Journal of Identity and Migration Studies
Volume 9, number 2, 2015

FOCUS: MIGRANTS' LABOUR RIGHTS

International Legal Realities of Migrant Labour Rights

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Abstract. This paper is concerned with the evolutionary process of the global governance of labour migration, which has led to the progressive privatisation and commodification of international labour mobility. The focus is on the effects of such change on working conditions for migrants. In particular, the analysis is concerned with legal conceptualisations of labour mobility and their repercussions on the normative process of migration governance. For people on the move, the journey almost always entails sacrifices and uncertainty. The possible costs range from the emotional cost of separation from families and friends to high monetary fees. The stakes can include the physical dangers of working in dangerous occupations, or even a risk of death, such as in the case of illegal border crossings. Nevertheless, millions of people are still attempting movement, facing these costs or risks, in order to improve their living standards and those of their families. The implications for international human rights law are striking. Thus, attention is drawn to the human rights of all migrant workers, and more specifically to the protection and development of basic labour rights in the framework of international organisations. Ultimately, the main point of this study is to evaluate to what extent the freedom to choose where to work and to do so in decent conditions is a current legal reality at both the national and international levels.

Keywords: *International labour law; migrant labour rights; migration governance; labour mobility; decent work; ILO*

1. The international law of labour migration: ILO's minimum standards

International regulation and direction play a crucial role in shaping contemporary patterns in the international movement of workers and constitute the essential foundation for legislation, policy and practices at the national level. Besides the vast array of international standards already in place to provide parameters for the regulation of cross-border migration, numerous complementary

instruments present more specific frameworks in the areas of labour and human rights, which are relevant to this study.

The present regulatory system displays the struggle to protect migrant workers' rights, addressing the related issues from national through to bilateral, regional and multilateral levels. The comprehensive ILO system of standards, combined with a tripartite supervisory mechanism comprising of scrutiny by independent legal experts, is the pivotal crossroad of the multilayered apparatus of international regulation concerning migrant workers.

Overall, all ILO fundamental principles and standards apply to migrant workers, although Conventions No. 97 and No. 143 and their accompanying recommendations are specifically relevant to people moving in search of employment.

The ILO developed these two comprehensive standards in 1949 and 1975, marking two dissimilar approaches to labour migration due to the different political contexts in the wake of the Second World War and of the 1973 oil crisis respectively.

The provisions of the Migration for Employment Convention (Revised), 1949 (No. 97), and the supplementing Recommendation (Revised), 1949 (No. 86), were induced by the concern of managing (and facilitating) the movement of surplus labour from a struggling post-war Europe to other regions of the globe, therefore focusing on the standards applicable to the recruitment of migrants for employment and their conditions of work.

Less than 30 years later, unemployment and an increase in irregular migration had become major concerns of governments, who were interested instead in restraining migrant flows and enforcing the curb on unauthorised migration and employment.

Indeed, the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the Migrant Workers Recommendation, 1975 (No. 151), were the first multilateral instruments aimed at regulating the irregular migration phenomenon and calling for sanctions against traffickers.

However, Conventions No. 97 and No. 143 both deal with the migratory process as a whole, from emigration through transit and immigration, applying to people on the move from one country to another in search of being employed otherwise than on their own account.

With few exceptions, the instruments of the two conventions do

not differentiate between permanent or temporary migrants.[1] Besides, the included provisions are not based on reciprocity and cover refugees and displaced persons to the extent that they work outside their home country.

In particular, Convention No. 143 not only reaffirms that Member States have a general obligation to respect the basic human rights of all migrant workers and that they should be entitled to equal treatment, it also prescribes more specifically the protection of equality of opportunity, which entails access to employment, trade union and cultural rights, and individual and collective freedoms. The general provisions of Part II of Convention No. 143 do not cover trainees and employees who enter the host country on a short-term basis to carry out specific duties or assignments, in addition to the categories already excluded from its scope of application by Convention No. 97, such as seamen, frontier workers, artists and members of the liberal professions.[2]

With regard to the application of the above-mentioned instruments, an ILO general survey found that governments tended to consider these obstacles to ratification, especially arts 6 and 8 of Convention No. 97, affirming equality of treatment for foreign and national workers, as well as the maintenance of residence rights for permanent migrant workers in the event of incapacity for work. In addition, arts 8, 10 and 14(a) of Convention No. 143 are concerned with the

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[1]Article 8 of Convention No. 97 states: "1. A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to accompany or join him shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides.2. When migrants for employment are admitted on a permanent basis upon arrival in the country of immigration the competent authority of that country may determine that the provisions of paragraph 1 of this Article shall take effect only after a reasonable period which shall in no case exceed five years from the date of admission of such migrants", available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097>; and Article 11.2(e) of Convention No. 143 does not apply its provisions to "employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments", available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143>.

[2] The ILO defines 'liberal profession' or 'professional service' as "those services supplied by professional workers, often self-employed, such as doctors, lawyers, accountants, architects, etc." International Labour Organization, ILO INFORM, Bureau of Library and Information, ILO Thesaurus 2005, available at <http://www.ilo.org/public/libdoc/ILO-Thesaurus/english/tr4621.htm>.

protection of lawfully admitted migrant workers in the event of loss of employment, equality of opportunity and treatment, and the right of migrant workers to geographical and occupational mobility.[3]

Arising from the very fact of membership of the organisation and regardless of the ratification of specific conventions, all ILO Member States have the obligation to respect, realise and promote core labour rights and principles. The 1998 Declaration on Fundamental Principles and Rights at Work and its follow-up identifies four categories of such principles and rights: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

These fundamental principles and rights at work are universal and applicable to all people in all countries. It therefore applies to all migrant workers, regardless of their legal status. Additionally, the 1998 Declaration specifically refers to migrant workers as a group with special needs.[4] As a result of the successful ILO campaign for the universal ratification of its core conventions in the past 20 years, a critical mass of labour rights and standards covering migrant workers along with all other workers is currently binding on the vast majority of ILO Member States.

