
Regulating labour recruitment to prevent human trafficking and to foster fair migration:

Models, challenges and opportunities

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Preface

Fundamental principles and rights at work are at the core of ILO's decent work agenda. The ILO Declaration on Fundamental Principles and Rights at Work and its follow-up was adopted by governments, workers and employers at the International Labour Conference in 1998. The principles and rights enshrined in the 1998 Declaration – respect for freedom of association and collective bargaining and the elimination of child labour, forced and compulsory labour and discrimination at work—are recognized as universal human rights.

The Fundamental Principles and Rights at Work Branch (FUNDAMENTALS) provides leadership and knowledge to sustain and accelerate progress towards the full realization of those rights worldwide. A central component of its integrated Strategy (2015-2020) is to further enhance global understanding of effective policies in order to build a solid human rights and business case for the promotion of fundamental principles and rights at work. The strategy recognizes the importance of research on labour recruitment and employment practices as a basis for more effective laws and policies to prevent violations of fundamental rights at work.

This working paper has been published as part of ILO's Fair Recruitment Initiative announced by the Director-General in his report to the International Labour Conference in 2014. This multi-stakeholder initiative is implemented in collaboration with the ILO's Labour Migration Branch (MIGRANT) and many international, regional and national partners. As such, it is also an integral part of the ILO's Fair Migration Agenda, which seeks to broaden choices for workers to find decent work at home and abroad, with full respect of their human and labour rights.

An important pillar of the Fair Recruitment Initiative is to advance and share knowledge on policies, laws, emerging practices and challenges related to the recruitment of workers within and across countries. We hope this working paper will stimulate further discussion and effective action to foster fair recruitment practices, prevent human trafficking and reduce the costs of labour migration.

We would like to thank the authors for this important piece of research and all ILO colleagues involved in the review process. Thanks are also extended to the US Department of State's Office to Monitor and Combat Trafficking in Persons for supporting this research. Opinions and ideas expressed in this working paper are the responsibility of the authors and do not necessarily represent the policies of the US Department of State's Office to Monitor and Combat Trafficking in Persons or constitute an endorsement by the International Labour Organization.

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The responsibility for any errors or misrepresentation rests solely with the authors..

Glossary¹

Term	Definition
Labour recruiter	The term “labour recruiter” as expressed in the Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), can refer to both private and public entities that offer labour recruitment services. Private entities can take many forms: formal (e.g. registered under commercial or other law) or informal (not registered, such as informal sub-agents), profit-seeking (e.g. fee charging agencies) or non-profit (e.g. trade union hiring halls).
Private employment agencies	Private employment agencies fall within the definition of labour recruiters. In particular, they are defined by the ILO Private Employment Agencies Convention, 1997 (No. 181), as “a natural or legal person, independent of the public authorities, which provides one or more of the following labour market services: (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships that may arise therefrom; (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a “user enterprise”) that assigns their tasks and supervises the execution of these tasks; (c) other services relating to job-seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.” (Article 1(1)).
Migrant worker	As per the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families definition, a migrant worker is “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national”. ² In some cases, “internal” migrant workers who are recruited within a country may face similar risks as those who cross international borders. Where the report refers to internal migrants, this is made clear in the text.
Trafficking in Persons	Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons 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

¹ This Glossary only contains definitions that are provided in international standards.

² International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 2(1). Additional definitions may be found in the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).

purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

Forced labour

The ILO Forced Labour Convention, 1930 (No. 29), defines forced or compulsory labour 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." (Art. 2 (1)). The Protocol of 2014 to the Forced Labour Convention, 1930, reaffirmed this definition, and stressed the need for “specific action against trafficking in persons for the purposes of forced or compulsory labour.” (Art. 1 (3)),

List of acronyms

ACTRAV	ILO Bureau for Workers' Activities
ANAPEC	National Agency for the Promotion of Employment and Skills (Morocco)
ANEM	Algeria's National Employment Agency
ANETI	National Agency for Employment and Independent Work (Tunisia)
BCEA	Basic Conditions of Employment Act (South Africa)
CAS	ILO Committee on the Application of Standards
CDN	Canadian Dollars
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
EC	European Commission
EO	Executive Order (United States of America)
EPS	Employment Permit System of the Republic of South Korea
EU	European Union
FOIL	ILO Sub-regional Programme for Developing Integrated Training and Labour Intermediation Systems
GCC	Gulf Cooperation Council
GDP	Gross Domestic Product
GLA	Gangmasters' Licensing Authority (UK)
GMS	Greater Mekong Sub-region
ILC	International Labour Conference
ILS	International Labour Standards
INA	Immigration and Nationality Act (Canada)
IOE	International Organisation of Employers
IOM	International Organization for Migration
ITUC	International Trade Union Confederation
ITS	Industrial Trainee Scheme (South Korea)
JITCO	Japan International Training Cooperation Organization
LEAAZ	Labour Consultants and Employment Agencies Association of Zambia
LRA	Labour Relations Act (South Africa)
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MOEL	South Korean Ministry of Employment and Labour
MOHA	Ministry of Home Affairs (Malaysia)
MOL	Ministry of Labour

MOU	Memorandum of Understanding
MSD	Ministry of Social Development (Mexico)
NACTU	National Council of Trade Unions (South Africa)
NES	National Employment Service (Mexico)
OECD	Organization for Economic Co-operation and Development
OHCHR	UN Office of the High Commissioner for Human Rights
POEA	Philippines Overseas Employment Administration
QIZ	Qualifying Industrial Zone
RACT	Employment Agency Regulation (Mexico)
RMB	Ren Min Bi (legal tender of China)
TFWP	Temporary Foreign Worker Programme (Canada)
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNDESA	United Nations Department of Economic and Social Affairs
UNODC	United Nations Office on Drug and Crime
US	United States of America
US\$	United States Dollars
WRAPA	Manitoba's Worker Recruitment and Protection Act (Canada)
WTO	World Trade Organization

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1. Introduction and background

1.1. Labour mobility and the challenge of protecting (migrant) workers during recruitment

The global integration of national economies has increased the flow of goods, services, capital, information and, to a lesser extent, people within and across international borders. Demographic changes, conflict, environmental catastrophes and growing inequality push ever more people to seek employment far away from their homes. At the same time, emerging centres of global production and the growing demand for services provide many opportunities, especially for skilled and semi-skilled workers.

As a consequence, international labour migration is increasing every year and there are no signs that the trend will be reversed in the near future. According to the most recent data, the number of international migrants increased by 77 million between 1990 and 2013, from 154 million to 232 million. Approximately 48 per cent of international migrants are women who are, in increasing numbers, migrating independently rather than as dependents. After accelerating between 2000 and 2010, growth in international migration has slowed slightly since then. The slowing growth can be attributed to the economic crisis that hit countries in Europe and North America that receive a large number of migrants. Since 2000, the growth rate of migration has been higher in developing, as opposed to developed, regions. According to recent estimates, most labour migration takes place in Europe and Asia, including in the Middle East.³ In 2010, the ILO estimated that economically active migrants and their families represented 90 per cent of the total international migrant population.⁴ A significant part of global migration flow is related to temporary, seasonal and circular migration, especially for low-skilled work in agriculture, manufacturing construction, domestic work and other services.⁵

Labour mobility is also increasing within national borders, with the most populous countries providing a telling example. There are about 230 million internal migrant workers in China, representing about 20 per cent of its total population of 1.38 billion. The majority of these internal migrants move from rural areas to booming coastal cities in the East, many only temporarily.⁶ In India, about 30 per cent (330 million) of the population of 1.2 billion are internal migrants. Most seek

³ United Nations, Department of Economic and Social Affairs, Population Division Database, International migrant stock: By destination and origin 2013, available at: <http://www.un.org/en/development/desa/population/migration/data/estimates2/estimatesorigin.shtml> [accessed 22 June 2015].

⁴ ILO: International labour migration: A rights-based approach, Geneva 2010, p. 18.

⁵ According to the OECD, temporary migration flows had been rising until 2007 when they reached a high of 2.5 million. In 2012, temporary migration flows fell by 4.4 per cent and stood at approximately 75 per cent of their 2007 peak; see OECD, International Migration Outlook, Paris 2014, pp18.

⁶ ILO Office Beijing, based on data of the National Office of Statistics.

employment in more affluent states, and much of India's internal migration is seasonal.⁷ In both countries, internal migration far exceeds emigration to other countries.

Labour mobility, while being a positive development as such, comes at a price if it is not properly regulated. All across the world, a disturbing number of reports have emerged about the exploitation and abuse of workers, especially migrant workers, by unscrupulous labour recruiters and fraudulent and abusive employment agencies.⁸ In some cases, these abuses amount to trafficking in persons for the purpose of forced or compulsory labour. The ILO highlighted the relationship between inadequate mechanisms of recruitment and forced labour in its third Global Report on Forced Labour in 2009, stating that “there is growing awareness that many present-day arrangements for recruiting temporary workers display serious deficiencies. In part, these derive from loopholes in the existing labour laws, which fail to articulate the respective responsibilities of recruiting agents and final employers in providing safeguards against abusive practices, including forced labour. There are also many cases where detailed regulations on fee charging are simply not enforced and workers can, in practice, find themselves paying ten times or more the maximum amount provided for in national laws and regulations.”⁹

Further ILO research probing the relationship between forced labour, human trafficking and unscrupulous labour recruitment demonstrated a correlation between the reliance of workers on a third party to receive information and the credit required to access employment opportunities abroad. A key finding of this research was that the payment of recruitment fees by a worker increased their risk of ending up in forced labour.¹⁰ The payment of high recruitment fees contributes to the increased vulnerability of workers as they have to repay their debts for several months and sometimes years. During this period, they are highly dependent on their employers, who often deduct recruitment fees directly from their wages, sometimes at usury rates. Internal migration for low-skilled work, by contrast, is often stimulated by wage advances that are given to workers by labour recruiters. Workers are then “bonded” to their employers (and recruiters) for the entire season and sometimes for years or even a life time until they have paid back those advances.¹¹

⁷ Ministry of Statistics, National Sample Survey Organization data, 2007-2008.

⁸ See studies cited in ILO (Jennifer Gordon): *Global Labour Recruitment in a Supply Chain Context*, Geneva 2014 (footnote 6).

⁹ ILO: *The cost of coercion*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 98rd Session, (Geneva 2009), p. 27.

¹⁰ ILO: *Profits and Poverty: The Economics of Forced Labour*, (Geneva 2014); See also Katharine Jones: *For A Fee: The business of recruiting Bangladeshi women for domestic work in the Middle East*, ILO Working Paper 2015; Beate Andrees: *Combating the criminal activities in the recruitment of migrant workers*; in: *Merchants of Labour*, ILO (Geneva 2006); Rita Afsar: *Unravelling the Vicious Cycle of Recruitment: Labour Migration from Bangladesh to the Gulf States*, Declaration Working Paper/WP/63/2009; G.M. Arif: *Recruitment of Pakistani Workers for Overseas Employment: Mechanisms, Exploitation and Vulnerabilities*, ILO Declaration/WP/64/2009.

¹¹ See for example: Beate Andrees and Patrick Belser (eds.): *Coercion and Exploitation in the Private Economy*, ILO/Lynne Rienner (2009); Ravis S. Srivastava: *Bonded Labour in India, Its incidence and Pattern*, ILO Declaration/WP/43/2005; Patricia Trindade Maranhao Costa: *Fighting Forced Labour: The example of Brazil*, ILO, (2009).

The issue of labour recruitment and the responsibilities of governments and employers to protect workers from such fraudulent and abusive practices were at the centre of the debate at the 103rd International Labour Conference that led to the adoption of the Protocol of 2014 to the Forced Labour Convention, 1930, and the Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203). The overall purpose of these new instruments is to strengthen action against forced labour, in particular in the areas of prevention, protection and remedies. The Protocol and Recommendation also create a clear link between human trafficking and forced labour and stipulate: “The definition of forced or compulsory labour contained in the Convention is reaffirmed, and therefore the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour” (Article 1(3), Protocol).

More specifically, the Protocol and Recommendation contain provisions aimed at “protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process” (Article 2(d), Protocol) and on the “promotion of coordinated efforts by relevant government agencies with those of other states to facilitate regular and safe migration and to prevent trafficking in persons, including coordinated efforts to regulate, license and monitor labour recruiters and employment agencies and eliminate the charging of recruitment fees to workers to prevent debt bondage and other forms of economic coercion” (Para 4 (i), Recommendation).

Also at the 103rd Session of the ILC, the ILO Director-General launched a Fair Migration Agenda, which was discussed and endorsed by the Conference.¹² In his report to the Conference, he stressed that “migration has moved centre stage in national, regional and global policy agendas, bringing with it not only a sense of urgency in societies and among decision-makers, but also a set of controversies that can be damaging to social coherence if left unaddressed [...] despite the positive experiences that can and should be cited, migration is still too frequently associated with unacceptable labour abuses in the face of which inaction is an abdication of responsibility”.¹³ An important objective of the ILO’s Fair Migration Agenda is to ensure fair recruitment and equal treatment of migrant workers to prevent exploitation and level the playing field with nationals.

The high economic and social costs of labour migration are increasingly being recognized by the international community as serious impediments to realizing sustainable development outcomes. These costs need to be viewed in the broader context of employment and labour markets and not merely through the narrow lens of remittance transactions. Indeed, the Secretary-General’s eight-point agenda for action on making migration work for development, contained in his report to the United Nations General Assembly High-level Dialogue on International Migration and Development, held in

¹² ILO: Fair migration: setting an ILO agenda, Report of the Director-General to the International Labour Conference, 103rd Session, 2014.

¹³ Ibid, p. 3.

October 2013, views such costs more broadly to also include the costs relating to recruitment, among others: “There are enormous gains to be made by lowering costs related to migration, such as the transfer costs of remittances and fees paid to recruiters, especially by low-skilled migrant workers. In addition, countries can strengthen the benefits of migration by enhancing the portability of social security and other acquired rights, and by promoting the mutual recognition of diplomas, qualifications and skills”.¹⁴

Building on the growing political will to address fraudulent and abusive labour recruitment practices, the ILO launched the Fair Recruitment Initiative with the following objectives:

- To help prevent trafficking in persons for the purposes of forced or compulsory labour within and across countries;
- To protect the rights of workers, in particular migrant workers, from abusive and fraudulent practices during the recruitment process, which involves pre-selection, selection, transportation, placement and the possibility to return; and,
- To reduce the costs of labour migration and enhance development outcomes for migrant workers and their families, as well as for countries of origin and destination.

The Fair Recruitment Initiative is based on a four-pronged approach centred on social dialogue. The four strategic objectives of the initiative are to enhance global knowledge on national and international recruitment practices, strengthen laws, policies and enforcement mechanisms, promote fair business practices, and empower workers and provide access to remedies.

This multi-stakeholder initiative is being implemented in collaboration with the ILO’s social partners, notably the International Trade Union Confederation (ITUC) and the International Organisation of Employers (IOE), governments, UN agencies, civil society organisations and other stakeholders.¹⁵

1.2. Research design

The purpose of this paper is to contribute to a better understanding of: international labour standards and their application with regards to labour recruitment; regulatory models and approaches aimed at preventing human trafficking and exploitation of workers in the recruitment process; and, models of enforcement to ensure compliance with national law and international standards. Special emphasis is put on the protection of migrant workers in the context of cross-border recruitment and placement.

¹⁴ United Nations, General Assembly, 68th Session, *International migration and development*, Report of the Secretary General, A/68/190 (25 July 2013), para. 113.

¹⁵ For more information about the Initiative see the following link: www.ilo.org/fairrecruitment.

The paper aims to present a basic framework for identifying emerging good practices for further discussion. As such, it can also be used as a preliminary baseline for the implementation of the second strategic objective of the ILO's Fair Recruitment Initiative – strengthening laws, policies and enforcement mechanisms to protect workers from abusive and fraudulent recruitment practices. While the extent and manifestations of those abuses have been extensively covered by other reports,¹⁶ there is now a need to focus on emerging practices to enhance protection of workers from abuse, especially in the context of cross-border migration. Such emerging practices can come under criminal, labour or administrative law. All of those are complementary and need to be enforced.¹⁷

The present paper is primarily a descriptive presentation of international labour standards and national laws, regulations and enforcement mechanisms. It focuses in particular on private recruiters and employment agents. It is presented as a work in progress to solicit feedback and comments to further enhance research design and develop a rigorous baseline against which progress can be measured in the future.

The following questions have guided this research project:

- What are the main international labour standards with regards to labour recruitment and how have the ILO supervisory bodies assessed national regulation and its implementation?
- What are the different models and approaches to regulate labour recruitment? What are the most recent trends in terms of statutory regulation?
- How are private employment agencies monitored and how are statutory regulations enforced? What are the main challenges with regards to enforcement?

There are many questions that this paper will not address or only touch upon in a cursory manner, such as labour recruitment facilitated by public institutions (e.g. public employment services); the role of bilateral and multilateral agreements to facilitate the recruitment of migrant workers; private – public collaboration in labour recruitment; voluntary regulation by the recruitment industry and employers; the role of workers' organisations in the negotiation of recruitment agreements and their monitoring; or access to remedies. Those questions will be subject for further research and discussion.

¹⁶ For an overview of relevant studies see studies cited in ILO (Jennifer Gordon): Global Labour Recruitment in a Supply Chain Context, Geneva 2014 (footnote 6).

¹⁷ On the complementary of labour and criminal justice, see ILO: The cost of coercion, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 98rd Session, (Geneva 2009).

Definitions and concepts

The concepts referred to in this paper are often ill defined and misunderstood. Special attention has therefore been given to providing accurate definitions, based on international standards where possible. The central concept of this paper is recruitment for employment (paraphrased here as “labour recruitment”). Labour recruitment can be seen as a process in which one party provides specific services based on an agreement/contract established between the provider and the recipient of the service (typically the employer and the worker/job-seeker) for the purpose of matching job-seekers with available job offers. In the private sector, the exchange of such services is normally offered for a fee, which one or both recipient parties (the employer and the worker/job-seeker) will have to pay once the employment contract has been signed.¹⁸ Recruitment involves several stages: canvassing, testing, (pre) selection, placement, and in some cases, repatriation of the worker. These stages can involve ancillary services, such as medical tests, document processing, or preparing job-seekers. Placement can also include transportation within or across international borders, harbouring and transfer to the premises of the employer. Labour recruitment therefore refers to job matching and certain ancillary services such as those listed above.¹⁹

Both private and public entities can offer labour recruitment or placement services. Private entities can take many forms: formal (e.g. registered under commercial or other law) or informal (not registered, such as informal sub-agents), profit-seeking (e.g. fee charging agencies) or non-profit (e.g. trade union hiring halls). To capture those various situations, the Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), referred to “labour recruiters” and “employment agencies” in a broad sense.²⁰ For the purpose of this paper, both terms are used, unless otherwise defined in national law. The focus is on private labour recruiters and employment agencies.

The service of labour recruitment or job matching is also covered by the definition of private employment agencies provided in the ILO Convention on Private Employment Agencies, 1997 (No 181). A private employment agency, as defined in Convention No. 181, is “any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

¹⁸ The role of private employment agencies in the functioning of labour markets, International Labour Conference, 81st Session, 1994, p. 13; ILO: Trafficking for forced labour: How to monitor the recruitment of migrant workers, (Geneva, 2005).

¹⁹ On labour market intermediation more broadly see: David Autor: The economics of labour market intermediation: An analytical framework, No 14348, National Bureau of Economic Research, 2008

²⁰ Both terms “private recruiters” and “employment agencies” have been used in the Forced Labour (Supplementary Measures) Recommendation, No 203, paragraph 4 (i) and will henceforth be used in this paper.

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- (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships that may arise therefrom;
 - (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") that assigns their tasks and supervises the execution of these tasks;
 - (c) other services relating to job-seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.” (Article 1(1)).

The distinction between agencies offering any of these services is not always clear-cut. While labour recruiters would fall into the first category, they may also offer training services or other information. In some instances, they may also employ the worker, which would bring them under the second category listed above. The emphasis of this paper, however, is not on the employment of workers in order to make them available to a third party but on the regulation of the recruitment process, particularly as it involves the crossing of international borders (Article 8).

Migration is therefore an important concept in this paper. In most instances, migration refers to the movement of people across international borders; As per the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families definition, a migrant worker is “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national”.²¹ There is no legal definition of internal migration; however various descriptors have been used to define internal migration for statistical purposes.²² Internal migration occurs within countries and may involve the crossing of internal administrative borders, e.g. of provinces or states. Countries that have agreed on establishing a single labour market (e.g. EU member states) also experience movements of their citizens across international borders yet within a common labour market.

Migration can be voluntary or forced, regular or irregular. In the international context, irregular migration refers to the breach of immigration laws, including laws regulating the entry, residence or employment of non-nationals. Irregular migration can sometimes be linked to a process of *smuggling*,

²¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 2 (1). Additional definitions may be found in the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).

²² UN Department of Economic and Social Affairs, Population Division: Cross-national comparisons of internal migration: An update on global patterns and trends. Technical Paper No 2013/1. UNDP estimates based on internal migration indicators suggest that, in 2009, there were approximately 740 million internal migrants. See UNDP: *Human Development Report 2009 Overcoming barriers: Human mobility and development*, available at: http://hdr.undp.org/sites/default/files/reports/269/hdr_2009_en_complete.pdf [accessed 22 June 2015].

which involves the illegal transportation of a person across international borders.²³ In certain cases, the circumstances of irregular as well as regular migration may amount to human trafficking, which is further defined below.

The paper will also discuss *regulation*, in particular emerging regulatory practices to prevent abusive and fraudulent labour recruitment. Regulation can be understood as an activity that aims to influence behaviour of various actors with a view to preventing undesirable conduct and to enabling the occurrence of desired conduct; in other words, regulation aims to influence behaviour by using positive and negative incentives.²⁴

Regulation can be “statutory”, i.e. laws and administrative decisions that are enacted by a legislative body or government authority and enforced by a government entity. Regulation can also be “voluntary”, i.e. measures adopted by an industry, business association, an individual company or a multi-stakeholder initiative involving various actors, including civil society organisations. Regulation can also be the outcome of a collective bargaining process or other non-statutory processes of negotiation. Labour market regulations play a key role in shaping the conduct of labour recruiters and employment agencies. A critical aspect of labour market regulations is to ensure decent working conditions,²⁵ including by protecting workers from abusive and fraudulent recruitment practices.²⁶

The emphasis of this paper is on statutory regulation of labour recruiters and private employment agencies and related enforcement mechanisms, which contain positive and negative incentives, i.e. they can reward law-abiding agencies through tax breaks or impose sanctions in the case of non-compliance. There are three basic models of statutory regulation:²⁷

1. **Prohibition:** Private labour recruiters and employment agencies are banned from the labour market, and state authorities, usually public employment services, have a monopoly on job matching and placement services. While a general government monopoly has become very rare, private labour recruiters and employment agencies may be prohibited from handling certain categories of workers, such as migrant

²³ UN Protocol against the smuggling of migrants by land, sea and air, supplementing the UN Convention against Transnational Organised Crime, 2000; see also Anne Gallagher and Fiona David: *The international law of migrant smuggling*, Cambridge University Press, 2014.

²⁴ Robert Baldwin, Martin Cave, Martin Lodge: *Understanding Regulation: Theory, Strategy and Practice*, Oxford University Press, 2012, p. 3; see also: Julia Black: *Critical Reflections on Regulation*, London School of Economics and Political Science, 2002.

²⁵ Based on the ILO concept of “decent work” enshrined in the ILO Declaration on Social Justice for a Fair Globalization, adopted in June 2008 by governments, workers and employers representative at the International Labour Conference, 97th Session.

