social protection to domestic workers

Legal exclusion in national legislation (nationality, status, type of employment, etc.)	High number of domestic workers working in the informal economy	Restrictions in contingencies covered	Exclusion linked to specific characteristics (income, work-time, number of employees)
Lack of affordability	Complexity of administrative procedures	Low social protection coverage of the national population in certain countries	Lack of ratification of relevant convention
Lack of social security agreements or bilateral arrangements with social security provisions	Lack of information, difficulty of accessing it or linguistic and cultural barriers	Stigmatization and discrimination	Lack of organization and representation

[123] For more information, please see The International Domestic Workers Federation.

Examples:

- The MERCOSUR Multilateral Social Security Agreement,[124] which entered into force in 2005 and is recognized as one of the most advanced in the region owing to its effectiveness and coverage, includes healthcare, old-age and disability benefits and ensures the portability of migrant domestic workers' pension rights.
- The Ibero-American Multilateral Convention on Social Security provides for the coordination of national legislation on pensions, thus guaranteeing the rights of migrant workers and their families. As at 2017, it has 15 States parties (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Paraguay, Peru, Portugal, Spain, Uruguay and Venezuela (Bolivarian Republic of) and is currently being implemented in 11 of them (Argentina, Bolivia, Brazil, Chile, Ecuador, El Salvador, Paraguay, Peru, Portugal, Spain and Uruguay). While the Convention applies only to persons who are entitled to social security in their countries of origin, a fact that significantly reduces the number of potential beneficiaries, it has the potential to encompass migrant domestic workers. Article 8 states that the Convention is fully applicable in the absence of any bilateral or multilateral social security agreement between States parties thereto.
- The 2003 Agreement between France and Tunisia seeks to ensure the social protection of migrant workers from both countries, including employed and self-employed persons, unemployed persons receiving benefits, nationals of one of the two States parties, refugees and stateless persons. Hence, it also covers migrant domestic workers. The Agreement contains provisions on all branches of social security, covers 54 per cent of the Tunisian community in France and provides access to healthcare and social security benefits on the same basis as French citizens where the condition of legal residence is met (Maddouri 2011). Maternity benefits are available with a minimum contribution period of 10 months prior to the date of birth. A range of family benefits, (cash benefits; education, childcare, birth, adoption and disabled child education allowances; supplementary family benefits; and housing benefits) are available to foreign nationals without a minimum employment or contribution period (Van Panhuys, Kazi-Aoul and Binette 2017).
- The two bilateral Social Security Agreements signed by Spain with Morocco and with Ecuador apply to workers who are or have been subject to the social security legislation of either migrant-sending country and to their dependents and survivors. In addition to the contingencies provided for under the general social security scheme of Spain, application of the Agreement between Spain and Morocco includes specific categories of workers covered by the special schemes of the Spanish social security system (such as agricultural workers, coal miners, seafarers, domestic workers and self-employed persons) (Art. 2(1)(B)). The Social Security Agreement between Spain and Ecuador applies to all contributory benefits provided through the Spanish social security system and covers all categories of workers with the exception of public and civil servants and military personnel (Art. 2(1)(B)) (Van Panhuys, Kazi-Aoul and Binette 2017).

The inclusion of social security provisions in bilateral labour arrangements (BLAs) and MoUs can be a step towards the protection of migrant domestic workers' rights although coverage will also depend on the relevant national laws and social security agreements, where these exist. In addition, empowering diplomatic representations and domestic workers' unions to monitor the enforcement of bilateral labour agreements can help to ensure migrant domestic workers' access to social protection.

Example:

- In 2013, Saudi Arabia and the Philippines signed a bilateral labour in order to better protect Filipino domestic workers employed in Saudi Arabia. According to Article 4(2) of this Agreement, the Ministry of Labour of Saudi Arabia is responsible for ensuring the welfare and rights of domestic workers. Nevertheless,

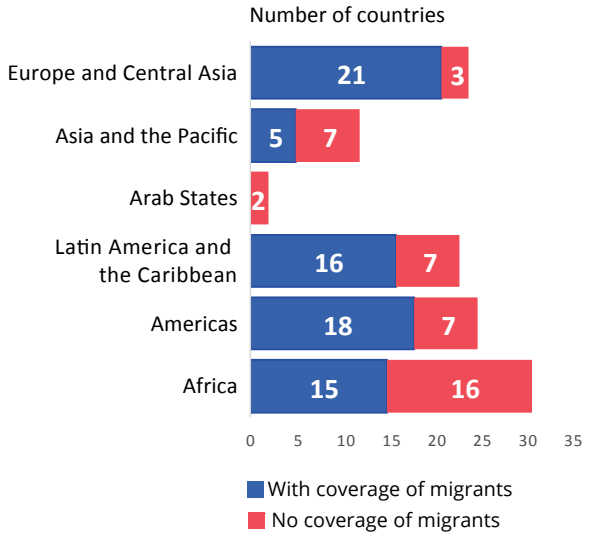
  [s]ocial protection with respect to domestic workers under the Saudi Arabian social security scheme appears to be almost non-existent. 'Domestic helpers' are excluded from the personal scope of application of the Saudi Arabia *Labor Law*, as per Article 7(2). Similarly, the *Social Insurance Law*, regulating old-age, disability and survivors benefits, does not cover 'Domestic servants' (art. 5.1e), nor does it cover 'foreign workers who usually come to the Kingdom to engage in works which usually take no more than three months to complete' (art.5.1f). However, in October 2013, the Kingdom's Council of Ministers approved

[124] Relevant national legislation includes: Argentina, Act No. 25655 of 18 September 2002; Brazil, Legislative Decree No. 451/200 of 15 December 1997; Uruguay, Act No. 17,207 of 14 September 1999; and Paraguay, Act No. 2513 of 14 December 2004.

Resolution No. 310 or the Household Regulation on Service Workers and Similar Categories aimed at enhancing legal protection for domestic workers. This recent resolution guarantees certain labour rights (a weekly rest day; one month leave after two years of service; paid sick leave of no more than 30 days; and end-of-service benefits equivalent to one-month). The only reference made to social protection is the right to healthcare according to the rules and regulations of Saudi Arabia" (Panhuys, Kazi-Aoul and Binette. 2017, 29–30).

The adoption of unilateral measures, including national SPFs, is another means of extending social protection to migrant domestic workers and their families (see Chapter 5). In total, 60.7 per cent of 168 countries provide legal protection of domestic workers under at least one social security branch. This covers roughly half of all domestic workers globally, with coverage varying widely across regions. Nevertheless, only 15 per cent of the 168 countries include domestic workers under all branches, as such less than 6 per cent of domestic workers benefit from comprehensive legal coverage (ILO 2021c).

► **Figure 6.5 Number of countries that have social security provisions for domestic workers with an indication of whether migrant workers are also covered**



Source: ILO 2021c

States can include migrant domestic workers in their social security schemes and programmes on a unilateral basis. These schemes may be contributory or non-contributory and should be based on the principle of equality of treatment between nationals and non-nationals. Transitional measures such as voluntary coverage, special programmes and differentiated coverage can be instrumental in achieving legal coverage in the short term, bearing in mind that mandatory coverage may present a challenge to the social security institutions of countries of origin.

In addition, SPFs can be used in order to extend social protection to migrant domestic workers in their countries of origin and destination (see Chapter 5).

Examples:

- In Chile and Italy, migrant domestic workers are eligible for medical coverage under the general social security regime; in other countries, they are covered under special schemes.
- In Ecuador, these workers are offered coverage through a general scheme managed by the Social Security Institute.
- In the Philippines, the Overseas Workers Welfare Administration (OWWA) provides a range of social services to the country's 3.8 million migrant workers, including domestic workers, under the Migrant Workers and Overseas Filipinos Act (Act No. 8042). The OWWA provides life and personal accident insurance and monetary benefits to members who suffer occupational injuries, illness, or disabilities while employed abroad. It also facilitates access to the Philippines Health Insurance (PhilHealth).
- In Costa Rica, an employment contract and individual social security coverage are preconditions for regularizing migration status. An unexpected side effect of this is that migrant domestic workers have a higher level of social security coverage than national domestic workers; for example, their rate of maternity coverage is nearly twice as high.
- In Argentina, the introduction of a universal child allowance in 2009 closed a social protection gap for dependents of domestic workers. However, this benefit is not always applicable to them as coverage is limited to children of Argentine nationals and children who have been resident in the country for at least three years.

► Box 6.2 Chile and the extension of social protection to all domestic workers, including migrants

Under Chilean law, migrant workers are subject to the same regulations as nationals. Their access to social protection benefits and to membership in and coverage under the national social security system is mandatory. They have access to benefits under the social security system if they have a work permit and meet certain requirements, such as a minimal period of contributions and legal residence or minimum length of stay. Most of these benefits are based on private insurance schemes and cover several branches of social protection, including old-age, unemployment, disability, invalidity, sickness, occupational disease and maternity. The public system also provides basic and complementary old-age pensions.

Domestic workers are recognized as a specific category of workers in the Labour Code and its regulations apply to migrant domestic workers, regardless of nationality. It should be noted that these regulations require employers to contribute 4.11 per cent of domestic workers' wages per month to an individual compensation fund with a benefit payable upon termination of the worker's contract. In an effort to formalize domestic work and guarantee workers' labour and social security rights, a more recent legal reform (Act No. 20,786 (2014)) requires employers to submit a copy of their workers' employment contracts to the labour inspectorate and to pay their social security contributions. Chile ratified the Domestic Workers Convention 2011 (No 189) in 2015. It has signed several bilateral agreements on social protection and is a party to the Ibero-American Multilateral Convention on Social Security.

Complementary measures can be taken in order to mitigate the administrative, practical and organizational obstacles faced by migrant domestic workers. These include awareness-raising campaigns, translation of essential information on social security schemes and establishment of complaint mechanisms. Policymakers should facilitate access to social protection by all groups of domestic workers, by removing administrative barriers, including through the use of innovative technologies. Governments can establish flexible financing mechanisms or introduce differentiated contributory provisions in order to encourage formalization of the domestic work sector (ILO 2019a). It is important for policymakers to collaborate with all relevant ministries to ensure coherence between migration, employment and social protection policies and strategies.

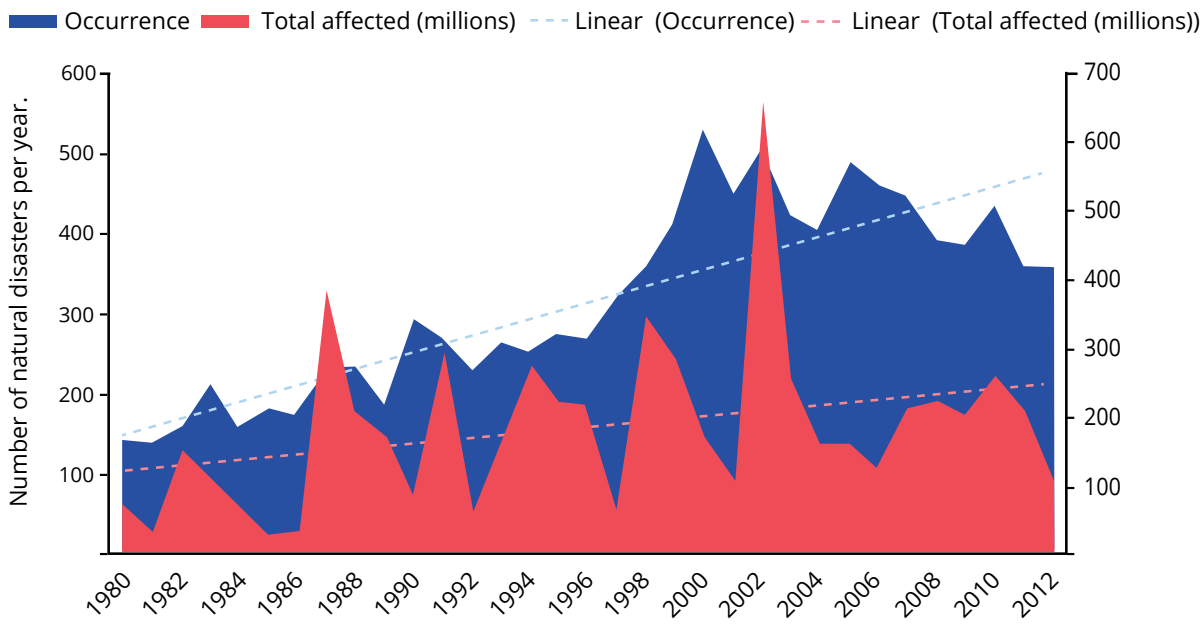
Example:

- Argentina is implementing a comprehensive policy, including tax incentives, simplification of procedures and an information campaign, with a view to increasing formalization and social security coverage of the most un-secure workers (migrants, domestic workers and construction workers). As a result, the number of migrant domestic workers covered by social security doubled over a period of five years although the overall number remains low and enrolment is a challenge.

► 6.2 Migrant seasonal agricultural workers

Approximately 3 billion people – close to half of the world's population – live in rural areas and play a significant economic role in the majority of countries. Close to 28 per cent of the global workforce is employed in the agricultural sector (ILO 2019a). The regional differences are, however, significant with the majority of these workers located in Africa and Asia. Overall, agricultural work is heavily seasonal with a high demand for labour during planting and harvest, alternating on a yearly basis with periods of little or no work. This leads farmers to make frequent use of casual and seasonal workers, many of whom are migrants. Moreover, this pattern of demand has become increasingly unpredictable over time owing to the rising rate and recurrence of natural hazards (floods, droughts and so on):

► **Figure 6.6 Occurrence and extent of crises, 1980–2012**



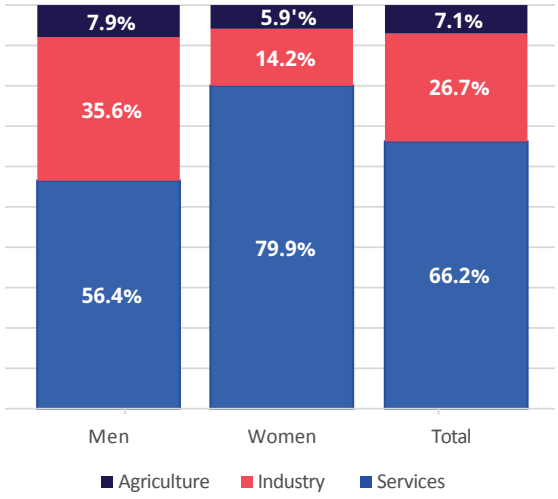
Source: European Commission 2019

At the same time, agricultural work is known for being poorly paid and physically demanding, often under difficult working conditions,[125] and has lost attractiveness for the young national workforce, who have gradually been replaced by seasonal migrant workers.

These workers are often temporary migrants who work in host countries for a limited period of time, after which they are expected to return to their country of origin or move to another country. The ILO defines "seasonal workers" as "[...] workers who hold explicit or implicit contracts of employment where the timing and duration of the contract is significantly influenced by seasonal factors such as the climatic cycle, public holidays and/or agricultural harvests" (ILO 1993, para. 14(g)). Most seasonal migrant workers are low-skilled and come from lower-income countries in geographical proximity to the destination country (such as Morocco–Spain; Mexico–US or Canada and Pacific islands–New Zealand), although there are exceptions such as berry pickers from Thailand working in Sweden. The majority of these migrant workers are employed in the informal economy.

In 2019, about 7 per cent of the total international migrant workforce – were employed in agriculture (ILO 2021) as compared to 11 per cent in 2013 (ILO 2015a).

► **Figure 6.7 Global distribution of international migrant workers, by broad branch of economic activity, 2019**



Source: ILO Global estimates on migrant workers 2021

[125] A trade union consultation organized by the ILO in 2003 showed that in Europe, low wages in agricultural work are the result of an imbalance of power that allows big supermarket chains to force farmers to produce at low cost and pass the burden on to their workers by reducing their wages.

In many parts of the world, the movement of migrant seasonal agricultural workers is governed by temporary foreign worker programmes (TFWPs), which regulate admission based on territory, residence and employment criteria. These programmes are administered by one or two government agencies, which unilaterally or multilaterally set an annual quota for the maximum number of migrant workers to be admitted into the country of destination and the criteria for their selection and recruitment in order to ensure that the labour force meets the needs of the sector. Seasonal migration schemes usually operate over a three-to-nine-month period and contain provisions encouraging return to the country of origin following expiration of the temporary work visa. Family reunification is usually not permitted under such schemes.

6.2.1 International legal frameworks of relevance to migrant seasonal agricultural workers

Many international human rights instruments and international labour standards guarantee social security rights to migrant workers (see Chapter 2), including migrant seasonal agricultural workers:

▶ **Table 6.1 International labour standards of relevance to migrant seasonal agricultural workers**

Instrument	Description
Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204)	This Recommendation seeks to facilitate the transition of workers and economic units from the informal to the formal economy while respecting workers' fundamental rights and ensuring opportunities for income security, livelihoods and entrepreneurship.
Social Protection Floors Recommendation, 2012 (No. 202)	This Recommendation seeks to guarantee, at a minimum, a basic level of social security for all, including for disadvantaged groups and persons in both the formal and informal economy. It covers migrant seasonal agricultural workers (returning workers and family members in their home countries).
Safety and Health in Agriculture Convention, 2001 (No. 184)	This Convention requires that workers in agriculture be provided with coverage against occupational injuries and diseases, invalidity and other work-related health risks through an insurance or social security scheme providing coverage at least equivalent to that enjoyed by workers in other sectors (Art. 21).
Private Employment Agencies Convention, 1997 (No. 181)	This Convention calls for adequate protection of workers, including migrants (and thus migrant seasonal agricultural workers), employed by private employment agencies in respect of, among other things, statutory social security benefits.
Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168)	This Convention extends and adapts unemployment protection to seasonal work and its specific occupational circumstances (Arts 17, 18 and 19).
Maintenance of Social Security Rights Convention, 1982 (No. 157)	This Convention covers migrant seasonal agricultural workers.
Migrant Workers Recommendation, 1975 (No. 151)	This Recommendation covers migrant seasonal agricultural workers.
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)	This Convention requires States parties to promote equality of opportunity and treatment for migrant workers – including migrant seasonal agricultural workers – and members of their families who are lawfully within their territory in respect of social security. It also states that migrant workers, irrespective of status, must enjoy equality of treatment in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

Instrument	Description
Equality of Treatment (Social Security) Convention, 1962 (No. 118)	This Convention, which calls for equality of treatment in respect of every branch of social security recognized thereunder, covers migrant seasonal agricultural workers.
Social Security (Minimum Standards) Convention, 1952 (No. 102)	This Convention calls for the equality of treatment of non-national and national residents and covers migrant seasonal agricultural workers.
Migration for Employment Convention (Revised), 1949 (No. 97)	This Convention contains provisions on the acquisition by non-national workers – including migrant seasonal agricultural workers who are lawfully present in a State's territory – of social security in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme. The CEACR has expressly included workers with temporary residence status in the scope of application of Article 6, which mandates equality of treatment with regard to social security with the exception of benefits that are payable wholly out of public funds and minimum contribution conditions for pensions.[126]

The ILO Multilateral Framework on Labour Migration – Non-binding principles and guidelines for a rights-based approach (ILO 2006), also includes specific provisions on the extension of social protection to migrant seasonal agricultural workers:

- "Principle 8: 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";
- "Principle 9c: National law and policies should also be guided by other relevant ILO standards in the areas of employment, labour inspection, social security, maternity protection, protection of wages, occupational safety and health and in such sectors as agriculture, construction and hotels and restaurants".

6.2.2 Obstacles, protection gaps and challenges

Migrant seasonal agricultural workers may be excluded from social protection by law or in practice.

- The social security systems of the country of destination or origin may not cover seasonal agricultural workers or migrant workers or may cover them at a lower level of protection, forcing them to work in the informal economy.
  - These workers risk being excluded from the social protection systems of both their country of employment, since they have no permanent residence status, and their home country, since they are not employed there.
  - Moreover, as family reunification is usually not allowed, the dependents of these workers usually remain in the country of origin, where they risk being excluded from the social security system because the main breadwinner does not work in that country.

[126] Direct request (CEACR) – adopted 2007, published 97th [International Labour Conference (ILC)] session (2008): Migration for Employment Convention (Revised), 1949 (No. 97) – Belize (Ratification: 1983); direct request (CEACR) – adopted 2001, published 90th ILC session (2002): Migration for Employment Convention (Revised), 1949 (No. 97) – New Zealand (Ratification: 1950).

- The nature and duration of seasonal agricultural work may lead to exclusion from or limited access to social protection. This situation may be exacerbated by a lack of multilateral or bilateral social security agreements.