With regard to freedom of association and collective bargaining, the CEACR and the Committee on Freedom of Association (CFA) have repeatedly affirmed the fundamental rights of migrant workers (even if irregular)[5] to form and join trade unions and to be protected against any act of discrimination on the grounds of trade union activities. The denial of trade union rights by countries that have

[3]International Labour Organization (ILO), General Survey on migrant workers, Report III (Part 1B), International Labour Conference, 87th Session (Geneva, 1999) at para 101.

[4]International Labour Organization, ILO Declaration on Fundamental Principles and Rights at Work - 86th Session (Geneva, June 1998): "Whereas the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation;" available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>.

[5] With respect to migrant workers in an irregular situation, the Committee on Freedom of Association considered that Article 2 of Convention No. 87 "recognize[d] the right of workers, without distinction whatsoever, to establish and join organizations of their own choosing without previous authorization. The only permissible exception to Convention No. 87 [was] that set out in Article 9 concerning the armed forces and the police". International Labour Organization (ILO), 327th Report of the Committee on Freedom of Association, Governing Body, 283rd Session (Geneva, March 2002) at GB.283/8, para 561.

ratified the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), have also been addressed by the CEACR and CFA, claiming that representation and voice at work are crucial to guarantee labour rights and the improvement of labour conditions for migrant workers. Therefore, restrictive provisions on nationality deprive migrant workers of the right to elect their representatives and take up trade union office, in most cases even after a reasonable period of residence in the host country, particularly in sectors where they are the majority of the workforce.[6]

On several occasions, the ILO supervisory boards have expressed concern about the absence or inadequacy of legislation and measures taken against forced labour of migrants and for the elimination of child migrant labour. Practices that are against the Forced Labour (1930, No. 29 and 1957, No. 105) and Child Labour (1973, No. 138 and 1999, No. 182) Conventions usually include, for instance, the use by employers of excessive power over migrant workers in an irregular situation, the retention or non-payment of wages, contract substitution and retention of passports, long working hours and physical violence.[7]

The ILO supervisory bodies have also frequently affirmed that migrant workers, irrespective of their legal status, are protected by the instruments developed to battle discrimination based on race, sex, religion, political opinion, national extraction and social origin in employment, occupation and wage remuneration, as set out in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Equal Remuneration Convention, 1951 (No. 100).[8] Besides the above fundamental principles and rights at work and the standards dedicated to migrant labour, all other ILO standards are in principle applicable to migrant workers regardless of their specific reference.[9] In addition,

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[6]International Labour Organization (ILO), Freedom of association and collective bargaining: General Survey, Report III (Part 4B), International Labour Conference, 81st Session (Geneva, 1994) at para 118.

[7] Inter alia see International Labour Organization (ILO), Report of the Committee on the Application of Standards, International Labour Conference, 88th-91st Sessions (Geneva, 2000-03).

[8]Inter alia see: Committee of Experts on the Application of Conventions and Recommendations, CEACR Report, International Labour Conference, 89th Session (Geneva, 2001), individual observations concerning Conventions Nos. 97 and 111, pp. 369-374 and 493-495.

[9] Remarkably, in 2003 the Inter-American Court of Human Rights issued a far-reaching advisory opinion which clearly reinforces the application of international labour standards to

comments by the supervisory bodies of the ILO substantiate the practical application of instruments especially relevant for migrant workers. For example, the Private Employment Agencies Convention, 1997 (No. 181), asserts that the recruitment and placement of migrant workers through private employment agencies should be free of charge to prevent abuses, although certain exceptions are allowed in respect of specific types of services and categories of workers.

The Protection of Wages Convention, 1949 (No. 95), also applies in this context where it prohibits deductions from wages for payment to fee-charging agencies for the purpose of obtaining or retaining employment.[10] The CEACR has raised issues in relation to deductions made from the salaries of plantation workers that are mostly migrants,[11] and to non-payment of wages to workers forced to return to their country because of war.[12]

The Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), strongly affirms the promotion of full, productive and freely chosen employment through the equal and non-discriminative treatment of lawfully resident migrant workers, and the more recent Safety and Health in Agriculture Convention, 2001 (No. 184), also explicitly covers temporary and seasonal migrant workers. Nonetheless, other aspects particularly relevant to the payment of wages to migrant workers such as periodicity, modes of payment, deferred payments in foreign currency and appeals still do not seem to be dealt with in depth, since, for instance, no specific standards can be found with specific regard even to domestic workers.

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non-national workers, particularly those of irregular status. The Court found that non-discrimination and the right to equality are 'juscogens' and applicable to all residents regardless of immigration status. See further in Inter-American Court of Human Rights (IACrtHR) Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants, OC-18/03, (San Jose', Costa Rica, 17 September 2003) available at <http://www.unhcr.org/refworld/docid/425cd8eb4.html>.

[10] International Labour Organization (ILO), Protection of wages: Standards and safeguards relating to the payment of labour remuneration, General Survey of the reports concerning the Protection of Wages Convention, 1949 (No. 95), and the Protection of Wages Recommendation, 1949 (No. 85), Report III (Part 1B), International Labour Conference, 91st Session (Geneva, 2003) at para 267.

[11] Committee of Experts on the Application of Conventions and Recommendations, CEACR Report, International Labour Conference, 87th Session (Geneva, 1999) at p. 313; and CEACR Report, International Labour Conference, 89th Session (Geneva, 2001) at p. 357.