²⁶ On the broader debate of labour market regulations see: Sangheon Lee and Deirdre McCann (eds): *Regulating for decent work: new directions in labour market regulation*, 2011; Janine Berge and David Kucera (eds): *In defence of labour market institutions: cultivating justice in the developing world*, 2008.

²⁷ ILO: *Guide to Private Employment Agencies: Regulation, monitoring and enforcement*, ILO 2007.

workers, or certain types of services, such as making workers available to a user enterprise on a temporary basis.

2. **Licensing:** Private labour recruiters and employment agencies must request a license that is granted when certain conditions are met, such as documented proof of the agency's financial, professional and marketing capability. A license is generally renewed as long as the conditions are still met; otherwise they can be withdrawn. Licensing implies that the government establishes special administrative procedures to regularly inspect agencies, measure compliance and imposes sanctions in the case of non-compliance. Licenses are generally granted after payment of an annual tax. They are issued under domestic commercial, trading or labour law and often monitored by the Ministry of Labour. In some countries, certain types of agencies are required to have a license while others may come under a general registration scheme.
3. **Registration:** Private labour recruiters and employment agencies are registered in the same way as any other industrial or commercial business and are subject to controls, just like other businesses.

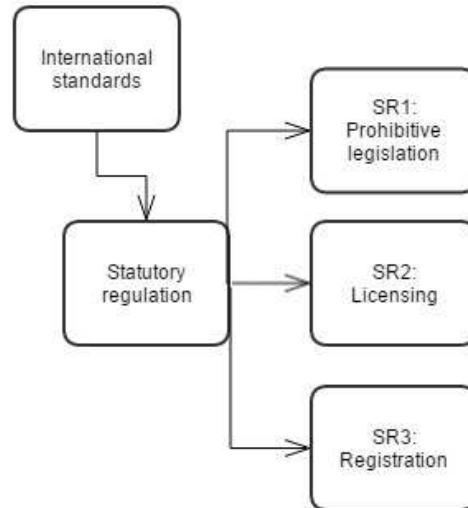


Figure 1: Models of statutory regulation

Voluntary regulation of labour recruiters and employers agencies may include the use of codes of conduct, or systems of certification or rating.²⁸ These systems are sometimes linked to private or third party auditing. Regulation can also be achieved through collective bargaining and the conclusion of collective agreements. Collective bargaining often intersects with government regulation, especially in countries with strong social partner representation.²⁹

International standards influence national laws, policies and regulations. They provide an overarching framework and aspirational goals towards which national law and practice should ideally converge. International labour standards in particular are the “rules of the game” of the global economy to ensure a level playing field and to provide men and women with equal opportunities to decent work.³⁰ Given the diversity of national labour markets, international labour standards provide a certain degree of flexibility, recognizing that there is no one-size-fits-all approach. In the same spirit, this paper aims to provide an overview of different regulatory models and the specific context from which they have emerged.

For regulation to be effective, the law needs to be enforced by a transparent and functioning administration. Enforcement refers to a system of deterrence, discovery, sanctions and rehabilitation to ensure compliance with the law. Different authorities can be involved in enforcement of recruitment standards, such as public employment services, labour inspectorates, police, specialist enforcement units, immigration authorities and tax authorities.

Private labour recruiters and employment agencies, like other businesses, operate along a continuum of formality and informality, compliance and non-compliance with regard to national and international standards. The extreme ends of this continuum can be considered as “human trafficking” on the one hand and as “decent/fair recruitment” on the other. In between, there is a broad spectrum of abusive and fraudulent practices. For the purpose of this paper, abusive and fraudulent recruitment practices refer to one or more of the following, presented here as a non-exhaustive list:³¹

- Charging fees to workers that are not in their interest³² and without prior consultation with social partners;
- Threats and intimidation, including verbal and psychological abuse;

²⁸ For example, the International Organization for Migration (IOM) and the International Organisation of Employers (IOE) with a coalition of stakeholders including governments, private sector employers and recruitment intermediaries, and civil society actors, are developing a voluntary certification system for recruitment intermediaries called the International Recruitment Integrity System (IRIS).

²⁹ Further research is planned for 2015/2016 to study measures of self-regulation and social dialogue.

³⁰ ILO: Rules of the Game: A brief introduction to International Labour Standards, revised edition, (Geneva 2014).

³¹ The terms “abusive and fraudulent practices” is used in Convention No. 181 and therefore also used in this context. In 2008, the ILO carried out an expert survey to better assess indicators of abusive and fraudulent practices along the continuum of forced labour/trafficking. They are reproduced in: ILO, Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children (Geneva 2012).

³² Based on ILO Private Employment Agencies Convention, 1997 (No. 181), see next section for further explanation.

-
- Deception with regards to contracts, working and living conditions as well as failure to disclose relevant information;
 - Restriction on the freedom of movement;
 - Retention of identity documents with the aim to control jobseekers;
 - Physical and sexual violence;
 - Recruitment of children below working age; and,
 - Recruitment of workers into hazardous and unsafe work.

A combination of these fraudulent and abusive recruitment practices could amount to the crime of trafficking in persons if the end result of the recruitment process is exploitation. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organised Crime (henceforth UN Trafficking Protocol), defines ‘trafficking’ 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” (Article 3 (a)). The definition further provides that, for the purposes of the Convention, exploitation shall include as “at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs” (ibid). Another important element of the definition, which brings it within the scope of the Forced Labour Convention (No. 29), is the means of coercion used against an individual, including the threat or use of force, abduction, fraud, deception, the abuse of power or a position of vulnerability, which exclude the voluntary offer or consent of the victim. With regard to the latter, the UN Trafficking Protocol contains a qualifying provision that the consent of a victim of trafficking to the intended exploitation shall be irrelevant where any of the abovementioned means have been used.”³³

³³ ILO: Giving globalization a human face: General survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (1B), International Labour Conference, 101st Session, (Geneva 2012), pp 297.

Methodology

The paper is based on an empirical review of regulatory measures covering 54 countries from different regions of the world (see Annex 1). Countries were selected by using the following criteria: a) ratification of ILO Conventions, in particular the Private Employment Agencies Convention, 1997 (No. 181); b) existence of significant labour migration flows within, from or to the countries (assuming a demand for services offered by labour recruiters and employment agencies in those countries); and c) balanced geographical coverage. In eight countries, in-depth studies were carried out based on semi-structured interviews with policy makers, labour recruiters and employment agencies, enforcement authorities and other stakeholders. The results of those studies will be published separately but they were used to inform this general overview of regulatory approaches. Information was stored in a global database that will be made publicly available once more country profiles are validated and uploaded.

In addition, the study was informed by a review of 420 observations and direct requests made by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) in relation to national reports submitted by States parties to the Forced Labour Convention, 1930 (No. 29) and the Private Employment Agencies Convention, 1997 (No. 181) during the period of 2004 - 2014. Comments were reviewed by using the following criteria: a) law and practices regarding the charging of recruitment fees; b) measures to protect migrant workers from abusive and fraudulent recruitment practices, including human trafficking; and, c) enforcement, with special emphasis on the role of labour administration and labour inspection.

Under the Fair Recruitment Initiative, the ILO also organised two tripartite consultation meetings in 2014, and a technical meeting in 2015, involving government representatives around the world, workers' and employers' representatives, civil society organisations, representatives of international organisations, independent experts and donor representatives. The reports of those meetings provided further background information to this paper, including discussions on international standards, national law and practice, challenges in enforcement and recommendations for further action.³⁴ The various stakeholders invited to those meetings contributed to the richness of the debates and the identification of emerging practices that were further examined in this paper.³⁵

Eventually, this and further research could be used to identify good practices. However, given the lack of data and research on this topic, the paper is more limited in scope. It identifies “emerging” as opposed to “good practices”. Good practices result from a rigorous process of research, evaluation

³⁴ For more information about the Initiative see the following link: www.ilo.org/fairrecruitment.

³⁵ Among others, stakeholders which participated in those meeting include the International Trade Union Confederation (ITUC), the International Organization of Employers (IOE), the International Confederation of Private Employment Services (CIETT), Vérité, Migrant Forum in Asia (MFA), and the Institute for Human Rights and Business (IHRB).

and peer review that demonstrate a positive impact of the practices and recommend the practice for replication. They represent successful strategies or interventions, and their positive impact can be traced through a clear cause and effect relationship. Good practices have achieved measurable results or benefits and it can be assumed that they produce the same positive results in different settings.

With some exceptions, it is not yet possible to establish good practices regarding models of regulation and enforcement that aim to limit abusive and fraudulent recruitment practices, either because the practice is too recent and/or its impact has not yet been tested through rigorous research. There is, however, some emerging practice that is highlighted in this study, which will possibly be further asserted by the results of the forthcoming 2016 ILO General Survey on the Instruments concerning Migrant Workers.³⁶ An emerging practice must be in line with international standards, values and recommendations with regards to labour recruitment (for the purpose of this study, those standards were confined to the ILO Conventions mentioned above). Emerging practices should also demonstrate some positive outcomes, based on a continued process of evaluation, feedback and quality control.³⁷

³⁶ Report from for the General Survey concerning the Migration for Employment Convention (Revised), 1949 (No. 97), the Migration for Employment Recommendation (Revised), 1949 (No. 86), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Migrant Workers Recommendation, 1975 (No. 151), ILO, 2014.

³⁷ ILO: Policy Guidelines for results-based evaluation, Guidance note no. 3: Evaluation lessons learned and emerging good practice, (Geneva 2014).

2. International standards to regulate the recruitment of workers

2.1. The evolution of international labour standards to protect workers from abusive and fraudulent recruitment practices

International Labour Standards (ILS) address a wide spectrum of employment-related issues, such as rights and conditions at work, labour administration and inspection, social protection, labour migration and skills, among others. Since its establishment in 1919, the ILO has adopted 189 Conventions, six Protocols and 204 Recommendations. Some of those instruments deal specifically with aspects related to the recruitment of workers, including special categories of workers such as migrants, domestic workers or seafarers. The purpose of this section is to provide an overview of key international labour standards relevant to the recruitment of workers and to discuss their supervision and application at national levels.

The ILO's overall approach to the recruitment and employment of workers is enshrined in the 1944 Declaration of Philadelphia, incorporated into the ILO Constitution in 1946, which states that "labour is not a commodity".³⁸ This principle provided the moral and intellectual justification for more specific standards aimed at protecting workers from fraudulent and abusive recruitment practices. At the beginning of the 20th century, the increasingly assertive trade unions' and philanthropic organisations' denunciations of widespread and systematic abuse of workers by unscrupulous labour recruiters eventually led to stronger state intervention.³⁹

While the subject of recruitment was not necessarily associated with the discussion of forced labour at the time, a connection was progressively made as the international law evolved, and was established in a more explicit manner in recent instruments. The introduction to this paper already cited the newly adopted Protocol of 2014 and Recommendation No. 203, supplementing the Forced Labour Convention, 1930 (No. 29). The Forced Labour Convention and its Protocol are part of ILO's fundamental Conventions, which apply to all workers, whatever their status and origin. ILO member States are obliged to promote and realize those fundamental principles and rights independent of whether they have ratified the respective Conventions. Non-ratifying member states of the ILO are required to submit reports under the follow-up mechanism of the 1998 Declaration on Fundamental Principles and Rights at Work, while ratifying member states are subject to ILO's regular supervisory system as will be further explained below.

³⁸ See also the Labour Chapter of the Versailles Peace Treaty.

³⁹ See for example Bruce Goldstein: 'Merchants of labour' in three centuries: Lessons from history for reforming 21st century exploitation of migrant labour; in *Merchants of Labour*, ILO (Geneva 2006).

The ILO adopted its first Convention against Forced Labour in 1930 (No. 29) as a direct follow-up to the adoption of the Slavery Convention by the League of Nations in 1926. At the time, the ILO's main concern was the elimination of forced labour in territories under colonial administration; hence the issue of human trafficking was not the focus of this particular instrument. The ILO's subsequent Abolition of Forced Labour Convention, 1957 (No. 105), that dealt with forced labour imposed as a means of political coercion, economic development, discrimination or labour discipline, also did not cover the issue human trafficking.

The link between forced labour, human trafficking and abusive recruitment practices has, however, been at the centre of more recent discussion on supplementary standards to eradicate forced and compulsory labour. This discussion, starting at the International Labour Conference in June 2012, eventually led to the adoption in June 2014 of the above-mentioned Protocol to the Forced Labour Convention and Recommendation No. 203. The Protocol explicitly recognizes the need for special measures to address trafficking for the purpose of forced or compulsory labour (Article 1(3)) and calls for measures to prevent forced labour, including the protection of persons, especially migrant workers, from abusive and fraudulent recruitment practices (Article 2 (d)). The Recommendation provides further guidance on this issue as cited above. It can be considered as an important milestone that such specific language on recruitment is now included in one of the ILO's fundamental instruments.⁴⁰ By explicitly linking the issue of forced labour with the governance of labour recruitment, the ILO standards have paved the way for enhancing prevention, protection and remedies, including through the application of labour law. As such, they complement and reinforce the UN Trafficking Protocol.

The protection of workers from abusive and fraudulent recruitment practices is also being addressed in the context of ILO instruments related to migration. The Migration for Employment Convention (Revised), 1949 (No. 97) sets standards regarding the recruitment and employment of migrant workers. A core principle of the Convention is equality of treatment between migrant workers lawfully residing in the territory and national workers with respect to a number of matters relating to conditions of work, trade union rights, social security, employment taxes and legal proceedings (Article 6). Attached to the Convention are two annexes that contain specific provisions on the recruitment, introduction and placing of migrant workers under government-sponsored or other arrangements. The supplementing Recommendation (No. 86) provides further guidance on recruitment and model arrangements for temporary and permanent migration. The instruments stipulate that there should be free services to assist migrant workers, in particular providing them with accurate information. States should take specific measures against "misleading propaganda". The services rendered by public employment agencies should be free of charge and in case a system of

⁴⁰ The Forced Labour Convention, 1930 (No. 29) has been ratified by 177 member States, as of 16 May 2015. The Protocol can only be ratified by countries that are a party to the Forced Labour Convention.

supervising contracts of employment is in place, documents including an employment contract and adequate information should be provided. While private employment agencies are not excluded from being involved in the recruitment of migrant workers, state authorities should still bear primary responsibility.⁴¹

By the 1970s, many state-managed “guest worker” programmes in Europe had come to an end and private labour recruiters and employment agencies assumed a greater role in international migration, including by using irregular channels. In response to the changing nature of migration, the ILO adopted the Migrant Workers (supplementary Provisions) Convention, 1975 (No. 143) and supplementing Recommendation (No. 151). These instruments attempted mainly to control migration flows, eliminate irregular migration and to prosecute the “authors of manpower trafficking, whatever the country from that they exercise their activities” (Articles 2, 3, 5 and 6),⁴² while at the same time providing minimum standards of protection for migrant workers, irrespective of their migrant status (Articles 1 and 9). The other main objective of the 1975 instruments is to promote equality of opportunity and treatment between migrant workers in a regular situation and nationals, and eliminate discrimination in law and in practice.

In 2004, the issue of migrant workers was placed again on the agenda of the International Labour Conference. In preparation of the debate, the office carried out a survey; of the 90 member States that responded, 40 confirmed that private employment agencies are granted authorization to recruit migrant workers. In the majority of countries, however, employment agencies were not allowed to charge migrant workers for their services.⁴³

The debate in 2004 concluded with the adoption of a Resolution and Conclusions on a fair deal for migrant workers in a global economy, which was also contained in an ILO plan of action for migrant workers. The centrepiece of the plan was a call to develop a non-binding multilateral framework on labour migration that was adopted by a tripartite meeting of experts in November 2005.

The Framework was approved by the ILO Governing Body for publication and dissemination in March 2006. It lays out principles and guidelines on labour migration, including the recruitment of migrant workers, supported by a compilation of “best practices”. Principle No. 13 states that governments should give due consideration to the licensing and supervision of recruitment and placement services in line with Convention No. 181. Specific guidelines include for example that migrant workers receive understandable and enforceable employment contracts, are not subject to

⁴¹ The Convention has been ratified by 49 member States, including migrant destination countries, although many have excluded the annexes. Status as of 22 June 2015.

⁴² The Convention has been ratified by 23 countries; only a few of them are destination countries of migrant workers. Status as of 22 June 2015.

⁴³ Towards a fair deal for migrant workers in the global economy, Report IV, International Labour Conference, 92nd Session, 2004.

discriminatory treatment in the recruitment process and are not recruited into work that entails unacceptable hazards or risks. The guidelines further provide that recruitment fees should not be borne by migrant workers and that private employment agencies should be duly sanctioned for unethical practices. It also suggested that recruitment agencies should be required to place a bond or insurance to compensate workers in the event that contractual obligations are not met. Governments should also consider positive incentives for agencies displaying good performance.⁴⁴

Following a decision by the Governing Body, the ILO convened a Tripartite Technical Meeting on Labour Migration in November 2013 that called for special guidance to prevent abusive and fraudulent recruitment practices: “[T]he Office should... [I]n collaboration with constituents and GMG members and other stakeholders, develop guidance to promote recruitment practices that respect the principles enshrined in international labour standards, including the Private Employment Agencies Convention, 1997 (No. 181), and identify, document, and promote the exchange of good practices on reducing the financial and human costs of migration”.⁴⁵ The issue of migration has been proposed as a possible item of general discussion for the International Labour Conference in 2018,⁴⁶ and a General Survey on the application of the ILO’s migration conventions based on information on law and practice provided by governments and social partners in line with Art 19, 22 and 35 of the ILO Constitution is currently being carried out. Fair recruitment also features as a key subject in Outcome 9 on promoting fair and effective labour migration policies of the ILO Programme and Budget for 2016-2017. It can therefore be anticipated that the issue will remain a focus of ILO’s future work.

ILO standards dealing with the recruitment of workers more broadly also have a long history. The first generation of ILO Conventions, namely the Unemployment Convention, 1919 (No. 2), and the Fee-Charging Employment Agencies Convention, 1933 (No. 34), called for the establishment of free public employment services and a prohibition of fee charging private employment agencies. While those early standards did not eliminate fee charging private employment agencies, they did have an impact on tighter state regulation of their activities as well as the creation of free public employment services. After the end of the Second World War, Convention No. 34 was revised to make place for a more nuanced approach to private employment agencies. The Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96) offered ratifying member states the choice of either prohibiting fee charging employment agencies (Part II) or of regulating their activities (Part III). The first option also required governments to set up a free public employment services prior to the abolition of fee

⁴⁴ ILO Multilateral Framework on Labour Migration, Non-binding principles and guidelines for a rights-based approach to labour migration, (Geneva 2006).

⁴⁵ Tripartite Technical Meeting on Labour Migration, Geneva, 4-8 November 2013, TTMLM/2013/14, Conclusions, para. 5(iii).

⁴⁶ See Agenda of the International Labour Conference (2017–19), 323rd Session of the Governing Body, 12-27 March 2015, GB.323/INS/2.

charging agencies. If governments opted for Part II, they were required to establish a licensing system. Many of the 42 ratifying states chose the first option, reflecting the post-war consensus that governments should play a leading role in labour market intermediation to achieve full and productive employment for all.⁴⁷

The revision of Convention No. 34 was preceded by the adoption of the Employment Service Convention, 1948 (No. 88), which is another reflection of this post-war consensus. The Convention stipulates that ratifying member states should establish public employment services that “shall ensure, in co-operation where necessary with other public and private bodies concerned, the best possible organisation of the employment market” (Article 1(2)). The Convention enjoys wide ratification.⁴⁸ Both post-war Conventions (Nos. 96 and 88) hence assign a critical role to governments in job placement and intermediation services, and both recognize that there is a possible role to play for private agents. Countries have adopted different approaches. While some introduced a strict “state monopoly” on the issue of recruitment, both of national and international workers, others adopted a more liberal approach towards private employment agencies.

Over time, labour market regulations evolved and became more flexible, responding to the growing sophistication of global production systems and economic integration. The standard employment relationship based on direct and full-time employment is no longer as prominent and diverse forms of employment and contractual arrangements emerged, including the employment of workers by a sub-contractor or private employment agency and their assignment to user companies on a temporary basis. In parallel, private employment agencies enjoyed impressive growth rates in countries where their operations are legal.⁴⁹

These developments suggested a need to take a fresh look at international standards related to the recruitment, placement and employment of workers.⁵⁰ Eventually, the issue was put on the agenda of the International Labour Conference in 1994 as well as in subsequent years until ILO constituents agreed on a new international standard in 1997. The Private Employment Agencies Convention, 1997

⁴⁷ ILO: General Survey concerning employment instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, 2010, Report III (1B), International Labour Conference, 99th Session, (Geneva 2010).

⁴⁸ There are 90 ratification as of 22 June 2015 and 3 denunciations (Bulgaria, Italy, United Kingdom).

⁴⁹ ILO: The role of private employment agencies in the functioning of labour markets, (Geneva 1994). On the evolving debate of this issue see: ILO: Conclusions of the meeting of Experts on Non-Standard Forms of Employment, GB.323/POL/3, March 2015; ILO: Private employment agencies, promotion of decent work and improving the functioning of labour markets in private sector services, GDFPSS/2011; ILO: World Employment Social Outlook: The changing nature of jobs, (Geneva 2015).

⁵⁰ The main focus of Convention No. 96 was on the recruitment and placement of workers, less on temporary work agencies. The general view was however that Convention No. 96 also covered temporary work agencies. See Eric Gravel: ILO standards concerning employment services; in: ILO: Merchants of Labour, ed. by Christiane Kuptsch, (Geneva 2006).

(No. 181) entered into force in 2000 and has been ratified by 30 member states.⁵¹ It is supplemented by a Recommendation No. 188.

The adoption of the Convention marks a further shift from earlier ILO standards in that it recognizes the “role which private employment agencies may play in a well-functioning labour market” (Preamble). During the negotiations, the employers group emphasised that the recognition of private employment agencies would provide for a “healthy and flexible environment for growth” while the workers’ group was concerned with patterns of abuse and fraud, the undermining of collective bargaining agreements and the employment relationship as such.⁵²

As a result, the Convention seeks to strike a balance between the need for greater flexibility on the one hand, and the important goal of protecting workers on the other. The definition of private employment agency recognizes various labour market services, including “services consisting of employing workers with a view to making them available to a third party” (Art. 1(1)(b)), or what is often called temporary agency work. Member states may however prohibit certain types of private employment agencies in consultation with workers’ and employers’ organisations. Many of the substantive articles deal with the protection of workers, including the protection of their fundamental rights such as freedom of association and collective bargaining, equality of treatment and the banning of child labour (Articles 4, 5 and 9). Article 11 and 12 provide a list of issues requiring protection if workers are employed by a private employment agency, namely their protection with regards to: payment of minimum wages; working time and other working conditions; statutory social security benefits; access to training; occupational safety and health; compensation in case of occupational accidents or diseases; compensation in case of insolvency and protection of workers claims; maternity protection and benefits; and, parental protection and benefits.

The Convention does not specifically mention forced labour or human trafficking, however it provides for the special protection of migrant workers from abusive and fraudulent practices (Article 8). In addition, it includes an important provision on the regulation of recruitment fees (Article 7). It stipulates that workers shall not, directly or indirectly, be charged any fees related to their recruitment and placement. Exceptions to this general rule are possible if they are in the interest of the workers concerned and are being agreed in consultation with representative workers’ and employers’ organisations (Ibid). The prohibition of fee charging is very much at the heart of the ILO’s *leitmotiv* that labour should not be treated as a commodity and that access to work is a fundamental right.

Another important aspect of Convention No. 181 concerns its approach to the regulation and monitoring of private employment agencies and the enforcement of those regulations. Article 3

⁵¹ Status as of 22 June 2015.