Examples:

- The temporary, relatively limited, duration of these workers' contract or stay makes it particularly difficult for them to gain access to social protection because they are often unable to meet the minimum eligibility conditions for social security benefits in the country of employment.
- Frequent movement from one country to another may prevent them from reaching the minimum number of contribution years required for certain social security benefits unless they are able to aggregate the periods of time spent in multiple countries.
- Their migration cycle can be unpredictable and they may fall under several different social security systems in the course of their life.
- Additional factors that may lead to their exclusion include a lack of an identifiable employment relationship, low and fluctuating income, remoteness of their workplace, high labour mobility and lack of organization.
- These workers may lack incentives to enter the formal economy and contribute to social security schemes from which they may not be able to benefit.
- Language barriers, lack of information on the social security system, the absence of social networks and other constraints related to their migrant status and the nature of their work (remote areas, long hours and seasonal work) often prevent them from exercising their rights and accessing social security schemes, including underlying mechanisms such as complaint and redress mechanisms. These difficulties are, moreover, exacerbated by their short stay in the country.

As seasonal agricultural work can be hazardous and subject to a higher occupational injury rate, it is particularly important to ensure that these workers are eligible for short-term benefits such as occupational injury protection, basic healthcare and maternity protection.

► Box 6.3 Further challenges in light of COVID-19

With the outbreak of COVID-19, supply chains, including for agricultural products, have been disrupted and food security has become an issue for many countries worldwide. Although the pandemic has highlighted the importance of agricultural workers in sustaining food systems, in some countries they are excluded from the general protections of labour law (ILO 2016d). Because there is little incentive for national workers to take these jobs, seasonal foreign worker programmes are being put in place. The COVID-19 pandemic and the subsequent measures taken (such as border closures and travel bans) have placed a burden on countries that have historically relied on migrant agricultural workers. Many countries have designated these workers as "essential" and adopted special measures allowing them to travel or extending their visas in order to give them access to healthcare services. However, social protection coverage for all is still far from being fully applied in practice.

It seems likely that this new recognition of agricultural work will lead to a greater focus on decent work and to a greater appreciation of agriculture work as a profession. Recognizing these workers as essential entails closing legal loopholes exempting them from coverage under the labour laws and increasing the consistency of (im)migration, employment and social security regulations. As key stakeholders in this sector, migrant workers must be able to benefit from pay raises and social protection, including access to healthcare and other benefits, as and when they become available. Seasonal foreign worker programmes must be integrated into planned improvements and rather than being designed as a parallel reality.

Source: ILO 2020a

6.2.3 From right to reality: Extending social protection to migrant seasonal agricultural workers

It is important to ensure that national agricultural workers are covered by labour and social security laws as this is a precondition for extending social protection to agricultural migrant workers.

Countries can take a variety of measures to extend social protection and ensure equality of treatment for migrant workers. When considering policy options and measures for migrant workers in general, countries should also take into account the specific challenges and obstacles that migrant seasonal agricultural workers may face with regard to social protection. These obstacles are compounded by the duration of their work and by their migration status, which may prevent them from meeting the minimum required conditions.

Policy options and examples of the extension of social protection to migrant seasonal agricultural workers include:

- Conclusion and enforcement of social security agreements (bilateral/multilateral) to ensure the portability of acquired rights and totalization of contribution periods.

Examples:

- France concluded a bilateral social security agreement with Morocco, one of the primary countries of origin of seasonal workers, in 2007 with entry into force as from 2011. This Agreement expressly includes seasonal workers in its scope of application and covers all nine branches of social security, including old-age benefits.
- EU Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers recognizes their right to equal treatment with nationals of host Member States in respect of access to social security. However, the Directive does not cover unemployment and family benefits and is limited with regard to tax benefits, education and vocational training.

- Inclusion of social security provisions in bilateral labour arrangements (BLAs) and temporary workers programmes

Examples:

- Canada's Seasonal Agricultural Worker Programme (SAWP),[127] launched in 1966 as part of its Temporary Foreign Worker Programme (TFWP),[128] facilitates the temporary seasonal employment of foreign workers through a system of bilateral labour agreements between Canada, Mexico and 11 Caribbean countries.[129] Seasonal agricultural workers from these countries may be employed for up to eight consecutive months per year for on-farm activities and work related to previously identified commodities. As Canadian employers can request specific employees, they have a significant influence on the composition of the seasonal workforce (which comprises a larger proportion of men than women). These bilateral labour agreements mandate receipt of the provincial minimum wage and include specific provisions on social protection.

  Employers must ensure that all migrant workers included in the Programme have registered for health insurance. Depending on the province, workers may be covered by the provincial/territorial (public) health/workplace safety insurance, private insurance or a combination of the two. Depending on the option chosen, the cost may be covered by the migrant, the employer or both. The agreements state that "the employer can deduct the cost of non-occupational medical coverage by way of regular payroll deduction at a premium rate of [C$]0.90 per day per worker" (Canada 2020). Coverage includes non-occupational medical insurance (sickness, accident and hospitalization) and any other benefit that is in the worker's interest. Yet, despite being legally entitled to such care, migrant workers often face difficulties in accessing the benefits, including language barriers, fear of repatriation, fear of employer reprisal and/or lack of system awareness (Braganza 2016).

  SAWP workers are also eligible for other social security benefits. Separate social security agreements have also been concluded, including between Canada and the United Mexican States (van Panhuys, Kazi-Aoul and Binette 2017).

[127] Additional information is available at: https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html.

[128] The TFWP is a broader programme that allows national employers to hire temporary foreign workers in a range of fields for varying time periods.

[129] Anguilla, Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago.

► **Table 6.2 SAWP workers' access to healthcare and social security benefits**

	Coverage under the public scheme
Healthcare	Yes • During waiting periods (3 months in British Columbia, Ontario and Quebec), private insurance provided by the employer [130]
Employment injury benefits	Yes (provincial or territorial insurance plan) • If excluded from the provincial or territorial plan, private insurance provided by the employer
Cash sickness and unemployment benefits	No • Residence in Canada while receiving benefits is required
Maternity, parental and compassionate care benefits	Yes • Upon completion of insurable hours
Long-term benefits (old-age, disability and survivors' benefits)	Yes, upon completion of the qualifying period • Portability of benefits and coordination of schemes ensured through bilateral social security agreements

Source: Government of Canada (Employment and Social Development Canada and Service Canada)

- Adoption of unilateral measures by countries of origin and destination.

  An important option to consider is the establishment of national SPFs in origin countries to facilitate the extension of social protection to the families of migrant workers abroad and to returning migrants who are not covered or only partially covered by a social security agreement or by the legislation of their home countries. Other measures may include exceptions to the requirement that migrant workers join the social insurance scheme of their country of employment if they are already covered in their country of origin and authorizing the payment of benefits abroad. It is also essential to incorporate flexibility into the design of social security schemes in order to ensure that migrant seasonal agricultural workers can also meet the qualifying conditions and minimum requirements. For example, countries can authorize retroactive payments for missed contribution periods, the totalization of non-consecutive contributory periods and lump-sum payment or reimbursement of contributions when leaving the scheme. This situation of migrant seasonal agricultural workers requires a compromise between providing effective coverage of these workers and their families in the host country and after their return, and requiring them to pay contributions from which they cannot benefit.

Examples:

- Under Ghana's social security legislation, foreign workers who leave the country before reaching the minimum age to qualify for a pension benefit may withdraw their contributions (National Pensions Act, sect. 101).
- In France, seasonal migrant workers contribute to and benefit from the social security system on the same terms as nationals. The minimum contribution period for unemployment benefits is 24 weeks over a two-year period.
- Colombian nationals working abroad may remain affiliated as independent workers under the General Pension System.[131] This is particularly important for migrant seasonal agricultural workers, allowing them to ensure that their family members back home remain protected.
- In Macedonia, the Social Protection Act regulates the social assistance benefits to which nationals and foreign nationals with a permanent residence permit are entitled. Although the residency requirement is usually difficult for migrant seasonal agricultural workers to meet, they are entitled to healthcare from the moment that their employment commences. If Macedonia has concluded a social security agreement with the worker's country of origin,

[130] For more information, see: https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural/requirements.html. In some provinces (including British Columbia, New Brunswick, Ontario and Quebec), there is a three-month waiting period for all new residents and employers must ensure that their seasonal workers have medical coverage for those months.

[131] Decree No. 682 on social protection mechanisms for nationals working abroad, 2014. Available at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=enandp_isn=96164andp_country=COLandp_count=590andp_classification=17andp_classcount=8.

pension periods from other countries may be taken into consideration (Strban 2010).

- Complementary measures should be considered in order to address the numerous administrative, practical and organizational obstacles faced by migrant seasonal agricultural workers. Information and services should take into account their often-remote work location, long hours of works, short stay in the country and other obstacles as described above. Outreach programmes using mobile units can facilitate access to information, registration and payment of social security benefits in remote rural areas. Other possibilities include increasing the number of local offices in these areas, facilitating social security access through digital services and offering greater flexibility in the choice of contact point for access to benefits and services. In order to minimize the costs of the latter, partnerships with established agencies, organizations or private sector companies may be sought. Experience has shown that such partnerships work well for simple processes, including awareness-raising, the provision of information and the payment of contributions, if the staff is appropriately trained (ISSA 2012).

Seasonal work can be advantageous for all parties concerned if migrant workers' rights, including labour rights, are enforced through effective regulation. More jobs and higher wages allow migrants to support their families at home through remittances while reducing pressure on the labour market of their country of origin. Migrant seasonal agricultural workers may also fill significant labour and skills gaps in destination countries, thereby promoting agricultural sector growth and national development.

► Box 6.4 Costa Rica: Improving healthcare for indigenous migrant seasonal workers and their families

Indigenous people are among the most vulnerable migrant workers as they are often excluded from social protection and suffer from serious discrimination. However, some countries have taken decisive steps to improve their situation. Costa Rica is a destination country for the Ngäbe-Buglé people, an indigenous migrant community from Panama whose members travel to Costa Rica to perform seasonal work on coffee farms. Their access to social services has historically been limited owing to their high mobility and separation from the resident population.

Cross-border migration of Ngäbe-Buglé migrant workers and their families has been addressed in Costa Rica through several policies and programmes that focus primarily on healthcare. The Healthy Farms (Finca Sana) project was funded by the World Bank and implemented by the IOM in cooperation with the Governments of Costa Rica and Panama, health authorities and health partners, civil society, coffee producers and the Ngäbe-Buglé people between 2007 and 2009. It sought to improve the health of these migrant workers through public- private partnerships and a participatory approach to the coverage of medical emergencies and occupational, maternal and child health in decentralized communities. As part of the project, a visiting mobile health team provided health education and medical assistance, check-ups and care during emergencies to 3,000 Ngäbe-Buglé people. Additional services included the establishment of community homes, health networks and emergency transportation systems and the provision of logistical support for health promoters along migration routes.[132]

The bilateral agreements and other policy instruments on labour migration concluded between Costa Rica and Panama since 2005 include references to social security, and particularly access to healthcare, for indigenous populations in Costa Rica. The 2015 bilateral agreement seeks, among other things, to ensure access to healthcare, education and social security. Regulation 8986 of 30 August 2018 entitles national and non-national coffee-pickers, including indigenous migrant workers such as the Ngäbe-Buglé people, regardless of migration status, to coverage under the social security system and to healthcare in hospitals and clinics associated with the Costa Rican Social Security Fund during the five-month harvest period. A family benefit, funded jointly by the Costa Rican Coffee Institute (ICAFE) and the Government (contributing 5.75 per cent and 9.25 per cent, respectively), is also provided but pension benefits are not included.

Source: IOM 2015

[132] Although this project is an interesting initiative, in order to ensure its sustainability it is paramount to ensure equality of treatment between nationals and non-nationals and to integrate migrant workers into the national health systems; the primary responsibility for doing so ultimately lies with the State.

▶ 6.3 Migrant workers in an irregular situation

Migrant workers in an irregular situation are defined by the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) as those who are not "authorized 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" (Art. 5). As noted in the Glossary, the Committee on the Protection of the Rights of All Migrant Workers has stated that "the term 'in an irregular situation' or 'non-documented' is the proper terminology [...;] use of the term 'illegal' to describe migrant workers in an irregular situation is inappropriate and should be avoided as it tends to stigmatize them by associating them with criminality" (CMW 2013, para. 4).

There are different paths towards irregularity and migrant workers may find themselves in an irregular situation for a variety of reasons: their visas may have expired, their asylum applications may have been declined or they may have entered the country without documents or with forged documents. They may also have entered the country of destination through regular channels and obtained a valid residence permit but find themselves in an irregular situation because they have engaged in illegal employment.

In a number of countries, migrant workers in an irregular situation are excluded from coverage under the labour and social security legislation and thus do not have access to social protection, including healthcare. Providing these workers and their families with access to emergency and other healthcare has many advantages; it improves their health status, reduces their vulnerability and social exclusion, enhances their resilience and employability, represents a first step towards regularization of their status, and benefits society as a whole by reducing public health risks (including the transmission of communicable diseases) and lowering the infant and child mortality rates.

6.3.1 International legal provisions on migrant workers in an irregular situation

6.3.1.1 Human rights instruments

The Universal Declaration of Human Rights make no distinction based on nationality or immigration status, thus granting all migrants the right to social protection.

With regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR), in its General Comment No. 20, the Committee on Economic, Social and Cultural Rights states that "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" (CESCR 2009, para 30). Similarly, the Committee on the Elimination of Racial Discrimination has called upon States parties to the International Convention on the Elimination of All Forms of Racial Discrimination to "ensure 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" (CERD 2004, para. 7).

In its General Recommendation No. 26 on Women Migrant Workers, the Committee on the Elimination of Discrimination against Women recalls that States parties have an obligation to protect the basic human rights of women migrant workers, regardless of their immigration status. The Committee stresses that women migrant workers in an irregular situation must have access to legal remedies and justice with a view to fulfilling their basic needs, including in times of health emergencies or pregnancy and maternity, (para. 2(l)) and that victims of abuse must be provided with emergency and social services, regardless of their immigration status (CEDAW 2008, para. 26(i)).

A different approach is taken by the International Covenant on Civil and Political Rights (ICCPR), which provides that any difference of treatment between nationals and non-nationals, including migrants with irregular status, must be based on reasonable and objective criteria.

As mentioned above, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) draws a distinction between migrant workers in a regular and those in an irregular situation. While Part III (on human rights) applies to all migrant workers, regardless of their administrative situation, Part IV sets out additional rights for documented migrant workers including liberty of movement and freedom to choose their residence and to participate in public affairs.

The Convention states that all migrant workers, whether in a regular or an irregular situation, have the right to leave any State, including their State of origin, and to enter and remain in their State of origin (Art. 8). It establishes the right to life (Art. 9) and the principle of equality before the courts (Art. 18) and prohibits torture, cruel, inhuman or degrading treatment and punishment (Art. 10), slavery and forced labour (Art. 11).

Article 27 states that "migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties" and that "[w]here the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances".

In its General Comment No. 2 (CMW 2013), the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families recalls that "any distinction based on nationality or migration status must be prescribed by law, pursue a legitimate aim under the Convention, be necessary in the specific circumstances, and be proportionate to the legitimate aim pursued" (para. 18). It also considers that "[i]n cases of extreme poverty and vulnerability, States parties should provide emergency social assistance to migrant workers in an irregular situation and members of their families [...] for as long as they might require it" (para. 71) and that particular attention should be given to women migrant domestic workers in an irregular situation (para. 21).

With respect to access to healthcare, States are obliged to ensure migrant workers' effective access to any medical care that is urgently required in order to avoid irreparable harm to their health (para. 72) and may not require public health institutions to share data on a patient's migration status with immigration authorities (para. 74).

Nevertheless, as mentioned above, the limited number of ratifications of this Convention, especially by countries of destination, limits effective recognition of the rights established therein.

6.3.1.2 Scope of application of ILO Conventions

While most ILO social security Conventions establish the principle of equality of treatment between nationals and non-nationals (see Table 2.1), their scope of application does not always extend to migrant workers in an irregular situation (see table 6.3).[133]

[133] The CEACR has held that the provisions of the Migration for Employment Convention (Revised), 1949 (No. 97), the Migration for Employment Recommendation (Revised), 1949 (No. 86) and Part II (Equality of Opportunity and Treatment) of the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) cover only migrant workers who have been regularly admitted for the purposes of employment (ILO 1999).

► **Table 6.3. ILO Conventions and Recommendations relevant to specific groups of migrant workers.**

	Migrant Domestic Workers	Migrant Seasonal Agricultural Workers	Migrants In An Irregular Situation	Refugees
C102 Social Security (Minimum Standards) Convention, 1952	X	X		X
C118 Equality of Treatment (Social Security) Convention, 1962	X	X		X
R202 Social Protection Floors Recommendation, 2012	X	X	X (children)	X
C157 Maintenance of Social Security Rights Convention, 1982	X	X		
C97 Migration for Employment Convention (Revised), 1949	X	X		X
R086 - Migration for Employment Recommendation (Revised), 1949	X	X		X
C143 Migrant Workers (Supplementary Provisions) Convention, 1975	X	X	X	X
C181 Private Employment Agencies Convention, 1997	X	X	X	
R151 Migrant Workers Recommendation, 1975	X	X	X	X
C189 The Domestic Workers Convention, 2011	X		X	
R204 Transition from the Informal to the Formal Economy Recommendation, 2015	X	X	X	X
C184 Convention on Safety and Health in Agriculture, 2001		X	X	
C168 Convention on Employment Promotion and Protection against Unemployment, 1988	X	X		

The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) seeks to ensure that migrant workers in an irregular situation who are or have been engaged in unlawful employment are not deprived of their rights in respect of the work that they have performed. Under Part I of Convention No. 143, migrant workers in an irregular situation are entitled to the social security rights and benefits which they have acquired by virtue of their period of employment and, in the case of migrants in a regular situation, by fulfilling the other qualifying conditions. More specifically, Article 9(1) requires that migrant workers whose situation cannot be regularized enjoy equality of treatment in respect of rights arising out of past employment, including as regards social security. According to the CEACR, the scope of this provision should be determined with respect to the relevant national legislation applying to migrants with regular status and the provision of equality of treatment. Thus, migrant workers in an irregular situation are entitled to a specific right only where that right is granted to lawfully employed migrant workers under the legislation of the country of destination. Furthermore, Article 9(1) does not extend to benefits, the granting of which is not dependent on periods of past employment, and the provision should be understood to refer to long-term benefits. The term "past employment" includes "any period of legal employment in the country concerned which may have preceded the illegal employment" (ILO 1999, para. 308, and ILO 2016d).

However, although the equality of treatment to be accorded to migrant workers in an irregular situation pursuant to Convention No. 143 is considered to be on the basis of equality with migrant workers in a regular situation in the territory, the effect in practice may be equality with nationals where the country concerned grants such treatment to migrant workers in a regular situation.

Further, the CEACR considered that "as provided for in Paragraph 34(1)(b) of Recommendation No. 151, it is essential that all migrant workers, irrespective of their legal status, whether regular or irregular, be entitled to benefits due in respect of any employment injury suffered" (ILO 2016d, para. 314). Therefore the provisions of Convention No. 143 should be read in conjunction with paragraph 34 of the Migrant Workers Recommendation (No. 151), which states that "[a] migrant worker who leaves the country of employment should be entitled, irrespective of the legality of his stay therein [...] to benefits which may be due in respect of any employment injury suffered" (para. 34(1)(b)).[134] A number of States have in fact granted these benefits to workers regardless of their migratory situation and of whether they and/or their employers have made contributions to the social security system (ILO 2016d).

With regard to the Social Security (Minimum Standards) Convention, 1952 (No. 102), the Committee has stated that the concept of residence for the purpose of the Convention only applies to lawfully residing non-nationals. "The Committee recognizes that extending the right to social security, including the right to medical care, to non-citizens is a key challenge for many societies today. With regard to the non-citizens, even where they are in an irregular status on the territory of another State, such as undocumented workers, they should have access to basic benefits and particularly to emergency medical care" (ILO 2011, para. 260).

6.3.1.3 Children

On several occasions, the Committee on the Rights of the Child has expressed the view that children in an irregular situation or whose parents lack regular migration status should enjoy equal access to social protection, including health services, psychological care and disability care (CRC 2002(a), (b) and (c); CRC 2003). The importance of full access to social protection for children, regardless of their legal status, is also affirmed in the Social Protection Floors Recommendation, 2012 (No. 202), according to which States "should provide the basic social security guarantees referred to in this Recommendation to at least all residents and all children, as defined in national laws and regulations"(Art. 6), whether or not they are legal residents.

6.3.2 Obstacles, protection gaps and challenges

In many countries, migrants in an irregular situation live in constant fear of detention or deportation and may even face criminal persecution on the grounds of their administrative status alone. They are frequently excluded from the social protection system, even where they have lived and worked in the country for many years.