[12] Such as in the case of a number of Egyptian workers in Kuwait during the Gulf War: CEACR Report, International Labour Conference, 89th Session (Geneva, 2001) at p. 358.

2. The international human rights law of migrant workers: the UN's ICRMW

Since its establishment in 1919, the ILO recognised in the preamble of its constitution the need to protect the interest of "workers employed when in countries other than their own", drawing international attention to the practical significance of the rights of migrant workers.

The two major ILO treaties concerning migrant labour mentioned above (1949, No. 97 and 1975, No. 143) have been described as innovative, rich in detail and ground-breaking, but have been largely ignored by the international community thus far.[13] The Conventions register a poor record of adoption, generally occurring in origin rather than destination countries, where the protections are most needed.[14]

It is argued that this lack of attention is due to the generality of the Conventions, the enduring preference for a State's own nationals in economic matters, and principally the concern that treaty obligations may hinder the regulation and enforcement of irregular immigration.[15] The ILO itself has acknowledged that the Conventions do not effectively face the challenges raised by contemporary migration issues, such as regional integration, commercialisation and privatisation of recruitment and the increase of female labour migration.[16]

In the past two decades, the importance of the ILO Conventions has been overshadowed by the conclusion and growing adoption of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), which follows the latest trend of adopting specific human rights treaties to protect groups of vulnerable people on the grounds of gender, age or other particular circumstances, such as women, children, persons with disabilities and indigenous peoples.

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[13] Cholewinski, R., Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment, Clarendon Press (Oxford, 1997) at 135.

[14] As of January 2015, Convention No.97 has been ratified by 49 countries and Convention No. 143 by 23 countries. For an updated list of adopting countries, see: ILO at http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242 and <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288>.

[15] Fitzpatrick, J., The human rights of migrants in T. Aleinikoff and V. Chetail (eds), Migration and International Legal Norms, TMC Asser Press (The Hague, 2003) at 169-184.

[16] Leary, V., Labor migration in T. Aleinikoff and V. Chetail (eds), Migration and International Legal Norms, TMC Asser Press (The Hague, 2003) at 227-239.

The ICRMW is a comprehensive convention opting for a new approach to migrant labour, focused on the human rights of migrant workers rather than minimum standards at work, as per the ILO's usual methodology. Indeed, although some countries wanted the drafting of the new convention to take place at the ILO, a larger number of (origin) countries advocated for the treatment of migrant workers as subjects of a broader set of rights and to expand protection to their families. Therefore, the ICRMW was drafted under the auspices of the United Nations General Assembly, with many provisions echoing the civil and political rights of the related International Covenant of Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social, and Cultural Rights (ICESCR).

Beginning in 1980, the drafting process was lengthy and reflective of tensions raised by diverging interests and perspectives of the diverse countries involved. The first draft was issued in 1984 and further discussion went on for another six years. Meanwhile, rapid and unforeseen changes in global migration dynamics influenced government policies and subsequently modified their attitudes towards transnational labour mobility. Both earlier progressive and traditional countries of emigration that started to receive migrants began to be concerned with the increased flows of undocumented migrant workers and became more restrictive and conservative, thus influencing the text.

The ICRMW was eventually adopted by the United Nations on 18 December 1990. Contrary to other major human rights treaties, in which universalism and multilateralism were pledged, virtually only the G77 non-aligned movement from the late 1970s was the driving force behind the studies and initiatives that led the General Assembly to initiate the Convention.[17]

In general terms, the ICRMW extends existing rights and creates new ones in providing for the prevention and elimination of the exploitation of all migrant workers and members of their families throughout the whole migration process, including preparation to migrate, adjustments in the receiving country, and access to social and medical services.[18]

The ICRMW is composed of nine parts: scope and definitions; non-discrimination with respect to rights; human rights of all migrants (also including

[17] On the ICRMW draftingprocesssee: Battistela, G., La naissance d'une Convention: les difficiles relations entre migrations et droits de l'homme, in Hommes & Migrations, Cité nationale de l'histoire de l'immigration (Paris, 2008) at 1271:20-30.

[18]Nafziger, J., and B. Bartel, The Migrant Workers Convention: its place in human rights law in International Migration Review 25, Wiley-Blackwell (Hoboken, NJ, 1991) at 771–799.

the rights of migrants in an irregular or 'undocumented' situation); other rights of migrants who are documented or in a regular situation; provisions applicable to particular categories of migrants; the promotion of sound, equitable, humane and lawful conditions in connection with international migration; application of the Convention; general provisions; and final provisions.

This index shows the comprehensiveness (which might well be seen also as undue complexity) of the ICRMW as an international treaty on labour migrants' human rights, produced by an unprecedentedly thorough combination of factors. Existing legally binding agreements, as well as United Nations human rights studies, resolutions, recommendations and debates on the migrant worker issue, all combined to inspire the formulation of the treaty.[19]

The ICRMW offers for the first time an international definition and taxonomy of migrant workers and members of their families.[20] In viewing migrants as more than labourers or mere economic entities and assets, it admirably fills a conceptual gap in the protection of situations of vulnerability. Minimum universal human rights standards are affirmed for all migrant workers, including those who are undocumented, and further rights are expanded to documented labour migrants and members of their families, especially in the area of employment and equality of treatment in a number of legal, social, political and economic matters.[21]

The ICRMW identifies a core of non-negotiable rights directly derived from the International Bill of Human Rights.[22] Most articles on civil and political rights included in Part III of the ICRMW on human rights of all migrants virtually

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[19] Office of the United Nations High Commissioner for Human Rights (UNHCHR), Fact-Sheet No 24(Rev.1), The International Convention on Migrant Workers and its Committee (Geneva, 2005).

[20] Article 2(1) ICRMW defines a 'migrant worker' as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national', available at OHCHR, <http://www2.ohchr.org/english/law/cmw.htm>.