⁵² ILO, Provisional Record, 16 (Rev.), 1997, p. 4.

stipulates that “the conditions governing the operation of private employment agencies [shall be established] in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice”. Article 10 calls for an “adequate machinery and procedures, involving as appropriate the most representative employers and workers organizations, [...] for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies”. Article 14 deals with the monitoring of compliance that “shall be ensured by the labour inspection services or other competent public authorities”.

Also, in the case of non-compliance, “[a]dequate remedies, including penalties where appropriate shall be provided” (Article 14). Private employment agencies are further required to submit reports about their activities in regular intervals and measures shall be taken to promote collaboration between private and public authorities (Article 13). Public authorities however retain final authority over the formulation of labour market policies and the allocation of public funds to ensure implementation of this policy (ibid). Recommendation No. 188 further specifies areas of collaboration, such as exchange of vacancy notices, and joint projects such as training and pooling of information.

Convention No. 181 is the most comprehensive and up-to-date international standard on private employment agencies. It should be applied in conjunction with other ILO employment instruments, notably the Employment Service Convention, 1948 (No. 88) and the Employment Policy Convention, 1964 (No. 122). Taken together, these Conventions assign a leading role to public authorities in the formulation of employment policies and their implementation, while recognizing the important contribution of private actors to the functioning of labour markets. In addition, the Employment Relationship Recommendation, 2006 (No. 198), while aiming to protect workers in an employment relationship, is also relevant in this context. It states that “where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices that have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship (Paragraph 7(b)).

In addition to those standards dealing with i) the elimination of forced labour, ii) protection of migrant workers and labour migration governance, and iii) employment/private employment agencies, some sectoral and technical Conventions of the ILO also address the issue of labour recruitment. The Domestic Workers Convention, 2011 (No 189) contains a provision aimed at the protection of domestic workers, including migrant domestic workers, from abusive practices of private employment agencies (Article 15). The Work in Fishing Convention, 2007 (No. 188), includes several provisions on the recruitment and placement of fishers, including by private employment agencies. Similarly, the Maritime Labour Convention, (MLC, 2006), stipulates that each Member to the Convention shall

effectively exercise its jurisdiction and control over seafarer recruitment and placement services that have been established on its territory (Article 5(5)).

To conclude, ILO standards concerned with the governance of labour recruitment, within countries and across international borders, consist of legally binding instruments as well as non-binding recommendations and guidelines. They entail obligations to protect workers from abusive and fraudulent recruitment practices as well as guidance to national legislators. As such, they aim to create a level playing field for workers and employers across different regions and countries. Labour law is the main tool through which these international standards are transposed into national law and practice. Criminal law, however, applies if abusive and fraudulent recruitment practices amount to trafficking in persons for the purpose of forced or compulsory labour, or other crimes. The combination of labour and criminal law allows legislators and policy makers to address the wide spectrum of abusive and fraudulent recruitment practices.

2.2. Supervision of ILO standards related to the governance of recruitment

ILO Conventions and Recommendations are subject to a rather unique supervisory system enshrined in the ILO Constitution and subsequent resolutions. It requires member states to submit regular reports on their legislation and national practices for each ratified Convention (and Protocol where applicable). In 1926, the International Labour Conference established a Committee of Experts on the Application of Conventions and Recommendations (CEACR), which consists of 20 independent jurists, appointed by the ILO Governing Body. The CEACR examines the reports submitted by governments and social partners and provides two types of comments: observations and direct requests. Observations are usually made in cases of serious and persistent failure to comply with obligations under a Convention. They provide the basis for the selection of specific cases of non-compliance for discussion by the Conference Committee on the Application of Standards (CAS), often related to ILO fundamental Conventions. By contrast, direct requests are usually of a more technical nature, such as requests to governments to provide further information on a particular issue.

Any member of the ILO (including representative workers' and employers' organisations) can file a complaint if it is not satisfied with the compliance of another member with a ratified Convention. The Governing Body can then decide whether the complaint justifies the establishment of a Commission of Inquiry.⁵³ The Government in question has to communicate to the Director-General whether it accepts the recommendations of the Commission of Inquiry or prefers to refer the case to the International Court of Justice (which has not yet happened in ILO's history). If the Government fails

⁵³ Such a Commission can also be established independent of a complaint upon decision by the Governing Body.

to implement the recommendation of a Commission of Inquiry, the International Labour Conference can invoke Article 33 of the ILO Constitution and take action to expedite compliance.⁵⁴

The establishment of a Commission of Inquiry has occurred several times in ILO history, always in relation to non-compliance with fundamental Conventions. Commissions of Inquiry related to Conventions No. 29 and No 105 addressed, for example, forced labour and forced recruitment of workers by the Government of Portugal in colonial territories of Mozambique, Angola and Guinea (1962); the forced labour exploitation of Haitian migrant workers on sugar plantations in the Dominican Republic (1983); and the forced recruitment of child soldiers, porters and other civilian workers by the military regime in Myanmar (1998).⁵⁵

Apart from these high-profile cases, the CEACR makes assessments of compliance and notes progress. Compliance with ILO standards is often achieved through a combination of technical assistance, supervision and external factors.⁵⁶ Even if a member state does not ratify a specific Convention, it may revise its legislation to ensure conformity with international standards. This is particularly the case with technical Conventions such as the Private Employment Agency Convention (No. 181), which may have certain aspects that some member states cannot comply with and therefore they choose not to ratify. ILO standards however should also be understood as aspirational goals and they provide important guidance, whether member states have ratified the conventions or not.

In addition, the CEACR can be tasked to carry out a General Survey to assess the application of specific Conventions (and Recommendations) across ILO member States, whether or not they have ratified them. Such surveys have been carried out in regular intervals on ILO fundamental Conventions (in 2012), on employment related instruments (in 2010) and migrant workers Conventions (in 1999). The results of those surveys provide important guidance on compliance; they review the main thrust of CEACR comments on individual cases and assess the application of ILO instruments in light of contemporary developments. As a new General Survey is currently being carried out to assess application of ILO Migrant Worker Conventions No. 97 and No. 143. The forthcoming General Survey will allow the Committee of Experts to provide guidance on the scope of the instruments, examine difficulties raised by governments and social partners as standing in the way of their application, and indicate possible means of overcoming obstacles for their implementation. The following summary of CEACR comments will therefore be limited to Conventions Nos. 29 and 181.

⁵⁴ This has only happened once in ILO history in 2000 with regards to the failure of the Government of Myanmar to eliminate forced labour, following recommendations of a Commission of Inquiry established in 1996.

⁵⁵ Reports by the Commission of Inquiry can be downloaded at: <http://www.ilo.org/dyn/normlex/en/>.

⁵⁶ ILO: Rules of the Game. A brief introduction to International Labour Standards, Revised Edition (Geneva 2014); Rodgers et al: The ILO and the Quest for Social Justice 1919 – 2009, (Geneva 2009).

Supervision of the Forced Labour Convention No. 29

Compared to Convention No. 181, the ILO's Forced Labour Conventions have a much longer history, and there is much to learn from their effective application and the comments provided by the CEACR. While the initial goal of the ILO's Forced Labour Conventions was to eliminate state-imposed forced labour, such as forced labour used by colonial powers, prison labour camps and forced labour imposed by military regimes, the issue of human trafficking has come to the fore in more recent years. As the Forced Labour Convention (No. 29) defines forced or compulsory labour 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",⁵⁷ over the years the CEACR has been analysing the recruitment processes in order to assess the presence of consent, voluntariness or menace of penalty.

Initially, comments by the CEACR highlighted the issue of labour recruitment mainly in conjunction with state-imposed forced labour. In the 1970s, the CEACR first began issuing direct request to Governments regarding forced labour involving private agents, with one of the initial direct requests referring to "allegations of recourse to coercion by certain labour recruiters" in Pakistan.⁵⁸ In the early 1980s, the focus of the Committee started to increase its focus on forced labour resulting from coercive recruitment and employment practices imposed by private actors. A very prominent case involved the Dominican Republic and Haiti, following a complaint submitted by a group of workers' delegates to the International Labour Conference in 1981.⁵⁹

With the fall of the Iron Curtain and a relative decline of forced labour orchestrated by state authorities, the Committee shifted its focus further towards forced labour in the private and informal economy. The adoption of the Palermo Protocol further reinforced this trend. In 2001, the Committee published a general observation calling on governments to report on "measures taken or contemplated to prevent, suppress and punish trafficking in persons for the purpose of exploitation". It henceforth requested information on provisions in national law aimed at punishing trafficking in persons and exploitation of prostitution more systematically. It also sought information regarding the "measures designed to encourage victims to turn to the authorities".⁶⁰

In the 2007 General Survey on the application of the ILO's Forced Labour Conventions, trafficking in persons had become a prominent issue, and there have been a number of high-profile cases that were also discussed in the Committee on the Application of Standards (CAS). The CEACR stressed that exploitation, including forced labour, was a crucial element of the definition of trafficking. According

⁵⁷ ILO Forced Labour Convention, (No. 29), 28 June 1930, Article 2.

⁵⁸ Quoted in Lee Swepston: *Forced and Compulsory Labour in Human Rights Law*, ILO Working Paper, (Geneva 2015), p. 11.

⁵⁹ *Ibid*

⁶⁰ ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 89th Session, (Geneva 2001).

to the Committee, “the notion of exploitation of labour inherent in this definition allows for a link to be established between the Palermo Protocol and Convention No. 29, and makes clear that trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour [...]. This conjecture facilitates the task of implementing both instruments at the national level.”⁶¹

A review of comments provided by the Committee over the last ten years (2004–2014) confirms the growing shift of attention towards forced labour exacted in the private economy, and in particular links with and abusive and fraudulent recruitment practices. The CEACR has addressed numerous comments to source and destination countries as well as to countries where there is internal trafficking. In total, 307 comments have been reviewed. More than 30 comments deal with the protection of migrant workers and the enforcement of relevant legislation respectively (some of them being repeated comments). Nine comments deal with the issue of recruitment fees.

In the case of Belgium, for example, the Committee noted with interest the various measures taken by the government to prevent and suppress human trafficking. On the issue of enforcement, the government referred to the “problem of subcontracting as an element that complicates the battle against the trafficking of persons because of the exploitation of their work”. It noted that the risk of informality and exploitation was greater in long chains of sub-contracting.⁶² In 2010, the Committee received a communication from the Netherlands Trade Union Confederation regarding the application of Convention No. 29, highlighting *inter alia* the “vulnerable situation of workers in certain sectors, who may become victims of forced labour exploitation, as a result of abuses of certain informal labour agencies,” and the Committee requested further information.⁶³

Similar comments have recently been addressed to other migrant destination countries, notably Malaysia, Qatar and the United Arab Emirates (UAE). In the case of Malaysia, the Committee received a communication from the ITUC about migrant workers who encounter forced labour in the hands of employers or informal labour recruiters. The Committee “urged the Government to take the necessary measures to ensure that migrant workers, without distinction of nationality or origin, are fully protected from abusive practices [...]”⁶⁴ With regards to Qatar and the U.A.E., the Committee

⁶¹ ILO: Eradication of forced labour, International Labour Conference, 96th Session, 2007.

⁶² Direct Request (CEACR), adopted 2007, published 97th ILC Session (2008) Forced Labour Convention, 1930 (No. 29) – Belgium; Direct Request (CEACR), adopted in 2009, published 99th ILC Session (2010) Forced Labour Convention, 1930 (No. 29) – Belgium.

⁶³ Direct Request (CEACR), adopted 2010, published 100th ILC Session (2011) Forced Labour Convention, 1930 (No. 29) – the Netherlands.

⁶⁴ Observation (CEACR), adopted 2012, published 102nd ILC Session (2013) Forced Labour Convention, 1930 (No. 29) – Malaysia.

notes in particular that “the recruitment of migrant workers and their employment are governed by [...] the sponsorship system” that could exacerbate the risks of forced labour.⁶⁵

With regards to source countries of migrant workers, the Committee made an observation on Nepal, for example, following a communication by the ITUC through which it expressed concerns that recruitment agencies and brokers are involved in the trafficking of Nepalese migrant workers and their subsequent exploitation in conditions of forced labour. The Committee urged the Government to “redouble its efforts to ensure that perpetrators of trafficking in persons and forced labour of migrant workers, and complicit government officials are investigated and prosecuted and that sufficiently effective and dissuasive penalties are imposed in practice.”⁶⁶ The Committee also noted measures taken by the Government of Moldova to monitor businesses that provide travel services and employment of Moldovan citizens abroad.⁶⁷

Regarding internal migration and trafficking, the Committee noted measures taken by the Government of Brazil to replace the often dubious role of labour recruiters (also called “*gatos*”) by a national employment system to facilitate the recruitment and placement of rural workers in zones particularly affected by forced labour.⁶⁸ It further noted continued government efforts to warn the “population of the methods used by middlemen to recruit workers, [...] information on labour rights and how to report cases of slave labour”.⁶⁹

⁶⁵ Observation (CEACR), adopted 2014, published 104th ILC Session (2015) Forced Labour Convention, 1930 (No. 29) – Qatar, see also Report of the Director-General, GB 320/INS/14/8, March 2014.

⁶⁶ Observation (CEACR), adopted 2012, published 102nd ILC Session (2013) Forced Labour Convention, 1930 (No. 29) – Nepal.

⁶⁷ Direct Request (CEACR), adopted 2012, published 102nd ILC Session (2013) Forced Labour Convention, 1930 (No. 29) – Moldova.

⁶⁸ Observation (CEACR), adopted 2008, published 98th ILC Session (2009) Forced Labour Convention, 1930 (No. 29) – Brazil.

⁶⁹ Observation (CEACR), adopted 2007, published 97th ILC Session (2008) Forced Labour Convention, 1930 (No. 29) – Brazil.

Box 2.1: The case of Indonesia

Thousands of Indonesian women migrate for domestic work to the Middle East every year. Many of them face serious abuses, run away from their employers and return to Indonesia. The government regulates the recruitment and placement of Indonesian migrant workers abroad through special legislation that also requires migrants to complete mandatory pre-departure training provided by private employment agencies.⁷⁰ Agencies must obtain a special permit to recruit and train workers, but circumvention of these obligations by many agencies and abuses in the training facilities were frequent.

Following a string of comments by the Committee, including allegations of forced labour exploitation of prospective migrants by the International Confederation of Free Trade Unions, the case was referred to the Committee on the Application of Standards in 2004. In their comments, the workers group denounced exploitative recruitment practices linked to the mandatory training requirement and the government's failure to effectively monitor private employment agencies and to protect workers. According to some worker members, migrants had to spend three to 12 months in training camps and were charged extortionist fees by the agencies. Some migrants were also forced to carry out work not related to the training.⁷¹

In subsequent years, the case was carefully monitored by the Committee. It particularly requested information on how the Government controlled recruitment agencies and fee charging, and the assistance provided to migrant workers who were subjected to exploitation and abuse. The supervisory system was assisted by an ILO technical cooperation project begun in 2003 and supported by various donors up to 2012. The first phase of the project focused specifically on migrant domestic workers and their recruitment in Indonesia. Based on technical advice provided by the ILO, the Law of 2004 was amended to better regulate and monitor private employment agencies. Those projects facilitated progress in Indonesia that did not go unnoticed by the Committee of Experts.

In 2011, Indonesia was again in the spotlight following the prosecution of an Indonesian migrant domestic worker in Saudi Arabia. The Committee requested more information about the protection of migrant workers abroad without losing focus on the issue of recruitment. It also referenced the Convention on the Elimination of Discrimination Against Women (CEDAW) that observed in July 2012 that many women migrant workers suffer severe abuses in the hands of private employment agencies. In the same year, the Committee took note of the fact that the government had reinforced its monitoring of private employment agencies and urged the government to pursue its efforts. It requested in particular information about the number of violations reported, investigations, prosecutions and the penalties applied in specific cases.⁷²

⁷⁰ Law 39/2004 Concerning Placement and Protection of Indonesian Workers in Foreign Countries, Decision No 104 A/Men/2002.

⁷¹ Report of the Committee on the Application of Standards, Report III (Part 1A) General Report and observations concerning particular countries, adopted in 2004, published 92nd ILC Session (2004).

⁷² Observation (CEACR), adopted 2012, published 102nd ILC Session (2013) Forced Labour Convention, 1930 (No. 29) – Indonesia.

Supervision of the Private Employment Agencies Convention No. 181

For the purpose of this paper, CEACR comments have been reviewed that had been addressed to ratifying member states of Convention No. 181 over the last ten years (2004–2014). Comments were classified according to their year of adoption, type (observation or direct request) and subject matter, focusing in particular on a) the protection of migrant workers, b) the charging of recruitment fees, and c) the enforcement of regulations pertaining to private employment agencies. In total, 81 comments have been reviewed, the majority of which are direct requests, in addition to the information provided in the 2010 General Survey.⁷³

The review revealed that the CEACR has consistently raised the issue of migrant workers and their protection from abusive and fraudulent recruitment practices. In the 2010 General Survey, the CEACR noted, for example that, through the reference in the Preamble to the Forced Labour Convention, 1930 (No. 29), Convention No. 181 “reinforces the role played by public authorities and private employment agencies in eradicating forced labour.”⁷⁴ It further notes that “forced labour is often linked to human trafficking in which abusive intermediaries might engage”.⁷⁵ The CEACR further emphasised that “the proper application of the Convention enhances the role of international labour standards in eradicating illegal practices by abusive private recruiters that might, if committed in a widespread or systematic manner, amount to a crime against humanity”.⁷⁶

With regard to mediation and labour migration, the CEACR noted “that Article 8 of the Convention draws on the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of December 18, 1990”. It further emphasised that “these references show the importance of including private agencies in the protection of workers in the trans-boundary mediation of labour”.⁷⁷

In total, 49 individual country comments were reviewed in which the Committee specifically addressed issues related to migrant workers in source and destination countries. In many of its comments, the Committee requested further information about bilateral agreements, measures to protect migrant workers from abuse, mechanisms to supervise agencies involved in cross-border migration and efforts to impose penalties for unlawful recruitment practices.

⁷³ ILO: General Survey concerning employment instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, 2010, Report III (1B), International Labour Conference, 99th Session, (Geneva 2010).

⁷⁴ Ibid: p. 87 (paragraph 362).

⁷⁵ Ibid.

⁷⁶ Ibid: p. 88 (paragraph 363).

⁷⁷ Ibid: p. 88 (paragraph 366).

The CEACR has placed consistent emphasis on adequate enforcement and sanctions – in total, 74 comments have been reviewed related to that matter. Most of its direct requests focus on information about inspection services, inspection reports, reported incidences of non-compliance and sanctions. Regarding the implementation of Article 3, paragraph 2, that requires agencies to be registered or licensed, the Committee noted “that the national licensing and certification requirements for private agencies constitutes a means of ensuring the proper performance of private agencies and increases the transparency in the labour market”, and ultimately, its functioning.⁷⁸ It also stressed the need to ensure that “legal provisions or national practices governing private agencies are properly and permanently enforced.”⁷⁹

On the issue of recruitment fees, the CEACR has frequently recalled the principle that workers should not be charged fees or other costs, directly or indirectly. In total, 37 comments have been reviewed, which mainly request information about exemptions under national law. In the 2010 General Survey, the CEACR noted that the provision on fee charging is subject to the principles of consultation, transparency and reporting.⁸⁰ Given that Convention No. 181 is still a relatively new instrument, further guidance by the CEACR may be expected as more countries ratify it.

The CEACR has noted legislative changes in a number of cases and expressed its satisfaction in cases where countries provided detailed information following a direct request. In four countries, namely Albania, Ethiopia, Georgia and Moldova, the CEACR was particularly concerned about the protection of migrant workers and made extensive comments on national legislation. In all cases, it has led to legislative changes, also supported by ILO technical cooperation programmes that were implemented at around the same period of time.

In other cases, the CEACR requested further information on exceptions provided by national law on the prohibition of fee charging (e.g. Japan), the impact of systems of self-regulation (e.g. Netherlands) and detailed information about sanctions in the case of non-compliance, remedies and complaint procedures (e.g. Belgium, Japan and Spain). In the case of Japan, where the penetration rate of temporary work agencies is relatively high, legislative reform also took place, and the Committee expressed “its firm hope [...] that the revised legislation will ensure “adequate protection” for all workers employed by private employment agencies in accordance with the Convention.⁸¹

⁷⁸ Ibid: p. 62 (paragraphs 242 – 243).

⁷⁹ Ibid: p. 63 (paragraph 249).

⁸⁰ Ibid: p. 82 (paragraphs 332 – 334).

⁸¹ Observation (CEACR), adopted 2014, published 104th ILC Session (2015), Private Employment Agencies Convention, 1997 (No. 181) – Japan. This was preceded by a representation in accordance with article 24 of the ILO Constitution, lodged by the Japan Community Union Federation in 2009. The report can be downloaded at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507469,en [accessed 22 June 2015].

Box 2.2: The case of Ethiopia

The case of Ethiopia illustrates the role of the CEACR in conjunction with technical assistance provided by the ILO. According to government estimates there are more than 1,000 private agencies in Addis Ababa alone; only about 70 are licensed. Estimates of the number of private labour brokers outside the capital can range from a couple dozen to many thousands. Industry representatives believe that most private employment agencies in Ethiopia cater for the foreign market, in particular to employers in the Middle East and the Gulf Cooperation Council (GCC) States who seek to employ domestic workers. It is estimated that there are hundreds of thousands of women migrating for domestic work to the Middle East every year.⁸²

Ethiopia ratified Convention No. 181 in 1999 after having changed its Labour Code in order to allow licensed private employment agencies to operate in the market (Proclamation No. 104/1998). The 1998 Proclamation translated key features of the Convention into national law: it prohibited fees charged to workers; provided for a principle of joint liability between agencies and employers; and, required the use of standard employment contracts. Following the submission of the first government report in 2002, the CEACR requested more detailed information on how these provisions were implemented in practice to which the Government responded in 2005.

At around the same time, the ILO office, in collaboration with the Ministry of Labour and Social Affairs, undertook a study that shed light on abusive recruitment practices in the context of overseas migration, in particular of women domestic workers to the Middle East. The extent of deception and coercion under which many of these women suffered were qualified as trafficking that called for criminal sanctions under UN and ILO instruments that Ethiopia has ratified.

In subsequent years, the ILO offered technical assistance to the Government of Ethiopia to better control private employment agencies and support Ethiopian workers abroad, while the CEACR monitored the process through a series of observations and direct requests. With increasing emphasis, the CEACR asked the Government to report on the use of provisions in the Criminal Code to combat unlawful recruitment under its trafficking legislation.⁸³ A breakthrough was achieved in 2009 when Ethiopia revised its legislation to adopt a new Employment Exchange Services Proclamation No. 632/2009, which significantly strengthened provisions to protect migrant workers abroad. According to the Proclamation, standard employment contracts have to be signed by all parties – recruitment agencies in Ethiopia, partner agencies in destination countries, the employer and the Ministry of Labour. Agencies and employers can be held jointly and separately liable for violations of the contract. The Government is required to appoint labour attachés in key destination countries to follow-up on complaints and to monitor agencies abroad.⁸⁴ All agencies were required to re-apply for the license and to prove that they complied with the new provisions. Sanctions for non-compliance were reinforced. With the adoption of the new Proclamation, the Federal Police set up a Human Trafficking Unit which started investigating cases of labour trafficking. Within only a couple of

⁸² ILO: Trafficking in Persons for Overseas Labour Purposes, The Case of Ethiopian Domestic Workers, (Addis Ababa 2011).