► Box 6.5 Basic social security guarantees for all residents and children (Recommendation No. 202, para. 6): Observations of the CEACR in the 2019 General Survey concerning the Social Protection Floors Recommendation, 2012 (No. 202)

In its 2019 *General Survey*, the CEACR states: "Equal treatment in coverage and access to social security should be guaranteed to all members of society, who should stand together, non-nationals and nationals, to provide this protection as an expression of solidarity. The Committee reiterates that non-discrimination is a key principle on which the right to social security is premised. It pertains to all persons, irrespective of status and origin" (para. 142).

The Committee then calls on member States "to establish the principle of equality of treatment to ensure that non-national residents, irrespective of their immigration status, have the same social security rights as nationals. [...] The Committee also hopes that member States will make efforts to provide non-nationals, even those in an irregular status, including workers in an irregular situation, with access to basic benefits, and particularly to any medical care that is urgently required" (para. 143).

[134] Paragraph 34(1)(c)(ii) of the Recommendation also provides specifically that migrant workers, irrespective of their legal status, should be entitled "to reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements: Provided that where social security contributions do not permit entitlement to benefits, every effort should be made with a view to the conclusion of bilateral or multilateral agreements to protect the rights of migrants".

- Migrant workers in an irregular situation are particularly vulnerable to hazardous conditions of work, abuse and exploitation, circumstances that worsen during crises.
  - Migrants affected by disasters often fall between the cracks of response systems, reducing their ability to seek adequate support. This is especially true of migrant workers in an irregular situation and their families. In the absence of such support, they are exposed to further risks such as increased abuse, smuggling, trafficking and other forms of exploitation.
  - This increase in vulnerability has recently been evidenced during the COVID-19 pandemic; migrant workers in an irregular situation have been one of the hardest hit communities. Because of their status, the authorities may not be aware of their existence or may not consider them when developing public assistance measures such as prevention, testing and vaccination campaigns.[135] State-imposed mobility restrictions and border closures have redirected migrants into situations where humanitarian support is often not available (Sanchez and Achilli 2020). As a consequence, the paths for safe, orderly and regular migration have narrowed, compounding the risks and challenges that migrants with irregular status face.
- Poor housing, inadequate access to water and sanitation, risky and exploitative employment and the circumstances of travel to the country of destination can have a significant impact these migrants' health status and endanger their lives.
  - Despite these enhanced vulnerabilities and health risks, migrant workers in an irregular situation usually enjoy little or no access to health services and are often disregarded in policy conversations despite their high level of vulnerability (OHCHR 2014, UNDP 2009).
- Eligibility requirements related to employment and residence often exclude migrant workers with irregular status from access to social security.
  - Because most contributory social security benefits are linked to employment, migrants who work in the informal economy are excluded from social security on the basis not of their residence status, but of the labour laws.
  - Non-contributory social protection programmes, including social assistance schemes, are usually based on residence, thus excluding migrants in an irregular situation.
  - Migrant workers with irregular status in the informal economy may not be able to meet the application criteria for a permanent or long-term residence permit even after living and working in a country for several years.
- Lack of documentation (such as identification documents, passport, birth certificate, work contract, pay slips and bank statements) is an additional obstacle to accessing benefits. For example, migrant workers in the informal economy, regardless of status, may be unable to prove their source of income and produce the documents required for means-tested social assistance schemes.
- The risk and fear of deportation is another major obstacle that prevents migrant workers in an irregular situation from claiming their benefits and exercising their right to healthcare and other services. Even in countries with legislation that grants them basic access to healthcare, they may still be reported to the authorities and face deportation (PICUM 2007).
- Owing to their status and their often-temporary and unpredictable length of stay, migrant workers in an irregular situation may face additional challenges if they attempt to claim their social protection rights or request legal assistance.

For many migrant workers with irregular status, work in the informal economy is the only way to make a living. In some countries, the informal economy accounts for up to three quarters of all non-agricultural employment and is often characterized by poor employment conditions and poverty (ILO 2012b). However, the informal economy is not composed entirely of migrant workers with irregular status; it also includes many nationals, documented migrants and foreign nationals with a residence status that does not allow them to work, such as asylum seekers and, in some countries, refugees. These workers may have similar problems in accessing social protection.

[135] For further information, see ILO Forthcoming 2021.

6.3.3 From right to reality: Extending social protection to migrant workers in an irregular situation

A variety of measures can be taken in order to ensure the social protection of migrant workers in an irregular situation:

- Adoption of unilateral measures, including national SPFs. Countries of destination can facilitate the regularization of these migrant workers through measures ranging from the simplification of administrative procedures and reduction of legal loopholes to widespread regularization campaigns. This approach can have a positive financial impact; in Spain, "significantly higher public revenues resulted from regularization, even where social security benefits were already granted to migrant workers in an irregular status; positive labour market impact was reported in association with mobility of migrant workers from areas of high immigrant populations to low immigrant population localities" (Monras, Vásquez-Grenno and Elias 2018).

Examples:

- In 2002, Argentina established a Regional Agreement for Nationals of Member States of the Common Market of the South, which allowed nationals of any of the six MERCOSUR Member States to reside and work in each other's territory under the principle of equality of treatment. In 2003, the Government commenced the signing and implementation of all international human rights treaties, leading to a shift in its domestic and foreign policy and a new rights-based approach. A year later, it eliminated the deportation of migrants in an irregular situation originating from neighbouring countries and signed a new migration law (Act No. 25871/2004), which not only recognized migration as a human right but also eased regularization procedures, provided for equality of treatment and guaranteed family reunification and migrants' access to social assistance, health and education, irrespective of migration status. In 2005, the country implemented the Great Country (Patria Grande) programme, which gave effect to the Migration Act (Act No. 25871/2004) and was designed to promote the regularization of migrants in an irregular situation originating from the MERCOSUR and associated countries. At the time, 90 per cent of migrants in an irregular situation were from MERCOSUR countries (Cavaleri 2012). Not only did the programme guarantee their right to migrate in and out of these countries; it also entitled them to reside, work and study there. At the outset, the programme granted a temporary two-year residence permit, which could then be converted into a permanent permit upon presentation of an identity document and a criminal record certificate.

  In its first phase (2006–2010), the programme granted residency to 13,000 non-MERCOSUR migrants and facilitated the regularization of 650,000 (Cavaleri 2012).[136] Overall, 11.6 per cent of the migrant population have benefitted from some social plan since 2005; 51 per cent of migrant families have had access to family benefits[137] and 75 per cent of migrant men (over 65 years of age) and 60 per cent of migrant women (over 60 years of age) have received a pension (ILO 2015c). Taken together, these measures have reduced unemployment, underemployment and (extreme) poverty (Cavaleri 2012).

  Argentina has also launched a national labour formalization plan through Act No. 25877/2004, which seeks to ensure respect for the labour laws and access to social security and to promote formalization. The plan focuses on occupations with a very low formalization rate, in which migrant workers are often overrepresented. Act No. 26844/2013 on domestic work facilitates the regularization of domestic workers by establishing a simplified register for domestic workers and a personal card in order to facilitate the payment of contributions and access to rights; it also establishes general rules on occupational safety and health and maximum working hours. In addition to these instruments, the Government has established a National Institute against Discrimination, Xenophobia and Racism and a Tripartite Commission on Gender and Labour Equality.

- Countries can unilaterally extend social protection to migrant workers in an irregular situation through the development of inclusive policies, laws and schemes.

[136] A total of 58 per cent of applicants to the programme were from Paraguay, followed by Bolivia (24 per cent) and Peru (11 per cent).

[137] This estimate includes both contributory and non-contributory schemes.

Examples:

- Under Panama's social security legislation (Act No. 51 of 27 December 2005), foreign workers who do not comply with the migration rules or the rules on the employment of foreign nationals may register with the Social Security Fund (Caja de Seguro Social) despite their irregular status. Thus, migrants in an irregular situation can access the social security system under the same conditions as other workers.
- In Switzerland, migrant workers in an irregular situation may, under certain conditions, enjoy various social security benefits; coverage is not contingent on legal status but arises from the obligation to enrol in a social insurance scheme (ILO 2016c);
- In Cyprus, labour inspectors who encounter unregistered or irregularly employed workers require the employer to register them with the Social Insurance Scheme, which covers every gainfully employed person in Cyprus.

- Employment injury for migrant workers in an irregular situation

  - In Japan and the Republic of Korea, the Labour Standards Act (Act No. 49 (1947), Chapter VIII) and the Industrial Accident Compensation Insurance Act (1963), as amended, sects 5(2) and 6, respectively, provide that all workers are eligible to receive industrial accident compensation, regardless of their legal status.
  - In the United States, migrants in an irregular situation have received compensation of up to US$2.85 million for injuries owing to an unsafe environment.
  - In South Africa, migrant workers are expressly included under the Compensation for Injury and Occupational Diseases Act (Act No. 130 (1993), as amended, regardless of their migratory status.

- Health protection for migrant workers in an irregular situation is regulated at the national level and, depending on the country, may include full access once the qualifying conditions have been met, access only to emergency care, or no access at all. Migrants in an irregular situation had no access to preventive care in over 60 per cent of the developed countries sampled in a UNDP study and had no access to emergency care in 35 per cent of those countries. In developing countries, those figures were 70 and 30 per cent, respectively (UNDP 2009). Hence, entitlement to healthcare under national legislation is often at odds with migrants with irregular status' rights under international human rights instruments. The extent of coverage varies widely from one country to another.[138]

Examples:

- In France, migrant workers in an irregular situation who have been living in France for at least 3 months without interruption and whose financial resources are below a certain threshold may be eligible for State medical assistance (Aide Médicale d'Etat (AME)) covering up to 100 per cent of their healthcare expenses (France 2019).
- In Belgium, article 57(2) of the Organization Act of 8 July 1976 entitles migrants in an irregular situation to urgent medical care if they reside in an area covered by a public social assistance centre and/or do not have the financial means to pay for their own medical care. An urgent medical care certificate from a doctor is required.
- In Germany, migrant workers in an irregular situation have access to emergency medical care and can request reimbursement of costs without fear of denouncement or deportation since the procedure is confidential (OHCHR 2014).
- In Sweden, the Act on health and medical care for persons staying in Sweden without necessary permits (Act No. 2013:407) entitles non-documented workers to healthcare.
- Mexico's 2014 Migration Act (sect. 8) and Uruguay's 2007 Migration Act (Act No. 18.250, sect. 9) guarantee access to healthcare for all persons within their territory, irrespective of migration status (ILO 2016c);

[138] For details and country examples, see Chapter 5, section 5.2.1.4.

▶ Box 6.6 Portugal's Strategic Plan for Migration: Access to healthcare for all people, including migrant workers in an irregular situation

In 2015, after public consultation, the Portuguese Government launched the National Strategic Plan for Migration 2015–2020. The Plan, which is consistent with the European Commission's Global Approach to Migration and Mobility, is designed to facilitate the social and economic integration of migrants in the country. It is also in line with the Portuguese Constitution, article 64 of which guarantees access to general healthcare under the National Health System (NHS) for all residents, including immigrants; the NHS cannot deny assistance based on nationality, legal status or lack of economic resources. All residents must pay a small fee in order to access healthcare. Persons who have no residence permit or are in an irregular situation under the immigration legislation are, however, required to present a document from the community in which they live, certifying that they have been living in the country for more than 90 days.

- Migrants in an irregular situation who cannot prove residence in Portugal for more than 90 days are nevertheless eligible for certain types of care through the NHS at no cost:
- urgent and vital healthcare;
- maternal, reproductive and child healthcare;
- treatment of communicable diseases that pose a threat to public health (such as HIV/AIDS or tuberculosis);
- immunization.

In response to the COVID-19 pandemic, Portugal adopted provisions that regularized migrants, including asylum seekers with pending applications, until 30 June 2020. By treating them as permanent residents, it granted them full citizenship rights, including access to public services such as healthcare, social support, employment and housing (ILO 2020d).

- Conclusion and enforcement of bilateral/multi-lateral social security agreements or including social security provisions in BLAs can facilitate the regularization and formalisation of migrant workers. Indeed, the mere existence of these agreements can be an incentive for workers to migrate through regular channels and work in the formal economy in order to benefit from the social protection that they provide.
  - For instance, the 1979 Social Security Agreement between Spain and Morocco, amended in 1998, covers employed and self-employed workers, including agricultural and domestic workers, and provides for equality of treatment under the legislation of the country of destination.
- Complementary measures at various levels may be considered in order to address the administrative, practical and organizational obstacles faced by migrants in an irregular situation.
  - Dialogue and cooperation between countries of origin and destination can help to improve the protection of migrant workers by facilitating the regulation of labour migration and recruitment processes. For example, the Colombo Process is a regional consultative process aiming at managing overseas employment and contractual labour migration through informal and non-binding dialogue and cooperation. Under this process, which accounts for a high percentage of Asian migration flows, member countries have taken concrete steps aiming at improving labour migration management, including the conclusion of BLAs and MoUs and the launching of programmes aiming at regulating the recruitment process in order to discourage irregular migration. Efforts to disseminate information on the migration process and reduce irregular migration have been made through orientation programmes and training opportunities in countries of origin. Similarly, debates held in the context of the Global Forum on Migration and Development and the Abu Dhabi Dialogue[139] have focused on a comprehensive approach to the labour recruitment industry in order to empower temporary and circular migrants.

[139] The Global Forum on Migration and Development is a voluntary, informal and non-binding process, open to all UN Member States and Observers, which seeks to enhance cooperation in the areas of migration and development. The Abu Dhabi Dialogue is an interregional ministerial consultation process that was established in 2008 in order to bring together member countries of the Gulf Cooperation Council and the Colombo Process, as well as Malaysia, Singapore and Yemen.

- Non-binding regional policy documents and frameworks can also demonstrate a region's commitment to the social protection of migrant workers, including those in an irregular situation, and guide policy action at the national level. The Code on Social Security in the Southern African Development Community (SADC) (2007) states that "[i]llegal residents and migrants in an irregular situation should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country" (Art. 17(3)). However, the Code is not a legally binding agreement and most of the SADC countries do not, in practice, ensure access to social protection for workers in an irregular situation.
- At the national level, it is important to ensure the consistency of migration, employment and social protection policies. For instance, policies and measures aimed at facilitating the transition from the informal to the formal economy can have an impact on migrants with irregular status' access to the formal labour market and employment- based social protection and can thus facilitate their regularization.. Formalization can be achieved through a variety of means, including by extending mandatory social insurance coverage, perhaps with partial subsidies for low-income groups, and enhancing access to non-contributory and usually tax-financed benefits.
- Countries of origin can strengthen the control and monitoring of recruitment agencies to ensure that employers of migrant workers provide them with a contract and decent working conditions, including social protection. In many countries, factors such as lack of monitoring and investigation mechanisms, unscrupulous intermediaries and fraudulent agencies expose migrant workers to, among other things, recruitment fees that push them into irregularity, indebtedness, forced labour and trafficking. This is especially true of migrant domestic workers (ILO 2016a).

6.4 Conclusion

While many instruments and standards establish the social security rights of migrant workers, States should introduce provisions that specifically provide social security coverage to those who are not yet covered in accordance with the principles of equality of treatment and non-discrimination. Migrant workers' access to social protection depends on a variety of factors, some of which are linked to their employment status, skills set and duration of stay and others to the lack of social security agreements, discriminatory laws and complex administrative procedures. Migrant domestic and seasonal agricultural workers and migrant workers in an irregular situation face specific barriers that must be taken into account in order to ensure universal social protection.

In order to extend social protection to migrant domestic workers, States must ensure that all domestic workers are covered under their labour and social security laws, simplify procedures for registration and the payment of contributions and adapt their eligibility criteria in light of the specific situation of these workers (work in a private household, multiple employers and so on).

For migrant seasonal agricultural workers, special measures that meet their needs in light of the temporary and unpredictable nature of their migration are required; these may include allowing them to retain membership in the social security schemes of their country of origin, insuring the portability of their benefits and authorizing lump-sum reimbursement of their contributions. It is also important to address practical obstacles such as isolation, high labour mobility, lack of information and networks and low, fluctuating income.

For migrant workers in an irregular situation, national measures that provide access to basic social protection without fear of repercussions should be adopted or enhanced. These workers are often non-documented and face hazardous working conditions, poor housing, abuse and exploitation. This forces them to work in the informal economy and severely affects their health status and endangers their lives.

While such customized measures are important when extending social protection to these three categories of migrant workers, many other groups may be left out if their specific characteristics are not taken into account. For example, seafarers, posted and detached workers, frontier workers, health workers and internal migrant workers warrant greater attention and could be the subject of additional research.

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Chapter 7

Extending social protection to refugees and asylum seekers

▶ Key messages

- Many international and regional human rights instruments, including the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights (CESCR) and the 1989 Convention on the Rights of the Child (CRC), establish the universal human right to social security and contain specific provisions on refugees' access to social security.[140] Other related rights are enshrined in the 1951 Convention relating to the Status of Refugees (hereafter referred to as the 1951 Convention).[141]

- Refugees, the majority of whom (85 per cent) are hosted by developing countries, face specific obstacles in accessing social protection[142] owing to their often-temporary legal status, unpredictable length of stay, limited history of contributions, lack of social protection from their countries of origin and limited or no access to the formal labour market. Where there is a massive influx of refugees, the resulting pressure on the available socio-economic resources tends to create tensions with host communities.

- National social protection strategies and systems should take into account the specificities of refugees and asylum seekers in order to ensure their access to social protection on an equal footing with nationals based on the principles of equality of treatment and non-discrimination.

- Refugees' access to contributory social protection schemes is intrinsically linked to their access to the labour market. Moreover, access to the labour market and to social protection facilitates their inclusion in national legal frameworks and integration into the community, promotes social justice, contributes to tax revenue, enhances public health and reduces dependency.

- The integration of refugees into national social protection schemes, both contributory and non-contributory, can provide sustainable, cost-effective solutions allowing them to move out of humanitarian assistance, particularly in protracted situations. Strengthening social protection systems generally benefits both refugees and host communities and reduces tensions between them.

- Where possible, ad hoc and short-term emergency cash and food transfers for refugees and asylum seekers can be incorporated into social protection strategies and channelled through existing social protection systems.

- Including refugees and asylum seekers in national social protection responses, in line with international human rights and labour standards, will play an important role in mitigating the effects of COVID-19 with a view to a swifter recovery.

[140] See, among other things, Art. 24 of the IESCR.

[141] See Arts 11–12 of the ICESCR on an adequate standard of living and health and Art. 23 of the 1951 Convention on public relief: "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals".

[142] As explained above, the term "social protection" includes both contributory and non-contributory schemes and programmes.

▶ 7.1 Introduction

In many parts of the world, instability, conflicts, persecution, violence and other human rights violations, as well as natural disasters and climate change, have forced people to leave their countries and seek protection for themselves and their families elsewhere. The need for protection has most recently been evidenced by the unexpected emergence of the COVID-19 pandemic, which has forcibly displaced people throughout the world. For example, in March 2020, the number of asylum applications to EU countries was 43 per cent lower than in the preceding month, largely as a result of border closures and restrictions. The number of registered refugees worldwide has also fallen, suggesting that the true magnitude of individuals seeking international protection during this pandemic has been underrepresented (UNHCR 2019).

Yet, based on the registration data collected in 2020, the UNHCR estimates that there are 82,4 million forcibly displaced persons in the world, including 26.4 million refugees, 4.1 million asylum seekers and 48 million internally displaced persons (UNHCR 2020). The proportion of women and girls in internationally displaced population was estimated at 47 per cent. Just five countries – Afghanistan, Myanmar, South Sudan, Syria and Venezuela (Bolivarian Republic of) – account for 68 per cent of cross-border displacements (UNHCR 2020). In 2018, on average, 37,000 people per day were forced to flee their homes (UNHCR 2018a).

Despite a growing trend towards the inclusion of refugees and asylum seekers in national social protection systems, they rarely enjoy the same rights as nationals; in practice, equality of treatment is still far from achieved in many countries around the world. National legislation may restrict their access to one or a few social security benefits and the level of these benefits may be inadequate. However, experience has shown that extending social protection to refugees and asylum seekers increases their resilience and reduces poverty, exclusion and vulnerability (UNHCR 2011a; UNHCR 2012b; ILO 2018; Canonge n.d.). It also reduces inequalities and contributes to economic growth in host communities by supporting household income and domestic consumption, thus reducing strain on host communities' resources and labour markets. Consequently, failure to incorporate refugees and asylum seekers into national social protection systems can be a missed opportunity for countries since refugees' length of stay outside their countries of origin can last for decades, and may even be indefinite.

The UNHCR is mandated to provide international protection to refugees and asylum seekers, including by seeking durable solutions such as voluntary repatriation, local integration and, where appropriate, resettlement as a means of sharing responsibility based on international solidarity.[143]

- Voluntary repatriation of refugees to their countries of origin can be facilitated when the situation permits (where there is no longer a risk of persecution).
- Local integration of refugees in an asylum/host country includes is a more permanent solution, yet this process may be hindered by administrative and practical obstacles.
- Resettlement involves transferring refugees from the State in which they originally sought protection to a third State that has agreed to grant them permanent residence status.