[21] For further reference see: December 18, International NGO Platform on the Migrant Workers' Convention, A Guide for Non-Governmental Organisations on the Implementation of the UN Migrant Workers' Convention, Updated (Brussels, 2007) available at <http://www.december18.net/sites/default/files/Guide_for_NGOs_en.pdf>.

[22] The so-called (informally) International Bill of Human Rights consists of the Universal Declaration of Human Rights (adopted in 1948), the International Covenant on Civil andPolitical Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966).
On their link with the ICRMW see further: Grange, M., Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties – A do-it-yourself Kit, International Catholic Migration Commission (Geneva, 2006) at Table IV: 44-49.

correspond to articles in the International Covenant on Civil and Political Rights. Equivalent articles on the right to physical and moral integrity and the right to procedural guarantees can also be found in the Convention against Torture (Part I, arts 1–16).

In the ICRMW, included in the fundamental set of rights applicable to both documented and undocumented migrant workers and members of their families, are a number of provisions such as the right to life (art 9); protection from torture or cruel, inhuman or degrading treatment or punishment (art 10); freedom of thought, conscience and religion (art 12); the right to liberty and personal security and protection against arbitrary detention (art 16); freedom from slavery, servitude or forced or compulsory labour (art 11); and the right to procedural guarantees (art 18). Article 18 is also significant as it explicitly entitles all migrant workers (including those who are illegal) to another basic human right that applies to all people: the right to equality before the courts and to a fair trial by an independent and impartial tribunal established by law (arts 6 and 7 of the UDHR, and art 14 of the ICCPR).

Only a few rights had not specifically been formulated in previous human rights instruments, as they inherently relate to migrant workers. For example, it is unlawful for anyone, other than a public official duly authorised by law, to confiscate, destroy or attempt to destroy identity documents, documents authorising entry or stay, residence or establishment in the national territory, or work permits (art 21). The ICRMW also provides a shield for other civil and political rights specific to the condition of migrant workers, such as the right for migrants to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin whenever the rights recognised under the ICRMW are impaired (art 23), and the right to protection against collective expulsion (arts 22 and 56).

In addition, the ICRMW designs its core socio-economic provisions on the basis of the International Covenant on Economic, Social and Cultural Rights, with certain measures added to meet the specific issues of migrant workers. For instance, upon termination of their stay in the State of employment, migrant workers and members of their families shall have the right to transfer their earnings and savings and their personal effects and belongings (art 32). Moreover, in the event of death, State Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers and

members of their families (art 71).

Another set of specific rights addresses important issues of migrant workers in regular situations, such as the right to be fully informed by their States of origin and employment about conditions applicable to their admission and concerning their stay and the remunerated activities in which they may engage (art 37).[23] In addition, they can form trade unions (art 40); they can participate in the public affairs of their State of origin and vote or be elected at elections of that State (art 41); they may enjoy some political rights in the State of employment (art 42); and they may have the same opportunities and treatment as nationals in relation to various economic and social services (art 43).

Under art 44, State Parties are obliged to facilitate family reunification and to take appropriate measures to ensure the protection of the unity of the families of migrant workers. Regular migrants have to be able to choose their remunerated activity (art 49), while enjoying the same protection as nationals against dismissals and being entitled to similar unemployment benefits (art 54). Lastly, labour migrants are entitled to a clear level of guarantees and protections against expulsion (art 56).

The ICRMW required 20 ratifications to come into force (art 87), which occurred in 2003. The ICRMW was negotiated by the United Nations General Assembly precisely with the goal of attracting more support than it would have as a convention drafted by the ILO, and it actually did.[24] Nearly as many States have adopted the ILO's Conventions No. 97 over 60 years as have ratified the ICRMW in only 20 years.[25] Nevertheless, in examining the list of the States currently party to the convention, it is striking to note the absence of any Western democracies, although (or perhaps because) these are the politically prominent countries receiving foreign migrant labour. As was the case with the ILO conventions, it is evident that the success of the ICRMW relies ultimately on the support of highly

[23] Arguably, it is not explained how migrants' native states would know and manage all this information about other countries.
[24] Lönnroth, J. The International Convention on the Rights of All Migrant Workers and Members of Their Families in the context of international migration policies: an analysis of ten years of negotiation, International Migration Review 25: 710–736, Wiley-Blackwell (Hoboken, NJ, 1991), at 728.
[25] As of March 2013, the ICRMW accounts for 35 signatories and 46 parties. For an updated list of adopting countries see UN Treaty Collection, at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en>.

developed destination countries.

Among the various reasons for this poor adoption rate are the incompatibility with existing national legislation; technical and financial challenges of implementation; coordination problems between government departments because of shared responsibility for migrant workers;[26] lack of awareness of the convention; failure of the convention to differentiate sufficiently between regular and irregular migrant workers; and a general lack of political will.[27] Other authoritative research goes even further in addressing, for instance, self-perpetuated ignorance about ICRMW provisions and peer pressure for non-ratification.[28]

3. Beyond Conventions and Institutions: a new international regime on labour migration

The limits of the ILO Conventions and the ICRMW discussed above have nonetheless prompted additional measures to ensure protection for migrant workers through the development of a soft law framework.[29]

In 2005, the ILO introduced a Multilateral Framework on Labour Migration to provide guidance to migration policy makers through a collection of principles, guidelines and best practices. Respecting the latest trend in the area, the framework develops a rights-based approach to labour migration, but does so within a non-binding framework that does not interfere with the sovereign right of all countries to dictate their own migration policies. For instance, Principle 9 states that national laws and regulations should be inspired by the underlying principles of ILO Conventions No. 97 and No. 143, as well as the ICRMW, to be fully implemented if ratified by the State concerned. This softer language certainly fits