⁸³ Section 598 of the Criminal Code deals with trafficking in persons; see also, Observation (CEACR), adopted in 2009, published at 99th ILC session (2010), Private Employment Agencies Convention, 1997 (No. 181) – Ethiopia, Art. 8; Observation (CEACR), adopted in 2010, published at the 100th ILC sessions (2011), Private Employment Agencies Convention, 1997 (No. 181) – Ethiopia, Art. 8; Observation (CEACR), adopted in 2011, published at the 101st ILC session, Private Employment Agencies Convention, 1997 (No. 181) – Ethiopia, Art. 8.

⁸⁴ By 2012, not a single labour attachés had been deployed despite the fact that ILO provided training on this matter. ILO technical assistance on the implementation of the Proclamation continues through technical cooperation projects on the ground.

months, the unit investigated 63 cases and referred them to the Prosecutor's office. The Federal High Court convicted eight of these cases and sent the perpetrators to prison for up to 12 years.⁸⁵

The ILO worked closely with the Ministry of Labour and the Ethiopian Employers' Federation to help private employment agencies professionalize their businesses and develop business models that would allow them to abide by the law. Despite progress, there has not yet been a case in which authorities from Ethiopia and a destination country jointly prosecuted a case of trafficking. The provision on liability of the 2009 Proclamation has had an impact on Ethiopian agencies, but has never been applied to their counterparts in destination countries, and in particular to employers who are ultimately responsible for the respect of employment contracts. Some countries where abuses are particularly egregious were banned from the list of countries to which private employment agencies were allowed to send workers – a measure, however, that risks exacerbating irregular recruitment and migration.

To conclude, the CEACR has been consistent in its comments pertaining to the two Conventions under discussion, each of which deals with different but related issues. Many of its comments were concerned with the protection of migrant workers, and the enforcement of relevant legislation, including sanctions against illegal and criminal recruiters. The Committee dealt with the issue of recruitment fees under Convention No. 181 in particular; and to a lesser extent under Convention No. 29. It can be concluded that the supervision of the relevant Conventions is complementary. In some cases, like in Indonesia and Ethiopia, it has set in motion a virtuous cycle of progressive legal change.. While Convention No. 29 does not contain any specific regulations on recruitment, the CEACR nonetheless considered them as essential to effectively eliminate forced labour. This has been confirmed by the recent inclusion of such provisions in the Forced Labour Protocol and Recommendation. In many countries highlighted in this section, the ILO also provided technical assistance through projects, research and exchange of good practice. The interaction between the ILO's supervisory system and technical cooperation can be further strengthened in the framework of the Fair Recruitment Initiative.

⁸⁵ See ILO: Trafficking in Persons for Overseas Labour Purposes, The Case of Ethiopian Domestic Workers, (Addis Ababa 2011).

3. National approaches to regulating labour recruitment

3.1. Africa

Introduction

Labour mobility and recruitment regulations in Africa, reflecting the diversity of the continent, are complex and multifaceted. Over the past several decades, the characteristics of migration flows and the roles of labour recruiters have evolved due to the increased mobility of women, the diversification of countries of destination within Africa, the opening of new markets for low and middle-skilled African workers and the economic incentives that encourage many of Africa's skilled professionals to seek work in developed economies.⁸⁶ Humanitarian crises, linked to conflicts or climate change, have also greatly influenced current migration trends.⁸⁷

The UN Population Division's latest estimate of the number of international migrants in Sub-Saharan Africa stood at 17.2 million.⁸⁸ One of the notable characteristics of the region is that most of the cross-border labour mobility is intra-continental. This trend is partly the result of efforts to promote increased integration of labour markets between neighbouring states. Regional economic communities, which flourished in the past two decades, have pushed for the gradual removal of barriers to labour mobility. These treaties have envisioned the free movement of goods, services, capital and people and the gradual removal of immigration, trade and other barriers.⁸⁹

Extra-continental flows from Africa are reported mainly towards Western Europe, North America and the Middle East.⁹⁰ Migrants who are recruited through regular immigration channels to other regions generally have had specific skills targeted to their country of destination, from highly qualified health professionals migrating for work in the United Kingdom, the United States and Canada⁹¹ to thousands of domestic workers employed in the GCC States.⁹² Increased international attention has recently been paid to the critical situation of Sub-Saharan Africans attempting irregular migration to Europe,

⁸⁶ See generally, Aderanti Adepoju: "Changing Configurations of Migration in Africa", in *Migration Policy Institute*, 1st September 2004; see also, Shimeles, A., *Migration Patterns, Trends and Policy Issues in Africa*, Africa Development Bank Group, (Tunis 2010).

⁸⁷ *Ibid.*

⁸⁸ United Nations, Department of Economic and Social Affairs, Population Division Database, International migrant stock: By destination and origin 2013, available at:

<http://www.un.org/en/development/desa/population/migration/data/estimates2/estimatesorigin.shtml> [accessed 22 June 2015].

⁸⁹ See e.g., the Common Market of Eastern and Southern Africa (COMESA) Treaty, Article 4(6) (e); see also, the Protocol of 1979 adopted by the Economic Community of West African States (ECOWAS); see also, the Protocol on Freedom of Movement and Rights of Establishment of Nationals of Members states of the Economic Community of Central African States (ECCAS); see also, the 1997 Protocol on the Facilitation of Movement of Persons adopted by Members of the Southern African Development Community (SADC); see also, the Protocol on the Establishment of the East African Community (EAC) Common Market which entered into force on 1 July 2010, article 7.

⁹⁰ Aderanti Adepoju: *Recent trends in international migration in and from Africa*, (Nigeria, undated) p. 1.

⁹¹ M. Awases, A. Gbary, J. Nyoni and R. Chatora: *Migration of Health Professionals in six countries: a synthesis report* (Brazzaville 2004), p. x.

⁹² Human Rights Watch: *I Already Bought You*, (New York 2014), p. 12.

often at the cost of their lives. These are often mixed migration flows, with some migrants seeking economic opportunity in Europe while others are fleeing persecution in their country of origin. They are deceived by informal recruiters and smugglers who promise them safe transportation across the Mediterranean Sea.⁹³

Private labour recruiters and employment agencies, as well as public employment agencies in several countries, play an important role in facilitating migration flows across the continent and to countries outside of Africa. However, there is a general lack of data on the recruitment processes from, within and into the continent as well as the current challenges faced by key stakeholders in regulating those flows.

This section analyses the regulatory and enforcement mechanisms in several Eastern and Southern African countries including Kenya, South Africa and Zambia. Kenya and Zambia are primarily countries of origin that have pursued similar licensing approaches despite several key differences. The main destinations for their migrant workers are different: while Kenya has seen explosive growth in the private recruitment industry for cross-border migration, recruiters in Zambia have predominantly served the domestic market. South Africa, on the other hand, presents an example of recruitment regulations in an African country of destination. It had explored regulations that target recruitment practices through immigration laws, rules for private employment agencies and specific regulations pertaining to temporary work agencies. The research also looked at the specific situation of countries of the Maghreb (including Algeria, Morocco and Tunisia), where public employment services play a central role in the matching of job vacancies and the smooth functioning of the labour market. Despite sharing similarities, each of these three countries have taken different approaches to public employment service involvement in labour migration, and have provided for varying degrees of private sector involvement.

Strong role of public institutions in the Maghreb

In Tunisia, the political and social upheavals experienced since 2011 and in the neighbouring countries of Libya and Egypt have had a considerable impact on the migration profile of the country. Although Tunisia remains predominantly a country of origin, with 12.5 per cent of Tunisian nationals living or working abroad⁹⁴ (mainly in Europe, the GCC States and North America), the country is increasingly becoming a destination for migrant workers from Sub-Saharan Africa. There are no reliable statistics on the total number of migrant workers in Tunisia as a large portion is working in the informal economy, often with irregular status. Many of these workers also use Tunisia as a transit country en route to Libya and Europe. As one response to this phenomenon, Tunisia signed a Mobility

⁹³ Ian Traynor: "EU plans migrant quotas forcing states to 'share' burden", *The Guardian*, 10 May 2015.

⁹⁴ Sarra Hanafi: *Examen des législations et des pratiques concernant les travailleurs migrants et recommandations en vue de mieux protéger les travailleurs migrants, hommes et femmes*, Réalisé dans le cadre du projet du BIT IRAM, 2014.

Partnership with the European Union in 2014 to “facilitate the movement of people between the EU and Tunisia and to promote a common and responsible management of existing migratory flows, including by simplifying procedures for granting visas to Tunisians and by [...] supporting the Tunisian authorities in their efforts in the field of asylum”. The agreement also plans for better cooperation to prevent human trafficking and the smuggling of migrants and to improve border management.

This complex migratory situation, coupled with a still unstable democratic transition process and a high unemployment rate, especially of youth, has put tremendous pressure on public employment services. Tunisia has two public agencies tasked with matching supply and demand for labour, both abroad and nationally. First, the National Agency for Employment and Independent Work (ANETI)⁹⁵ is mandated to ensure the job development and placement of Tunisians workers internally, and the implementation of Tunisia’s international agreements on cross-border labour mobility. ANETI also monitors returning migrants in their professional reintegration projects.⁹⁶ Second, the Tunisian Agency for Technical Cooperation (ATCT) manages the migration of Tunisian public servants in the context of technical cooperation projects with other countries as well as high-skilled youth entering the labour market.⁹⁷ Overall, where recruitment services are utilized in Tunisia, they are predominantly facilitated by the ANETI, which has employment counselling offices across the country, and strong links with foreign public employment services such as the French *Pôle Emploi*.⁹⁸ More recently, the ANETI also opened small offices in Libya, Qatar and Saudi Arabia aimed at fostering employment opportunities for middle and high-skilled Tunisians in those countries.⁹⁹

Private labour recruiters have been generally forbidden from recruiting workers for the Tunisian labour market under articles 280 and 285 of the Labour Code, which stipulates that “workers, whether permanent or non-permanent, are recruited either through public placement offices or directly” and “private employment agencies, non-profit seeking or profit-seeking, are suppressed”.¹⁰⁰

While the use of public employment services thus remains the overarching approach for job placement in Tunisia and of foreign workers into Tunisia, *Decree No. 2010/2948* amended in 2011, on the conditions, modalities and procedures to obtain authorization to operate for private employment

⁹⁵ Agence Nationale pour l’Emploi et le Travail Indépendant (French).

⁹⁶ For more information, see the ANETI website (French) available at: <http://www.emploi.nat.tn/fo/Fr/global.php> [accessed 22 June 2015].

⁹⁷ See generally, ACTC Website, Our Services, available at: <http://www.tunisie-competences.nat.tn/default.aspx?id=138&Lg=2> [accessed 22 June 2015].

⁹⁸ The usage of ANETI services however is somewhat low, at least among young workers. According to the ILO School-to-work transition survey (SWTS) in 2012-2013, only 5.7% of students who transitioned into the labour market stated that they benefited from the services of ANETI.

⁹⁹ Mohamed Kriaa: *Diagnostic de la gouvernance de la migration de main d’œuvre en Tunisie: synthèse des recommandations*, IRAM Project, ILO, 2014, p. 21.

¹⁰⁰ Labour Code, Act No 66-27 of 30 April 1966, as amended, articles 280 and 285.

agencies placing abroad,¹⁰¹ introduces an exception by establishing a licensing system for private employment agencies recruiting Tunisian workers for jobs abroad. This licensing scheme, supervised by the Ministry of Vocational Training and Employment, has to date resulted in the granting of 17 licenses to private employment agencies.¹⁰² They include major multinational companies, such as Manpower and Adecco, which are part of the *Chambre Syndicale Nationale du Travail Temporaire et du Service de l'Emploi*¹⁰³ (the private employment agency association of Tunisia), as well as local private employment agencies. However, recent studies reported the parallel development of small informal labour recruiters that often have opaque structures and modes of operation.¹⁰⁴ The *Decree No. 2010/2948* forbids, in the terms of ILO Convention No. 181, the charging of any fees or costs to workers being placed abroad¹⁰⁵ and introduces a set of rather strict requirements to be respected by businesses wishing to obtain a licence. Sanctions provided by the Decree are limited, however, to the temporary or permanent closure of the establishment in case of any violations of the Decree. Data on violations committed by labour recruiters is very scarce, although a few reports have highlighted deceptive and coercive practices leading to situations of human trafficking.¹⁰⁶

The recruitment framework in Morocco, shares several similarities with the public employment service approach in Tunisia, while also providing considerable space for private recruiters. Morocco's main labour intermediation tools are in the hands of the public National Agency for the Promotion of Employment and Skills (ANAPEC) which provides placement services for high, middle and low-skilled workers both domestically and abroad.¹⁰⁷ The agency is responsible for collecting and managing job market information, maintaining a database of candidates and vacancies, providing career guidance, assisting employers with filling vacancies and implementing training programmes. ANAPEC has an agreement with professional associations and a network of organizations assist it with service delivery across the country. Through its international placement division, initially

¹⁰¹ Journal Officiel de la République Tunisienne, 3 Mai 2011, available (in French) at : http://www.emploi.gov.tn/fileadmin/user_upload/PDF/Cadre_juridique/Francais/Emploi-fr/emploi_de_la_main_d_oeuvre/Decre_fran_etaoudif_2010_2948.pdf [accessed 22 June 2015].

¹⁰² The list of authorized placement agencies is published on the Ministry's website at http://www.emploi.gov.tn/fileadmin/user_upload/PDF/MOE/formulaires/fr/liste_bureau_fr.pdf [accessed 22 June 2015].

¹⁰³ For more information, see *Chambre Syndicale Nationale du Travail Temporaire et du Service de l'Emploi*, <https://avenirtunisie.wordpress.com/bienvenue/> [accessed 22 June 2015].

¹⁰⁴ Mohamed Kriaa: *Diagnostic de la gouvernance de la migration de main d'œuvre en Tunisie: synthèse des recommandations*, IRAM Project, ILO, 2014.

¹⁰⁵ Decree No. 2010/2448 of 9 November 2010, Art. 4.

¹⁰⁶ Republic of Tunisia, IOM: *Baseline Study on Trafficking in Persons in Tunisia: assessing the scope and manifestations*, (Tunis 2013), available at:

<http://reliefweb.int/sites/reliefweb.int/files/resources/Baseline%20Study%20on%20Trafficking%20in%20Persons%20in%20Tunisia.pdf> [accessed 22 June 2015].

¹⁰⁷ However, the involvement of low-skilled workers is limited as eligibility for ANAPEC services currently requires vocational training or secondary school.

supported by the European Union,¹⁰⁸ it is active in the recruitment of Moroccans to various countries of destination including France, Spain, Qatar, Canada and Saudi Arabia.

Morocco and Algeria are the only two states in North Africa that have ratified ILO Convention No. 181, in 1999 and 2006 respectively. Morocco's ratification has been supported by leading multinational private employment agencies operating in the country, which later created the Association des *Entreprises de Travail Temporaire Transparentes et Organisées* (AETTTO) and the *Fédération Nationale des Entreprises de Travail Temporaire* (FNETT). The government estimates that there are about 1,200 private employment agencies operating in Morocco, making the country the largest market for private employment agencies in North Africa.¹⁰⁹ However, the Ministry of Employment and Social Affairs granted authorization to only 48 private employment agencies in 2014,¹¹⁰ which demonstrates the high proportion of informal labour recruiters operating outside the legal framework. Private employment agencies performing the recruitment and placement of workers both abroad and in the national market, including temporary work agencies, are regulated by *section IV of the new Labour Code* adopted in 2004. Section 475 of the Code indicates that authorization can be granted to private agencies performing the linking of job applications and job offers; the provision of services to assist in the search for employment; and recruitment.¹¹¹ Minimum licensing requirements are stipulated in sections 481 and 482. The principle of free job placement for workers is retained in section 480 but exceptions are permitted for employees in receipt of a contract of employment abroad (although the ILO CEACR noted several times that the Government did not record any such contract being concluded through private employment agencies to date).¹¹²

Coordination between private employment agencies and the Government is limited to a few leading firms. The Government has indicated that the Ministry of Employment and Social Affairs' effort to collect data from private employment agencies still faces challenges. However, a strategic plan for 2012-2016 intends to develop an information system, based on public-private partnership, for the placement of jobseekers.¹¹³

Algeria, the second Maghreb country to ratify ILO Convention No. 181, shares similarities with the regulatory system and prominent role of public employment services in Tunisia. Algeria's National Employment Agency (ANEM) is the main public employment service; it is responsible for the

¹⁰⁸ One of the key pillars of the 2013 Mobility partnership between Morocco and the European Union is the strengthening of the capacity of the ANAPEC.

¹⁰⁹ Predominantly operating as temporary work agencies or private employment agencies recruiting for positions in Morocco. Ghada Ahmed: *Private employment agencies in Morocco*, ILO, (Geneva 2011), p. 8.

¹¹⁰ Direct Request (CEACR), adopted 2014, published 104th ILC session (2015) Private Employment Agencies Convention, 1997 (No. 181) – Morocco.

¹¹¹ Direct Request (CEACR), adopted 2009, published 99th ILC session (2010) Private Employment Agencies Convention, 1997 (No. 181) – Morocco.

¹¹² Direct Request (CEACR), adopted 2014, published 104th ILC session (2015) Private Employment Agencies Convention, 1997 (No. 181) – Morocco.

¹¹³ Ibid.

authorization of private employment agencies and it receives quarterly statistics from recruiters and employers on employment supply and demand and the job placements carried out by private recruiters.¹¹⁴ Under *Executive Decree No. 07-123*, ANEM is responsible for supervising the activities of private employment agencies and may revoke a private employment agency's authorization where it fails to meet the obligations set out in Algeria's laws and regulations.¹¹⁵ In 2014, the ILO CEACR noted that 20 private employment agencies had been approved at the national level.¹¹⁶ Efforts have been made by ANEM to improve engagement with private employment agencies, with a partnership agreement reached in January 2012 between ANEM and licensed private recruitment agencies. The agreement states that ANEM shall provide technical support to these agencies, particularly in relation to the organization and management of placement activities, employment guidance training sessions and statistics.¹¹⁷

Interestingly, while Tunisia has opted to restrict the role of private employment agencies in placing foreign workers in Tunisia, Algeria permits such activities while prohibiting the placement of Algerian workers abroad by private employment agencies under *Executive Decree No. 07-123*.¹¹⁸ ANEM is thus entrusted with examining any opportunities for the employment abroad of nationals wishing to emigrate.¹¹⁹ Algeria also signed bilateral agreements on migration with France in 1968 and with Tunisia, in 1961, but has not entered into any other agreements on the protection of migrant workers since that time.¹²⁰

Privatised recruitment in East and Southern Africa

In contrast to their North African neighbours, East Sub-Saharan countries have relied more extensively on private labour recruiters and private employment agencies. Following political upheavals in the 1990s, within a decade South Africa had become a major migration hub.¹²¹ Labour migration to South Africa has grown in response to a wide range of socio-economic pressures throughout the continent and its strong economic position and work opportunities in mining, manufacturing and agriculture. It has seen mixed inflows of migrants, particularly from countries in the Horn of Africa, who have been displaced by poverty, conflict or natural disasters.¹²² According to

¹¹⁴ Executive Decree No. 09-94 of 22 February 2009; See also, ILO CEACR, Direct Request, Convention (No.181), Algeria, Adopted in 2014.

¹¹⁵ See Executive Decree No. 07-123 of 24 April 2007, sections 15, 29-32; see also ILO CEACR, Direct Request, Convention (No.181), Algeria, Adopted in 2013.

¹¹⁶ Direct Request (CEACR), adopted 2014, published 104th ILC session (2015) Private Employment Agencies Convention, 1997 (No. 181) – Algeria.

¹¹⁷ Ibid.

¹¹⁸ See Executive Decree No. 07-123 of 24 April 2007; See also, ILO CEACR, Direct Request, Convention (No.181), Algeria, Adopted in 2014.

¹¹⁹ Direct Request (CEACR), adopted 2014, published 104th ILC session (2015) Private Employment Agencies Convention, 1997 (No. 181) – Algeria.

¹²⁰ Ibid.

¹²¹ World Bank: *Contemporary Migration to South Africa – A regional development issue*, (Washington D.C. 2011).

¹²² See generally, IOM: *Regional Strategy for Southern Africa 2014-2016*, (Pretoria 2014).

data from 2013, South Africa hosts nearly 2.4 million migrants.¹²³ Estimates suggest that over 20,000 migrants pass through the Great Lakes and the Southern Africa Development Community (SADC) region each year in an effort to reach South Africa. Large numbers of migrants also arrive from neighbouring countries, including Mozambique, Lesotho and Zimbabwe.¹²⁴ South Africa has also increasingly played host to migrant workers from Bangladesh, China, Pakistan and Eastern Europe.¹²⁵ As a result of these significant migratory flows, South Africa's immigration regulations and enforcement measures have faced considerable challenges.

Parallel to these developments, South Africa has witnessed a notable growth in the number of temporary work agencies, which make workers available to user enterprises. Figures from 1995 suggest that such agencies were placing an estimated 100,000 workers annually.¹²⁶ By 2010, further data suggested that temporary work agencies had placed 6.5 per cent of South Africa's work force, or 780,000 workers, and further studies have suggested that the number has since reached close to one million workers.¹²⁷

The end of apartheid and the subsequent trends in intra-African migration and growth in temporary work agencies has shaped South Africa's legislative responses and the ensuing regulatory landscape for recruitment agencies. South Africa's framework relies on a combination of immigration regulations, regulations on temporary work agencies, and general regulations on private employment agencies.

Under the *Immigration Act of 2002*, South Africa established its current system for regulating cross-border labour migration. The 2002 Act, amended in 2004 and with regulations issued in 2005, sets out a dual system of immigration for foreign workers recruited to work in South Africa. One channel is limited to permanent high-skilled immigration and the other is primarily for temporary lower-skilled migration, mainly through the use of work permits.¹²⁸

Restrictions and rules on the operation of temporary work agencies are set out in the *Labour Relations Act (LRA)*, and their activities and employees are subject to the *Basic Conditions of Employment Act (BCEA)* and the *Employment Equity Act*. Temporary work agencies, as they have grown in prevalence in recent years, have sparked on-going debate between social partners. Trade unions, most notably the Congress of South African Trade Unions (COSATU) and the National Council of Trade Unions

¹²³ United Nations, Department of Economic and Social Affairs, Population Division Database, International migrant stock: By destination and origin 2013, available at: <http://www.un.org/en/development/desa/population/migration/data/estimates2/estimatesorigin.shtml> [accessed 22 June 2015].

¹²⁴ IOM: *Regional Strategy for Southern Africa 2014-2016*, (Pretoria 2014).

¹²⁵ See generally, World Bank: *Contemporary Migration to South Africa – A regional development issue*, (Washington D.C. 2011) Chapters 1, 4.

¹²⁶ Paul Benjamin: *Law and practice of private employment agency work in South Africa*, ILO (Geneva, 2013), p. 8.

¹²⁷ Paul Benjamin: *Law and practice of private employment agency work in South Africa*, ILO (Geneva, 2013), p. 8.

¹²⁸ World Bank: *Contemporary Migration to South Africa – A regional development issue*, (Washington D.C. 2011) p. 45.

(NACTU), have taken the position that labour abuses that result from the use of temporary work agencies are serious enough to merit an outright ban. Conversely, the Confederation of Associations in the Private Employment Sector (CAPES) has argued that self-regulation methods are sufficient to control the industry and that abuses stem from poor enforcement of the current legislative framework and labour standards. Under the current system (set out in the LRA) the temporary work agency is recognised as the employer. However, the user enterprise may be found jointly and severally liable for violations of: a collective agreement concluded in a bargaining council that regulates terms and conditions of employment; a binding arbitration award that regulates terms and conditions of employment; the BCEA; or a determination made in terms of the Wage Act.¹²⁹ While article 198 of the Act uses the term ‘temporary employment services,’ it does not provide restrictions on long or indefinite employment of temporary workers, nor does it include an obligation for temporary work agencies to register.¹³⁰

Finally, private labour recruiters, particularly private employment agencies, are referenced in the *Skills Development Act (No. 97)* of 1999, as amended. Temporary work agencies also fall within the broader category of “private employment services agency” referred to in the Act. Regulations passed in 2000 by the MOL require private employment agencies to register and to regulate the fees they charge.