It is important to allow refugees to live their lives in dignity without depending on national or international aid over the long term.

In light of the foregoing, this chapter begins with an overview of the international legal framework, the various definitions of refugees and asylum seekers, and their right to work and to social protection. The obstacles, protection gaps and challenges to these rights are outlined in section 3 and possible solutions and examples of national best practices are highlighted in section 4.

[143] Where durable solutions cannot be pursued, complementary admission pathways can provide some protection to refugees. For more details, see: https://www.unhcr.org/complementary-pathways.html.

▶ 7.2 International legal framework

7.2.1 Definitions under various international instruments

Persons who are seeking international protection, have applied for refugee status or a complementary international protection status and have not yet been formally recognized as refugees are considered asylum seekers.[144] As part of their internationally recognized obligations, States are responsible for deciding whether asylum seekers qualify as refugees by determining whether their fear of persecution in their countries of origin is well-founded.[145]

The 1951 Convention is the primary international instrument of refugee law and is grounded in Article 14 of the Universal Declaration of Human Rights, which recognizes "the right of persons to seek asylum from persecution in other countries". It was adopted in order to protect European refugees in the aftermath of World War II, but its geographic and temporal scope was subsequently expanded through the 1967 Protocol Relating to the Status of Refugees in light of the increasing number of displacements globally. As at October 2020, 146 states have ratified the 1951 Convention.[146]

The 1951 Convention and its Protocol define "refugee" as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling, to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it". Thus, under international law, individuals are considered refugees as soon as they meet the relevant criteria, whether or not they have been formally recognized by the State in which they sought asylum (or by the UNHCR). The Convention also identifies the categories of persons who are not eligible for refugee status (those who have committed war crimes, crimes against humanity, serious non-political crimes or acts contrary to the purposes and principles of the United Nations).

States should grant refugees permanent residence status pursuant to Article 34 of the 1951 Convention, which requires countries to facilitate their integration and naturalization. The Convention also defines refugees' obligations to the Government of their host country and vice versa. In the latter case, great emphasis is placed on the principle of *non-refoulement* (Art. 33), which prohibits countries from forcibly returning or expelling refugees and asylum seekers to a country in which there is a risk that their lives or freedom would be threatened (Lauterpacht and Bethlehem 2003). Additional obligations include ensuring "access to the courts, to primary education, to work, and the provision for documentation, including a refugee travel document in passport form" (UNHCR 2020a, p. 3).

As a complement to international law, regional instruments in Africa and the Americas have introduced broader refugee criteria. For instance, the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa considers that the term "refugee" includes persons who are compelled to leave their place of habitual residence owing to "external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of [their] country of origin or nationality" (Art. I(2)). In Latin America, the 1984 Cartagena Declaration on Refugees includes in the definition of refugees "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order" (Art. 3). While not legally binding, the latter definition has been incorporated into the legal frameworks of many States parties to the Declaration.

144 The term "asylum seeker" can also refer to a person who has not yet applied for refugee status but may intend to do so or be in need of international protection. While not every asylum seeker will ultimately be recognized as a refugee, they cannot be sent back to their countries of origin until their asylum claims have been examined in a fair procedure and they are entitled to certain minimum standards of treatment pending determination of their status.

145 In the exercise of its mandate, the UNHCR can also recognize people as refugees and does so in some countries.

146 However, 171 UN Member States have ratified the ICESCR and are thus required to ensure the protection of refugees even if they are not parties to the 1951 Convention or maintain reservations to specific articles thereof. Article 2(1) of the ICESCR states: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

7.2.2 Refugees and access to work

Access to work plays a central role in the social and economic inclusion of refugees in their host communities by allowing them to meet their own needs and contribute to the local economy. Moreover, in many countries, employment is an essential condition for certain social security benefits and services. In these countries, when refugees are denied access to the formal labour market they are automatically excluded from social protection benefits. Where access to decent work is not possible, refugees and asylum seekers are more likely to accept hazardous work and/or work in the informal economy in order to support themselves and their families.

The right to work is enshrined in several international documents; the Universal Declaration of Human Rights establishes that "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment" (Art. 23) and the ICESCR states that the States parties thereto " recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right" (Art. 6); they also recognize "the right of everyone to the enjoyment of just and favourable conditions of work [...]" (Art. 7). In its General Comment 18, the UN Committee on Economic, Social and Cultural Rights notes that this article "lay[s] down specific legal obligations rather than a simple philosophical principle" and "defines the right to work in a general and non-exhaustive manner" (CESCR 2006).

The ILO's widely ratified Employment Policy Convention, 1964 (No. 122)[147] encourages States to adopt policies aimed at ensuring that "there is work for all who are available for and seeking work".

According to the CEACR, the provisions of the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary) Convention, 1975 (No. 143) apply to all workers employed outside their home countries, including refugees (ILO 1999, para. 101).

Articles 17–19 of the 1951 Convention (on, respectively, wage-earning employment, self-employment and liberal professions) regulate refugees' access to the labour market. Article 17 provides that "The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment". It also limits States' ability to impose restrictive measures on the employment of refugees in order to protect the national economy[148] and requires them to "give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes" (Art. 17(3)).

Under Article 18, the Contracting States undertake to accord refugees "treatment as favourable as possible" as regards the right to self-employment in agriculture, industry, handicrafts and commerce. These articles should be read together with Article 6, which states that refugees shall be exempt from requirements "which by their nature a refugee is incapable of fulfilling".[149] Lastly, Article 24 states that refugees shall receive "the same treatment as is accorded to nationals" with regard to "remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining".

Refugees' right to work has been further developed by the non-binding Michigan Guidelines on the Right to Work, which stress that this right is enshrined not only in the 1951 Convention, but also in several other human rights instruments and that its full recognition "empowers refugees, enabling self-reliance and contribution to the economy and society" (Colloquium on Challenges in International Refugee Law 2010, p. 295).

Despite these provisions, however, refugees' right to work remains quite limited in most countries. An assessment of the 20 countries that host 70 percent

147 As at April 2021, there are 115 States parties to this Convention.

148 See also Arts 2(3) and 4 of the ICESCR.

149 Consequently, when applying for a work permit, refugees should be exempt from requirements that, owing to their refugee status, they will be unable to meet (see Hathaway 2005).

of the world's refugees, conducted by the ILO and the Global Knowledge Partnership on Migration and Development (KNOMAD), found that "[a] restrictive approach to their right to work prevails, and most states are reluctant to ease these restrictions. The majority of refugees work in the informal sector, but under much less satisfactory and more exploitative conditions compared with nationals". In light of these findings, the assessment states that "more national and international coordination is required [and] multiple actors should share in the responsibility to deliver decent work [...]" (Zetter and Ruaudel 2016, p. iii).

Discussions on refugees' access to the labour market have been held in various international forums, including the UN Summit on Refugees and Migrants, which led to the adoption of the New York Declaration for Refugees and Migrants in September 2016 and of the Global Compact on Refugees in 2018 (Box 7.1), and an ILO tripartite technical meeting in July 2016, which led to the Governing Body's adoption of the *Guiding Principles on the Access of Refugees and other Forcibly Displaced Persons to the Labour Markets* in November 2016 (ILO 2016).

The ILO's Employment and Decent Work for Peace and Resilience Recommendation 2017 (No. 205) also mentions refugees' access to the labour market:

> Members should develop and apply active labour market policies and programmes with a particular focus on disadvantaged and marginalized groups and population groups and individuals who have been made particularly vulnerable by a crisis, including, but not limited to, persons with disabilities, internally displaced persons, migrants and refugees, as appropriate and in accordance with national laws and regulations (para. 12).
>
> Members should take measures, as appropriate, to: (a) foster self-reliance by expanding opportunities for refugees to access livelihood opportunities and labour markets, without discriminating among refugees and in a manner which also supports host communities; and (b) formulate national policy and national action plans, involving competent authorities responsible for employment and labour and in consultation with employers' and workers' organizations, to ensure the protection of refugees in the labour market, including with regard to access to decent work and livelihood opportunities (para. 30). [Emphasis added][150]

[150] See also ILO 2018.

▶ Box 7.1 The Global Compact on Refugees

The 2016 New York Declaration led to the endorsement of the Global Compact on Refugees by the UN General Assembly in December 2018. The Compact makes a number of commitments regarding social protection access for refugees and host communities, including:

- delivering assistance to refugees and host communities through local and national service providers rather than establishing parallel systems specifically for refugees (para. 66);
- promoting economic opportunities, decent work, job creation and entrepreneurship programmes (para. 70);
- enhancing the quality of national healthcare systems to facilitate access by refugees and host communities (para. 72);
- supporting the facilitation of access to age-, disability- and gender-responsive social and healthcare services (para. 75);
- meeting immediate food or nutritional needs, including through the increased use of cash-based transfers or social protection systems and supporting access to nutrition-sensitive social safety nets (para. 81).

Part II of the Global Compact is the Comprehensive Refugee Response Framework (CRRF). Its four key objectives are to:

1. ease pressure on countries that welcome and host refugees;
2. build self-reliance of refugees;
3. expand access to resettlement in third countries and other complementary pathways;
4. foster conditions that enable refugees voluntarily to return to their home countries.[151]

In relation to social protection, the CRRF recognizes the economic and social costs borne by low- and middle-income countries hosting large numbers of refugees (para. 6(c)), including pressure on social services, and calls for the provision of adequate resources to support host countries and communities (para. 8(c)). It also calls on host states "[d]eliver assistance, to the extent possible, through appropriate national and local service providers, such as public authorities for health, education, social services and child protection" (para. 7(b)). At the Global Refugee Forum,[152] organized by the UNHCR and held in Geneva in December 2019, the ILO pledged, among other things, to support governments' efforts to ensure equitable access to social protection for refugees and host communities.

[151] UNHCR n.d.

[152] During the Global Refugee Forum (GRF), a number of countries pledged to develop inclusive social protection systems for refugees and host communities. For example, the Government of Ethiopia undertook to ensure that both refugees and host communities (particularly vulnerable persons such as women, children, persons with disabilities and older persons) were able to access and benefit from the national social protection services in a meaningful way. For more information see UNHCR - Global Refugee Forum.

7.2.3 Refugees and the right to social protection

Access to social protection is a human right enshrined in several international instruments, which, by extending this right to every member of society regardless of legal status, origin or nationality, include refugees in their scope of application (see Chapter 2).

Articles 20–24 of the 1951 Convention contain important provisions on welfare and social security. Article 23 states: "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals". In its Comments on the draft general comment [of the Committee on Economic, Social and Cultural Rights] on the right to just and favourable conditions of work (art. 7 of the International Covenant on Economic, Social and Cultural Rights), the UNHCR states that this article "seeks to ensure that refugees are entitled to benefit from the national social assistance and welfare schemes enjoyed by nationals, even if they do not meet any of the conditions of local residence or affiliation which may be required of nationals. The article must be given a broad interpretation and includes, *inter alia*, relief and assistance to persons in need owing to illness, age, physical or mental impairment, or other circumstances and medical care" (UNHCR 2015a, para. 15).

Article 24 of the 1951 Convention states:

> 1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;
>
> (a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;
>
> (b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:
>
> (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
>
> (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.
>
> 2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.
>
> 3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.
>
> 4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

It should, however, be borne in mind that many countries formulated reservations to Article 24 and are therefore not bound by its provisions.[153]

With regard to the ILO Conventions on social security analysed above, the Social Security (Minimum Standards) Convention, 1952 (No. 102) applies to refugees based on the principle of equality of treatment. Yet because this principle hinges on reciprocity it can, in practice, hinder refugees' access to their rights. More specifically, Article 68 of the Convention states:

[153] Angola, Canada, Egypt, Estonia, Finland, Iran (Islamic Republic of), Latvia, Liechtenstein, Malawi, Monaco, New Zealand, Poland, Sweden, Timor-Leste, the United Kingdom and Zimbabwe made reservations to all or part of Art. 24.

1. Non-national residents shall have the same rights as national residents: Provided that special rules concerning non-nationals and nationals born outside the territory of the Member may be prescribed in respect of benefits or portions of benefits which are payable wholly or mainly out of public funds and in respect of transitional schemes. Furthermore, it outlines that non-nationals will have the same protection under contributory social security schemes as nationals provided that the States have concluded bilateral/multilateral agreements providing for reciprocity.

2. Under contributory social security schemes which protect employees, the persons protected who are nationals of another Member which has accepted the obligations of the relevant Part of the Convention shall have, under that Part, the same rights as nationals of the Member concerned: Provided that the application of this paragraph may be made subject to the existence of a bilateral or multilateral agreement providing for reciprocity.

The Equality of Treatment (Social Security) Convention, 1962 (No. 118) expressly states: "The provisions of this Convention apply to refugees and stateless persons without any condition of reciprocity" (Art. 10(1)). It establishes that the principle of equality of treatment should apply in respect of medical care, sickness benefit, employment injury benefit and family benefit without condition of residence, although such a condition may apply to other benefits (Art. 4(2)).

The Social Protection Floors Recommendation, 2012 (No. 202) calls for the establishment of national social protection floors comprising basic social security guarantees to ensure, at a minimum, that all in need have access to essential health care and basic income security over their life cycle. These should cover "…at least all residents and children, as defined in national laws and regulations" (para. 6).

The Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205) "applies to all workers and jobseekers and to all employers, in all sectors of the economy affected by crisis situations arising from conflicts and disasters" (para. 4). It goes on to state that "Members should establish, re-establish or maintain social protection floors, as well as seek to close the gaps in their coverage, taking into account the Social Security (Minimum Standards) Convention, 1952 (No. 102), the Social Protection Floors Recommendation, 2012 (No. 202) and other relevant international labour standards". In section XI (Refugees and returnees), paragraph 33 states that "[…] Members should include refugees in the actions taken with respect to employment, training and labour market access, as appropriate and in particular: […] (f) facilitate, as appropriate, the portability of work-related and social security benefit entitlements, including pensions, in accordance with the national provisions of the host country".

The Migration for Employment Convention (Revised), 1949 (No. 97) applies to migrants for employment, defined as persons "who migrat[e] from one country to another with a view to being employed" (Art. 11). Article 6 of the Convention states:

> 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:
>
> […]
>
> (b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:
>
> (i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
>
> (ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;
>
> […]

On several occasions, the CEACR has expressly included refugees in the scope of application of Articles 2, 6 and 7 of the Convention.[154]

The non-binding Migration for Employment Recommendation (Revised), 1949 (No. 86) supplements Convention No. 97 and includes provisions on refugees and displaced persons. In particular, it states that member States should "facilitate the international distribution of manpower" (para. 4(1)) and provide information services, free assistance and medical assistance. The Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons, annexed to the Recommendation, promotes the exchange of information between the competent authorities of the countries of emigration and immigration "or in the case of refugees and displaced persons, to any body established in accordance with the terms of an international instrument which may be responsible for the protection of refugees and displaced persons" (Arts 1 and 4) and the conclusion of a separate agreement on social security (Art. 21).

The CEACR has stated that the provisions of the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) apply to all workers employed outside their home countries, including refugees. The Convention is divided into two parts, which can be ratified independently of each other. Part I calls on Members to respect the basic human rights of all migrant workers, including those in an irregular situation. Migrant workers whose position cannot be regularized must enjoy equality of treatment for [themselves] and [their families "in respect of rights arising out of past employment as regards remuneration, social security, and other benefits" (Art. 9). Part II contains provisions aimed at ensuring equality of opportunity and treatment for migrant workers in a regular situation, including with respect to social security (Art. 10).

The provisions of the Migrant Workers Recommendation, 1975 (No. 151) apply to all workers employed outside of their home countries, including refugees.

The Maintenance of Social Security Rights Convention, 1982 (No.157) promotes the conclusion of bilateral and multilateral agreements implementing the principle of the maintenance of rights in the course of acquisition and of acquired rights and specifies that such agreements should apply to refugees and stateless persons residing in the territory of a State party (Art. 4(3)). It also states that "[e]ach Member shall guarantee the provision of invalidity, old-age and survivors' cash benefits, pensions in respect of employment injuries and death grants, to which a right is acquired under its legislation, to beneficiaries who are nationals of a Member or refugees or stateless persons, irrespective of their place of residence" (Art. 9). Nonetheless, it should be noted that, as at October 2021, only four States (Kyrgyzstan, the Philippines, Spain and Sweden) have ratified this Convention.

The Maintenance of Social Security Rights Recommendation, 1983 (No. 167) states: "Members bound by a bilateral or multilateral social security instrument should endeavour by mutual agreement to extend to the nationals of any other Member, as well as to refugees and stateless persons resident in the territory of any Member, the benefit of the provisions of that instrument" (para. 2) with regard to three of the five key principles related to the coordination of social security and the protection of migrant workers (see Chapter 2 above):

- determination of the applicable legislation, which ensures that the social security of a refugee/stateless person is governed by the legislation of only one country at a time;
- maintenance of rights in the course of acquisition, which allows for the aggregation/totalization of the periods of insurance, employment or residence required for the acquisition, maintenance and recovery of rights; and
- maintenance of acquired rights and provision of benefits abroad, which allows for maintenance of any acquired right across territories without any restriction on payment.

The Recommendation also promotes the conclusion of "administrative or financial arrangements to remove possible obstacles to the provision of invalidity, old-age and survivors' benefits, pensions in respect of employment injuries and death grants, to which a right is acquired under their legislation, to beneficiaries who are nationals of a Member or refugees or stateless persons resident abroad" (para. 3)

[154] Direct request (CEACR) – adopted 2007, published 97th [International Labour Conference (ILC)] session (2008): Migration for Employment Convention (Revised), 1949 (No. 97) – Belize (Ratification: 1983); direct request (CEACR) – adopted 2001, published 90th ILC session (2002): Migration for Employment Convention (Revised), 1949 (No. 97) – New Zealand (Ratification: 1950).

The non-binding Guiding principles on the access of refugees and other forcibly displaced persons to the labour market, 2016 (ILO 2016) expressly mention social protection in two guiding principles:

> 19. Members should take steps to facilitate the portability of work-related entitlements (such as social security benefits, including pensions) [...] of refugees and other forcibly displaced persons between countries of origin, transit and destination.
>
> 22. Members should adopt or reinforce national policies to promote equality of opportunity and treatment for all, in particular gender equality, recognizing the specific needs of women, youth and persons with disabilities, with regard to fundamental principles and rights at work, working conditions, access to quality public services, wages and the right to social security benefits for refugees and other forcibly displaced persons and to educate refugees and other forcibly displaced persons about their labour rights and protections.

Thus, the international legal framework is clear: granting refugees' access to social security and ensuring their social and economic integration is essential in order to achieve a durable and sustainable solution for both refugees and host countries. The application of international standards is, however, often hindered at the national level by inadequate national legal and policy frameworks and other practical obstacles, including, among other things, lack of information, language barriers and discriminatory practices. The following section will elaborate on these challenges and suggest potential solutions.

► Box 7.2 Protecting the rights of refugees and other forcibly displaced persons during the COVID-19 pandemic

The COVID-19 pandemic continues to wreak havoc on nations and their economic activities. Its impact on the health, employment and social inclusion of nationals has also been felt by refugees and other forcibly displaced persons, who are finding it increasingly difficult to provide for themselves and their families.

Their precarious legal status and the associated restrictions on their mobility heighten their mental and physical stress and make it increasingly difficult for them to obtain and maintain employment and social protection. This further exacerbates the negative impact of COVID-19 while reducing their access to coping strategies. The challenges that they face include:

- loss of income and jobs, which increases their food insecurity, limits their access to healthcare and places continuous education for their children at risk;
- limited access to social protection owing to requirements (nationality, valid work permits or formal employment) that effectively exclude refugees and their families;
- difficulty in applying COVID-19-related workplace protection measures owing to the type of occupation or limited access to personal protective equipment;
- erosion of working conditions and weakened prospects for social integration owing to the socio-economic effects of the pandemic, particularly as refugees' bargaining power is limited;
- risk of gender-based violence, forced labour and child labour owing to the increasingly vulnerable situation of refugee populations during the pandemic;
- the negative economic impact of the virus on micro-, small and medium-sized enterprises and own-account workers with limited access to finance, land and property and low savings, investment and cash reserves.