[26]Cholewinski, R. The rights of migrant workers, in R. Cholewinski, R. Perruchoud and E. MacDonald (eds), International Migration Law: Developing Paradigms and Key Challenges, TMC Asser Press (The Hague, 2007), at pp.255-274.
[27]Pécoud A. and P. de Guchteneire, Migration, human rights and the United Nations: an investigation of the obstacles to the UN Convention on Migrant Workers‘ Rights, in Global Migration Perspectives No. 3. GCIM (Geneva, 2004) at 4 and 13, available at <http://portal.unesco.org/shs/en/files/6611/10962899451GCIM.pdf/GCIM.pdf>.
[28] UNESCO, UN Convention on Migrants' Rights, Information Kit, International Migration Programme, UNESCO Publications (Paris, 2005) at 12-14, availableat<http://unesdoc.unesco.org/images/0014/001435/143557e.pdf>.
[29] Betts, A., Towards a soft law framework for the protection of vulnerable migrants. New Issues in Refugee Research, UNHCR Research Paper No. 162, (Geneva, 2008) at 12-18.

better with both intrinsic dissimilarities between States and the need for gradual implementation. The long-term goal of the framework is to positively influence State practice towards the better protection of migrant workers, without the strictures of binding legal instruments. The development of such world best practices and standards is supposed to spread out widely and to be advanced through inter-agency programmes. Similarly, other United Nations mechanisms aimed at protecting human rights often make detailed recommendations on the situation of migrants, based on numerous non-discrimination clauses in respective human rights treaties. For example, the independent expert bodies set up to supervise the implementation of core human rights treaties, also known as treaty monitoring bodies (TMBs), have specifically addressed the application of relevant treaty provisions to undocumented migrants in European countries, while urging a more general and basic protection for legally residing migrants in the Middle East.[30]

The International Organization for Migration (IOM) was established in 1951 on the basis that there was a need to manage the resettlement of millions of Europeans displaced by the Second World War. In its original role as a logistical agency, it helped to transport and resettle nearly one million Europeans during the 1950s, largely to the Americas and Oceania. The IOM assumed its present name and revised its constitution in 1989, expanding its scope to become one of the leading international agencies working with governments and civil society to advance the understanding of migration issues and conducting operations on a global scale to encourage social and economic development through migration, as well as to uphold the human dignity and wellbeing of migrants.

The IOM is not an entity within the United Nations system, but is an intergovernmental organisation (IGO) whose members are bound by a constitution, under which membership is confined to States with a demonstrated interest in the principle of free movement of persons, together with States that were previously members of the Intergovernmental Committee for European Migration. There are currently 157 Member States, and numerous other entities have observer status (including ten States).[31]

Article 1 of IOM's constitution identifies its core functions as: making

[30]Guimont, A., M. Silvestri and Proli, P., The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat, UNESCO-December 18 vzw (Brussels, 2008) at 2.2:10.
[31] As of January 2015, for updated figures see: International Organization for Migration (IOM), at <http://www.iom.int/cms/en/sites/iom/home/about-iom-1/members-and-observers.html>.

arrangements for the organised transfer of migrants, refugees and displaced persons; providing migration services to States upon request (including services for voluntary return migration or repatriation); and providing a forum for the exchange of views and coordination of efforts on international migration issues.

To facilitate the coordination of international activities, the IOM cooperates closely with international organisations concerned with migration, refugees and human resources. Critically, the IOM provides an approach to forced and voluntary migration based on assistance rather than rights, with no formal protection mandate, as is the case of the UNHCR in dealing with forced migration and asylum. Notably, because the dividing line between forced and voluntary migrations has been becoming finer than ever since the end of the Cold War, the IOM is assuming an increasingly protective role in relation to refugees, virtually overlapping with the role of UNHCR.[32]

Thus far in this study, the ILO and IOM have been identified as the foremost labour migration organisations. Nevertheless, an array of other international institutions is concerned with the free movement of migrant workers. This proliferation of specialised institutions can lead to conflicting considerations. From one side, tensions occurred between the ILO and the United Nations General Assembly in the negotiation of the ICRMW, during which promoting countries bypassed the traditional role of the ILO.[33] This is a good example of what can result from overlapping bodies in terms of duplication of effort, wasted resources and gaps in responsibilities.[34] Conversely, it can be argued that from proliferation of the international institutions, such organisations gain expertise, develop effective networks, fill the gaps in the system and focus on their specialised tasks without the bureaucracy and inefficiency typical of larger organisations with their extended chains of command.[35]

[32]Perrouchoud, R., Persons falling under the mandate of the International Organization for Migration (IOM) and to whom the organization may provide migration services, International Journal of Refugee Law (Oxford, 1992) at 4:205–215.
[33]Böhning, R., The ILO and the new UN Convention on Migrant Workers: the past and future, International Migration Review, Issue 25, Wiley-Blackwell (Hoboken, NJ, 1991) at 698–709.
[34]Blokker, N., Proliferation of international organizations: an explanatory introduction, in Blokker, N. and H. Schermers (eds), Proliferation of International Organizations: Legal Issues, Kluwer Law International (The Hague, 2001) at 1-49.
[35]Schermers, H., Final remarks, in Blokker, N. and H. Schermers (eds), Proliferation of International Organizations: Legal Issues, Kluwer Law International (The Hague, 2001) at 551. For a more recent and thorough appraisal on global governance of migrations see in

The only common feature of such different perspectives is perhaps the call for a new international regime for labour mobility and migration. Globalisation is the factor most taken into account, as it is presenting the need for supranational regulation and international response to issues that cannot only be solved within national borders.