In addition, an *Employment Services Bill* was submitted to South Africa’s National Assembly in 2012, and passed in 2013, that intends to establish an updated framework on the regulation of private employment agencies and temporary work agencies.¹³¹ The Bill provides for the appointment of a registrar for private employment agencies, establishment of registration and deregistration procedures, and criminal sanctions against unregistered recruiters. The criteria established for registration differentiates between temporary work agencies and other private recruitment agencies. Agencies will be prohibited from charging any fees to workers for services rendered and recruiters and employers would be prohibited from circumventing this restriction by deducting it from the workers’ wages. The Minister may, however, permit fee charging for specific categories of workers or special services. Employment agencies will also be required to retain certain information, with due respect for rights of privacy.

Since the 1990s, Zambia’s labour market has developed towards greater casualization and the use of fixed-term contracts and private employment agencies. According to an ILO study, the majority of private employment agencies operating in the country provide services for the domestic market.¹³²

¹²⁹ Labour Relations Act (No. 66 of 1995) as amended, article 198(4).

¹³⁰ Van Eck, Stefan, Agency work in Namibia and South Africa: Lessons gained from the decent work agenda and the flexicurity approach, draft paper, 2013; See also Labour Relations Act (No. 66 of 1995) as amended, article 198.

¹³¹ Paul Benjamin: *Law and practice of private employment agency work in South Africa*, ILO (Geneva 2013), pp. 18-19.

¹³² Frederik Mutesa; Crispin Matenga: *Private recruitment agencies and practices in Zambia*, ILO (Lusaka 2007), p. 9.

Private employment agencies are regulated under the *Employment Act Chapter 268* which, under section 56, requires them to obtain a license from the Labour Commissioner before being able to operate. The collection of fees from workers is forbidden under section 59(2), while section 60 requires agencies to retain and submit records for inspection.

Box 3.1: Zambia's path to ratification of ILO Convention No. 181

According to several studies, over the past decade the legal framework in Zambia has been criticised for failing to curtail reported labour exploitation incidents, most notably the extraction of illegal recruitment fees from workers through the retention of wages.¹³³ In response, in 2006 the Minister of Labour and Social Security recalled all private employment agency licenses and required all private employment agencies to re-apply for authorization the following year, in an effort to eliminate unscrupulous actors.¹³⁴ An ILO report in 2007 highlighted informality in the industry and the need to enhance the country's regulatory and enforcement frameworks.¹³⁵

Since then, Zambia has gone through a political process to improve the recruitment practices in the industry. This process was supported by the Labour Consultants and Employment Agencies Association of Zambia (LEAAZ), which hosted campaign programmes, including radio programmes in partnership with the government and social partners. LEAAZ reports that these radio programmes were intended to raise awareness of forced labour, human trafficking and the role of private employment agencies in Africa, and featured members of LEAAZ, the Zambia Federation of Employers, the Zambia Trade Union, Federation of Free Trade Unions of Zambia, and the United House and Domestic Workers Union of Zambia and the Ministry of Labour and Social Security.¹³⁶ LEAAZ has also promoted self-regulation mechanisms, and has adopted a Code of Ethics for its members with the support of the ILO.

Reform efforts by all involved parties led to ratification of ILO Convention No. 181 in December of 2013.

Kenya is also primarily a country of origin for labour migration in Africa. However, while Zambian workers predominantly migrate within the continent, large numbers of Kenyan workers migrate out of Sub-Saharan Africa. According to the latest Diaspora Policy, the Government estimates the number of Kenyans abroad at 3 million, which represents inward remittances of US\$ 1.29 billion.¹³⁷ The majority of Kenyan migrants live in Europe, North America and the Middle East. The recruitment of workers to these regions is conducted through private employment agencies that have grown at an

¹³³ ITUC: *Internationally recognized core labour standards in Zambia, Report for the WTO General Council Review of the Trade Policies of Zambia*, (Geneva 2009).

¹³⁴ Carron Fox: *Investigating forced labour and trafficking: Do they exist in Zambia?* ILO (Geneva 2008), p. 2.

¹³⁵ See generally, Frederik Mutesa; Crispin Matenga: *Private recruitment agencies and practices in Zambia*, ILO (Lusaka 2007), p. 6-12.

¹³⁶ Questionnaire responses from Humphrey Monde, President of LEAAZ, on Zambia's decision to ratify ILO Convention No. 181, dated 10 June 2015.

¹³⁷ This accounts for 2.98 per cent of Kenya's gross domestic product. See Kenya Diaspora Policy, June 2014, pp. 8-9, available at: https://www.kenyaembassy.com/pdfs/Kenya_Diaspora_Policy.pdf [accessed 22 June 2015].

exceptional rate. In 2014, the Cabinet Secretary of the Ministry of Labour indicated that the number of private employment agencies in Kenya, numbering just five in 1998, has increased to more than 700 in 2013.¹³⁸

Part VII of Kenya's *Labour Institutions Act of 2007* has introduced provisions to regulate the activities of private employment agencies providing internal and cross-border recruitment. These include registration requirements, obligations on agency directors, competency requirements for employment officers, recruitment-related offences and appeals procedures. In 2014, further implementing regulations were developed under the Act.¹³⁹ They specify that, in the case of recruitment for foreign employment, the costs of recruitment should be met by the recruitment agent or the employer, including visa fees, airfare and a surety bond. However, a service fee could be charged to the worker to cover administrative fees or costs rendered during the recruitment, such as medical or occupational tests, provided that they did not exceed one quarter of the worker's first monthly salary.¹⁴⁰ The regulations further specify that licenses must be renewed annually. The adoption of these new regulations was accelerated by increasing reports of abuses occurring in cross-border recruitment, perpetrated by unscrupulous Kenyan private agencies and/or their counterparts in countries of destination. In 2014, the Kenyan Government subsequently launched a crackdown on unscrupulous employment agencies in an attempt to curb the exploitation of workers migrating to the Middle East.¹⁴¹ In September 2014, the Labour Cabinet Secretary announced a temporary ban on the recruitment of workers to the Middle East, notably the thousands of women recruited for domestic work.

Kenya's Ministry of Labour has also revoked the licenses of all private employment agencies in the country and has required them to re-apply for their licences and undergo an auditing process by the Ministry. As of May 2015, 82 private employment agencies have re-applied to be licensed.¹⁴² To give teeth to these new measures, the Minister of Labour appointed a Task Force to review matters relating to administration of foreign employment and the governance of labour migration. Members of the Task Force were selected among social partners and other key stakeholders involved in labour migration governance. The objectives of the task force, as articulated in Government Notice No. 7542 of 24 October 2014¹⁴³ are *inter alia* to: (i) review the existing regulatory framework for private employment agencies and assess its effectiveness in protecting Kenyans recruited to work outside the country; (ii) analyse the reasons for the increase in demand from the Middle East; (iii) recommend

¹³⁸ Speech by Hon. Samwel Kazungu Kambi, Cabinet Secretary, Ministry of Labour, Social Security and Services, 3 November 2014.

¹³⁹ The Labour Institutions (General) Regulations of 2014, 6 June 2014.

¹⁴⁰ The Labour Institutions (General) Regulations of 2014, 6 June 2014, article 8.

¹⁴¹ Brian Ngugi, "Kenyan Government moves to combat migrant worker abuse in the Gulf", in *Equal Times*, 13 October 2014.

¹⁴² Interview with the Ministry of Labour by ILO consultant, May 2015, conducted in the framework of the forthcoming ILO study on the processes of recruitment in Kenya.

¹⁴³ Kenya Gazette Vol. CXVI–No.126, Gazette Notice No. 7542, of 14 October 2014.

effective measures to ensure better coordination; (iv) develop a policy direction in relation to the regulation of private employment agencies. While the Task Force has met several times since its launch, it is yet to produce its final report.

3.2. Americas

Introduction

In Latin America, MERCOSUR member States (Common Southern Market) signed the Treaty of Asunción in 1991 which provides for the free movement of production factors. Free movement of labour was subsequently regulated under the MERCOSUR *Free Movement and Residence Agreement* signed by Argentina, Brazil, Paraguay, Uruguay and associate countries Chile and Bolivia in 2002. According to this agreement, citizens of participating countries enjoy visa-free movement and can take up employment in another member State provided that they have not had a criminal record for the past five years. In addition, they enjoy equal access to the labour market in conditions of equal treatment.¹⁴⁴ As a result, there is significant labour mobility within the MERCOSUR region. The majority of people rely on family members or friends to find employment and there is limited evidence of the role of formal labour recruiters in this process. In some countries like Brazil, many people also migrate internally in search for employment, which is often facilitated by labour recruiters.¹⁴⁵

In North America, Canada and the United States attract many temporary workers, most of them recruited from Mexico.¹⁴⁶ In 2012, more than 300,000 temporary workers and international students went to Canada, an increase of more than 10 per cent from the previous year. Similarly, the United States issued 8.9 million temporary visas in 2012, an almost 19 per cent increase compared to the previous year. In both countries, the migration of temporary foreign workers is regulated under special programmes, such as the H2-A visa programme for seasonal agricultural workers and the H2-B visa programme for non-agriculture workers in the United States. Mexico also attracts an increasing number of temporary workers, especially from Guatemala.¹⁴⁷

The following section presents several different regulatory approaches in the Americas, including Brazil, Paraguay, Mexico, Guatemala, the United States, and Canada. Assessing internal labour recruitment regulations in Brazil provides an example of a registration system, with remedies set forth in criminal laws. Looking at cross-border migration from Paraguay to Brazil, challenges are highlighted with regards to the regulation of a recruitment market that is heavily reliant on social

¹⁴⁴ OECD: *Free Movement of Workers and Labour Market Adjustment, Recent Experiences from OECD countries and the European Union*, Paris 2012.

¹⁴⁵ Patrícia Trindade Maranhão Costa: *Fighting Forced Labour: The Example of Brazil*, (Geneva, 2009), p. 8.

¹⁴⁶ OECD SOPEMI (“Système d’observation permanente des migrations”) Report 2014.

¹⁴⁷ *Ibid.*

networks. Mexico's regulatory system must account for its role as both a country of origin for labour migration to the United States and Canada, and a country of destination for labour migration from Guatemala. Regulatory approaches in Canada and the United States, on the other hand, demonstrate the role that immigration regulations and temporary worker programmes may play in labour mobility and associated recruitment practices in countries of destination. This section also seeks to highlight emerging practices of enforcement that arise in these contexts, including joint liability schemes for employers in some Canadian provinces, and efforts to monitor labour abuses, including recruitment abuses, in supply chains in the United States.

Regulating the recruitment of migrant workers from Paraguay and within Brazil

Within the MERCOSUR region, Paraguay is a net sender of migrant workers with emigrants outnumbering immigrants by 40,000 annually in recent years and, collectively, accounting for the equivalent of 8 per cent of the population as of 2010.¹⁴⁸ More than 80 per cent of Paraguayan migrants have settled in neighbouring Brazil or Argentina.¹⁴⁹ Those migrants who have officially registered for temporary or permanent residence in Brazil have predominantly done so in Brazilian states neighbouring Paraguay, or in the capital region of São Paulo.

Recruitment from Paraguay to Brazil is characterized by heavy reliance on social networks rather than private recruitment agencies or public employment services. Paraguay's *Ley N° 978/96 de Migraciones* prohibits the operation of private employment agencies that recruit Paraguayans for work abroad unless they are granted specific authorization by the government.¹⁵⁰ It further directs the Ministry of Labour to develop mechanisms to intervene or advise nationals regarding employment contracts relating to work abroad. Additionally, the Labour Code (Law No. 213/93) requires that any contract concluded by Paraguayan workers to provide services abroad be approved and registered by the labour authorities and the Consular Office where they will deliver services. The Labour Code also requires that such contracts include essential clauses detailing the costs that must be borne by the employer, including possible repatriation expenses, and that the worker must be at least 20 years of age unless hired by a relative.

A recently adopted bill on domestic work, which has been approved by Parliament but is awaiting entry into law, will provide for enhanced regulation of private employment agencies that place domestic workers inside and outside of Paraguay.¹⁵¹ The law sets out the basic contract and working

¹⁴⁸ World Bank Data on Net Migration, available at: <http://data.worldbank.org/indicator/SM.POP.NETM> [accessed 22 June 2015].

¹⁴⁹ Office of the High Commissioner for Human Rights, News report: Committee on Protection of Migrant Workers and their families considers report of Paraguay, 17 April 2012, available at:

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12066&LangID=E> [accessed 22 June 2015].

¹⁵⁰ Paraguay: Ley No. 978 de 1996 de Migración [Paraguay], 27 June 1996, available at:

<http://www.refworld.org/docid/3dbe93534.html> [accessed 22 June 2015].

¹⁵¹ Law No. 5407 on Domestic Work ("Ley No. 5407 del Trabajo Domestico"), 2015.

condition requirements for domestic workers. It also indicates that the Administrative Labour Authority (“Autoridad Administrativa del Trabajo”) will regulate the operation of private employment agencies that hire or place domestic workers inside or outside of the country, to protect against unfair or deceptive practices, specifying the obligations of private employment agencies and penalties in the case of abuse or fraud.¹⁵²

Limits on the operation of private employment agencies, the ability of Paraguayans to freely enter Brazil and easily obtain work permits under the MERCOSUR agreement, strong relationships with family members and the Paraguayan community who can provide initial housing and job referrals, low transportation costs and the desire to avoid recruitment fees are all factors that may contribute to the higher prevalence of recruitment through social networks as opposed to formal recruitment channels. While a growing number of Paraguayans have registered for official work and residence permits in Brazil in recent years,¹⁵³ recruitment through social networks may also contribute to lower rates of registration and potentially higher risks of abuse for those employed in the informal market.

While Brazil is the largest economy in Latin America and a major country of destination for workers from Paraguay and other countries in the region, there is also a high rate of internal migration and associated risks of abuse by unscrupulous recruiters.¹⁵⁴ In many rural areas of Brazil, low-skilled workers are recruited for temporary work far from their hometowns by agents of landowners, known as *gatos*. The work is generally in distant regions and *gatos* often entice workers by making false promises about the conditions of employment and wages.¹⁵⁵

Brazil has simultaneously pursued a registration approach to recruitment agencies for both internal and foreign labour recruitment. There are no specific laws pertaining to cross-border recruitment or otherwise specifically restricting the activities of private employment agencies recruiting workers within Brazil’s borders. Professional activities that are not expressly prohibited by law are permitted in Brazil under Article 5 of the Constitution; thus private employment agencies are free to operate as registered businesses and provide recruitment services to both Brazilians and foreign nationals.

The issue of fraudulent practices during recruitment leading to forced labour of internal migrant workers in Brazil was examined by the ILO CEACR in the past and the government has since taken measures to strengthen the role of labour inspection and other government authorities to identify and

¹⁵² Ibid, Article 23.

¹⁵³ According to the Ministry of Labour and Employment of Brazil, the number of registered Paraguayan nationals in the Relação Annual de Informações Sociais (RAIS) increased from 5.314 in 2011 to 6.819 in 2012 and to 8.550 in 2013 (Dutra et al, 2014). This change implies a growth of 28.32 per cent over the period 2012-2011 and 25.38 per cent in the period 2013-2012. See Dobrée, Paraguay – Brazil Migration Corridor Study on Recruitment Practices, Centro de Documentación y Estudios (Forthcoming).

¹⁵⁴ International Fund for Agriculture Development: *Rural Poverty in Brazil*, available at: <http://www.ruralpovertyportal.org/country/home/tags/brazil> [accessed 22 June 2015].

¹⁵⁵ See ILO: Fighting Forced Labour: The Example of Brazil,(Geneva 2009).

prosecute those practices.¹⁵⁶ Regarding the abuse of Brazilian migrant workers abroad, a draft decree issued by the Labour and Employment Ministry would have created a National Registry of Private Recruitment Agencies and required agencies conducting recruitment services for Brazilian nationals seeking employment abroad to seek authorization/licensing from the Ministry. However, the decree was rejected in 2013 and has not been tabled for further consideration.

Brazil does not impose licensing requirements or other regulations on the activities of labour recruiters or private employment agencies. Remedies and penalties in case of violations are set forth in the Criminal Code. The Criminal Code punishes several of the abusive recruitment practices of *gatos* and their employers such as prohibiting the illegal recruitment of workers in Brazil either by fraud, by charging fees to the workers or by failing to provide for their return to their place of recruitment.¹⁵⁷ It also imposes criminal penalties for recruiting workers in Brazil through fraud for work abroad.¹⁵⁸ Employers may also face criminal charges if their actions create conditions of forced or exploitative labour.¹⁵⁹ In addition, with many foreign migrant workers unregistered and not holding work or residence permits, employers may face fines or penalties if they hire or transport undocumented migrants under the Brazilian Foreigners Statute.¹⁶⁰

Further recognizing the vulnerability of workers in certain regions, Brazil's Ministry of Labour, within the context of Brazil's public employment service, has also launched a pilot project for the promotion of employment in rural areas.¹⁶¹ The project is intended to eliminate the role of *gatos* in the recruitment process in order to reduce the risk of forced or exploitative labour.

Recruitment for temporary foreign worker programmes in North America

The approach for regulating private recruiters and for the recruitment of migrant workers in Canada and the United States is largely defined by the division of responsibilities between the federal and state or provincial governments. Recruitment agency licensing or registration regulations are generally determined by states and provinces, while immigration and labour regulations pertaining to migrants, including temporary migrant workers, are primarily issued at the federal level.

Regulation of the recruitment industry has a long history in both provincial legislation in Canada and state legislation in the United States. Recruitment agencies began to emerge in the United States and Canada in parallel to industry growth towards the end of the 19th century.¹⁶² The early regulations pertaining to private recruiters varied considerably between states, and differences between regulatory

¹⁵⁶ Ibid.

¹⁵⁷ Penal Code ("Codigo Penal"), Article 207.

¹⁵⁸ Penal Code, Article 206.

¹⁵⁹ Penal Code, Article 149.

¹⁶⁰ Foreigners Statute ("Estatuto do Estrangeiro"), Art. 125.

¹⁶¹ Direct Request (CEACR), adopted 2011, published 101st ILC Session (2012) Forced Labour Convention, 1930 (No. 29) – Brazil.

¹⁶² W. H. H., *The Regulation of Employment Agencies* (1928) 38:2 The Yale Law Journal 225 at 226-7.

approaches operated in US States and Canadian Provinces remain evident in the current regulatory landscape. Many US states have adopted detailed regulations on employment agencies, such as the Employment Agency, Employment Counselling and Job Listing Services Act in California.¹⁶³ Similarly, there has been a growing trend toward the use of licensing schemes with proactive enforcement mechanisms in Canadian Provinces (See Box 3.2). Individual Provinces have also, since at least 2008, shown a willingness to enter into bilateral agreements on recruitment and labour migration with countries of origin, most notably the Philippines.¹⁶⁴

Box 3.2: The Manitoba approach and the growth of Provincial licensing regulations and proactive enforcement¹⁶⁵

In 2008, Manitoba's *Worker Recruitment and Protection Act* (WRAPA)¹⁶⁶ was passed and marked a subsequent shift in Provincial legislation towards licensing systems for agencies recruiting foreign workers that provide for proactive and enforcement mechanism (discussed below). Following WRAPA, new or updated licensing regulations were adopted in several Canadian Provinces, including: Nova Scotia¹⁶⁷ in 2011, Alberta¹⁶⁸ in 2012, Saskatchewan¹⁶⁹ in 2013 and New Brunswick¹⁷⁰ in 2014.

WRAPA bans recruiters from charging any fees to foreign workers and prohibits employers from recovering recruitment fees from workers. It applies to all migrant workers in all labour migration programmes in Manitoba and provides for both recruitment agency licensing and employer registration, coupled with proactive enforcement measures. For recruiters, Manitoba requires licensees to: hold a professional license as a lawyer, paralegal or immigration consultant; keep detailed records on all recruitment agreements; put down a security deposit of \$10,000 CDN; and be willing to undergo comprehensive investigations of their character, history and general eligibility for a license. These requirements have limited the number of recruiters licensed to recruit foreign workers in Manitoba, with only 23 valid license holders as of May 2015.¹⁷¹

Employers who want to hire foreign workers are also required to register with the Director of Employment Standards and may not use a recruiter who does not hold a license under the Act. The

¹⁶³ California Code Title 2.91 "Employment Agency, Employment Counselling and Job Listing Services Act.

¹⁶⁴ The Philippines has signed bilateral agreements with several Canadian Provinces, including: Alberta, British Columbia, Manitoba, and Saskatchewan.

¹⁶⁵ See generally, Gordon, *Global Recruitment in a Supply Chain Context* (Forthcoming), Ch. 4.

¹⁶⁶ *Worker Recruitment and Protection Act of 2008*, Province of Manitoba, 2008.

¹⁶⁷ *Labour Standards Code of 1989 (Amendments of 2011)*, Province of Nova Scotia, available at: <http://www.jstor.org/stable/41828499> [accessed 22 June 2015].

¹⁶⁸ *Fair Trading Act, Employment Agency Business Licensing Regulation of 2012 (No. 45/2012)*, Province of Alberta.

¹⁶⁹ *Foreign Worker Recruitment and Immigration Services Act of 2013 (FWRISA)* Province of Saskatchewan.

¹⁷⁰ *Province of New Brunswick, Act to Amend the Employment Standards Act of 1982*, 26 March 2014.

¹⁷¹ See the Government of Manitoba Website, *List of Valid License Holders*, updated 21 May 2015, available at: https://www.gov.mb.ca/labour/standards/asset_library/pdf/wrapa_valid_licensees.pdf [accessed 22 June 2015].

registration process requires the employer to provide details regarding their business, the entity in charge of recruiting the foreign worker, and the position that the foreign worker(s) will hold. Registering companies must be in compliance with labour standards and have no outstanding labour violations. Upon hiring a migrant worker, the employer must provide detailed information about the worker, their contact information, and details about their job and duties and must also be prepared to provide expense records and any contracts or agreements signed with foreign workers.

In addition to the recruiter licensing requirements and the registration requirements placed on employers, Manitoba Employment Standards has taken a proactive approach to enforcement. The Province has dedicated resources to a Special Investigations Unit that conducts both audits of groups of employers in particular sectors/regions and audits of individual employers. While these audits do not require complaints to initiate them, workers may also file complaints and the Employment Standards may instigate subsequent investigations.

Legislation developed subsequently in other Provinces has further enhanced the regulatory framework established in Manitoba under WRAPA. Several Provinces have included provisions that put even greater pressure on employers to scrutinize recruiters and their labour supply chains. These additional measures include: enhanced reporting obligations that require recruiters to disclose all partners, affiliates or agents in or out of the province; provisions requiring recruiters to provide information on their residence in the province; details about any other business owned or operated by the recruiter, a list of all countries they intend to recruit from, the names of any agencies or individuals they intend to work with in foreign countries, and a list of all businesses associated with their recruitment activities; making employers liable for recruitment fees charged to workers if the employer recruited the worker with an unlicensed recruiter; and, creating specific offenses for employers who utilize unlicensed recruiters.¹⁷²

In addition to efforts at the state and provincial level to regulate the activities of private employment agencies, the United States and Canada also seek to regulate the recruitment of foreign workers through strict immigration regulations and channels. As highlighted, a growing number of migrant workers are taking advantage of temporary worker programmes in the United States and Canada that are provided for in federal immigration regulations.