In order to mitigate the negative impact of the pandemic on refugees and other forcibly displaced persons, it is of paramount importance that all stakeholders – including governments and employers' and workers' organizations – understand that international labour standards are central to this response. Specific policy options may be divided into two categories:

Protecting refugees in the workplace by:

- identifying and monitoring refugees' specific needs through rapid assessments (examples include Iraq, Pakistan and Tunisia);
- simplifying procedures for obtaining and renewing work permits in order to prevent refugees from falling into an irregular situation. Italy, Ireland, Poland and Portugal took steps to extend or automatically renew documents related to residence or asylum status during the peak months of the crisis;
- ensuring fair wages and access to justice, irrespective of legal status;
- enabling refugees' representation through the exercise of their right to freedom of association and collective bargaining;
- providing all workers, irrespective of status, with the necessary means and information to apply workplace safety and health measures and ensuring that information is available in a language that the refugees can understand. In Italy, a multilingual information portal, JUMA, provides refugees and asylum seekers with information on COVID-19 in 15 different languages;
- taking measures to counter discrimination, violence and harassment at work.

Ensuring inclusive and sustainable recovery by:

- recognizing refugees' skills and contribution to recovery by lifting restrictions and giving them access to employment in essential sectors (such as the medical professions, logistics, food and retail) in times of crisis;
- ensuring that refugees and their families have access to social protection measures as an indispensable element of crisis response in order to keep them from slipping deeper into poverty;
- enabling refugees with disabilities to participate fully in the world of work through disability-inclusive occupational safety and health (OSH) and social protection measures and accessible and inclusive working conditions. If adequately protected, refugees with disabilities can be as productive as persons without disabilities;
- including refugee workers and entrepreneurs in economic stimulus measures, such as management and resilience training, so that they can acquire the necessary skills and capacities to adapt their businesses during the crisis;
- encouraging social cohesion through balanced job creation programmes for both nationals and refugees.

Source: ILO 2020

▶ 7.3 Obstacles, protection gaps and challenges

Refugees' effective access to social security in the host country is influenced by several factors, including the State's legal and administrative framework and social security system and the active steps that it takes in order to facilitate such access. These factors, like those analysed in other chapters in the context of migrant workers' access to social protection, are of two kinds. On the one hand, they may be related to the host country's legal system or to its bilateral or multilateral agreements with the sending country; on the other, even where refugees theoretically have access to such rights, their effective enjoyment can be hindered by hurdles such as lack of knowledge, lack of funds, administrative and language barriers and discrimination.

7.3.1 Legal obstacles

Refugees and asylum seekers may be legally excluded from the legislative framework of the host country.

An analysis of the legislation of 120 countries found that only 56 States' legislation contained explicit provisions granting refugees access to social security and that only 40 States granted such access to asylum seekers (Van Panhuys, Kazi-Aoul and Binette 2017).

Refugees face specific obstacles to contributory and non-contributory social protection owing to their nationality, residence (often temporary) status, type of employment, unpredictable length of stay and limited number of years of contributions. These obstacles may also prevent them from accessing the formal labour market, and thus employment-based social protection. A number of countries have been reluctant to grant refugees access to the labour market, particularly in cases of massive influx, because they fear distortion of the labour market and increased unemployment rates among the host population.

It should be borne in mind that massive influxes of refugees have the greatest impact on neighbouring, and particularly low- and middle-income, countries that are struggling with pre-existing socio-economic challenges. In 2019, 85 per cent of the world's refugees were hosted in developing regions, which often lack effective national social security protection systems even for their own nationals (UNHCR 2019). Without adequate international solidarity, refugees' protection may remain temporary and limited.

Moreover, countries may be reluctant to give refugees access to social protection as this might be seen as a first step towards more permanent residence or local integration. In addition, as mentioned above, not all countries have ratified the 1951 Convention[155] and the fact that many States parties have formulated reservations to some of its articles, including those related to social protection, is a major impediment to refugees' enjoyment of their social protection rights.

Like migrant workers, refugees who apply for social security benefits in the host country commonly find it difficult to qualify for benefits and, in particular, long-term benefits (old age, survivors' and invalidity); for example, pensions provided through a contributory scheme often require a minimum number of contributory years. Many working-age and older refugees have spent some of their productive years in the country from which they fled and must start from zero in the host country. Moreover, where States have collapsed and regimes changed, the previous social security system may have been dissolved and all contributions to it lost.

Furthermore, because refugees are, by definition, people who have fled their country of origin for fear of persecution, they cannot avail themselves of its protection. As a consequence, the so-called "social contract" with that country, which involves the payment of taxes and other obligations in return for social protection, access to education, healthcare and other rights, is also broken (Makhema 2009). For this reason, refugees often lose the contributions that they have paid in their country of origin and even where bilateral or multilateral social security agreements exist, they may no longer be applied by the home country, especially in situations of internal conflict or lack of effective governance. However, where both the host and the destination country are parties to the 1951 Convention, they are both obliged to extend to refugees the benefits identified in any agreements between them, "subject only to the conditions which apply to nationals of the States signatory to the agreements in question" (Art. 24(3)).

7.3.2 Practical obstacles

In addition to these hurdles, refugees often face other practical obstacles of a non-legal nature.

For instance, as stated above, even where national law grants refugees legal access to social protection, it may be unavailable in practice owing to language or cultural barriers, discrimination, administrative issues

[155] As at July 2021, there are 149 States parties to the Convention and/or its Protocol.

or lack of information and awareness of their rights. (see Chapter 1). Discrimination in host countries may be directed towards specific groups of refugees owing to historical, religious, ethnic and political tension between the host country and the refugees' country of origin. The administrative barriers faced by refugees are compounded by the difficulty or impossibility of requesting the administration or institutions of their countries of origin to supply missing information and documents on social protection contributions and other matters.

Moreover, refugees are often not represented or consulted during the design and implementation of programmes of relevance to them. This top-down approach to policymaking fails to take into account their unique experience, expertise about their communities and knowledge of gaps in service delivery. Thus, policies and programmes designed without consulting refugees and their families do not adequately meet their needs. It should, however, be noted that recent years have seen a trend towards greater inclusion and participation of refugees in decision-making processes, as evidenced by the 2016 New York Declaration for Refugees and Migrants and the 2018 Global Compact on Refugees. Nonetheless, putting these provisions into practice remains a challenge (Harley and Hobbs 2020).

Lastly, while geographical and financial barriers[156] affect both nationals and refugees, they often place a heavier burden on the latter because they are compounded by the other obstacles mentioned above. The fact that many refugees live in remote areas or refugee camps and are employed in the informal sector at low wages and with limited or no access to finance makes it impossible for many families to afford basic necessities, healthcare, housing, education and transportation or to make social contributions.

7.3.3 Specific obstacles faced by asylum seekers

Owing to their pending refugee status, asylum seekers often do not enjoy the same rights as refugees or nationals of the host country: they usually do not have residence status and may not have the right to work, to education and even to travel within the country. In some countries, asylum seekers are entitled to work, either as soon as their asylum application is approved or after a certain period of time. However, this entitlement is often limited to specific sectors or to a maximum number of hours per month.[157] In addition, asylum seekers who are awaiting a decision on their applications may have limited social protection rights under national laws (for example, access only to healthcare). In any event, it should be noted that these rights are typically not on par with those granted to nationals or to other foreign residents. Moreover, asylum procedures can be long and subject to delay. Applicants who are denied refugee status can, in some instances, lodge an appeal but this will entail another extended waiting period without regularized status and, in some instances, additional legal fees.

▶ 7.4 From right to reality: country practices

7.4.1 Why extend social protection to refugees and asylum seekers?

There are a variety of reasons for providing refugees and asylum seekers with social protection. Everyone, including refugees, has the right to social security in accordance with international human rights law. Protecting refugees against life's risks (such as sickness, maternity, old-age and occupational injury) not only improves their income security and reduces household poverty; it also reduces the prevalence of disease and illness and ultimately provides host countries with more productive, healthy and employable workers, thus improving their economic and social situation (UNHCR 2012a). Ensuring refugees' access to work and to social protection in the host country is also a way to support durable solutions in the context of protracted situations. Refugees and asylum seekers provide an important source of labour and new ideas and perspectives. Overall, their participation in the local economy increases their level of integration into the community and reduces dependency (ASCR 2013, 3–4; Arnold-Fernández and Pollock 2013).

Participation in the formal economy allows refugees to meet their own needs and contribute to the fiscal and social security systems of their host country. Integrating them into the country's social protection system rather than creating parallel structures reduces tension between refugees and host communities, enhances the financial sustainability of national social

[156] For example, the inability to pay contributions or to make cash payments for healthcare.

[157] For instance, while Sweden grants asylum seekers immediate access to the labour market, in Italy access is not granted until two months after an asylum application has been approved while Austria allows employment only in certain public sectors and limits the number of hours worked per month. Outside Europe, countries such as Armenia, Ethiopia, Jordan, South Africa, Turkey, and some Latin American countries also grant asylum seekers only limited access to work. For more information, see: http://www.migrationwatchuk.org/briefing-paper/316.

security systems and reduces financial pressure on non-contributory social protection mechanisms, including humanitarian cash transfers. Excluding refugees from the formal labour market may force them to accept precarious or hazardous employment, thus increasing the risk of occupational diseases and injuries, abuse and exploitation. It also increases the risk of social dumping with a boomerang effect on the labour conditions of regular workers; the opportunity to circumvent the regular employment and taxation system can lead to downward pressure on wages and working conditions, particularly for low-skilled workers. While this sounds easy on paper, the creation or adaptation of existing systems is often constrained by political will and/or fiscal space, factors that must be overcome in light of the net positive contribution that properly-integrated refugees and asylum seekers have on countries of destination.

In conclusion, the incorporation of refugees and asylum seekers into the labour market and the social protection system can help to promote social justice, regenerate the tax system and stabilize the effects of an ageing population.

7.4.2 Policy options and country practices

States have a responsibility under international law to ensure refugees' access to social protection. There are a number of policy options and measures that they can adopt in order to fulfil this obligation and to overcome the legal and practical obstacles highlighted above.

At the outset, they should ratify the relevant legal instruments and bring their legislation into line with international standards, including the 1951 Convention, the 1967 Protocol thereto, the 1976 ICESCR and the relevant ILO Conventions. They should also consider establishing new or adapting existing social protection systems – including social protection floors – in order to address the specific needs of refugees and asylum seekers, especially with regard to contributory and residency requirements.

National legal frameworks should provide refugees with access to social protection and provide for equality of treatment between refugees and nationals.

Examples:

- Paraguay's Refugee Act states that "[r]efugees have the right to work, to social security and to education under the same conditions as citizens" (Act No. 1938 (2002), Art. 25).
- Most of the EU countries and, among others, Armenia, Mauritania, Nicaragua, Nigeria, Paraguay, Senegal, the Republic of Korea, Switzerland, Uruguay have similar legislative provisions.
- South Africa's Refugees Act[158] and the amendments thereto[159] establish refugees' right to employment and access to social security, including child, disability, old-age and foster care benefits, social relief of distress and the care dependency grant.
- In Burkina Faso, refugees have access to basic services such as healthcare pursuant to Act No. 042–2008 on the status of refugees and Decree No. 2011–119 on the modalities for its implementation.
- In the Democratic Republic of Congo, refugees can access social protection, where available, on the same basis as nationals pursuant to Act No. 021/2001.
- In 2020, Djibouti amended its Presidential Decree governing the social registry to include refugees. This represents a major policy advance that paves the way for their access to social protection schemes, including the Health Social Assistance Programme and the National Family Solidarity Programme.

Existing social protection benefits can be adapted in order to make them accessible to refugees, including by removing or easing the minimum residence requirements.

Examples:

- In France, provisions of the Social Security Code expressly exempt refugees from the residence requirements for access to family and old-age benefits.[160]

158 Act No. 130 (1998).

159 Acts Nos 11 (2017), 10 (2015), 12 (2011) and 33 (2008).

160 Arts L512-2 and L816-1.

- Under Australia's system, refugees are exempt from the two-year waiting period that normally hinders foreign nationals' access to social security.[161]

States should identify and adopt measures that remove the practical barriers to refugees' effective enjoyment of their rights. These measures could include information campaigns, hiring cultural-linguistic mediators, translating documents and pamphlets into other languages, conducting anti-discrimination campaigns and reflecting cultural diversity in their legal and administrative systems. Finally, host countries and the international community can channel humanitarian assistance and/or development aid to strengthen social protection systems for both refugees and host communities.

► Box 7.3 Brazil's promotion of refugee rights

In Brazil, the State Committees for Refugees create links among the various stakeholders involved in the policymaking process and promote respect for refugees' rights. These Committees, which are active in areas such as Rio de Janeiro, São Paulo and Paraná, are composed of representatives of state governments, civil society institutions and the Office of the UNHCR Representative in Brazil (Jubilut 2010; UNHCR 2010b; Oliveria 2014). They are responsible for implementing the National Plan for Refugees, monitoring its outcomes, supporting the conclusion of agreements among the relevant institutions and promoting awareness of refugees' rights among public agents through the distribution of information.

The Committees are organized into six thematic workgroups on, among other things, health, education and access to labour markets. In 2010, in cooperation with the Federal Government and the National Committee for Refugees, they promoted labour mobility pathways for Haitians affected by the 2010 earthquake; some 45,000 Haitians who did not meet the 1951 Convention 's definition of "refugee" received five-year permits that could be automatically converted into work permits upon proof of employment. A similar scheme was implemented in 2013, whereby the Federal Government granted entrance visas to individuals affected by the crisis in Syria who did not qualify as refugees under the 1951 Convention. Everyone who entered Brazil through this scheme had automatic access to the labour market although, in practice, many of them could not find work (ILO 2016).

[161] Australia Social Security Act (1991), as amended, sect. 7.

► Box 7.4 Morocco's reform enhancing the rights of migrants, refugees and asylum seekers

Traditionally a country of emigration and transit, Morocco is increasingly becoming a country of destination. In 2013, at the request of its King, the country embarked on a reform process designed to enhance the rights of migrants, refugees and asylum seekers. The National Human Rights Council's 2013 report on the situation of migrants and refugees in Morocco called on the Government to develop a comprehensive and inclusive plan and formalize a legal framework based on the principles established in the 2011 Constitution and in international agreements ratified by the country.

As a result, several measures have been taken, including the creation of a Ministry in charge of Moroccans Living Abroad and Migration Affairs in October 2013, the opening of an Office for Refugees and Stateless Persons in Rabat and the granting of residency permits to refugees and asylum seekers and their families. In January 2014, an initial campaign regularized about 23,000 migrants with irregular status and in December 2014, the National Policy on Immigration and Asylum (NPIA) was adopted. Since 2014, Morocco has also been implementing the National Immigration and Asylum Strategy with a view to improving the integration of regular migrants. The State ratified the Migration for Employment Convention (Revised), 1949 (No. 97) in June 2019.[162]

The NPIA incorporates the recommendations made by the National Human Rights Council in its 2013 report and promotes the principle of equality of treatment between nationals and foreign nationals. It protects irregular immigrants, as well as refugees and asylum seekers, through regularization and the development of integration policies and training programmes for law enforcement officers. Morocco has undertaken legal reforms within the framework of this Policy, including the adoption of legislation on migration, asylum and trafficking in persons.

The steps taken in order to integrate refugees and migrants in an irregular situation into Moroccan society are noteworthy. A second regularization campaign, conducted from December 2016 to December 2017, enabled the regularization of 14,000 of the 26,000 applicants (North Africa Post 2018). Through the NPIA, the country has also moved from a restrictive law on migration, enacted in 2003, to a system that gives resident migrants the right to work and to social protection. This represents a remarkable example of policy change considering that prior to 2013, Morocco had no official legal structures for effectively addressing issues relating to migrants and refugees (Morocco, Ministry of External Affairs and International Cooperation 2019); the only relevant regulation, the 2003 Foreign Nationals Act, largely ignored migrants' and refugees' rights and imposed severe sanctions on irregular immigrants. Three bills on immigration, asylum and trafficking have been developed in order to replace that Act and one, the Human Trafficking Act, was adopted in 2016.[163]

[162] Morocco ratified the International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families in 1933.

[163] Act No. 27-14 of 25 August 2016 on combating trafficking in persons (https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=frandp_isn=103357andp_count=3andp_classification=03).

▶ 7.5 Addressing social protection gaps: The ILO's response

The ILO supports its constituents by building a knowledge base, providing technical advisory services and capacity-building and promoting social dialogue in order to facilitate refugees' access to labour markets and social protection.

In July 2016, the ILO and the UNHCR signed a revised MoU on the promotion of decent work for refugees and other forcibly displaced persons and agreed on a Joint Action Plan[164] for its implementation. Social protection is included in the Plan's goals and strategic objectives.

Examples of ILO support:

- The ILO provided technical advisory services and input to Jordan's Refugee Response Plan in 2016–2017.
- Training programmes and South-South exchanges on social protection for refugees were held in, among other locations, El Salvador, Ethiopia, Italy, Mexico and Tanzania, between 2016 and 2020.
- In 2016–2017, the UNHCR and the ILO provided the Mexican City authorities with technical advisory services on adapting local programmes to the needs of migrants and refugees.[165]

Recent partnerships and projects:

- The ILO–UNHCR–[United Nations Children's Fund (UNICEF)]–World Bank–International Finance Corporation (IFC) Partnership for improving prospects for host communities and forcibly displaced persons (PROSPECTS) (2019–2023), financed by the Netherlands, "aims to shift the paradigm from a humanitarian to a development approach in responding to forced displacement crises"[166] in Egypt, Ethiopia, Iraq, Jordan, Kenya, Lebanon, Sudan and Uganda. "Under the umbrella of PROSPECTS, the ILO and partner governments are looking to work across humanitarian and development processes using social protection systems to provide predictable and sustainable support for displaced populations and host communities beyond the short-term intent of international humanitarian assistance".[167]
- In Turkey, the ILO supports the social security institution under the Ministry of Family, Labour and Social Services through the Transition to Formality Programme (KIGEP), launched in 2019, which helps refugees and host communities to access formal employment and social security.[168]
- Several ILO–UNHCR small scale projects, implemented between 2017 and 2019, explored innovative ways to integrate refugees into existing national health insurance schemes in Burkina Faso, Cameroon, the Democratic Republic of the Congo, Guinea, Mauritania, Rwanda, Senegal and Sudan. In Rwanda, the project led to the enrolment of over 6,000 urban refugees in community-based health insurance.
- An ILO–UNHCR–EU project, Promoting Employment and Social Protection under the Comprehensive Refugee Response Framework in Central America and Mexico, was launched in mid-2019 and includes activities focusing on refugees (in Mexico and Costa Rica) and returnees and domestically displaced persons (in Honduras).
- The International University College of Turin (IUC)–International Training Centre of the ILO (ITCILO) implemented a partnership programme on research and applications through law clinics in 2016.

164 The first such Plan covers the period 2017–2019 while the current one covers the period 2020–2021.

165 Barriers to foreign nationals in general were removed and returnees (Mexicans deported by other countries), refugees and migrants were entitled to 6 months of unemployment benefits on the same basis as Mexican nationals. However, this rule applies only to Mexico City.

166 https://www.government.nl/latest/news/2019/12/18/netherlands-takes-joint-action-to-support-refugees-and-host-communities-with-prospects-partnership#:~:text=Prospects%20is%20an%20international%20partnership,responding%20to%20forced%20displacement%20crises.

167 https://www.ilo.org/global/programmes-and-projects/prospects/themes/social-protection/lang--en/index.htm.

168 For more information, see: https://www.ilo.org/ankara/news/WCMS_739375/lang--en/index.htm.

▶ Box 7.5 Turkey's Transition to Formality Programme (KIGEP)

In Turkey, the ILO has helped host communities to ensure refugees' access to formal employment and social security under the Transition to Formality Programme (KIGEP). Turkey hosts the world's largest number of refugees (4 million), primarily from Syria, most of whom are working informally and have limited access to social protection. Since 2019, the ILO has been cooperating with the country's Social Security Institution in the implementation of this Programme, which has been scaled up considerably since its pilot phase in 2017 and, by mid-2020, had made over 4,800 formal job placements. KIGEP Plus, the second phase of the Programme, is ongoing with a focus on both Turkish and Syrian workers.

The ILO covers refugees' work permit fees and social security premiums for six months, after which they receive protection under the country's labour legislation and access to social security on an equal basis with members of their host communities. Companies are eligible for supplementary support under the Programme, enhancing its sustainability. Since early 2020, under KIGEP Plus, the ILO has supported the placement of more than 1,200 workers in formal jobs. The Programme is being implemented in nine provinces with a focus on the areas in which most refugees live: the south-eastern portion of the country, Anatolia and the large cities of western Turkey. Of the refugees served, 50 per cent are Syrian and 20 per cent are women. The main sector of employment is manufacturing with more than half of all workers employed in the textile industry.

Complementing the ILO's support, the Office of the UNHCR Representative in Turkey provides livelihood incentives, educational grants and scholarships to support refugees' access to higher education and the labour market and strengthen their self-reliance and general social cohesion. Some 3,000 refugees received educational grants and scholarship and almost 400 benefitted from livelihood incentives during the first nine months of 2020.