Recent literature generally advocates well-balanced and comprehensive multilateral frameworks in labour mobility, combined with global minded migration policies, although it seems difficult to find any detailed and elaborated proposal.[36]

More realistically, in 2005, the Global Commission on International Migration (GCIM) expressly considered the question of appropriate global institutions to provide a framework for the formulation of a coherent, comprehensive and global response to international migration.

In the same year, the GCIM reported to the United Nations Secretary-General the conclusion that, in the long term, a fundamental overhaul of the current institutional architecture relating to international migration will be required, both to bring together the disparate migration-related functions of existing United Nations' and other agencies within a single organisation, and to respond to the new and complex realities of international migration.[37]

The GCIM professed a preference for institutional consolidation by envisioning the amalgamation of the IOM with UNHCR and the individuation of a spearhead agency from among existing institutions. However, no specific recommendation was made on this matter aside from bringing the IOM into the United Nations system, to be put at the cutting edge of the voluntary migration regime, but not out of the context of a thorough on-going reform of the United Nations.

Beyond these long-term consolidating options, the GCIM took forward the combination of operational efforts rather than institutional structures and advocated the establishment of a short-term, inter-agency facility to strengthen cooperation between all international institutions dealing with migration.[38] The Secretary-General first put this suggestion into action in 2006 with the

particular: Grugel, J.B. and Piper, N., Critical Perspectives on Global Governance: Rights and Regulation in Governing Regimes, Routledge (London, 2007) at 3:41-64.

[36] For example see: Ghosh, B. (ed.) Managing Migration: Time for a New International Regime? Oxford University Press (Oxford, 2000) at 227.

[37] Global Commission on International Migration (GCIM), Migration in an Interconnected World: New Directions for Action (Geneva, 2005) at 75.

[38] See Global Commission on International Migration (GCIM), above n 37, at 76-78.

transformation of a limited-membership Geneva Migration Group into a larger GMG. This would involve 14 relevant agencies and a number of recent inter-state and inter-agency initiatives, such as the United Nations High Level Dialogue, which started in 2006.[39]

This is a new approach in some cross-agency areas of the United Nations that aims to achieve better coordination of efforts. Initiating new programmes without establishing new organisations can provide more flexible structures in building new processes for coordination. Hence, the call for a versatile Joint United Nations Programme on International Migration seems well founded on the spur of the useful development of the coordination efforts of the GMG, jumping over the hurdles of starting up a new international organisation and providing crucial settings for consolidating existing principles and promoting new concepts of international labour migration law[40].

4. Bilateral and regional agreements regulating cross-border labour migration

The multilateral context of international standards and mutual support at bilateral, regional and multilateral levels are paramount in the operation of agreements regulating transnational labour migration and addressing the protection of migrant workers.

In connection with its application, Convention No. 97 asks States to enter into bilateral agreements to regulate issues concerning migration. Additionally, the accompanying Recommendation No. 86 sets out a model agreement covering major features of the whole migratory process and offers contents for model contracts of employment.

Bilateral agreements adhering to such standards aim to provide protection for migrant workers, especially with regard to specific areas, like social security and protection of more vulnerable groups, as previously discussed.

Until the economic turmoil of the oil crisis in the 1970s, bilateral agreements were current practice in managing migration flows and resolving related issues between two countries. In the following two decades, much looser

[39]Neilsen, A., Cooperation mechanisms, in R. Cholewinski, R. Perruchoud and E. MacDonald (eds). International Migration Law: Developing Paradigms and Key Challenges, TMC Asser Press (The Hague, 2007) at 405-426.
[40]Opeskin, B., The Influence of International Law on the International Movement of Persons, Human Development Research Paper 2009/18, UNDP (Geneva, 2009) at 6:127.

framework agreements, memoranda of understanding, and declarations of mutual cooperation on the contracting and protection of foreign workers largely superseded bilateral agreements.[41]

It is difficult to discern whether the concomitant upsurge of the more integrated approach of international law in migration affairs is the cause or effect of the decline of bilateral agreements. Nevertheless, in the 1990s, there has been a global, although geographically irregular, growth in the number of bilateral agreements. For instance, in the last decade of the 20th century, OECD countries registered a fivefold increase[42] and Latin American countries doubled the number of bilateral agreements, while Asian countries did not present the same expanding figures.[43] Noticeably, Central-Eastern European States and the Former Soviet Republics marked a significant use of bilateral agreements not only with neighbouring or other regional countries, but also with States on other continents.[44]

This latest generation of bilateral agreements usually seeks to address broader economic and social issues, although the objectives may focus on a more specific range, such as preventing irregular migration or regulating seasonal work in agriculture, at the same time raising hopes and prompting criticism in the arena of global migration governance.[45]

Similarly, subregional and regional bodies have established an array of measures at various levels with regard to the management of transnational migratory flows, addressing in their agendas pivotal issues such as the conditions of admission, stay and treatment of foreign workers. In place in all continents (although to different extents, such as in Asia), regional standards usually comprise both the protection of migrant workers and the governance of migration, showing

[41] Abella, M., *Sending workers abroad,* International Labour Organization(Geneva, 1997) at 6.1:63-67.
[42] Bobela, D. and Garson., J., *Migration for Employment*, *Bilateral Agreements at a Crossroad*, Organisation for Economic Co-operation and Development (OECD), (Geneva, 2004) at 11-29.
[43] See International Organization for Migration (IOM), *World Migration Report 2003, Managing Migration - Challenges and Responses for People on the Move* (Geneva, 2003) at 11:195-212.
[44] See IOM, above n 43, at 13:239-256.
[45] See for example: Commonwealth Caribbean and Mexican Agricultural Seasonal Workers Programme in Canada: Martin, P., *Managing labour migration: Temporary worker programmes for the 21st century,* International Institute for Labour Studies (Geneva, 2003) at 26-35.

converging interests and approaches towards progressive harmonisation, especially in terms of processes of regional and subregional economic integration. Indeed, in the last decade, regional inter-state economic integration and frameworks increasingly developed or implemented agreements regarding labour mobility at both administrative and formal legal levels.