¹⁷² See Province of Nova Scotia, Labour Standards Code of 1989 (Amendments of 2011); see also Province of Saskatchewan, FWRISA of 2013.

Canada's Temporary Foreign Worker Programme (TFWP) is comprised of four sector-specific programmes, including the Seasonal Agricultural Workers Programme (SAWP).¹⁷³ While the TFWP was initially targeted at workers with specialized skills, since 2002 it has increasingly served as an avenue for low-skilled and semi-skilled temporary migrant workers to fill labour shortages in Canada. The total number of temporary migrant workers has also increased, with more than three times as many registered in 2013 than in 2002.¹⁷⁴ The programme is demand driven, and does not place a ceiling on the number of temporary workers who can enter Canada in a given year.

Similar to the Canadian TFWP, the United States has created avenues in its *Immigration and Nationality Act* and federal regulations that allow foreign migrant workers to obtain temporary work visas to fill labour shortages in agriculture and other low-skilled occupations. Most notable among them are the H-2A (temporary agricultural work) and H-2B visas (temporary non-agricultural work).¹⁷⁵ While the H-2A programme is similar to the Canadian TFWP and is unlimited, the H-2B programme sets a cap on the number of workers admitted, currently 66,000 visas annually.

Both the TFWP in Canada and the H-2A/B visa programme in the United States generally follow a three-step immigration process similar to other categories of work visas. First, an employer must apply to the Ministry or Department of Labour for certification¹⁷⁶ that they have taken reasonable efforts to hire a worker within the country but have been unsuccessful and that hiring a foreign worker would not be harmful to the domestic labour market. Second, the worker must apply to immigration authorities for a work permit or visa. Third, the worker must pass through immigration and border controls, including security screenings, at a port of entry in the United States or Canada.

While direct recruitment is possible in either system, in practice, recruiters on either side of these immigration processes play significant roles in pairing prospective workers in Mexico or other countries of origin with employers in the United States and Canada. In general, workers come into contact with a recruiter in their home community and are presented with job opportunities in the United States or Canada. They may be required to pay a lump-sum fee to the recruiter, which may include their recruitment fee, visa costs and travel expenses. They are then referred to a larger agency or to a counterpart recruiter in the country of destination to begin the immigration process, prepare a formal job offer, secure a work visa and facilitate travel to their job site.

¹⁷³ These four programmes are: the Live-in Care Program; the Stream for Lower-skilled Occupations; the Agricultural Stream; and, the SAWP. The growing influx of lower-skilled workers began in 2002 with the launch of the TFWP's Pilot Project for Hiring Foreign Workers in Occupations that Require Lower Levels of Formal Training.

¹⁷⁴ Government of Canada, Citizen and Immigration Department, *Facts and figures 2013 – Immigration overview: Temporary residents*, 2013, available at: <http://www.cic.gc.ca/english/resources/statistics/facts2013/temporary/index.asp> [accessed 2 June 2015].

¹⁷⁵ See: Sections 101(a)(15)(H), 214 and 218 of the Immigration and Nationality Act of 1952, (INA), as amended and 20 CFR Part 655 Subparts A-B, 8 CFR Part 214.2(h)(6), and 29 CFR Part 501.

¹⁷⁶ A "Labour Market Opinion" in Canada, or "Foreign Labour Certification" in the United States.

Regulations in the United States require employers recruiting farmworkers to use authorized “farm labour contractors” and both countries prohibit recruiters from charging fees to recruited farm workers.¹⁷⁷ However, fee charging has remained an issue of concern for migrant rights groups that point to examples of high fee charging and violations of anti-discrimination laws that occur in countries of origin, such as Mexico, avoiding the reach and scrutiny of regulators in the United States and Canada.¹⁷⁸

While the combination of immigration regulations and state or provincial legislation are the primary tools for regulating recruitment in the United States and Canada, growing emphasis is also being placed on federal governments and companies/employers to scrutinize their supply chains and actively prevent recruitment and other labour abuses. This has been evidenced by the Provincial legislation in Manitoba and other Canadian provinces that place heightened responsibilities on employers (See Box 4), and also by recent steps taken in the United States both by states and the federal government to scrutinize the labour supply chains involved in large-scale business and government contracts.

California’s Transparency in Supply Chains Act of 2010 is an example of state-level regulations that are shining light on the supply chains of contractors and subcontractors, and highlighting the need for businesses to take steps to prevent forced labour and human trafficking.¹⁷⁹ The Act went into effect at the beginning of 2012, and requires businesses subject to the Act to provide detailed public information on their efforts to combat forced labour and trafficking in their supply chains, which can include labour recruitment issues.¹⁸⁰ However, the practice is currently limited in scope (it only applies to retailers and manufacturers with global revenues greater than US\$100 million annually that conduct business in California) and does not provide for sanctions.

These developments at the state level share some similarities with recent efforts by the Federal Government to tighten regulations on contractors and sub-contractors to prevent trafficking in the labour supply chains of US Government contracts (see Box 3.3).

¹⁷⁷ For the United States see the Code of Federal Regulations, section 20 CFR 655.135, on Assurances and obligations of H-2A employers; For Canada, see, the rules on recruitment and advertisement for the Seasonal Agricultural Workers Program, referenced at: http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml [accessed 22 June 2015].

¹⁷⁸ International Labor Recruitment Working Group: *The American Dream Up for Sale: A Blueprint for Ending International Labour Recruitment Abuse*, (2013), pp. 15. Concerns have also been raised about the working conditions of temporary migrant workers once they arrive in the United States and Canada. In the United States, labour regulations establishing employer obligations for temporary migrant workers are set out in specific rules, such as the joint rules issued by the Department of Labour and the Department of Homeland Security for the H-2B visa programme. Conversely, under Canadian law, temporary migrant workers explicitly fall under the same national and provincial labour laws and protections that apply to Canadian workers.

¹⁷⁹ Senate Bill 657 – the California Transparency in Supply Chains Act of 2010, (October 2010).

¹⁸⁰ *Ibid.*

Box 3.3: Executive Order 13627 - Combating abuses in the labour supply chain of US Government contracts¹⁸¹

On September 25, 2012, US President Barack Obama issued Executive Order 13627 entitled “Strengthening Protections Against Trafficking in Persons in Federal Contracts.”¹⁸² The Order and the resulting amendments to federal regulations set out strict requirements for contractors and subcontractors who receive federal contracts. The Order explains that its safeguards are intended to “strengthen compliance with anti-trafficking laws” and to “promote economy and efficiency in Government procurement.” While it is an executive action targeted at government contracts and supply chains, it effectively places recruitment regulations on a large number of contractors and subcontractors.

In this regard, the Order expressly forbids all federal contractors, subcontractors or their employees from engaging in certain recruitment practices, such as: using misleading or fraudulent recruitment practices during the recruitment of employees; failing to disclose basic information or making material misrepresentations regarding the key terms of the contract; confiscating or otherwise denying access to employees’ identity documents; charging employees recruitment fees; and, failing to pay return transportation for workers who travel internationally. It also mandates that contractors and subcontractors agree to allow contracting agencies and other enforcement agencies to conduct compliance audits or investigations and that they report any potentially unlawful activities.

Where federal contracts to be performed outside the United States exceed US\$ 500,000 in value, the Order also requires that each contractor and subcontractor maintain a compliance plan during the entire duration of the contract that, at minimum, includes protections such as: an awareness programme for employees; a reporting process for employees to raise concerns without fear of retaliation; a recruitment and wage plan that only permits the use of recruitment companies with trained employees; a prohibition against charging recruitment fees to the workers, and ensuring that wages meet applicable legal requirements; a housing plan if the contractor or subcontractor intends to provide it; and, procedures to prevent subcontractors at any level from engaging in trafficking and to monitor, detect and terminate contracts with any who have.

While the Order and subsequent regulations are relatively new, and their immediate effect on recruitment practises have yet to be tested, they demonstrate an alternative approach to the regulation and enforcement of recruitment practices by focusing on supply chains and the responsibilities of contractors and subcontractors. In this respect, the Order has proactive aspects similar to those detailed in the Manitoba Model, relying on businesses to pressure their overseas partners to comply with recruitment regulations. Large contractors are, in effect, required to take an active approach in scrutinizing the recruitment and labour practices of their subcontractors and suppliers, down to the lowest level. The Order, while limited in this instance to companies that secure federal contracts, may serve as a model for future regulations or enforcement mechanisms targeting recruitment abuses in corporate supply chains. Alternatively, it may illustrate a possible component of industry self-regulation schemes.

¹⁸¹ Executive Order (E.O.) 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, 25 September 2012.

¹⁸² Executive Order (E.O.) 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, 25 September 2012.

Similar pressure on retailers and other contractors to demand fair labour practices, including fair recruitment practices, from their suppliers and sub-contractors has also been growing outside of the regulatory framework in North America. This is owing to an increased involvement of trade unions, collective bargaining agreements and industry certification schemes relating to temporary migrant workers.¹⁸³

Crossroads: regulating recruitment in Mexico as both a country of origin and destination

Mexico has long been an important country of origin for migrant workers destined to fill demand in the United States and Canada for farming and other low-skilled work. Increasingly however, Mexico has become a country of considerable internal migration and of destination for workers from Guatemala and other Central American countries, presenting new regulatory challenges.¹⁸⁴ In parallel to the flow of migrant workers from Mexico, destined for low-skilled or agricultural jobs in the United States or Canada, Mexico is also the principal country of destination for labour migration from Guatemala, receiving approximately 73 per cent of Guatemala's foreign workers.¹⁸⁵ In recognizing the need to improve migrant worker protection, Guatemala has been taking steps to improve the functioning of its public employment agencies, including their role in facilitating and monitoring the recruitment and placement of migrant workers.

The Employment Agency Regulations (RACT) of 2006, as amended in 2014, regulates private recruiters in Mexico.¹⁸⁶ Before private recruiters may legally operate, the RACT requires them to obtain a licence.¹⁸⁷ Licensed recruiters may charge fees to employers for their services, but they are prohibited from charging fees to workers and may not make agreements with employers to have their recruitment fees deducted from workers' wages.¹⁸⁸ In addition to setting out the conditions for private employment agencies that wish to provide recruitment services within Mexico, the RACT adds additional requirements for private employment agencies if they seek to place Mexican workers in employment abroad. Specifically, the legislation requires recruiters to: verify the seriousness and reliability of the employer to safeguard the worker; ensure the working conditions match those offered to the applicants on housing, social security, and repatriation; verify the workers' right to seek consular protection; and, guarantee to cover the repatriation costs of workers where there has been a breach of the contract terms.¹⁸⁹ The new amendments to the RACT also require the Ministry of Labour and Social Welfare, to inform the Ministry of the Interior every six months of all

¹⁸³ See, Jennifer Gordon: *Global Recruitment in a Supply Chain Context* (Geneva 2015).

¹⁸⁴ Zulum Avila (Forthcoming). Notes on Public Employment Services in Latin-America: Mexico (ILO Geneva).

¹⁸⁵ Government of Guatemala, Ministry of Labour and Social Welfare, National Employment Service Indicators, 2014.

¹⁸⁶ Reglamento de Agencias de Colocación de Trabajadores (RACT) of 28 February 2006, as amended; See also, Direct Request (CEACR), adopted 2014, published 104th ILC Session (2015) Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96) – Mexico.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

authorizations and registrations issued for private employment agencies that place Mexican workers abroad.¹⁹⁰

In addition to regulations set out in the RACT for private recruiters, the Government of Mexico is also taking several steps to improve the labour mobility of Mexican migrant workers and reduce the impact of temporary migrant work on Mexican families through programmes providing free recruitment services and/or related social assistance (See Box 3.4).

Box 3.4: Farm Workers Assistance and Internal Worker Mobility programmes¹⁹¹

Recognizing the high dependence of many low-skilled Mexican workers on seasonal agricultural work, the Government of Mexico has, through its National Employment Service (NES) and Ministry of Social Development (MSD), implemented a coordinated intervention to improve the living and working conditions of seasonal migrant workers and their families.

The Worker's Mobility Programme of the NES was launched in 2002 and facilitates the labour mobility of agricultural or other low-skilled workers from areas of high unemployment to areas with high labour demand in agriculture, industrial and service industries. Mobile units bring services to rural communities where disadvantaged populations are targeted. The workers participating in the programme receive job placement services and economic support to cover costs associated with travelling or relocating for work. The NES coordinates service delivery with other governmental agencies and the farms employing seasonal agricultural workers to ensure that the basic legal working conditions are met.

Inter-agency interventions facilitate a more comprehensive service delivery to seasonal farm workers and their families. The MSD Farm Workers Assistance programme operates primarily during the farming season. In an effort to break the cycle of poverty that can affect farm workers' families, the programme provides food and other subsidies for the education, health care and monitoring of farm worker families. In the first half of 2013 alone, the programme helped 12,709 children attend school and assisted with the relocation expenses of 14,342 seasonal migrant workers.

In Guatemala, similar challenges face migrant workers destined for Mexican farms and low-skilled occupations. A knowledge sharing session was held in Guatemala in March of 2014 on the ILO's Sub-regional Programme for Developing Integrated Training and Labour Intermediation Systems (FOIL). Even though work on labour migration was not initially an important component of FOIL's project, one of the two specific target populations of FOIL's intervention was migrant workers. FOIL provides

¹⁹⁰ Direct Request (CEACR), adopted 2014, published 104th ILC Session (2015) Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96) – Mexico.

¹⁹¹ Avila (Forthcoming). Notes on Public Employment Services in Latin-America: Mexico (ILO, Geneva).

a means of strengthening linkages and coherence between employment and labour migration policies.¹⁹²

Both countries have recognized the significance of the flow of labour migration from Guatemala and, on 14 August, 2014 Mexico and Guatemala signed a Bilateral Cooperation Agreement on Labour Migration.¹⁹³ The agreement is aimed at promoting decent, productive and quality jobs as well as respect for the labour rights of temporary migrant workers through the equality of treatment principles and by contributing to advancing development goals. The agreement mentions the use of active labour market policies and the creation of a bi-national system to register and approve licenses for the operation of recruiting agencies and placement of workers, which will allow for the monitoring and verification of private employment agencies.

3.3. East Asia

Introduction

East Asia has one of the world's most mobile labour forces in the world, alongside some of its most tightly regulated labour markets. Labour migration policies opening up domestic labour markets to low-skilled international migrant workers are a quite recent development.¹⁹⁴ In parallel, over the past two decades, emerging differences in income and demographic profiles between countries within East Asia have led to increased migration within the region. Currently, of the estimated 22 million East Asian international migrants, more than 7 million have migrated within the region.¹⁹⁵ Japan, Hong Kong SAR, China, Malaysia, the Republic of Korea, Singapore and Thailand are the most important destinations of these “intra-regional” migrants.

¹⁹² The ILO also launched a project, in March of 2015, to ensure fair recruitment of Guatemalan migrant workers in Mexico through South-South Cooperation. The project will seek to further expand knowledge regarding existing legislation and practices pertaining to the recruitment and placement of Guatemalan migrant workers. It further intends to strengthen the institutional capacity of public employment services to assist in the recruitment of migrant workers, to register and monitor recruiters, and to disseminate information to workers regarding the recruiter registry and available recruitment processes.

¹⁹³ The agreement mentions the creation of a Labour Observatory to analyse the working conditions of migrant workers and to monitor labour migration flows between the two countries. Its main objective will be the creation of instruments that will provide quantitative and qualitative information on the characteristics of migrant workers, and to design Active Labour Market Policies for them. Similarly, the agreement mentions the need to ensure that migration is beneficial to both countries and contributes in every way to the welfare of migrants and their families. Lastly, it explicitly includes mention of the possibility that the signed parties request the support of the ILO to reach the objectives established in the agreement, and its introductory paragraph considers the building of public policies that promote decent and productive employment, as well as labour rights for temporary migrant workers, as a means of advancing towards the achievement of equality and development. http://www.stps.gob.mx/bp/secciones/sala_prensa/boletines/2014/agosto/bol_273.html.

¹⁹⁴ Manolo Abella: *Policies on Admission Low-Skilled Workers in Korea, Japan and Taiwan (China): similarities and differences*, ILO/EU Asian Programme on the Governance of Labour Migration Technical Note.

¹⁹⁵ A. Ahsan; M. Abella; A. Beath; Y. Huang; M. Luthria; T. Van Nguyen: *International Migration and Development in East Asia and the Pacific*, the World Bank (2014, Washington), p. xi.

This increase in internal and international labour mobility, accompanying rapid economic growth in the region, has led to an evolution in national recruitment regulations. The resultant approaches to regulation are, however, highly diverse, reflecting marked differences between the countries concerned. This chapter focuses on analysing the approaches used in China, Japan and the Republic of Korea (South Korea), as well as in the Greater Mekong region, specifically Thailand and Malaysia. These countries demonstrate a range of approaches, from those depending entirely on public employment services to those relying most heavily on private labour recruiters.

Promoting government-to-government recruitment

Among the countries reviewed in this paper, few have maintained regulatory approaches that restrict private employment agencies from conducting cross-border recruitment; the Republic of Korea and Japan are the prime examples in East Asia. Both countries operate temporary labour migration programmes for low-skilled jobs that are executed through bilateral Memoranda of Understanding (MoU) with the migrant workers' countries of origin. The Employment Permit System of the Republic of Korea (EPS) was initiated in 2003 under the *Law concerning the Employment Permit for Migrant Workers*. It is a temporary labour migration system aimed at achieving “smooth supply and demand of manpower and the balanced development of the national economy”.¹⁹⁶ It replaced the Industrial Trainee Scheme (ITS), the Republic of Korea's previous regulatory system for the recruitment and employment of low-skilled foreign workers. The ITS programme had been put in place to fill structural shortages in the labour market, through the recruitment and placement of trainees primarily by private employment agencies, overseen by the Korea Federation of Small and Medium Business. However, the ITS quickly became misused and utilized as a means of employing cheap labour without providing meaningful training, and led to an increase in the number of migrant workers in an irregular situation, as trainees overstayed due to the limited possibility of contract renewal. Abusive practices also began to emerge in relation to the ITS programme, including high recruitment fees being charged by agencies.¹⁹⁷

In response, the EPS was designed as a government-managed scheme, with the aim of fostering greater transparency and a clearer structure for governing cross-border labour migration.

¹⁹⁶ Law concerning the Employment Permit for Migrant Workers of 31 July 2003, Article 1.

¹⁹⁷ Min Ji Kim: *The Republic of Korea's Employment Permit System (EPS): Background and Rapid Assessment*, ILO (Geneva, 2015), p. 1.

Box: 3.5: The protective approach of the Republic of Korea's Employment Permit System¹⁹⁸

The EPS procedures integrate protective provisions to limit abusive practices against workers. As of early 2015, the Republic of Korea had signed MoUs with 15 countries of origin under the EPS framework.¹⁹⁹ These MoUs stipulate the duties and responsibilities of the respective governments regarding the recruitment, selection and placement process, as well as the protection and employment conditions of the migrant workers in the Republic of Korea.²⁰⁰ The government set a quota of 62,000 permits for workers from collaborating origin countries through the EPS programme in 2013. Strict selection criteria for migrant workers are applied, including passing a Korean language proficiency test and having a high school diploma. Official liaison offices are established in all origin countries, managed by the Ministry of Employment and Labour (MOEL) of the Republic of Korea. These provide pre-departure training and orientation, including for the prevention of recruitment abuses and to ensure that no fees are charged to workers at any stage. Employers must obtain special permits in order to access the EPS labour pool. Their applications are reviewed by MOEL to verify that they have less than 300 employees and have first tried to fill the position(s) with nationals. Origin countries that violate the requirements of the MoU may be suspended from the scheme for a fixed duration; both Indonesia and Mongolia have had this sanction imposed.²⁰¹

While the Republic of Korea opted for a “guest worker” programme, Japan continues to approach the recruitment of foreign workers through a training programme, without avenues for the general admission of low-skilled workers. Low-skilled foreign workers are recruited solely through the Industrial Training and Technical Internship Programme (TITP), established in 1993 with the stated aim to secure the transfer of industrial technology, skills and knowledge from Japan to developing countries. Under this scheme, foreign nationals can enter Japan as “trainees” for one year and then become “technical interns” for a further two years, with the obligation to return to their home country at the end of their contract. The Japan International Training Cooperation Organization (JITCO) monitors the programme, supervised by the Immigration Bureau and labour inspection authorities. Amendments to the *Immigration Control Act* were introduced in 2009 in order to strengthen the protection of the trainees. They are now given a legal residence status for up to three years, with equal protection to national workers under various laws and regulations, such as the Labour Standards Law and the Minimum Wage Law.²⁰² Other new provisions include extending the suspension period for companies found guilty of malpractice under the scheme from three to five years.²⁰³

¹⁹⁸ ILO Regional Office for Asia and the Pacific: *Pioneering a system of migration management in Asia: The Republic of Korea's Employment Permit System approach to decent work*, (Bangkok, undated).

¹⁹⁹ Including: Bangladesh, Cambodia, China, Indonesia, Kyrgyzstan, Mongolia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Thailand, Timor-Leste, Viet Nam and Uzbekistan. See Min Ji Kim: *The Republic of Korea's Employment Permit System (EPS): Background and Rapid Assessment*, ILO (Geneva, 2015), p. 5.

²⁰⁰ Min Ji Kim: *The Republic of Korea's Employment Permit System (EPS): Background and Rapid Assessment*, ILO (Geneva 2015), p. 6.

²⁰¹ Amnesty International: *Disposable Labour: Rights of Migrant Workers in South Korea* (London 2009), p. 25.

²⁰² Except for restriction on changing employers, foreign workers are protected under the Labour Standard Act equally as native workers. They have right to a guaranteed minimum wage, to form and join the trade union, to collective bargaining as

Fifteen countries, mostly in Asia,²⁰⁴ have signed bilateral MoUs with Japan under the programme. There are currently around 200,000 trainees and interns in Japan, mostly from China. While this programme is promoted as a government-to-government endeavour in Japan, there is in fact considerable involvement of private recruiters in the recruitment of trainees in origin countries. For example, China has 245 accredited sending organizations, regulated by the *Foreign Labour Cooperation Management Ordinance* of 2012, China's first specialized law in the field of foreign labour cooperation.²⁰⁵

Concerns have been raised in Japan over those schemes for providing a means of employing low-skilled workers in industrial sectors, while compensating them only with low allowances. There have even been some allegations of forced labour, with trainees threatened with deportation and unable to leave their employer.²⁰⁶ Enforcement has sometimes been weak, and sanctions against abusive employers inadequate to act as a real deterrent. Nor do the programmes necessarily prevent the charging of fees to prospective migrants by unscrupulous private employment agencies operating “at the margins” in origin countries. There have been reports of workers paying exorbitant recruitment fees that put them into debt for the duration of their stay overseas, sometimes pushing them to move from their initial placements into better paid jobs with irregular work status.²⁰⁷

Japan has also sought to regulate internal temporary labour recruitment within the country through the so-called “worker dispatch system” that operates through private employment agencies in specified industrial sectors.²⁰⁸ The worker dispatching system started off with 16 occupations for which private employment agencies were authorized to provide temporary workers, but Japan has since been moving towards a negative list approach, specifying the select industries in which temporary work agencies are still prohibited from operating. The current list restricts private employment agencies from providing temporary workers in 26 specific sectors, such as construction and port transport.²⁰⁹

well as collective action. See: Manolo Abella: *Policies on Admission Low-Skilled Workers in Korea, Japan and Taiwan (China): similarities and differences*, ILO/EU Asian Programme on the Governance of Labour Migration Technical Note.

²⁰³ Observation (CEACR), 2012, published 102th session ILC (2013), Forced Labour Convention, 1930 (No. 29) – Japan.