▶ 7.6 Conclusion

Extending social protection to refugees is not only a State's obligation under international and regional law; it also contributes to economic growth in the host country by facilitating more inclusive societies.

The right to social protection is enshrined in several international instruments. Social protection plays a central role in ensuring the social and economic inclusion and long-term sustainability of refugees by allowing them to meet their own needs and contribute to their host country's economy. Moreover, in many countries, formal employment is an essential condition for access to social security.

However, despite the clear international framework, refugees' access to social protection is often hindered by various obstacles. In addition to the legal and practical barriers faced by all migrants (see Chapter 3), refugees cannot avail themselves of the protection of their home countries and may thus lose all of the benefits that they had acquired prior to their flight. The fact that asylum seekers are particularly at risk of exclusion from both the labour market and the social security system has a particularly negative impact, especially since the determination of refugee status can take months or even years.

Extending contributory and non-contributory social protection to refugees not only fulfils the host State's obligation to ensure their enjoyment of the human right to social security; it also increases their resilience and reduces poverty, exclusion, vulnerability and the incidence of child labour. This is particularly important in the context of a crisis such as the COVID-19 pandemic. The incorporation of refugees into social healthcare systems is a cost-effective solution and helps to reduce tensions between refugees and host communities. In addition, emergency cash and food assistance for refugees and asylum seekers should be incorporated into longer-term strategies and be channelled through existing social protection systems wherever possible. Ensuring refugees' access to work and to employment-based social protection allows them to contribute to their host countries' socio-economic development. Thus, strengthening social protection systems benefits both refugees and host communities.

To that end, it is recommended that States ratify and implement the international Conventions of relevance to refugees' rights and social protection; take steps to ensure their inclusion under policies, emergency measures and national social protection schemes; and remove the practical obstacles that compromise their effective enjoyment of their rights.

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Chapter 8

Gender, social protection and labour migration

Key messages

- Gender shapes the migration experience in many ways and influences how, when and why women and girls, as well as men and boys, migrate. This is also true of lesbian, gay, bisexual, transgender and intersex persons and those who do not conform to traditional gender roles, who may face discrimination in their home countries and decide to seek opportunities elsewhere. Gender norms affect power relations, employment opportunities and working conditions and can lead to inequality in access to social protection rights. At the same time, migration can also empower men and women.

- Women workers, especially migrants, face multiple forms of discrimination when attempting to access social protection. In many countries, social insurance schemes are designed around a male breadwinner model[169] based on the assumption that each family has an uninterrupted, full-time worker in the formal economy. Informality and persistent inequality in the earnings of men and women, particularly those from marginalized communities, limits women migrant workers' ability to meet the qualifying conditions for social insurance schemes. They may also be at higher risk of sexual and gender-based violence, abuse, exploitation and human trafficking, further exacerbating their vulnerability.

- Based on the principle of equality of treatment and non-discrimination, established in international human rights instruments and international labour standards, social protection systems and schemes should take the specificities of migrant women and men into account and promote gender equality.

- Social protection systems and schemes, including SPFs, can contribute to women's economic empowerment and increase gender equality if they are designed, implemented and monitored in a gender-responsive manner. Conversely, gender-blind schemes and systems can perpetuate and even exacerbate unequal gender relations.

- Well-designed national SPFs[170] aimed at guaranteeing social protection benefits for all and gender-responsive social security agreements are essential in closing coverage gaps and redressing gender inequality in access to social protection.

- Enhanced awareness and understanding of gender gaps, as well as experience with social protection and migration, can lead to the design and implementation of more-gender-responsive strategies and schemes aimed at enhancing migrant workers' enjoyment of their social protection rights.

- Crises such as the COVID-19 pandemic intensify inequality for women and girls, particularly those who are already in a vulnerable situation such as migrants, displaced persons and refugees. In addition, many migrant women are healthcare workers, domestic workers, community volunteers, logistics managers or scientists and, as frontline workers, face increased exposure and risk. At the same time, their access to social protection and healthcare may be limited, both legally and in practice, by increased discrimination against and stigmatization of foreign nationals.

[169] The prevalence of insurance schemes based on a male-breadwinner model is largely a result of the fact that women's child-bearing and -raising activities often remove them from the workforce for extended periods of time and that, once they re-enter the labour market, they are more likely than men to take up part-time employment. Although this has been changing over the past few decades, the male-breadwinner model is still common in more conservative countries that follow a patriarchal family model, including those from which many migrants originate (Fitzpatrick et al. 2006).

[170] Social protection floors are "nationally-defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion. These guarantees should ensure at a minimum that, over the life cycle, all in need have access to essential health care and basic income security" (ILO 2012).

▶ 8.1 Introduction

In 2019, there were an estimated 169 million migrant workers worldwide, including 99 million men and 70 million women (ILO 2021). While both sexes emigrate from their countries of origin for similar reasons (seeking an education, better job opportunities and decent working conditions), migration is often a gendered experience that is affected not only by gender norms and expectations, but also by power relations and unequal rights which, combined, shape the migration options and experiences of women and girls, but also of men and boys (ODI 2016).

Yet although their motivation may be similar, the obstacles that they face during the migration cycle and their opportunities in their countries of destination differ. Migrant women and girls often have less information, a lower level of education and fewer options for regular migration than men and this places them at higher risk of exploitation and abuse, including trafficking and forced labour (UNFPA 2015).

Once they have arrived in their destination countries, these obstacles, together with potential cultural norms and expectations, make women more likely than men to work in precarious and informal jobs, carry a heavier burden of unpaid care and face interruptions and inequalities in paid work. Taken together, these factors heighten the challenge for women migrant workers in their effort to access social protection (ILO and UNWomen 2015b).

While these inequalities also exist for national women, they are amplified for women migrants given the intersectionality of barriers based on a number of additional characteristics that do not apply to national workers.[171] Yet although their experiences may vary, the vulnerabilities caused by gender-discriminatory practices accumulate for all women over their life cycle, increasing their vulnerability in old age and resulting in social protection gaps (SPIAC-B 2019; ILO and UNWomen 2015b).

Unfortunately, these vulnerabilities can only be addressed to a certain extent by today's migration governance, which is largely gender-blind and overlooks the ways in which gender and its various forms of intersectionality, particularly the gendered realities and risks faced by women, shape migration (Hennebry and Petrozziello 2019). A gender-neutral approach to migration policy ignores the power dynamics and implications of socio-economic and socio-cultural structures and definitions at home, abroad[172] and in gender-segregated labour markets[173] (Piper 2006).

Gender plays an important role in labour migration. Cultural norms and the political will to address gender inequalities are crucial to equality of opportunity for all, independently of gender identities and their intersectionality. Understanding the ways in which women and men are, in practice, differently affected with regard to employment and social protection abroad requires an examination of women's migration from a gender inequalities perspective (CEDAW 2008) and an acknowledgement that gender is situated on a spectrum and is not restricted to the dichotomy between men and women. Such an assessment of gender differences can and should feed into social protection policy-making, enhancing awareness and understanding of gender gaps and experience with social protection and migration with a view to the design and implementation of more gender-responsive strategies and schemes aimed at increasing migrant workers' enjoyment of their social protection rights.

This chapter will provide a preliminary overview of the interplay between gender, migration and social protection. While acknowledging the importance of gender diversity in this regard, it also recognizes the limitations of the available studies and instruments as a means of addressing the spectrum of gender realities in the context of migration and social protection.

171 Intersectionality is a theoretical framework for understanding how characteristics of an individual's social and political identity (such as gender, sex, race, ethnicity, class, sexual orientation, religion, disability, age, physical appearance, height and employment status) combine to create different forms of discrimination and privilege (Runyan 2018). It highlights the importance of developing laws, policies and schemes that allow for flexibility in order not to unintentionally exclude people who do not fit into fixed categories.

172 Gender is a social category and its definitions are determined by the cultural and economic structures of society; people are assigned expected attributes, behaviour, and responsibilities based on their gender. In traditional patriarchal societies, men hold most positions of power while women are consigned to domestic and reproductive roles. In contrast, societies in Europe and North America are increasingly moving towards greater gender equality; socio-cultural structures are transforming and there is growing acceptance of women's place in the labour market and in positions of power. This transformation is accompanied by a move away from the male bread-winner model of society to one in which women can be their households' sole earners.

173 This refers to the distribution of workers across and within occupations in the labour market based on the demographic characteristic of gender.

With this in mind, the chapter will begin with an overview of the migration experience from a gender perspective, including trends, concepts and real-life examples. It will then present the international standards and instruments – including UN Conventions and ILO standards – with gender-responsive provisions on social protection for migrant workers; the obstacles and challenges faced by migrants, particularly women; the available policy options for addressing gender-specific vulnerabilities and inequalities; and complementary measures that can be used to address the practical barriers that hinder effective access to gender-responsive social protection, followed by a conclusion and recommendations.

► Box 8.1 Key concepts

Sex is a biological trait that is determined by the specific sex chromosomes inherited from one's parents. (Conger 2017).

Gender refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys and the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies, there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources and decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age. (UNWomen n.d.)

Equality between women and men (gender equality) refers to the equal rights, responsibilities and opportunities of women and men and girls and boys. Equality does not mean that women and men will become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men. Gender equality is not a women's issue but should concern and fully engage men as well as women. Equality between women and men is seen both as a human rights issue and as a precondition for, and indicator of, sustainable people-centred development (UNWomen n.d.).

Gender mainstreaming is the systematic consideration of the differences between the conditions, situations and needs of women and men in all policies and actions. It has been embraced internationally as a strategy towards realising gender equality. It involves the integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of policies, regulatory measures and spending programmes, with a view to promoting equality between women and men, and combating discrimination. (Europe Institute for Gender Equality 2020).

▶ 8.2 Concepts and trends: the experience of migration from a gender perspective

Men and women migrate for similar reasons in search of, among other things, an education, better job opportunities and decent working conditions. However, migration is a gendered experience that is affected by gender norms and expectations, power relations and unequal rights and this shapes the migration options and experiences of women and girls, but also men and boys (ODI 2016). Gender norms affect when and why people migrate.

Gender norms can restrict women's and girl's migration; they have less control than men over the decision to migrate, which is sometimes taken by their families on their behalf (Yeoh, Graham and Boyle 2002; Shaw 2005). However, some adolescent girls and women migrate in order to escape family control or harmful practices such as forced or early marriage (Temin, Montgomery, Engebretsen and Barker 2013).

The fact that women migrants often have less information, a lower level of education and fewer options for regular migration than men places them at higher risk of exploitation and abuse, including trafficking and forced labour (UNFPA 2015). As migrant workers, they are less able to rely on networks and social capital for support. Moreover, women migrants tend to be more risk-averse than men, favouring migration through regular channels with social networks in place wherever possible (ODI 2016).

- **Less information:** There are differences in the networks and social capital available to migrant men and women. While men tend to obtain information from a wider group of family and friends, women tend to focus on their immediate family. Women are also more likely to migrate for reasons other than employment, such as family reunification or humanitarian considerations (ILO 2018a), and are therefore more likely to be dependent on a man in the country of destination; this, together with language barriers, may also limit their access to information. As they are generally less well informed about labour market conditions in the country of destination, women migrants are exposed to certain dangers, including human trafficking, abuse and forced labour.
- **Lower levels of education:** Social stigma, resource constraints, institutions and discrimination lead to lower educational investment in and achievement by women, and consequently to reduced earnings, fewer job opportunities and lower labour force participation rates when compared with men. Taken together, these factors force a high proportion of women, especially migrants, into the informal economy with few or no social protection rights. Even when jobs are available, women, and especially migrant women, are more likely to be overqualified for a position, leading to a phenomenon known as "deskilling". Weak regulations may also allow employers to pay women, especially migrant women, lower wages while subjecting them to long working hours and exploitative working conditions (Abdulloev, Gang and Yun 2014).
- **Fewer options for regular migration:** Because women tend to be more risk-averse than their male counterparts and prefer to migrate through regular channels and with social networks in place, their limited access to information and lower level of education leaves them with fewer options for regular migration. Economic circumstances and the need to survive force many of them into irregular migration pathways and place them at higher risk of violence, trafficking and exploitation (ODI 2016).

Gender and social norms in their countries of origin and destination influence the outcomes of migration for migrant workers, especially women and girls. Migration can be empowering for women as it can increase their autonomy, improve their self-esteem and social standing and allow them to acquire new skills and send remittances back home, thus transforming power dynamics within families and communities (ODI 2016). In countries of both origin and destination, women migrant workers fill labour shortages and contribute to socio-economic development, skills transfer and innovation. These changing dynamics can also lead communities to adopt more equitable norms on matters such as education, division of labour and gender roles. However, some women migrants who return home with new skills and attitudes face stigma and resistance that make it hard for them to reintegrate into their families and communities (Sijapati 2015).

Global demand for labour, which influences migration patterns, is often defined by gender stereotypes: most employment opportunities for women migrants are low-skilled jobs, predominantly in informal, unregulated sectors such as agriculture, domestic work and the service and sex industries (OHCHR-UNWomen 2016). Women migrants are highly concentrated in devalued, gendered and invisible and/or isolated labour sectors in which labour, physical and psychological abuse and sexual violence are common (IOM

2017). The demand for women migrants in destination countries, especially in the domestic work and care sectors, reinforces stereotypes that limit their autonomy and decision-making power and leave them vulnerable to gender-based violence and systemic abuse of their human rights (UNWomen 2015a). Some governments, such as those of Cambodia, Ethiopia, Indonesia, Madagascar, Malaysia, Myanmar and Nepal, have banned migration to certain destination countries that are considered high-risk (Napier-Moore 2017; Hennebry and Petrozziello 2019). In some cases, however, this has merely increased irregular migration to these countries at the expense of the very migrants that the ban sought to protect and has led the Governments of Ethiopia, Nepal and, most recently, Indonesia, to reverse their decision.

- Until 2018, Ethiopia banned the employment of its nationals in Gulf countries. Yet, owing to the lack of employment opportunities in the country, many migrants left in an irregular manner, increasing their risk of human trafficking and employer-based exploitation in the destination country; an estimated 1,000 Ethiopian women per day were emigrating in order to seek employment abroad with Saudi Arabia the most common destination. In 2018, the Government lifted the ban and enforced new legislation in an effort to protect its citizens from mistreatment through regulations governing recruitment agents, minimum age and education requirements and pre-departure training. Yet even with this new legislation, challenges are anticipated and since many of the country's citizens cannot meet the eligibility criteria, informal migration pathways may persist (Walk Free Foundation 2019).

- The ban on migration to the Middle East imposed by the Government of Indonesia in 2015 was lifted in 2020. It initially prohibited women from travelling to the region as domestic workers owing to accounts of abuse and torture in the countries of destination. However, since roughly 5,000-10,000 low-skilled workers per month were migrating illegally to these countries, the Government lifted the ban and has been working to formalize this stream of workers. The rights to be established in the new migration plan include maximum limits on working hours and a prohibition of residence in an employer's home (Ganesha 2018).

In the context of labour migration, lesbian, gay, bisexual, transgender and intersex (LGBTI) 174 persons may face an extra layer of discrimination based on gender or sexual orientation, often compounded by nationality, race, ethnicity and migration status, which has a significant influence on their working and living conditions. These workers face multiple barriers to the exercise of many of their rights, including the right to social protection.

Examples:

- LGBTI persons may experience obstacles when trying to access healthcare owing to "mistrust between patients and doctors, problematic attitudes of medical staff and outdated approaches to homosexuality and transgenderism" (UNDP 2011).

- They also face discrimination and harassment on the labour market owing to gender-blind employment policies and laws that do not take non-binary individuals into account. LGBTI workers may also experience unequal treatment with regard to "appraisals, performance pressure, training opportunities, salary or holiday benefits" (UNDP 2011). Furthermore, partners in a same-sex relationship/partnership may not be entitled to benefits such as parental leave, healthcare insurance and education for their families, caregivers' allowances and death benefits.

[174] "The terms lesbian, gay, bisexual and pansexual refer to people's sexual orientation, that is, who they experience sexual attraction towards; while transgender refers to gender identity, that is, 'someone whose gender differs from the one they were given when they were born'. Terms like genderqueer and non-binary refer to people who fall outside the construction of gender as male or female. Intersex people are born with physical or biological sex characteristics such as reproductive or sexual anatomy, hormones or chromosomes that do not seem to fit the typical definitions of female or male" (UNRISD et al. n.d.).

► 8.3 International standards and instruments that promote gender-responsive social protection of migrant workers

8.3.1 Key UN Conventions

In order to combat these forms of discrimination, several international standards and instruments establish the right to gender-responsive social protection. Article 1(3) of the Charter of the United Nations states that one of the Purposes of the UN is "[t]o achieve international co-operation in [...] promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

> The United Nations has been working on the issue of women's rights almost since its founding. Within the Organization's first year, on 21 June 1946, the Economic and Social Council established its Commission on the Status of Women, as the principal global policy-making body dedicated exclusively to gender equality and advancement of women. Among its earliest accomplishments was ensuring gender neutral language in the draft Universal Declaration of Human Rights. (UN 1995).

From then onwards, the international feminist movement gained momentum, leading to the adoption of various UN conventions:

► Table 8.1 Key UN Conventions with provisions on gender-responsive social protection for migrant workers

International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, 1990	The Convention is applicable "[...] to all migrant workers and members of their families without distinction of any kind such as sex, [...] marital status [...] or other status" [...] during the entire migration process [...] (Art. 1). "With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties" (Art. 27). Thus, national authorities determine whether (and which) migrants meet these requirements. However, the Convention also provides that reimbursement of contributions should be considered where migrants are denied benefits. The Convention states that "[m]igrant workers and their families shall have the right to receive any medical care that is urgently required [...]" (Art. 28). As at April 2021, 56 countries have ratified this Convention.
UN Convention on the Elimination of All Forms of Discrimination against Women, 1979 (entry into force 1981)	The Convention is often described as the International Bill of Rights for Women. It provides that "States parties shall "[...] eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: [...] the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work and the right to paid leave; [...]" (Art. 11). It also states that States parties shall take "all appropriate measures to eliminate discrimination against women in the field of healthcare in order to ensure [...] access to healthcare services, including those related to family planning" (Art. 12). In its General Recommendation No. 26 (2008) on Women Migrant Workers, the Committee on the Elimination of Discrimination against Women considers that States parties should "require prospective employers to purchase medical insurance for women migrant workers" (para. 24 (d)); and should "design or oversee comprehensive socio-economic, psychological and legal services aimed at facilitating the reintegration of women who have returned" (para. 24 (i)). As at April 2021, 189 countries have ratified this Convention.

8.3.2 Key international labour standards

States' obligation to provide social protection to all, including migrant workers, is established in the ILO Constitution (1919) and in the Declaration of Philadelphia (1944). The Declaration affirms that "all 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 of dignity, of economic security and equal opportunity" (Art. II(a)). The ILO's 2008 Declaration on Social Justice for a Fair Globalization reaffirms the Organization's constitutional mandate and institutionalizes the 1999 Decent Work Agenda and its four strategic objectives, including the extension of social security to all, with gender equality and non-discrimination as cross-cutting issues. In 2019, the International Labour Conference adopted the Centenary Declaration for the Future of Work (ILO 2019a), which states that the ILO must direct its efforts towards, among other things, ''achieving gender equality at work through a transformative agenda'' and "deepening and scaling up its work on international labour migration in response to constituents' needs and taking a leadership role in decent work in labour migration'' (sect. II(A)(vii)) and (xvi)). The Declaration calls on member States, with the support of the ILO, to work towards ''the effective realization of gender equality in opportunities and treatment'' (sect. III(A)(I)).

The ILO's Multilateral Framework on Labour Migration (2006) states that "[a]ll international labour standards apply to migrant workers, unless otherwise stated" (para. 9(a)) and refers consistently to "men and women migrant workers". Similarly, all international labour standards apply to both men and women workers, unless otherwise stated. Many international labour standards are relevant to gender and migration issues.