In the Asia-Pacific area, the purpose of the Labour and Social Protection Network is to foster strong and flexible labour markets and strengthen social protection to address sustainable human resource development across Asia-Pacific Economic Cooperation (APEC) member economies. Labour mobility between New Zealand and Australia creates an excellent opportunity for the development of labour flows in accordance with migration issues and conventional economic theory. Over recent years, there have been large movements of people in both directions, as they have sought to achieve their objectives through employment in the other country. This provides an excellent opportunity for a study of the likely effects of the free movement of labour upon migrant workers' rights, although both countries are comparable in wealth and employment standards.

The Association of Southeast Asian Nations Labour Ministers' (ASEAN-LM) Work Programme provides the framework to prepare the region's labour force to face the challenges of globalisation and trade liberalisation. One of the six broad priorities set in the Work Programme is in the area of labour mobility. The 2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers mandates that member countries promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers. The 2009 ASEAN-Australia-New Zealand Free Trade Agreement also represents an opportunity to improve dialogue and conduct cooperative activities, including the promotion of labour rights and obligations and decent work conditions.

In Europe, there is a complex set of workers' circulation standards and migration policies, particularly within the framework of the EU. After the entry into force of the 1992 Maastricht Treaty on the EU, as amended by the treaties of Amsterdam, Nice and Lisbon, the evolution from a common economic space moved the European labour migration apparatus from the intergovernmental level to the community level. The freedom of movement for workers is one of the four pillars of the EU, as art 45 of the Consolidated Treaty on the Functioning of the EU (ex-art 39, European Community—EC Treaty) entitles about 500 million people to move and

stay freely in 27 different countries for the purpose of employment. Hence, the EU can be deemed as quite an advanced prototype of labour citizenship established within intergovernmental organisations, conferring status, participation, solidarity and identity on all those who have the right to be engaged in a remunerated activity in a Member State of which he or she is not a national.

Outside the EU framework, the European Committee on Migration (CDMG) is theCouncil of Europe body working with governments to develop common policies on the challenges of migration and the human rights of migrants. The CDMG's task is to develop European cooperation on migration and social integration of populations of migrant origin, aiming through its work to influence government policy and practice in the Member States of the Council of Europe. Its target group is therefore essentially government policy makers and public officials responsible for delivering services to migrants at both the national and local level.

In Africa, continental organisations embraced the concept of free movement, fundamental to Africa's integration objective, as can be seen in several instruments, including art 43 of the 1991 Treaty Establishing the African Economic Community and the African Union's Priority Programme on Free Movement of Persons as detailed in the 2004–2007 Plan of Action to Speed Up Integration of the Continent, promoting the free movement of people.

At the subregional African level, there is a clear influence of the EU model for the free circulation of labour. For instance, the Southern Africa Development Community (SADC) drafted a Protocol in 2001 on free movement of labour, which, although the Member States did not subsequently adopt it, forms the negotiation basis for new initiatives addressing labour migration in the area.

In 2003, the Central African Economic and Monetary Community (CEMAC) unsuccessfully sought new measures to put into effect its agreement on the free circulation of labour, all but implemented since its adoption in the 1980s. Further, the treaty establishing the East African Community in 2003 affirms free circulation and residence of labour for nationals of member countries.

Within the American continents, the Permanent Council of the Organization of American States (OAS) established in 2007 a Committee on Migration Issues as a strategic platform for the discussion and analysis of the patterns of human migration in the Americas and the impact of these movements on Member States. The Secretariat of this Special Committee on Migration is in the stage of gathering information and producing a matrix of existing legal frameworks

and, as appropriate, migration regulations, policies and programmes for OAS countries, with a view to creating a compendium of best practices with respect to migration.

The TN (Trade NAFTA- North American Free Trade Agreement) status is a special non-immigration status unique to citizens of the US, Canada and Mexico, created by virtue of the 1994 NAFTA. It allows American, Canadian and Mexican citizens the opportunity to work in each other's countries in certain professional occupations. In South America, the Mercado Comun Del Sur (MERCOSUR) countries approved an agreement on residence for their nationals in 2002 in order to implement the integration process, and similarly, the Andean Community adopted in 2003 a revised Andean Instrument for Labour Migration. More comprehensively, the Labor Consultative Council of the newly formed Union of South American Nations pursues the attainment of fuller participation in the construction of an integration process leading to the creation of a common market. The member countries have decided to join efforts to ensure that their inhabitants are able to move freely through the subregion for purposes of work, adopting measures aimed at the promotion of intra-community mobility.

In general terms, only few of all the subregional and regional agreements draw on relevant international standards, because not all Member States of these regional bodies have ratified ILO Conventions No. 97 and No. 143. Not incorporating international standards clearly presents the risk of putting in place legal measures that undermine existing norms and reiterate the transnational inconsistencies that these norms were designed to avoid.[46] For instance, recent literature noted that many countries in the Global South (especially in Asia) prefer to operate bilaterally on the basis of Memoranda of Understanding, which is not conducive to the promotion and upholding of migrant workers' rights at all.[47]

5. Social security rights for migrant workers: ILO instruments

As social security rights are usually related to periods of employment and residence, the situation of migrant workers, especially if they do not enjoy

[46] ILO, *Towards a fair deal for migrant workers in the global economy,* Report VI, International Labour Conference, 92nd Session (Geneva, 2004) at 264.

[47] See for instance Wickramasekara P., *Labour migration in South Asia: A review of issues, policies and practices*, ILO, International Migration Paper No. 108 (Geneva, 2011) at 3.4.1:23-24.

permanent or legal status is particularly difficult to manage at the national level and in compliance with the international regulation on labour and social rights.