²⁰⁴ Countries of origin part of the Programme are: China, Indonesia, Vietnam, Philippines, Thailand, Peru, Laos, Sri Lanka, India, Myanmar, Mongolia, Uzbekistan, Cambodia, Nepal and Bangladesh. See

http://www.jitco.or.jp/english/engagement_sending_out/regular.html [accessed 22 June 2015].

²⁰⁵ JITCO: Report of Briefing on China's "Foreign Labor Cooperation Management Ordinance, 2013, see

<http://www.jitco.or.jp/english/press/detail/455.html> [accessed 22 June 2015].

²⁰⁶ ILO Observation (CEACR), Japan, 2012, published 102th session ILC (2013), Forced Labour Convention, 1930 (No. 29) – Japan.

²⁰⁷ ILO Observation (CEACR), adopted 2012, published 102nd ILC session (2013) Private Employment Agencies Convention, 1997 (No. 181) – Japan; See also, New York Times: Japan Training Program is Said to Exploit Workers, 2010, available at: http://www.nytimes.com/2010/07/21/business/global/21apprentice.html?_r=0 [accessed 22 June 2015].

²⁰⁸ Law No. 88 of 5 July 1985, the “Worker Dispatch Law” of 1985.

²⁰⁹ Worker Dispatch Law of 1985, Chapter II: Measures for Securing the Proper Operation of Worker Dispatching Undertakings Section 1 Scope of Designated Work, Article 4.

Two types of worker dispatching have developed pursuant to Japan's Worker Dispatch Law of 1985. The first type is "regular dispatch" in which workers are regularly employed by a dispatching business operator and are dispatched to receiver companies as part of their business activities. Even in the event that a worker is not dispatched to a receiver company, under the regular dispatch model the employment contract between the dispatching business and the dispatch worker continues. The second is "registration-type dispatch" in which workers who seek to undertake dispatch work are registered in advance with a dispatching business operator and when requested by a dispatch receiver company, registered workers with the necessary skills are dispatched to the receiver company while being employed by the dispatching business operator.

The registration-type dispatch has raised concerns by trade unions and other groups, and the Japan Community Union Federation, in 2009, filed a representation under article 24 of the ILO Constitution alleging non-observance by Japan of Convention No. 181. Concerns have focused on, among other issues, the dispatch system's fee charging policies as fee charging to workers has not been banned for several professions including several low skilled professions such as housekeepers, waiters, and cooks. The CEACR has continued to invite information from the Japanese Government with respect to the recruitment fee exceptions applicable to these sectors and workers and the Government has indicated that such fees are being maintained as exceptional measures.²¹⁰

Sanctions for violations committed by private employment agencies are provided under Chapter 5 of the Worker Dispatch Law. For example, deceptive recruitment practices "inducing workers to engage in work injurious to public health or public morals, shall be punished by imprisonment with work of not less than one year and not more than ten years, or a fine of not less than 200,000 yen and not more than 3,000,000 yen".²¹¹ However, the effective application of administrative penalties has been called into question by trade unions, particularly in the case of employers who illegally receive workers from the dispatch service provider.²¹²

Other regulatory approaches in East Asia

The evolution of the regulation of recruitment has followed different paths and happened at varying speeds in the East Asia region. Among the most complex regulatory transformations were those undertaken in China where a state monopoly over international labour recruitment was the dominant approach of regulation until the 1980s. International labour migration was linked to foreign aid projects of the state at that time. Four state-owned "central companies", established in 1982, were tasked with carrying out international projects on a commercial basis. Labour supply was often

²¹⁰ ILO Observation (CEACR), adopted 2009, published 99th ILC session (2010) Private Employment Agencies Convention, 1997 (No. 181) – Japan.

²¹¹ Worker Dispatch Law of 1985, Article 58.

²¹² ILO Observation (CEACR), adopted 2009, published 99th ILC session (2010) Private Employment Agencies Convention, 1997 (No. 181) – Japan.

subcontracted to other state-owned companies within China. Even when a subcontractor dealt directly with foreign clients, it had to present the project through a central company, because the latter was the only legitimate “window”, through which Chinese companies could sign international contracts.²¹³

In 2002, the Chinese government completely changed its approach, introducing the *Regulations on the Administration of Overseas Employment Intermediaries*, which allow any independent entity to become a licensed recruitment agent instead of government institutions facilitating international recruitment. Some have argued that this licensing system has not succeeded in eliminating the complex chain of labour intermediaries and brokers as its emphasis on capacity and qualification has recreated the divide between those “in” and “out” of the system.²¹⁴

The recruitment of workers inside China, boosted by massive labour migration from rural to urban areas, has followed a similar path of deregulation and, as in Japan, is intrinsically linked to a labour dispatch system of “temporary, auxiliary, and substitute” positions. The Employment Promotion Law of 2007 regulates both public and private employment agencies in China “in order to promote the employment, the coordination between economic development and employment expansion”.²¹⁵ Employment agencies must meet several requirements, including having a fixed business location, explicit regulations, a management system, and other conditions, in order to apply for an administrative license and register with the industrial and commercial administrative department.²¹⁶ Private employment agencies recruiting internally function as temporary work agencies according to the Labour Contract Law of 2008. In 2013, amendments to the law were introduced to limit the use of agency workers, as some companies were using labour dispatch as their main method for hiring workers to limit their liability and to reduce staff costs. Labour recruiters operating internally have also been serving in intermediary-only capacities, specifically in sectors like domestic work, manufacturing, services, transport, financial and IT services.²¹⁷ According to the amendments of the Labour Contract Law, the minimum registered capital required to establish a labour dispatch agency was raised from RMB 500,000 to RMB 2 million. New conditions for incorporating a labour dispatch agency were also added, such as having fixed business premises and facilities corresponding to business operations and a management system that complies with laws and regulations. However, labour inspections of private employment agencies and user enterprises are rather weak and thus far have not been able to ensure fully effective oversight or the elimination of abusive practices.²¹⁸

²¹³ Biao Xiang: “The intermediary trap: international labour recruitment, transnational governance and state-citizen relations in China”, in *Asia Colloquia Papers*, York Centre for Asian Research, Vol. 03 No. 01, 2013.

²¹⁴ Biao Xiang: “Predatory Princes and Princely Peddlers: The State and International Labour Migration Intermediaries in China”, in *Public Affairs*: Vol. 85, No. 1 March 2012, p. 67.

²¹⁵ Employment Promotion Law of the People’s Republic of China, Adopted at the 29th session of the Standing Committee of the Tenth National People’s Congress on August 30, 2007.

²¹⁶ *Ibid.* at Article 40.

²¹⁷ Liu Genghua: *Private employment agencies and labour dispatch in China*, Geneva, 2014, ILO, p. 7.

²¹⁸ Liu Genghua: *Private employment agencies and labour dispatch in China*, Geneva, 2014, ILO, p. 7.

Labour migration has emerged as an important factor in sustaining the growth of economies in the Greater Mekong Sub-region (GMS), as well as in alleviating poverty. In the GMS, Thailand has been an engine of growth, and has become a major country of destination, attracting migrant workers from Cambodia, Lao People’s Democratic Republic and Myanmar, many of whom have been vulnerable to abusive and fraudulent recruitment practices.²¹⁹ Malaysia’s economic success has led it also to become an important destination country for workers coming both from within the GMS region and from South Asian countries such as Nepal and Bangladesh. Reporting on her visit to Malaysia in February 2015, the UN Special Rapporteur on trafficking in persons noted that there are an estimated 2 million documented and a further 2 million undocumented migrant workers in Malaysia.²²⁰

Thailand has implemented licensing regulations for private employment agencies that recruit Thai workers who wish to migrate abroad. The delivery of this overseas recruitment license, which extends to private recruiters’ sub-agents, is regulated by the Employment and Job-Seekers’ Protection Act, 1985. This law requires the agency to be registered with the central registrar’s office under the Director General of the Department of Employment. A supplementary Ministerial Regulation prescribes procedures for the application and granting of licences. Under this scheme, private employment agencies are allowed to charge workers for recruitment fees that vary according to the type of employment and the country of destination. In order to avoid contract deception, private recruiters must submit to the Director General, prior to the worker’s departure abroad, the employment contract between the overseas employment licensee (or its agent) and the job seeker, together with the hiring conditions agreed between the overseas employer (or its agent) and the job seeker, as well as other evidence as required.²²¹

Malaysia has also opted for licensing regulations for both internal and cross-border recruitment. Malaysia’s *Private Employment Agencies Act* of 1981 establishes licensing requirements for private employment agencies in Malaysia, as well as specific requirements for agencies that place Malaysian workers abroad.²²² Licenses are issued by the Ministry of Human Resources. While direct recruitment of foreign workers is a longstanding practice in Malaysia, the Cabinet Committee on Migrant Workers decided in 2005 that foreign migrant workers could also be employed by outsourcing companies, registered with the Ministry of Home Affairs. It was determined in 2010 that these “outsourcing”

²¹⁹ ILO: *Regulating recruitment of migrant workers: an assessment of complaint mechanisms in Thailand*, (Bangkok, 2013), p. xi.

²²⁰ OHCHR: Preliminary findings, UN Special Rapporteur on Trafficking in persons, especially women and children, Maria Grazia Giammarinaro Visit to Malaysia (23 -28 February 2015), available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15631&LangID=E> [accessed 22 June 2015]; See also Direct Request (CEACR), adopted 2014, published 104th ILC session (2015) Forced Labour Convention, 1930 (No. 29) – Malaysia; United Nations, Department of Economic and Social Affairs, Population Division Database, International migrant stock: By destination and origin 2013, available at: <http://www.un.org/en/development/desa/population/migration/data/estimates2/estimatesorigin.shtml> [accessed 22 June 2015].

²²¹ Section 36 of the Employment and Job-Seekers’ Protection Act, 1985

²²² Laws of Malaysia, Act 246 the “Private Employment Agencies Act” of 1981, as amended.

businesses would be regulated under the Private Employment Agencies Act and must be licensed by the Ministry of Home Affairs (MOHA).²²³ The Department of Immigration, under MOHA, determines the sectors and origin countries of migrant workers from which outsourcing businesses may recruit, and provides a list of currently licensed agencies.²²⁴

Malaysia's approach is unique in the region, operating a licensing scheme for private employment agencies that recruit both Malaysian and foreign workers alongside a parallel scheme for licensing "outsourcing" businesses employing migrant workers from outside Malaysia. However, there are still some challenges involved in this approach according to several sources.²²⁵

3.4. Middle East and South Asia

Introduction

The Middle East is one of the major recipients of low-skilled migrant workers who primarily fill demand in the services, construction and domestic work sectors. The six countries of the GCC alone are host to more than 22 million migrants,²²⁶ with workers generating over US\$ 80 billion in annual remittances worldwide.²²⁷ Countries of origin have recognized the value of labour migration, both in addressing national unemployment and as a substantial source of income and foreign currency.²²⁸ Most migrant workers recruited to the Middle East come from South Asia, including Bangladesh, Nepal, India, Sri Lanka, the Philippines, Indonesia, Pakistan and Afghanistan, and from Africa including Ethiopia Kenya and Egypt.²²⁹ Given this unique context, this section discusses the regulation of labour recruitment from South Asia to the Middle East. The data collected for this paper

²²³ Arukesamy, K., *Freeze on foreign workers' licence*, the Sun Daily, 24 July 2013, <http://www.thesundaily.my/news/779785> [accessed 22 June 2015].

²²⁴ For a current list, see the MOHA website page on Approved Sectors, available at: <http://www.moha.gov.my/index.php/en/bahagian-pa-maklumat-perkhidmatan> [accessed 22 June 2015].

²²⁵ See, OHCHR: Preliminary findings, UN Special Rapporteur on Trafficking in persons, especially women and children, Maria Grazia Giammarinaro Visit to Malaysia (23 -28 February 2015), available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15631&LangID=E> [accessed 22 June 2015]; See also Direct Request (CEACR), adopted 2014, published 104th ILC session (2015) Forced Labour Convention, 1930 (No. 29) – Malaysia.

²²⁶ United Nations, Department of Economic and Social Affairs, Population Division Database, International migrant stock: By destination and origin 2013, available at: <http://www.un.org/en/development/desa/population/migration/data/estimates2/estimatesorigin.shtml> [accessed 22 June 2015].

²²⁷ The Emirates Center for Strategic Studies and Research: *Labor mobility: an enabler for sustainable development*, (Abu Dhabi 2013), p. xvii.

²²⁸ In Nepal, remittances accounted for 28.8 per cent of the nation's GDP in 2013, the second highest percentage among countries covered in World Bank statistics for 2013. See World Bank Website Data on Personal Remittances, available at: <http://data.worldbank.org/indicator/BX.TRE.PWKR.DT.GD.ZS> [accessed 22 June 2015].

²²⁹ In addition, the Middle East region has also experienced the impact of the nearly 4 million Syrian refugees who have been displaced by conflict, including 2.2 million registered in Egypt, Iraq, Jordan and Lebanon, and who are often in search of new livelihoods in their host countries and vulnerable to many of the same risks of abuse as migrant workers. See, UNHCR, Syria Regional Refugee Response – Information Sharing Portal, updated 17 June 2015, available at: <http://data.unhcr.org/syrianrefugees/regional.php> [accessed 22 June 2015].

covers several key South/Southeast Asian countries, GCC States and Lebanon and Jordan in the Mashreq region.²³⁰

Since the oil boom of the 1970s, the Middle Eastern countries have increasingly relied on migrant workers to meet the labour demand in rapidly growing industries, such as construction and services. This has fuelled an increase in the number of labour recruiters and employment agencies in both source and destination countries. The ILO estimated in 1997 that around 80 per cent of temporary labour migration from Asia to the Middle East was facilitated by private employment agencies²³¹ and recent studies confirm the prevalence of this mode of recruitment in the region.²³² Indeed, in countries of destination, where migrant workers can in some cases account for more than 80 or 90 per cent of the workforce, public agencies have been unable to respond to the sharp increase in the demand for foreign labour through public employment services. Middle Eastern countries have therefore employed a predominantly private system for sourcing foreign workers, with employers relying almost exclusively on services offered by labour recruiters and employment agencies that have been able to quickly adapt to changes in the labour market and who have had the capacity to rapidly deploy workers with fewer administrative obstacles.

Following the rapid growth of private recruiters the Middle East in the 1980s, 1990s, and early 2000s, recruitment abuses were identified and began to attract increased attention by authorities. In response, South Asian countries began to reinforce their public administrations to increase their control over the recruitment of migrant workers. Despite the renewed efforts of origin countries to involve public employment services in cross-border migration, private employment agencies and other recruiters continued to dominate.²³³ Since the mid-2000s, this reality has required countries of origin to seek protection for their nationals going to work abroad through enhanced regulations and an increase in the use of bilateral agreements or MoUs with countries of destination. While some reports have suggested that the use of personal networks and direct contacts has begun to grow in proportion to formal recruitment channels and labour recruiters in countries such as Bangladesh, India and Pakistan,²³⁴ the latter remain the predominant intermediaries in this migration corridor.

²³⁰ Cursory research was conducted on a wide range of countries in the region, while comprehensive data was collected on the regulations in: Bangladesh, Indonesia, Nepal, the Philippines, Jordan, Lebanon, Qatar, and UAE. Workers' recruitment patterns in conflict-affected areas like Syria, Palestine and Iraq were excluded from this analysis due to their contextual peculiarities.

²³¹ Demaret, L.: "Private Employment Agencies: The Challenges Ahead from the Workers' Perspective", in *Merchants of Labour*, ILO (Geneva 2006).

²³² Jones, K.: *For a fee*, ILO (Geneva 2015).

²³³ Sri Lanka, for example, saw cross-border public sector placement fall from 47 per cent in 1977 to 9 per cent in 1979 and the number of licensed private employment agencies grow from 139 in 1985 to 477 in 1995. See ILO: *Recruitment Practices of Employment Agencies Recruiting Migrant Workers*, (Geneva 2013), pp. 5-7.

²³⁴ Afsar, R. (2009): *Unravelling the Vicious Cycle of Recruitment. Labour Migration from Bangladesh to the Gulf States*, ILO Geneva; Rajan, S.I.M. et al. (2008): *Overseas Recruitment Practices in India*, ILO Bangkok; Arif, G.M. (2009): *Recruitment of Pakistani Workers for Overseas Employment: Mechanisms, Exploitation and Vulnerabilities*, ILO (Geneva 2009).

The legislation that has been developed in recent years to regulate the activities of private employment agencies in South/Southeast Asia and the Middle East has mostly focused on labour recruiters involved in cross-border recruitment and placement of workers.²³⁵

Development of basic licensing systems in the Middle East

The migration of foreign workers to the Middle East has primarily been regulated through the sponsorship system, also known as the *kafala* system, implemented through immigration and labour laws.²³⁶ In practice, the *kafala* system has delegated responsibility for the increasing numbers of migrant worker to employers by linking a worker with a specific sponsor for the duration of his/her employment period in the destination country; restraining the worker's ability to leave or change employers during their stay; and, making the employer legally responsible for administrative and immigration-related procedures for the worker during his or her stay. The primary objective of sponsorship regulations has been to respond to the needs and demands of employers while limiting the State's involvement in migration governance. The prevalence of this approach can be explained by several factors, including a lack of social partner consultations during the legislative drafting process. This is due, in part, to the fact that trade unions are either weak, not permitted to have migrant worker members, or not allowed to operate at all in certain countries.²³⁷ The ILO Committee of Experts has noted that for low-skilled workers the *kafala* system may be conducive to the exaction of forced labour and has requested that the governments concerned better protect migrant workers from abusive practices.²³⁸

The *kafala* system has inevitably had an impact on business models in the recruitment industry. Agencies must directly pair and bind foreign workers with national employers, giving the latter a large degree of control in the labour migration process. It is perhaps a result of this common sponsorship framework, and resulting recruitment business models, that the regulatory schemes in the Middle East are among the most homogenous of all the regions analysed in this chapter.

Where countries in the Middle East have taken steps to regulate private employment agencies, they have overwhelmingly chosen to implement licensing schemes for agencies sourcing foreign workers.²³⁹ Jordan and Lebanon, for example, have enacted specific laws on the licensing of private

²³⁵ The primary reason for this divergence has been the rapid rate at which international labour migration has grown in these regions, specifically with respect to low-skilled workers from low-income countries migrating to high-income countries.

²³⁶ See for example Law No. 4 of 2009 regulating the entry and exit of expatriates in Qatar and their Residence and Sponsorship.

²³⁷ ILO: Giving globalization a human face: General survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (1B), International Labour Conference, 101st Session, (Geneva 2012), pp. 126–27.

²³⁸ ILO: Giving globalization a human face: General survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (1B), International Labour Conference, (Geneva 2012), pp. 295.

²³⁹ See e.g. Regulation No. 12 of 2015 (Jordan); Ministerial Resolution No. 1283 of 2010 (UAE); and, Ministerial Decision No. 8 of 2005 (Qatar) establishing licensing schemes. Despite the widespread use of licensing schemes in the region, in

employment agencies, while Qatar and the UAE regulate private employment agencies through references in their labour codes and have subsequently issued ministerial resolutions or decrees establishing licensing requirements for private employment agencies.

Supplementary sector-specific labour laws, while not ubiquitous, have also been issued in several Middle East countries, particularly with regard to sectors that are heavily reliant on foreign labour, such as domestic work and the garment industry.²⁴⁰ The Jordanian Government is one of the few countries in the region that has deviated from a generic licensing approach with such supplementary regulation. Indeed, it has explicitly excluded private employment agencies from operating in the apparel sector in an attempt to prevent the malpractice of labour recruiters observed in other sectors such as domestic work. However, evidence suggests this approach has not fully succeeded in ending migrant worker abuses in the sector.²⁴¹ Jordan has also drafted regulations that apply only to foreign workers of certain nationalities, particularly Egyptian workers who account for more than half of all migrant workers in Jordan, although such regulations have been criticized as marginalizing rather than enhancing worker protections.²⁴²

While a unique approach, Jordan's ban on private labour recruiters in the apparel sector parallels the larger trends in licensing systems in the region. Private employment agencies operating in the Middle East can secure their fees from the prospective employers (some of whom may recover the funds from the worker(s)),²⁴³ or through commissions paid by labour recruiters in countries of origin where fee charging to workers is permitted. While Jordan, Qatar, Saudi Arabia and the UAE all have laws prohibiting fee charging to workers, countries of origin in this same migration corridor, including Bangladesh, Indonesia, Nepal and the Philippines,²⁴⁴ all permit employment agencies to charge recruitment fees and other costs to workers, with actual costs often exceeding the prescribed limits.²⁴⁵

many of the sizeable sectors not covered by licensing or other labour recruiters regulations in countries such as Jordan (all sectors except domestic work and garment work) or Oman (all sectors except domestic work) the activities of private employment agencies would be subject to a "no regulation" model.

²⁴⁰ See e.g. Instructions on the conditions and procedures for bringing and employing non-Jordanians workers in the QIZs (Jordan); Regulation No. 90 of 2009 for Home Workers, Cooks, Gardeners and their Like (Jordan); and, Decision No. 310 of 1434 on Domestic Workers, 2013 (Saudi Arabia).

²⁴¹ Also lacking a strong PES to facilitate cross-border recruitment, employers in the sector must recruit directly through private employment agencies or PES based in countries of origin. The latest compliance report from Better Work Jordan on recruitment practices has shown that this model has not succeeded in ending abuses, including excessive fee charging or contract deception. See Better Work Jordan, *6th Compliance Synthesis Report*, (Geneva 2015).

²⁴² See Tamkeen: Between a Rock and a Hard Place, Amman, 2012, pp. 29, available at: http://tamkeen-jo.org/download/between_rock_hard_place.pdf [accessed 22 June 2015] (discussing the 2012 instructions that organize the entrance, exit, vacations, and repatriations of Egyptian migrant workers).

²⁴³ Katharine Jones: *For a Fee: The business of recruiting Bangladeshi women for domestic work in Jordan and Lebanon*, ILO, (Geneva 2015).

²⁴⁴ With the exception of migrant domestic workers and seafarers who may not be charged recruitment fees in the Philippines.

²⁴⁵ For examples of the additional costs which may be borne by migrant workers, see ILO, *The Cost: Causes of and potential redress for high recruitment and migration costs in Bangladesh*, (Dhaka 2014).

There have been mounting reports about abusive recruitment practices in countries of origin and destination, as a result of which some changes occurred in immigration laws, labour laws and the regulations on recruitment. One development has been the removal of the need for workers to obtain employer approval for an exit visa²⁴⁶ in certain countries, and another has been pledges or efforts to modify the sponsorship system in order to allow migrant workers some flexibility to change employers within the first few weeks or months of their employment contract while protecting the financial investments of employers.²⁴⁷ In addition, many of the licensing regulations have mandated that private employment agencies provide bank guarantees or secure insurance on behalf of workers in order to facilitate compensation in the event of legal judgements against the labour recruiter, employment-related injuries or the need to pay return expenses for migrant workers. Others have begun to explore the use of rating systems in the licensing of private employment agencies (see box 3.6).²⁴⁸

²⁴⁶ Exit visas generally require workers to meet certain requirements or provide particular information before the government to issue a visa for them to leave the country. In countries in the Middle East, such as Saudi Arabia and Qatar, workers have been required to obtain authorization or assistance from their employer before such visas are issued. This restriction creates a high risk of undue influence or forced labour by employers who refuse to provide the necessary authorization. In 2014, Qatar declared its intention to eliminate this requirement, although no concrete steps to this effect could be identified as of May 2015. See Al Jazeera: Qatar announces changes to labour law, 15 May 2014, available at: <http://www.aljazeera.com/humanrights/2014/05/qatar-announces-changes-labour-system-2014513115014474205.html> [accessed 22 June 2015].