► **Table 8.2 Key ILO Conventions and Recommendations with a view to gender-responsive social protection for migrant workers**

Violence and Harassment Convention, 2019 (No. 190) and Violence and Harassment Recommendation, 2019 (No. 206)	The Convention recognizes "the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment". In its Preamble, it expressly recalls the relevant international instruments, including those on migrant workers and their families. The Convention calls on States parties to ensure that "violence and harassment in the world of work is addressed in relevant national policies, such as those concerning occupational safety and health, equality and non-discrimination and migration" (Art. 11; emphasis added). Similarly, the Violence and Harassment Recommendation states that "[m]embers should take legislative or other measures to protect migrant workers, particularly women migrant workers, regardless of migrant status, in origin, transit and destination countries as appropriate, from violence and harassment in the world of work" (para. 10; emphasis added). The Convention's focus on inclusivity is essential; it establishes that everyone who works must be protected, irrespective of contractual status, including interns, volunteers, job applicants and persons exercising the authority of an employer. It applies to the public and private sectors, the formal and informal economies and urban and rural areas. Some groups and workers in specific sectors, occupations and work arrangements – for example, healthcare, transport, education, domestic work and work at night or in isolated areas – are acknowledged to be especially vulnerable to violence and harassment. The sectors specific to each country are to be identified through tripartite consultations. The impact of domestic violence on the world of work is also included in the Recommendation. Paragraph 23 states: Members should fund, develop, implement and disseminate, as appropriate: [...] (d) public awareness-raising campaigns in the various languages of the country, including those of the migrant workers residing in the country, that convey the unacceptability of violence and harassment, in particular gender-based violence and harassment, address discriminatory attitudes and prevent stigmatization of victims, complainants, witnesses and whistle-blowers (emphasis added). This is a significant step in bringing domestic violence out of the shadows and changing attitudes towards it. The Recommendation also calls for practical measures, including leave for victims, flexible work arrangements and awareness-raising.
Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205)	The Recommendation includes a section on guiding principles (II) that promote equality of opportunity and treatment for women and men without discrimination of any kind. It also includes a specific section (V) on rights, equality and non-discrimination: 15. In responding to discrimination arising from or exacerbated by conflicts or disasters and when taking measures for promoting peace, preventing crises, enabling recovery and building resilience, Members should: (a) respect, promote and realize equality of opportunity and treatment for women and men without discrimination of any kind [...]. Particular attention should be paid to population groups and individuals who have been made even more vulnerable by the crisis, including but not limited to migrants and refugees. This Recommendation has proved to be of particular importance in light of the current Covid-19 pandemic.

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

By addressing women's overrepresentation in informal work, the Recommendation promotes reducing coverage gaps and strengthening the sustainability and financing base of social protection systems. Governments should support the transition to the formal economy by, among other things, establishing legal and policy frameworks, creating sustainable decent jobs in the formal sector as part of comprehensive employment policies, extending social protection, providing incentives for the transition to formal work, improving access to finance, simplifying procedures for registering businesses, enforcing labour laws and workplace regulations, collecting data and supporting freedom of association and social dialogue.

> 7. In designing formalization strategies, States should take into account the following:
>
> [...]
>
> (h) the promotion of gender equality and non-discrimination;
>
> (i) the need to pay special attention to those who are especially vulnerable to the most serious decent work deficits in the informal economy, including but not limited to women, young people, migrants, older people, indigenous and tribal peoples, persons living with HIV or affected by HIV, persons with disabilities, domestic workers and subsistence farmers (para. 7 (h) and (i); emphasis added).

In order to facilitate formalization, they should also ensure that national development plans, strategies and budgets include an integrated policy framework that addresses: "the promotion of equality and the elimination of all forms of discrimination and violence, including gender-based violence, at the workplace", and "the establishment of social protection floors, where they do not exist, and the extension of social security coverage" (para. 11 (f) and (n); emphasis added).

Employment policies should include social protection schemes, including cash transfers, public employment programmes and guarantees, labour migration policies that promote decent work and measures to promote the transition from unemployment and inactivity to work, in particular for long-term unemployed persons, women and other disadvantaged groups (para. 15; emphasis added).

With respect to social protection, the Recommendation expressly provides that States should progressively extend social security and maternity protection to all workers in the informal economy and should "encourage the provision of access and affordable quality childcare and other care services in order to promote gender equality in entrepreneurship and employment opportunities and to enable the transition to the formal economy" (para. 21; emphasis added).

Social Protection Floors Recommendation, 2012 (No. 202).

Recommendation No. 202 states: "Subject to their international obligations, Members should provide basic social security guarantees [...] to at least all residents and children, as defined in national laws and regulations" (para. 6), thus covering the children of migrants in an irregular situation.

It also recommends that States:

> (a) establish and maintain, as applicable, social protection floors as a fundamental element of their national social security systems; and
>
> (b) implement social protection floors within strategies for the extension of social security that progressively ensure higher levels of social security to as many people as possible, guided by ILO social security standards" (para.1).

The Recommendation comprises a set of principles which are particularly relevant to efforts to address the social protection gender gap and inequalities in access to social protection: "universality of protection based on social solidarity" (para. 3 (a)); ("non-discrimination, gender equality and responsiveness to special needs" (para. 3 (d)); and "social inclusion, including persons in the informal economy" (para. (e)).

SPFs should ensure, at a minimum, access to essential healthcare, including maternity care and basic income security for children; persons in active age who are unable to earn sufficient income for reasons such as sickness, unemployment, maternity and disability; and older persons (para. 5). They should provide basic social protection guarantees for all in need and effective access to goods and services throughout their life cycle (para. 4), taking into account the particular risks that women may face throughout their lives.

When defining basic social security guarantees, the States should give due consideration to, among other things, "free prenatal and postnatal medical care for the most vulnerable" (para. 8 (a)). With respect to national strategies for the extension of social security, "social security extension strategies should apply to persons both in the formal and informal economy and support the growth of formal employment and the reduction of informality" (para. 15).

Domestic Workers Convention, 2011 (No. 189) and Recommendation, 2011 (No. 201)

Convention No. 189 offers specific protection to domestic workers. It establishes basic rights and principles and requires States to take a series of measures to make decent work a reality for domestic workers. Including migrant domestic workers: "Each Member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity" (art. 14(1)).

The Recommendation states:

> (1) Members should consider, in accordance with national laws and regulations, means to facilitate the payment of social security contributions, including in respect of domestic workers working for multiple employers, for example through a system of simplified payment.
>
> (2) Members should consider concluding bilateral, regional or multilateral agreements to provide, for migrant domestic workers covered by such agreements, equality of treatment in respect of social security and access to and preservation or portability of social security entitlements.
>
> (3) The monetary value of payments in kind should be duly considered for social security purposes, including in respect of the contribution by the employers and the entitlements of the domestic workers (para. 20).

Maternity Protection Convention, 2000 (No. 183); Maternity Protection Recommendation, 2000 (No. 191)	The Convention establishes that the period of maternity leave should be not less than 14 weeks and that cash benefits (at least two-thirds of previous earnings or a comparable amount) should be provided to ensure that women can maintain themselves and their children in proper conditions of health and with a suitable standard of living. Women and children should receive medical benefits, including prenatal, childbirth and postnatal care and, where necessary, hospitalization. The Recommendation calls for, among other things, at least 18 weeks of maternity leave.
Maintenance of Social Security Rights Convention, 1982 (No. 157); Maintenance of Social Security Rights Recommendation, 1983 (No. 167)	The Convention seeks to ensure the portability of rights and benefits. A model social security agreement is provided in annex to the Recommendation.
Workers with Family Responsibilities Convention, 1981 (No. 156); Workers with Family Responsibilities Recommendation, 1981 (No. 165)	The Convention and Recommendation stress that persons with family responsibilities must be free to exercise their right to employment without discrimination: > With a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken [...] (b) to take account of their needs in terms and conditions of employment and in social security" (Art. 4) "to develop or promote community services, public or private, such as child-care and family services and facilities (Art. 5(b)).
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)	The Convention is divided into two parts, which can be ratified independently of each other. Part I calls on Members to respect the basic human rights of all migrant workers, including those in an irregular situation: "On condition that he has resided legally in the territory for purposes of employment, the migrant worker shall not be regarded as illegal or irregular situation by the mere fact of loss of employment [...]" (Art. 8). Even > in cases where the relevant laws and regulations have not been respected and in which his position cannot be regularized, the migrant worker shall 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 (Art. 9). Part II mandates opportunity and treatment for migrant workers in a regular situation, including with respect to social security (Art. 10).
Equality of Treatment (Social Security) Convention, 1962 (No. 118)	The Convention mandates equal treatment with respect to social security between a country's nationals and nationals of other States in which the Convention is in force.

ILO Social Security (Minimum Standards) Convention, 1952 (No. 102)	The Convention provides for equality of treatment between national and non-national residents. Its application may, however, require the existence of a bilateral or multilateral agreement (Art. 68(2)).
Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	This is one of the eight fundamental ILO Conventions and is a key instrument for gender equality. Irrespective of whether ILO members States have ratified these fundamental Conventions, by adopting the 1998 Declaration on Fundamental Principles and Rights at Work they assumed the obligation to give progressive effect to the values established therein and to submit annual reports on the status of these fundamental rights in their countries (ILO 2019c). The Convention seeks to promote equality of opportunity and treatment in respect of employment and occupation with a view to eliminating discrimination on the basis of race, colour, sex, religion, national extraction, political opinion and social origin. The Recommendation states: With respect to immigrant workers of foreign nationality and the members of their families, regard should be had to the provisions of the Migration for Employment Convention (Revised), 1949, relating to equality of treatment and the provisions of the Migration for Employment Recommendation (Revised), 1949, relating to the lifting of restrictions on access to employment (para. 8; emphasis added).
Migration for Employment Convention (Revised), 1949 (No. 97)	States parties to the Convention undertake "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 [...] (b) social security [...]", subject to certain limitations (Art. 6; emphasis added).

8.3.3 Complementary international agendas

Social protection is also a fundamental aspect of the SDGs. Goals 1 (on ending poverty), 3 (on good health and well-being), 5 (on gender equality) (Box 8.2) and 10 (on reducing inequalities) have targets of relevance to social protection while Goals 5, 8 (on growth and decent work), 10, 16 (on peaceful, inclusive societies and access to justice for all) and 17 (on global partnerships on sustainable development) have targets of relevance to migration.

Gender components are central to both the ILO's Decent Work Agenda and the UN's 2030 Agenda for Sustainable Development, which are essential in ensuring fair access to social protection.

► Box 8.2 SDG Goal 5 – Gender equality

Goal 5 of the SDGs seeks to end all forms of discrimination against women and girls. Freedom from discrimination is a basic human right and, in view of the role of women and girls in economic growth and development, is crucial to a sustainable future. This Goal has nine specific targets:

Target 5.1 – End all forms of discrimination against all women and girls everywhere.

Target 5.2 – Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation.

Target 5.3 – Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation.

Target 5.4 – Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and promotion of shred responsibility within the household and the family as nationally appropriate.

Target 5.5 – Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life.

Target 5.6 – Ensure universal access to sexual and reproductive health and reproductive rights as agreed in accordance with the Programme of Action of the International Conference on Population and Development and the Beijing Platform for Action and the outcome documents of their review conferences.

Target 5.a – Undertake reforms to give women equal rights to economic resources as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws.

Target 5.b – Enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women.

Target 5.c – Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.

Although significant progress has been achieved across the globe, these targets have yet to be fully met. Yet, especially for migrant women and girls, this goal and its accompanying targets are vital in view of the challenges faced. These include, among others, violence at all stages of the migration process; exposure to different social norms and practices (such as female genital mutilation) as a result of migration; undervaluation of migrant domestic work and unpaid care, fields in which close to three quarters of the workforce are women; confinement of women migrants to "feminine" jobs (such as live-in care and domestic work) in the country of destination; the risk of forced labour, trafficking and exploitation and abuse; and failure to enforce their labour rights.

Source: UN n.d.; O'Neil, Fleury and Foresti 2016

► 8.4 Gender gaps in social protection: Obstacles and challenges

Gender gaps in access to social protection arise from the gendered characteristics of the labour market and the structure of the social security system, including social protection and the public services infrastructure. Globally, this system is not gender-neutral; it burdens women and girls with inequality and stereotypes about the division of labour (GAATW 2019).[175] Non-gender-neutral schemes have a tendency to penalize women.

All too often, women are disadvantaged under social protection systems by lower coverage rates and substantially lower benefit levels (UNWomen 2015b) and are paid less than men for work of equal value. This gender pay gap leads to reduced contributions, and thus to lower benefit levels in many cases (ILO forthcoming). Women's generally have a lower rate of labour force participation[176] and greater representation in the informal economy (particularly in the case of women migrant workers), together with gendered employment patterns,[177] result in lower social security coverage rates (ILO 2018a; Bilecen et al. 2019).

Women are also less likely to benefit from coverage under contributory social security schemes, which are usually linked to formal employment (Tessier et al. 2013). Informality limits workers' ability to meet the qualifying conditions for social insurance schemes[178] and thus leaves women particularly vulnerable, especially in old age (Box 8.3). It also subjects women migrant workers to compounded layers of discrimination. In the absence of an SPF, women are often left without old-age pensions, unemployment benefits and maternity protection (ILO 2016).[179] For example,

► Box 8.3 Women and old-age poverty

Women in old age tend to face a significantly higher risk of poverty and/or social exclusion than men. This inequality is characteristic of both the formal and the informal economy.

Women who have worked in the **formal economy** and have contributed to a pension scheme have a lower average pension income than men, often substantially so. These gaps in pension income reflect the gender gaps in remuneration, working hours and the duration of working life. Differences in wages may be rooted in the underlying variation of education and skill levels and in gender discrimination. In addition, the statutory pension age may be lower for women than for men, resulting in shorter contribution periods and, as a result, lower pension benefits. An additional hurdle that migrant women may face is the absence of a social security agreement ensuring the portability of pension benefits across borders, or of unilateral measures authorizing the exportability of acquired pension benefits.

The risk of old-age poverty is higher in the informal than in the formal economy. As women, and especially migrant women, are overrepresented in this sector and as the informal economy is characterized by a lack of social protection, they largely depend on the provision of social assistance although even these provisions are lacking or limited in many countries. Thus, in order to survive, women are forced to work for as long as they are physically able. However, the low wages paid in the informal economy, the lack of a social pension and their limited savings forces many of them into poverty in their old age. For women migrant workers who return to spend the rest of their days in their countries of origin after many years of work in the informal economy, an SPF is essential.

[175] The term "gender roles" has been defined as "a cultural and social approach towards the very thing that is traditionally considered being 'masculine' and 'feminine' roles and functions" (Kiaušienė, Štreimikienė, and Grundey 2011, p. 84). These stereotypes include the belief that women possess poorer abilities and are less able than men to perform work that requires responsibility. Such stereotypes often influence men's and women's choice of employment and, as such, create a labour market that is divided by gender.

[176] On average, their labour participation is 26 percentage points lower than that of men (ITUC 2018).

[177] Gendered employment patterns are patterns across occupations that are usually dominated by women or men. For example, public relations, nursing, and teaching are usually considered female-gendered occupations whereas stock trading, construction and engineering are considered male-gendered (Doering and Thébaud 2017).

[178] Social insurance schemes are state-led contributory schemes that protect beneficiaries from certain risks and catastrophic expenses. In recent years, there has been a trend towards the extension of these schemes to the informal economy, including in Brazil, Chile, China, Ghana, Rwanda, South Africa and Viet Nam (Holmes and Scott 2016).

[179] Globally, only 26.4 per cent of working-age women are covered by contributory old-age protection schemes as compared to 31.5 per cent of the total working-age population. Gender gaps in social protection tend to be especially acute for older persons; almost 65 per cent of people above the retirement age without a regular pension are women. This places women at a substantially higher risk of poverty than men, particularly as their average lifespan is longer. In the EU, 20.6 per cent of women over 65, as compared to 15 per cent of men, are at risk of poverty and in some countries, such as Bulgaria, the difference between men and women is over 15 percentage points.

► Box 8.4 The burden of unpaid care work

Globally, women spend two to ten times as much time as men on unpaid care work owing to gendered social norms that view unpaid care work as their responsibility (Ferrant, Pesando and Nowacka 2014). This, in addition to their paid activities, often places a double burden of work on women, especially migrants, as socio-economic, demographic and environmental transformation increases the demand for care workers. In fact, "across regions, sectors and occupations, migrant care workers are mainly women engaged by private households, in informal settings, working in the informal economy without full access to social protection and basic labour rights" (King-Dejardin 2019). Many of these workers migrate under temporary schemes, leaving their own families in the care of other family members or domestic workers. This creates "global care chains" under which inequality persists since many national policies do not address unpaid care work. Countries should ensure a more equal distribution of this work through flexible working schedules, shared parental leave and the extension of social protection to women, especially migrant women, through SPFs.

domestic workers are often excluded under national social security legislation and, when employed informally, have no access to social protection or coverage under the labour laws (UNDESA 2018).

In many countries, social insurance schemes are designed around a male-breadwinner model based on uninterrupted, full-time work in the formal economy.[180] In the informal economy, women depend on non-contributory social transfers, whether cash or in-kind, which are usually sent to households or to one member of the household (in the case of social pensions or child benefits), without taking into account the gender and social relations within the household and their effect on intra-household distribution of income (Devereux 2012; Holmes and Jones 2013). This can result in further challenges for women; for example, where a child benefit is paid in cash to the woman caregiver in a household, tension may arise between her and the male breadwinner and financial decision-maker and can even, in extreme cases, lead to domestic violence (Holmes and Jones 2010).

All of these factors contribute to a significant gender gap in social protection and levels of social security benefits. Moreover, it should be borne in mind that migrant workers also face other forms of discrimination in access to social protection systems. Women migrants, in particular, are at greater risk of exploitation, sexual violence and trafficking throughout their migration cycle. This creates a vicious circle, especially for migrant women in an irregular situation, as these risk factors make them more likely to require access to health protection, including the treatment of mental health problems for which they do not qualify in many countries.

Social protection schemes and more comprehensive social security systems that are designed, implemented and monitored in a gender-responsive manner can increase women's economic empowerment and promote gender equality, while gender-blind schemes and systems perpetuate and may even exacerbate unequal gender relations (Tessier et al. 2013). For instance, in gender-blind social assistance programmes, the burden of conditionality[181] tends to fall disproportionately on women owing to the programme's design or because these women are, de facto, the primary caregivers within their households. This exacerbates women's "time poverty", hindering their ability to work and reinforcing traditional social roles within the household (Tessier et al. 2013).

Gender-blind social protection models and the lack of a social protection scheme or floor can also influence migration patterns. In countries of origin, the absence of social protection, and particularly of child allowances, old-age pensions and affordable healthcare, are essential factors in women's decision to migrate and to provide for their family members who remain in the country of origin (Torada Máñez, Lexartza Artza and Martínez Franzoni 2012). In countries of destination, migrant workers, particularly women domestic and care workers, fill labour market needs and gaps in social protection and public services (GAATW 2019). Migration policies and regulations affect women and men differently; for example, highly skilled migrant women are still more likely than either migrant men or non-migrant women to work in what are seen as traditionally female-dominated occupations, including domestic and care work (ILO 2015).

[180] This places women at a disadvantage as they are more likely than men to have to interrupt their career or continue to work on a part-time basis in order to care for their children and perform other household-related tasks. Furthermore, social security schemes, especially in developing countries, do not always provide women with maternity benefits and employment protection.

[181] "Conditionality" means requirements such as school attendance, regular health checks and participation in information sessions on child-related issues.

► Box 8.5 The impact of COVID-19 on gender inequality

While pandemics such as COVID-19 affect everyone, they have a disproportionate impact on women and girls owing to the health and social risks that they face as a result of "deeply entrenched inequalities, social norms and unequal power relations" (UNDP 2020). In fact, situations such as a pandemic tend to intensify these risks and associated inequalities for women and girls, particularly those who, like migrants, displaced persons and refugees, are already in a vulnerable situation. The immediate effects of such crises on gender inequality are seen in the areas of health, education, employment, gender-based violence and the burden of unpaid care work.

Before the pandemic, a total of 1.3 billion women and 2 billion men (roughly 44 and 70 per cent of all women and men, respectively, worldwide) were employed. Men are usually more disproportionately affected by economic downturns than women because they tend to work in occupations that are closely linked to the economic business cycle. However, the COVID-19 pandemic is not typical as "sectors overexposed to the collapse in economic activity [have absorbed] a sizeable share of female employment" (ILO 2020b). The four sectors at highest risk of job loss and decline in working hours are the food and accommodation, real estate, business and administration, wholesale/retail and manufacturing sectors. In 2020, 41 per cent of all women in the labour force – 6 percentage points higher than total male employment – were working in these sectors (ILO 2020b). Moreover, many women in these sectors are self-employed or owners of micro-, small and medium-sized enterprises with lower level of capitalization and greater reliance on self-financing.

Of the 740 million informal workers in these high-risk sectors, 310 million (42 per cent) are women, a difference of ten percentage points. Lockdowns and restrictions have compounded the challenges faced by informal workers, including access to social protection (such as healthcare, food support and maternity benefits). This is especially detrimental to migrants as many of them, especially women, are employed in the informal economy. In addition to legal restrictions on access to social protection and healthcare, these workers also face increased discrimination and stigmatization, especially as foreign nationals. Women migrant workers with irregular status may also be hesitant to comply with COVID-19 screening, testing and treatment procedures owing to fear of documentation checks by authorities with potential fines, arrest, detention and deportation (UNWomen 2020b).