In general, the ILO instruments encourage the development of model contracts to manage effectively the issues that arise from the circumstances of migrating for employment. For instance, art 22 of the Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons, annexed to the Migration for Employment Recommendations (Revised), 1949 (No. 86), affirms that bilateral agreements should provide measures concerning the equal treatment of migrants and nationals and appropriate arrangements for acquired rights in the area of social security.

Migrant workers' social security rights are particularly vulnerable, as their benefits and entitlements are at stake not only in origin countries, due to their absence, but also in the host country, where restrictive conditions for the inclusion of alien residents in the national social security system may apply. For migrant workers' social rights, protection is crucial for equal access to and coverage by national entitlements, to maintain and export acquired rights when leaving the country, and to be able to accumulate the benefits obtained in different countries.[48]

As for labour rights, all current ILO social security standards apply in terms of their scope of coverage irrespective of nationality and residence status, in most cases including similar clauses on equality of treatment for nationals and foreign workers in the host country. Moreover, the ILO supervisory bodies have made specific reference to migrant workers in the context of their regular supervision in the social security area.[49]

Conversely, although the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), and the similar Equality of Treatment (Social Security) Convention, 1962 (No. 118), establish the right to equality of treatment for foreign workers in respect of compensation for industrial accidents and social security, signatory countries grant equality of treatment with their own nationals only to

[48]Humblet, M., and R. Silva, *Standards for the XXI century – Social security,* International Labour Organization (Geneva, 2002) at 41-45.
[49] Inter alia, with respect to application of the Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121) and of the Medical Care and Sickness Benefits Convention, 1969 (No. 130).

nationals of any other Member State on the provision of reciprocity.[50]

Under the Maintenance of Social Security Rights Convention, 1982 (No. 157), and Recommendation, 1983 (No. 167), State Parties have to ensure the maintenance of acquired rights for the nationals of other members in any branch of social security in which the concerned countries have legislation in force. Convention No. 157 and its relevant Recommendation No. 167 establish an international framework for the maintenance of not only acquired rights, but also rights in the course of acquisition for workers who cross borders, entailing the effective provision of their benefits abroad even when they return home. Essentially, Convention No. 157 advocates the conclusion of bilateral or multilateral social security agreements, while Recommendation No. 167 offers a model provision for the definition of such agreements.

Other special non-discrimination clauses are dealt with in Part XI of the Social Security (Minimum Standards) Convention, 1952 (No. 102), which affirms that national and non-national residents should have the same rights to social security, although with some acceptable exclusion of foreign people when benefits are funded entirely by public resources (art 68).

In conclusion, migrant workers' opportunities for maintaining and exporting social security benefits differ markedly according to the country and branch of social security being considered, although regular and permanent migrants usually enjoy equality of treatment with nationals. As delineated in the previous sections, restrictions mostly occur in the unemployment benefits area.

6. Conclusion

This paper provided a picture of the development and content of domestic and international legal instruments and programmes relating to migrant labour, to the extent that the freedom to choose where to work and to do so in decent

[50] For example, Convention No.19 provides for the export of covered benefits of foreign workers only when the ratifying State undertakes the grant of such export of benefits for its own nationals. In addition, Convention No.118 advocates the maintenance of acquired rights when stating that a member country has to ensure the provision of social security benefits abroad for its own nationals and for the nationals of any other State that hasaccepted the obligation of the Convention, regardless of the place of residence of the beneficiary. Relevant literature on "portable rights" includes Grugel, J. and Piper N., *Global governance, economic migration and the difficulties of social activism*, in: *International Sociology*, SAGE (London, 2011) at 26(4): 435-454.

conditions can enter the legal reality on several normative levels. The analysis focused on the current tendency of domestic legal systems to broadly incorporate such a conception, and to support it at an international level. Finally, the investigation revolved around the extent to which the established legal frameworks at both levels (national and international) recognise or incorporate the notion of decent work equally for domestic and migrant workers.

Nonetheless, for the past few decades, the preservation of working rights and social provisions is increasingly becoming economically unsustainable across the globe. Where the migrant labour cost is not able to compete with the sum of outsourced labour and logistics expenses, exporting production is more advantageous than importing labour. Hence, industry production has been largely reallocated to countries that have abruptly improved their socio-economic development, skipping the intermediate steps of the modernisation process that beforehand took the outsourcing countries more than a hundred years to achieve.

As a further development, the answers of this study could take into account the often under-estimated social capital created by transnational migrant labour in our society. Considering this may help us understand why both old and new immigration countries are not advancing a thoroughly integrated and far-sighted approach to global labour migration affairs. In such perspective, the pivotal matter is whether, at this present stage, these migrant-receiving countries are merely taking advantage of what historically is just a moment, where the migrants' social capital (i.e. the value of migrants' social relations and cooperation) transferred through generations of labour migration has not yet been dissipated, while at the same time trying to prolong this moment as much as possible by cutting or not bearing the social costs of workers on the move.

Such a short-sighted approach may well present in the near future the awkward situation in which the social costs of labour migration will no longer be sustainable, while its entire social capital will be lost irreversibly.

Over the long term, the failure in the global management of labour migration may also result in developed societies not being socio-economically sustainable, whilst not being able to grow without cross-border migrant workers. In other words, immigration may become socio-economically unsustainable, although still necessary for maintaining the current levels of human development in receiving countries.

In connection to the issues discussed in this paper, open-ended

configurations of transnational production and variable processes of economic globalisation are increasingly putting a strain on the already weak capability of domestic labour law to ensure justice at work for migrants. This situation may be seen as a call for migrant labour rights to comprehensively enter the international legal reality.