Yet, despite these challenges and increased risks and fears, many women have kept their jobs as healthcare workers, domestic workers, community volunteers, logistics managers, scientists and more. Depending on their occupation, they are exposed to contracting COVID-19 to varying degrees. For example, migrant domestic workers who care for children, the sick and older persons in a household setting are at higher risk of contracting the virus and must cope with an increased workload in order to ensure cleanliness and hygiene and provide the necessary care, often without personal protective equipment or overtime compensation; these conditions are also faced by workers in the health and care sectors. Migrant workers' exposure to discrimination, stigma, violence and harassment has increased as a result of COVID-19 (ILO 2020b) and unpaid women caregivers (representing two-thirds of the sector) have seen an increase in their hours of work owing to school/day-care closures, reductions in public services for the disabled and older persons, scarcity of domestic workers and the need to look after family members who have contracted the virus.

Taken together, this demonstrates the need for continued dialogue with all parties concerned in order to ensure that COVID-19 responses are effective and inclusive (ILO 2020b).

▶ 8.5 Gender-responsive social protection policies for migrant workers: Policy options and recommendations

The gender-specific vulnerabilities and inequalities identified above can be addressed through various public policies. Ensuring effective and equitable access to social protection is key to the achievement of gender equality. By providing public care services and infrastructure, social protection systems can play a significant role in redistributing care responsibilities and recognizing and valuing unpaid care and domestic work (Tessier et al. 2013). Access to public services and social protection systems is also critical in ensuring migrant women's enjoyment of their rights and preventing trafficking (GAATW 2019).

The previous chapters have examined several policy options for extending social protection to migrant workers. For each of these policy options, specific gender considerations should be taken into account in order to ensure that social protection policies, schemes and measures are gender-responsive.

▶ Ratification and application of international labour standards

In addition to the relevant UN conventions, governments should consider ratifying and implementing the following ILO Conventions and applying the relevant Recommendations when considering migrant workers' social protection rights through a gender lens:

- Equal Remuneration Convention, 1951 (No. 100);
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- Migration for Employment Convention (Revised), 1949 (No. 97);
- Migration for Employment Recommendation (Revised), 1949 (No. 86);
- Equality of Treatment (Social Security) Convention, 1962 (No. 118);
- Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143);
- Migrant Workers Recommendation, 1975 (No. 151);
- Workers with Family Responsibilities Convention, 1981 (No. 156);
- Maternity Protection Convention, 2000 (No. 183);
- Domestic Workers Convention, 2011 (No. 189);
- Domestic Workers Recommendation, 2011 (No. 201);
- Violence and Harassment Convention, 2019 (No. 190);
- Violence and Harassment Recommendation, 2019 (No. 206);
- ILO Social Protection Floors Recommendation, 2012 (No. 202);
- Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204).

▶ Concluding and enforcing gender-responsive social security agreements

Bilateral and multilateral social security agreements are essential to the coordination of social protection benefits across countries in order to overcome, on a reciprocal basis, the barriers that might otherwise prevent migrant workers from receiving benefits under the system of any of the countries in which they have worked (Hirose, Nikac and Tamagno 2011, p. 19). Several ILO Conventions and Recommendations,[182] as well as the ILO Multilateral Framework on Labour Migration (2006), call for the conclusion of such agreements.

An eight-step process is usually required for the negotiation and conclusion of a social security agreement (see Chapter 3). Before entering into negotiations with other countries, governments should gather social, economic and policy information on migration and social protection in their own country and in the country with which they wish to negotiate. To the extent possible, this should include gender-disaggregated data on migrant stocks and migration flows between the two countries, the international conventions of relevance to migrant workers' social protection that they have ratified, and other gender-related information. Representatives of the group(s) of migrant workers who will benefit from the agreement could also be invited or consulted in order to ensure that the resulting agreement adequately addresses the needs of the affected population. Wherever possible, a gender balance in the negotiation team should be ensured.

With respect to the content of social security agreements, the Recommendation on the Maintenance

[182] The Equality of Treatment (Social Security) Convention, 1962 (No. 118); the Maintenance of Social Security Rights Convention 1982 (No. 157); and the Maintenance of Social Security Rights Recommendation, 1983 (No. 167).

of Social Security Rights, 1983 (No. 167) includes a model agreement in annex thereto.[183] Social security agreements commonly include in their first article or clause definitions of the main terms agreed by the parties during the negotiations and used throughout the text and the relevant administrative arrangement. The use of appropriate terminology is important in promoting and recognizing gender equality; gendered language that is stigmatizing or demeaning should be avoided.

These definitions are normally followed by a section defining the personal and material scope of the agreement. The term "personal scope" refers to the categories of workers covered; it is important to consider including economic sectors in which women are disproportionately overrepresented, such as domestic work and agriculture, in order to ensure that they are expressly protected in the country of destination. The term "material scope" refers to the social security branches or type of schemes (general or specific) covered; social security agreements may include any or all of the nine branches of social security.[184]

A gender-responsive social security agreement should include provisions on:

- access to healthcare (including reproductive healthcare, pre- and post-partum maternity care and gender-specific preventive care);
- maternity, paternity or parental benefits, taking into account the specificities of the migrant workers covered by the agreement;
- survivors' benefits, using gender-responsive language that takes into account the fact that the breadwinner and the dependent survivors may be women or men. Same-sex couples should be entitled to the same survivors' benefits, regardless of the sex and/or gender of the deceased partner or spouse.

A number of gender considerations related to pension, sickness, unemployment and employment injury benefits, cannot be addressed through a social security agreement and should therefore be covered by national legislation because they fall within the scope of statutory social insurance. Their design and the extension of rights to specific groups are national matters in which other countries have no say.

Social security agreements address the lack of coordination between social security schemes through the inclusion of provisions that enshrine all or some of the key social security principles,[185] including equality of treatment, maintenance of rights in the course of acquisition (totalization) and acquired rights, payment of benefits abroad and determination of applicable legislation (see Chapter 3). The payment of maternity benefits abroad is of particular importance since some countries require migrant workers who are no longer employed to leave the country. In such cases, the payment of benefits abroad would allow women migrant workers to access maternity benefits under the schemes to which they contributed while working.

► Adopting gender-responsive unilateral measures

States may decide to unilaterally extend social protection to migrant workers in order compensate for the absence of bilateral or multilateral social security agreements or for other protection gaps, including those related to gender. International labour standards provide essential guidance on the design and implementation of such unilateral measures. They should take into account the needs and characteristics of specific groups of migrant workers, such as migrant domestic workers, migrant seasonal agricultural workers, migrant workers in an irregular situation and migrants working in the informal economy, and may thus vary widely from one country to another (see Chapter 5). Each measure should be designed, managed, financed, implemented and monitored based on social dialogue, promote gender equality and be in line with international labour standards.

It is particularly important to establish and strengthen well-designed national SPFs in order to promote gender equality and women's empowerment and to support the transition from informal to formal employment. SPFs are an essential tool for closing coverage gaps and redressing gender inequalities in access to social protection. In order to maximise their potential impacts, gender should be integrated into every stage of their design, implementation and monitoring. Well-designed SPFs also facilitate access to education, health and social services for women, including migrant women, and enhance their chances of finding decent employment. (Tessier et al. 2013).

SPFs are important to migrant workers in countries of destination, as well as for returning migrant workers and dependents of migrants who remain in the country

[183] For more information, see: http://www.ilo.org/global/topics/labour-migration/policy-areas/social-protection/lang--en/index.htm.

[184] The nine branches, defined in the ILO's flagship Social Security (Minimum Standards) Convention, 1952 (No. 102), include both contributory and non-contributory benefits.

[185] For an overview of the specific Conventions and Recommendations that promote these key social security principles, see Table 2.1.

of origin. They may comprise age- and gender-responsive social protection programmes, including non-contributory pregnancy and maternity/paternity benefits; family allowances; access to care services for children and dependent persons; access to healthcare, including maternity and reproductive healthcare; food support; and social pensions. Social pensions are particularly important for women who were not able to contribute to formal social security schemes because they were working in the informal economy, including, for example, undeclared care work or work in a family business. As called for in Recommendation No. 202, these programmes may be combined with active labour market policies and other policies that promote formal employment, income generation, literacy, vocational training, skills, employability and entrepreneurship.

Social insurance schemes in countries of destination should be accessible to migrant workers on an equal basis with nationals based on the principle of equality of treatment and non-discrimination. Countries of origin may also wish to allow their nationals working abroad to retain membership in their social insurance schemes. In either case, such schemes should take the specificities of migrant women and men into account and promote gender equality in accordance with international human rights instruments and international labour standards. Maternity/paternity protection should be provided through an insurance-based system, based on solidarity in terms of funding, rather than through an employer-funded liability scheme. Assigning the costs of an employee's pregnancy (leave and benefits) to the employer can lead to discrimination in recruitment, the type of employment contract offered and access to training and capacity-building; income replacement under an employer-funded scheme may also be lower. This is important because lower maternity benefits undermine women's economic independence and reinforce the traditional gender-based division of labour in the household (ILO 2014). With respect to pension benefits, it is important to consider special measures to compensate for interruptions in employment owing to pregnancy and childcare.

▶ Inclusion of gender-responsive provisions on social protection in bilateral labour agreements (BLAs)

BLAs[186] can be useful tools for extending the rights of migrant workers – including social protection rights – and can promote gender equality and non-discrimination, provided that they are drafted and implemented in accordance with the relevant international labour standards. With respect to social security, equality of treatment between nationals and non-nationals is the guiding principle. To that end, BLAs should include provisions ensuring that migrant workers are treated not less favourably than national workers and should refer to separate social security agreements (existing or forthcoming) to ensure the portability of social protection entitlements. They can also include provisions expressly promoting gender equality and non-discrimination,[187] including with respect to social protection.

The scope of social protection afforded to migrant workers by BLAs depends on the social security branches included in the agreement, the specific groups of migrant workers covered (for example, domestic workers, self-employed workers and migrant seasonal agricultural workers) and the related provisions of national legislation and other agreements. BLAs can extend social protection coverage to specific migrant groups, such as domestic workers, that are excluded from the labour or social security laws of the country of employment (as is the case in many Gulf Cooperation Council countries) and face specific vulnerabilities. BLAs specific to domestic workers have been concluded by several countries (such as Jordan with Indonesia and Saudi Arabia with the Philippines).

These agreements should address the specific vulnerabilities of and obstacles faced by women migrant workers with regard to social protection, working conditions and the risk of gender-based violence and sexual harassment. Therefore, in addition to generic provisions promoting gender equality and non-discrimination, they should include provisions on the complaint and redress mechanisms available in the event of their violation.

[186] For more information, see Chapter 4.

[187] For instance, Article 18 of the 2002 MoU between Lao PDR and Thailand states: "Labourers of the parties shall receive their wages and other benefits according to the local wage rates without exception of male or females, race and religion".

In addition, staff involved in the design and implementation of BLAs should receive gender-responsive training (Gallotti 2014), including with respect to social protection.

Although they may include provisions on social protection and/or gender equality, these agreements and related model contracts are rarely sufficiently specific and often include only a general reference to the relevant provisions of national legislation without detailing the rights and protections available to migrant workers. In order to make an informed choice on whether to migrate, these workers need to be aware of all matters related to their employment abroad, including their social protection entitlements.

8.6 Complementary measures

In addition to legal barriers and exclusions, including in the administration and delivery of social protection benefits, women and men migrant workers may also face practical barriers which hinder their effective access to gender-responsive social protection. These may include, among other things, administrative procedures, language barriers, lack of social protection schemes in the country of destination, lack of information on or knowledge of their rights, and failure to implement the relevant social security laws or bilateral/multilateral agreements (see Chapter 1). In order to address these practical barriers, the following complementary measures should be considered:

- develop and disseminate in the appropriate languages gender-responsive communication campaigns and information materials on migrant workers' social protection rights and how to access them and on non-discrimination and complaint mechanisms. The material should, among other things:
  - promote non-stigmatizing language and concepts that challenge negative stereotypes;
  - be adapted to the information needs of both men and women;
  - be disseminated through appropriate channels and at locations frequented by the migrant workers targeted;
  - consult or involve in their design the migrant workers targeted or the workers' organizations that represent them;
  - include information on the relationship between migrant workers' legal status and their access to social protection and/or complaint mechanisms in the event of discrimination, violence or harassment;
- consider providing gender-responsive training and education to policymakers and all stakeholders involved in providing social protection to men and women migrant workers and to the general public. Building technical expertise on the intersections between gender equality, labour migration and social protection contributes to the design and implementation of gender-responsive strategies and schemes;
- collect gender-disaggregated data and information and build a knowledge base that can be used to advocate for more equitable social protection policies and to enhance policymakers' awareness and understanding of the gender gaps in social protection and migration. Monitoring and evaluating social protection measures through a gender lens can support both policymaking and implementation, thus enhancing gender equality;
- ensure that policies with a direct or indirect impact on women and men migrant workers' access to social protection promote gender equality, including by:
  - adopting measures aimed at reducing the gender pay gap, including among migrant workers (Amo-Agyei 2020);
  - adopting measures aimed at reducing violence and harassment (particularly sexual harassment), trafficking, forced labour, discrimination in hiring and working conditions, and withholding pay;
  - ensuring that care and domestic work are recognized as work under the labour laws and other national legislation in line with the Domestic Workers Convention, 2011 (No. 189);
  - strengthening employment protection for pregnant women, and particularly the migrants among them;
  - strengthening maternity and paternity leave policies in order to reduce the burden on women migrant workers;
  - developing policies aimed at promoting the transition from the informal to the formal economy;
  - Implementing crisis response measures (as during the current COVID-19 pandemic);
- promote social dialogue and tripartite consultation with the relevant social partners in order to better understand the situation of women and men migrant workers and the different realities that they face (Briskin and Muller 2011; ILO 2019b).

▶ 8.7 Conclusion

Too often, social protection programmes do not adequately address the specific needs of women and girls across their lives. While their reasons for migration may be similar to those of their male counterparts, their experiences across the migration cycle differ to a great extent. Migrant women tend to be less educated than migrant men and often have little information on labour market conditions in the country of destination. Not only do gender norms and familial structures affect when, where and how women migrate; they also influence power relations, employment opportunities and working conditions upon arrival.

These barriers, together with the fact that the global demand for labour is often defined by gender stereotypes, condemn disproportionate numbers of women migrant workers to employment in low-skilled jobs in informal and unregulated sectors that generally exclude them from social insurance schemes. Persistent gender-based inequality in earnings and social insurance schemes designed around a male-breadwinner model and based on uninterrupted, full-time work in the formal economy also limit women migrant workers' ability to meet the qualifying conditions for these schemes. In the absence of well-designed unilateral measures, including SPFs, these women are often left with limited or no access to social protection, including, among other things, healthcare, old-age pensions and maternity and unemployment benefits. The fact that women are at higher risk of sexual and gender-based violence, abuse, exploitation and human trafficking further exacerbates their vulnerability.

Social protection policies and schemes should be designed to counter these forms of discrimination and should address gender-based differences in treatment in accordance with the principles of equality of treatment and non-discrimination established in various international human rights instruments and international labour standards. These include, among others, the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990), the UN Convention on the Elimination of All Forms of Discrimination against Women (1979; entry into force 1981), the ILO Violence and Harassment Convention, 2019 (No. 190), the ILO Social Protection Floors Recommendation, 2012 (No. 202), the ILO Domestic Workers Convention, 2011 (No. 189), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

SPFs based on these provisions and recommendations are a powerful tool that can progressively close social protection coverage gaps and promote the empowerment of women, thereby increasing their bargaining power and helping them to advance towards gender equality. In order to maximize their impact and that of other social protection systems and schemes, policymakers should ensure that they are designed, implemented and monitored in a gender-responsive manner. If this is not done, the resulting gender-blind schemes and systems can perpetuate and even exacerbate unequal gender relations.

In addition to this tool, several other policy options can facilitate the extension of social protection to women and men migrant workers. These include the ratification and application of key international labour standards, conclusion of gender-responsive social security agreements, adoption of other gender-responsive unilateral measures, inclusion of gender-responsive provisions on social protection in bilateral labour agreements, and other complementary measures designed to overcome the practical obstacles that hinder migrant workers' effective access to gender-responsive social protection.

The effective and equitable access to social protection established through these various policy options is key to the achievement of gender equality. This is all the more important during emergencies such as the COVID-19 pandemic as they tend to intensify the inequalities faced by women and girls, and particularly migrants, displaced persons and refugees who are already in a vulnerable situation.

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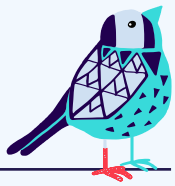
A call for action



Social protection can offer income security and protection against risks throughout the life cycle and is widely recognized as contributing to poverty reduction and sustainable development. Its critical role as a social and economic stabilizer has become all the more visible during the COVID-19 crisis. Yet too many migrant workers, refugees and their families, who are often the hardest hit in times of crisis, are still excluded from social protection. The importance of ensuring access to and maintenance of social protection coverage across countries has been emphasized repeatedly throughout this *Guide*.

As evidenced across the globe, crises can have a serious social and economic impact on countries of origin, destination and transit, creating inequalities and leaving migrant workers, and particularly migrant women, even further behind.

The fact that millions of individuals are denied access to social protection services and programmes shows that more needs to be done to make social security a right enjoyed by all. This will require not only the design and implementation of nationally appropriate and inclusive social protection systems, but also the portability of benefits across borders. Failure to take these steps come at a high political and economic cost for governments, hinder their development efforts and, most importantly, contradict human rights and universal values.

To fill this important protection gap and ensure that all migrant workers, refugees and their families have access to social protection, countries should take urgent action and consider the following measures:

1. ratification and implementation of the ILO Conventions and Recommendations on labour migration and social security as an important step in providing more comprehensive protection to migrant workers. This requires strong political commitment in order to ensure universal enjoyment of the right to social security, irrespective of origin, migration status, race, gender or age. Where the relevant Conventions have not been ratified, the principles and standards established therein should be incorporated in national laws and policy frameworks;

2. conclusion and implementation of bilateral and multilateral social security agreements ensuring equality of treatment and portability of benefits abroad. These agreements should be as inclusive as possible, particularly with regard to seasonal agricultural workers, domestic workers, seafarers and workers in the informal economy. The international labour standards provide useful guidance for their development and a detailed model social security agreement is provided in annex to the Maintenance of Social Security Rights Recommendation, 1983 (No. 167);

3. inclusion of social security provisions in temporary labour migration programmes and bilateral labour agreements in line with international labour standards. A model agreement is provided in annex to the Migration for Employment Recommendation, 1949 (No. 86) and UN guidance on BLMAs, including a section on social protection, will be published in 2021;

4. development and implementation of unilateral measures by countries of origin and destination in order to extend social protection to migrant workers, refugees and their families. These measures should:
   - ensure equal treatment of migrant and national workers in respect of social protection under national policies and legislation, based on the principles of equality of treatment and non-discrimination and in line with international human rights instruments and international labour standards;
   - establish and maintain national SPFs as a tool for reducing poverty, promoting social inclusion and ensuring basic social security guarantees to migrants and their families throughout their life cycle;
   - include migrant workers in crisis response measures in line with international human rights and labour standards;
   - ensure the progressive inclusion of currently excluded groups of migrants in policies, laws, emergency measures and national social protection schemes;
   - provide refugees and asylum seekers with access to the labour market and national social protection systems, both contributory and non-contributory;
   - adjust minimum contribution and residence requirements to the specific needs of migrants by, for example, establishing exemptions or lowering residence requirements;

5. Involve workers' and employers' organizations in the design and implementation of social security reforms and the negotiation of social security and labour agreements through effective social dialogue;

6. Collect data on the social protection of migrant workers and monitor existing programmes in order to inform evidence-base policymaking;

7. Remove the practical obstacles that compromise migrant workers' effective access to social protection by, for example, simplifying registration and other administrative procedures, ensuring that information is available and accessible in the appropriate language(s) and establishing effective appeal and complaint procedures for migrants and their families;

8. Ensure that migrant workers have a voice in decision-making processes concerning the design or reform of social protection policies, laws and agreements;

9. Create an enabling environment for migrant workers, and particularly those who do not have access to public social protection schemes, to explore private-led micro-insurance schemes, whether community based or not. These do not relieve the State of its responsibility to provide all residents and children with at least a set of basic social security guarantees that secure their protection in accordance with the ILO Social Protection Floors Recommendation, 2012 (No. 202).

Extending social protection to migrant workers, refugees and their families:

A guide for policymakers and practitioners

This Guide is intended to provide policymakers and practitioners, including workers' and employers' representatives, with practical guidance on how to extend social protection to migrant workers, refugees and their families. This Guide contains a variety of policy and administrative options for consideration and adaptation to specific groups and situations, taking the complexity of current migratory movements into account. The policy measures presented are accompanied by selected country and regional practices. The guide will inform users of the ILO approach, standards and tools developed and relevant for extending social protection to migrant workers, refugees and their families.

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Funding partners

Other partners