²⁴⁷ This approach was taken recently in Jordan in the new Law No. 12 of 2015 which permits workers recruited by private employment agencies to apply to the Ministry of Labour to change their employer within the first two months of their contract without additional costs to the employer for recruiting a new worker.

²⁴⁸ Law No. 12 of 2015 sets out the framework for a three-tiered rating system for private employment agencies which is expected to be implemented in Jordan, with higher ratings translating into lower bank deposit requirements. The Qatari Ministry of Labour also issues an annual evaluation of migrant domestic worker recruiting agencies, giving grades from A (highest) to C (lowest).

Box 3.6: Jordan's Regulation No. 12 and Instructions of 2015²⁴⁹

The recently enacted Regulation No. 12 and its Instructions of 2015, refining the licensing system for private employment agencies recruiting migrant domestic workers, outlines several provisions that may contribute to enhanced protection of migrant workers. They provide that:

- If within 60 days of entering Jordan a domestic worker refuses to work for their first employer but wishes to continue working in Jordan, they may seek to transfer their contract to a new employer through the Ministry of Labour. During this initial period private employment agencies would be responsible for securing replacement workers for such employers without additional cost or needing to repay visa fees.
- The Ministry of Labour will, under forthcoming implementing instructions, establish a three tiered ranking system for employment agencies. Regulation No. 12 outlines three categories (A, B, and C) with bank guarantee requirements in the amount of 50,000, 60,000 and 100,000 Jordanian pounds, respectively. The regulation further notes that the Minister may also grant additional privileges to employment agencies that are classified under category A, based on committee recommendations.
- Private employment agencies must recruit workers through an authorized authority (such as a licensed private employment agency) in the sending country, under an agreement subject to the terms of Jordan's bilateral agreement or MoU with the sending country.
- Private employment agencies must provide the Ministry of Labour with information about their business activities each month.

Mixed approaches to the regulation of recruitment in South Asia

Regulations on the South/Southeast Asia side of the migration corridor have been developed and implemented in accordance with several competing priorities. Governments shoulder the primary responsibility for protecting their citizens, yet, as predominantly developing economies, they must work with a limited pool of resources for enforcement as well as a high level of competition from other origin countries to secure labour market access for their nationals wishing to work abroad.

All South Asian countries reviewed in this migration corridor have employed licensing schemes for the regulation of cross-border labour recruiters.²⁵⁰ These regulations have set out legal requirements for obtaining governmental authorization to operate. These requirements, similar in many respects to

²⁴⁹ Regulation No. 12 of 2015 on the organization of private offices recruiting non-Jordanian house workers (Regulation No. 12) (unofficial translation); Instructions for Regulation No. 12 of 2015 (unofficial translation), 2 June 2015.

²⁵⁰ Bangladesh, India, Indonesia, Nepal, the Philippines and Sri Lanka all require private employment agencies to obtain a licence prior to sending workers abroad.

the licensing requirements in the Middle East, commonly include: bank guarantees; criminal record checks; adequate office premises; minimum orders for overseas workers to be dispatched; licensing fees; proof of national citizenship; experience and/or educational qualifications; and, restrictions on the concurrent ownership of multiple licenses or enterprises in particular sectors. While some countries of origin have also attempted to re-involve public agencies directly in the recruitment process to help eliminate abuses, to date, public employment services only facilitate the recruitment of a small fraction of the total number of migrant workers.²⁵¹

In contrast to the regulations in the Middle East, South Asian origin countries have also taken measures to supplement basic licensing requirements. They are comprised of rules and regulations to better safeguard the protection of migrant workers,²⁵² including: ceilings on fees charged to workers; additional obligations in the application process or additional disclosure requirements in order to send workers abroad; requirements to provide training or follow other pre-departure procedures; requirements to issue written contracts and/or include specific contract terms; limitations or restrictions on the use of sub-agents; rules on the settlement of disputes; and, procedures in case of worker illness, pregnancy or refusal to work.

Innovative steps have been taken by several countries to ensure better protection of workers through these supplementary regulations or rules. The Philippines has, for example, taken a bold regulatory stance as the first origin country to ban fees and set a minimum wage for Filipino domestic workers migrating abroad, while also experimenting with new transparency regulations applicable to private employment agencies (see box 3.7).²⁵³

²⁵¹ In Bangladesh, for example, the Bangladesh Overseas Employment and Services Limited (BOESL) was created in 1984 as a state-owned employment company. While the government has been making efforts to strengthen its role in recent years, they have yet to conduct recruitment in sizable numbers. See ILO: The Cost Causes of and potential redress for high recruitment and migration costs in Bangladesh, (Dhaka 2014), pp. 11, 15, 31.

²⁵² While some of these protections have been included in the regulations of COD, these “post licensing” regulations feature much more prominently in COO legislation.

²⁵³ Private employment agencies are forbidden from collecting recruitment fees from migrant domestic workers, and migrant domestic workers must receive a minimum wage of \$400 under POEA Advisory on Processing of Filipino Household Service Workers, 2007, available at: http://www.poea.gov.ph/hsw/hsw_advisory1.html [accessed 22 June 2015]. Fees are also banned for seafarers under the POEA Rules and Regulations Governing the Recruitment and Employment of Seafarers, 2003, available at: <http://www.poea.gov.ph/rules/SB%20Rules%202003.pdf> [accessed 22 June 2015]. Recently, the POEA has issued an order requiring licensed recruiters to maintain an active Facebook page and to accept requests from migrant workers in order to provide an addition avenue for workers to contact or make complains to their recruiter. See Memorandum Circular No. 03 of 2015, available at: http://www.poea.gov.ph/MCs/MC_2015/MC-03-2015.pdf [accessed 22 June 2015].

Box 3.7: Innovative Regulations to Protect Migrant Workers in the Philippines

With the longest-standing labour emigration policy (since 1974) the Philippines has one of the largest overseas populations working in Saudi Arabia, the UAE, Singapore, Hong Kong (China), Qatar, Kuwait, Taiwan (China) and Italy (currently estimated to be 2.3 million).²⁵⁴ Supporting this substantial deployment are 1,258 private employment agencies (as of June 2015), licensed by the Philippines Overseas Employment Administration (POEA) to recruit workers for overseas employment.²⁵⁵

With such a substantial number of migrants overseas, the Philippines has faced a substantial number of challenges in relation to regulating recruitment. In response, the Philippines has experimented with a number of highly innovative regulatory approaches, with the aim of better protecting migrant workers and reducing risks of exploitation. Regarding recruitment fees, the Philippines took initial steps to limit excessive fee charging to a maximum of one month's salary.²⁵⁶ Subsequently, the Philippines added additional regulations which prohibit employment agencies from charging recruitment fees to workers perceived to be especially vulnerable, such as domestic workers and seafarers.²⁵⁷ Part of the strategy has also been to promote the overseas employment of an increased number of skilled and professional workers. The overall objective is to transform the recruitment business model into one where the employer pays the cost of recruitment, reducing the risk of debt bondage for the migrant. Although enforcement of these rules is not easy, the POEA takes a hard-line in suspending or revoking offending private employment agency licenses.

The same regulation that prohibited fee charging to women heading overseas for domestic work also established a domestic worker minimum wage of US\$ 400 per month. Without this salary being clearly stated in the employment contract that Philippines law requires to be submitted to the nearest Philippines Overseas Labour Office, the recruitment will not be permitted. In practice, this is a challenging regulation to enforce as unless the domestic worker later reports a violation of this rule, the POEA has no way of confirming that this salary has been received. Nevertheless, the Philippines also takes firm enforcement measures against labour recruiters that engage in 'reprocessing', through recruiting women on employment contracts for other jobs in the Middle East such as "sales assistant" or "waitress" or "receptionist" with the express purpose of avoiding the 400 US\$ minimum wage and other protections included in the domestic worker contract.²⁵⁸

In addition, most recently, with the aim of further enhancing the transparency of the industry, the POEA stipulated that licensed private employment agencies that recruit domestic workers must maintain a Facebook account for their businesses. Such accounts should have the purpose of acting as a communication platform for deployed domestic workers, dispute prevention, endorsement of complaints, and submission of employment agencies' reports to the POEA on the status and condition of their deployed workers.²⁵⁹

²⁵⁴ Total Number of OFWs estimated at 2.3 million (Results from the 2014 Survey on Overseas Filipinos). Available at: <http://web0.psa.gov.ph/content/total-number-ofws-estimated-23-million-results-2014-survey-overseas-filipinos%C2%B9> [accessed 22 June 2015].

²⁵⁵ This number includes currently licensed "Manning Agencies" which place seafarers, and "Landbased Recruitment Agencies" which recruit workers for all other sectors. For a detailed and updated list, see POEA Website: Status of Recruitment Agencies, as of 18 June 2015, available at: <http://www.poea.gov.ph/cgi-bin/agList.asp?mode=all> [accessed 22 June 2015].

²⁵⁶ See POEA Rules and Regulations Governing the Recruitment and Employment of Land-based Overseas Workers, 2002 (Philippines), Rule V, Section 3.

²⁵⁷ The 2006 Household Service Worker (HSW) Reform Package) and POEA Rules and Regulations Governing the Recruitment and Employment of Sea-farers, 2003, Rule IV, Section 1 respectively.

²⁵⁸ E.g. see http://www.poea.gov.ph/news/2015/PR_May2015_Eunice.pdf [accessed 22 June 2015].

²⁵⁹ Memorandum Circular No. 1 of 2015, March 2015: Available at: http://www.poea.gov.ph/news/2015/PR_March2015_MC1_2015_FB%20account.pdf [accessed 22 June 2015].

India has, in addition to licensing cross-border private employment agencies, set up separate licensing regulations for agencies placing workers domestically.²⁶⁰ This approach, which has not been adopted elsewhere in this migration corridor, stems from the existence of large internal migratory flows and inequality between Indian States. However, it may prove to be a useful component of a comprehensive approach to addressing recruitment abuses for other countries in the region.

Box 3.8: India's licensing systems

India's labour force, currently the second largest in the world and numbering more than 480 million people, has presented regulators with several challenges.²⁶¹ One of the foremost issues, ever present when considering labour market regulation in India, is a high degree of informality in the labour force. Informal employment in India accounts for approximately 84 per cent of its non-agricultural workforce.²⁶² In urban areas, informal domestic workers, home-based workers and street-vendors account for around one-third of urban employment.²⁶³ Owing to these factors, and a large degree of decentralization in the regulation of the recruitment industry, India has not ratified ILO Convention No. 181.²⁶⁴

Private employment agencies generally fall into four categories in India, while other forms of labour mediation and informal labour recruiters are not covered by any specific legislation.²⁶⁵ They include: recruiters placing workers abroad;²⁶⁶ labour contractors;²⁶⁷ private security agencies;²⁶⁸ and, private placement agencies.²⁶⁹

While there are several large registered players in the Indian market, like the Indian Staffing Federation with around 26 member companies, there are many more small and medium-sized employment agencies and agents often operate without any form of license or registration. A 2013 survey in Delhi found that, out of 100 agencies surveyed in the capital-region, 33 were unregistered, 64 per cent had registered but did not have registration numbers or evidence of undergoing a formal process, and only 3 had undergone a formal registration process and had registration numbers.²⁷⁰ A majority of these agencies focused on placing domestic workers, security workers and overseas workers and more than half of them placed less than 1,000 workers per year.

²⁶⁰ See, for example, the Delhi Private Placement Agencies (Regulation) Order, 2014.

²⁶¹ World Bank: Data – Labour force, total (India 2013), available at: http://data.worldbank.org/indicator/SL.TLF.TOTL.IN/countries?order=wbapi_data_value_2013+wbapi_data_value+wbapi_data_value-last&sort=desc [accessed 22 June 2015].

²⁶² As of 2013, see ILO: Women and Men in the Informal Economy: A Statistical Picture, Geneva 2013, available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_234413.pdf [accessed 22 June 2015].

²⁶³ Ibid.

²⁶⁴ See, V.V. Giri National Labour Institute: *ILO Convention 181: Issues and Challenges in the Context of Private Placement Agencies in India*, National Labour Institute Research Studies Series No. 109/2013 (Delhi 2013), pp. 4.

²⁶⁵ Ibid, at pp. 8-9.

²⁶⁶ Recruitment agencies placing workers abroad are regulated under the Immigration Act of 1983.

²⁶⁷ Labour contractors are regulated under the Contract (Abolition & Regulation) Act of 1970 and the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act of 1979.

²⁶⁸ Private security agencies are regulated under the Private Security Agencies (Regulation) Act of 2005.

²⁶⁹ Domestic private placement agencies do not fall under any specific national Act, however they are subject to regulations which are enacted at the state or Union Territory level.

²⁷⁰ See, V.V. Giri National Labour Institute: *ILO Convention 181: Issues and Challenges in the Context of Private Placement Agencies in India*, National Labour Institute Research Studies Series No. 109/2013 (Delhi 2013), pp. 30-33.

In addition to the legislative gaps and challenges described above, on-going abuses in the recruitment corridor between South Asia and the Middle East occur in large part due to inconsistencies in legislation and weak enforcement capacity of public authorities. Licensing schemes in both regions are largely inward looking, focused on ensuring that private employment agencies operating within their territory respect domestic regulations, without placing requirements on partner agencies on the other end of the labour supply chain.²⁷¹ None of the destination countries covered by this study required private employment agencies operating in origin countries to apply for licenses or meet certain requirements before recruiting workers and the same can be said for countries of origin. Regulations in the origin country may also prohibit labour recruiters from the destination country from applying for licenses in the origin country (primarily through restrictions on the nationality of agency leadership or ownership).

Differing regulations across regions have made the legal framework on recruitment quite complex, especially for migrant workers wanting to understand and assert their rights. Laws and regulations on private labour recruiters have also evolved quickly in the region and are not always publicly known or circulated, which can make the process of obtaining a license quite opaque and discourage labour recruiters from going through formal channels.

The lack of effective joint liability provisions that can reach all actors in the labour supply chain has also been identified as a major challenge to achieve effective protection of workers. Indeed, these gaps have left government agencies without the tools to prosecute offenders and migrant workers with few legal channels through which they may seek remedies. Out of the countries surveyed in this migration corridor, the Philippines and Bangladesh provided the clearest bases for joint liability between employment agencies and employers in their recruitment regulations;²⁷² however, significant challenges remain in ensuring that these provisions can effectively secure access to justice for migrant workers.²⁷³

²⁷¹ This practice has been employed, for example, in the United Kingdom where the Gangmasters' Licensing Act requires that, in the sectors which it covers, labour recruiters who are based outside the UK must obtain a license. This is the case even if they simply source or introduce workers to a private employment agency in the UK or pre-screen candidates. For more information see the Gangmasters' Licensing Authority Website, available at: <http://www.gla.gov.uk/Guidance/Information-on-Licensing/Labour-Providers-Based-Outside-The-UK/> [accessed 22 June 2015].

²⁷² See POEA Rules and Regulations Governing the Recruitment and Employment of Land-based Overseas Workers, 2002 (Philippines): labour recruiters must provide a verified undertaking that they "Shall assume joint and solidary liability with the employer for all claims and liabilities which may arise in connection with the implementation of the contract, including but not limited to payment of wages, death and disability compensation and repatriations."; See also, Overseas Employment and Migrants Act 2013 (Bangladesh): "For the purpose of the employment contract, the recruitment agent shall be deemed to be a representative of the overseas employer, and as regards liabilities arising from the contract, the said recruitment agent and the employer shall be liable jointly and severally.

²⁷³ In the Bangladeshi context for example, there are no rules or policies on Bangladeshis who act as illegal intermediaries abroad and the existing regulatory framework does hold labour recruiters responsible for the conduct of illegal brokers or intermediaries who act on their behalf. See ILO: *The Cost causes of and potential redress for high recruitment and migration costs in Bangladesh*, (Dhaka 2014), pp. 48.

The use of standard contracts, whether they are mandated or advisory, may help protect workers. However, they may also provide an additional source of confusion and serve as a further enforcement obstacle if the terms are inconsistent between origin and destination countries. Jordan has, for example, recently issued a unified contract for all migrant workers recruited in the apparel industry.²⁷⁴ While this is a positive step, some provisions still need to be improved and made enforceable across borders to avoid deception during recruitment. Standard contracts should contemplate issues such as the freedom to change employers, to provide additional protection for workers at high risk of abuse. Regarding enforceability, bilateral agreements with countries of origin should clarify the applicability of the standard contract to all labour recruiters and employers involved on both sides of the migration corridor. Alternatively, some countries have attempted to combat contract substitution by determining that only the initial contract signed and approved in the country of origin will apply in case of any dispute.²⁷⁵ However, without specific enforcement authority in cooperation with the country of destination, migrant workers may have limited recourse against contract substitution by labour recruiters or employers.²⁷⁶

Enforcement efforts may, in many of the countries surveyed, struggle with unclear definitions of what actually constitutes recruitment activities for the purposes of licensing. Where the definitions described by recruitment regulations do not capture all of the labour recruitment-related activities in the labour supply chain, the actions of sub-agents or other intermediaries may fall outside the government's regulatory authority. In response to these challenges, some countries have attempted to either issue an outright ban on the use of sub-agents (such as India and Bangladesh), or have sought to extend licenses to sub-agents that tie them to specific private employment agencies (such as Nepal).²⁷⁷

An additional regulatory challenge has been insufficient clarity regarding the means of implementing regulations and monitoring compliance. The lack of clear procedures, often complicated by insufficient coordination between national agencies with overlapping mandates, has led to the renewal

²⁷⁴ See the Unified Employment Agreement for Expatriate Workers in the Textile, Garment and Clothing Industry, issued pursuant to Article 15 of the Collective Agreement No. 39/2013 signed on 28 May 2013 and implemented on 2 April 2015.

²⁷⁵ Republic Act No. 8042, the Migrant Workers and Overseas Filipinos Act of 1995, Sec. 6(i).

²⁷⁶ The MoU between Jordan and the Philippines of 2010 sets out some preliminary provisions on contract applicability, however it is unclear whether enforcement authorities in Jordan have relied on this MoU to prosecute contract substitution by Jordanian recruiters or employers. See Articles III-IV, ("Both Parties shall preserve and reinforce the rights of workers in accordance with the laws and regulations of both countries."; "Recruitment and deployment of workers shall be according to an employment contract that is valid only when authenticated by competent authorities of both parties, and that shall be binding for both employers and workers.") available at:

http://www.poea.gov.ph/lmi_kiosk/Bilateral%20Agreements/bla_jordan.pdf [accessed 22 June 2015]. Additionally, a 2012 agreement regarding migrant domestic workers signed by the two countries indicates that "Working contracts should be verified by [the Philippines Overseas Labour Office] and authenticated by the Embassy of the Republic of the Philippines in Amman." See Principles and Controls for Regulating Deployment and Employment of Filipino Domestic Workers, 2012, Article 6, available at: http://www.poea.gov.ph/lmi/Bilateral%20Agreements/BLA_PH_Jordan%202012.pdf [accessed 22 June 2015].

²⁷⁷ See IOM, *Recruitment Monitoring & Migrant Welfare Assistance: What Works?*, 2015, pp. 50-51.

of licenses of certain private employment agencies that have been prosecuted for violating national regulations.²⁷⁸

Limited capacity and insufficient allocation of resources are also key obstacles to effective enforcement in many countries.²⁷⁹ Even where licensing systems are limited to regulating international recruitment, the large number of licensed private employment agencies in South/Southeast Asia and the Middle East has outstripped the inspection and enforcement capacity of Ministries of Labour and other public agencies.²⁸⁰ Operating with limited resources, deployment bans are one of the short-term protection strategies that have been used by origin countries, preventing the deployment of workers to countries perceived to have insufficient protective safeguards.²⁸¹ While such bans draw attention to fraudulent practices in countries of destination, they often result in an increase in informal recruitment that puts workers at greater risk of abuse.

In light of the noted challenges, countries of origin have explored several emerging practices. One common strategy has been to develop hotlines for workers to report abuses and assist enforcement efforts.²⁸² Another has been to enhance the services provided to migrant worker by overseas embassies. The Philippines, for example, has expanded their role by ensuring legal services are available at embassies in countries of destination, specifically related to assisting migrant workers.²⁸³ Additionally, the Philippines has taken steps to involve its foreign embassies in the approval process of migrant workers' labour contracts, including through MoUs with countries of destination.²⁸⁴

²⁷⁸ See generally, discussion in ILO Workshop: Regulating Recruitment: Labour and Criminal Justice Responses in Preventing Trafficking in Persons and Migrant Exploitation, November 18-19, 2014, Bangkok, Workshop Report.

²⁷⁹ Interviews conducted with labour recruiters in Bangladesh revealed that, due to the limited capacity of PES, their agreements are almost exclusively prepared in coordination with labour recruiters in countries of destination, with the final agreements and contracts simply being sent to the public administration in batches for approval.

²⁸⁰ For example, the Philippines Overseas Employment Administration (POEA), which is one of the most proactive regulatory agencies in the corridor, is responsible for regulating over 1,200 licensed recruitment agencies. In the Middle East, Lebanon has approximately 500 licensed agencies to oversee and there are more than 1,000 licensed agencies in Bahrain.

²⁸¹ For example, in recent years, under the authority of the Migrant Workers and Overseas Filipinos Act of 1995 the POEA in the Philippines has placed and/or lifted bans on sending workers to several countries of destination, including: Afghanistan, Iraq, Israel, Jordan, Lebanon, Libya, Singapore, Thailand, and Yemen.

²⁸² Several countries of origin and countries of destination have set up hotlines for migrant workers including, for example: a Ministry of Labour hotline for migrant workers in Jordan, a 24-hour hotline for migrant workers to lodge police complaints in the UAE, a 24-hour hotline operated by the POEA in the Philippines, and a hotline is operated by Indonesia's BNP2TKI (National Agency for Placement and Protection of Indonesian Overseas Workers).

²⁸³ See generally, Global Legal Assistance and Advocacy (GLAAD) website, available at: <http://glaad.cfo.gov.ph/> [accessed 22 June 2015].

²⁸⁴ See Principles and Controls for Regulating Deployment and Employment of Filipino Domestic Workers, 2012, Article 6, available at: http://www.poea.gov.ph/lmi/Bilateral%20Agreements/BLA_PH_Jordan%202012.pdf [accessed 22 June 2015].

3.5 Europe

Introduction

Labour mobility is significant both within the European Union (EU-28)²⁸⁵ as well as between third countries and EU member states. As regards internal mobility, more than 7 million EU citizens worked and lived in an EU country other than their own in 2013. They represent 3.3 per cent of total employment in the EU.²⁸⁶ Germany and the United Kingdom are the main destination countries, followed by Austria, Belgium, and the Nordic countries. Countries that have been most hit by the recent economic crisis have seen an increase in the movement of their citizens to other EU member states; while flows have declined from countries of origin such as Poland and Romania.²⁸⁷ With regards to labour migration to the EU, there were an estimated 1.7 million immigrants from third countries in 2012.²⁸⁸ Germany reported the largest absolute number of third-country immigrants, followed by the United Kingdom, Italy, France and Spain. Among EU member states, 14 countries reported more immigration than emigration in 2012, but in countries hit by the crisis and in new accession countries Romania and Bulgaria, the trend was reversed.

Private employment agencies play an important role in facilitating labour mobility within the region by providing information about employment opportunities and by facilitating the recruitment process. Many private employment agencies in Europe also act as employers and are commonly called temporary work agencies. Most regulation in EU member states therefore targets this particular type of intermediary whereas third countries (e.g. Moldova or Ukraine) tend to have different legislation dealing on the one hand with cross-border placement agencies and on the other with labour intermediaries catering mainly for the internal labour market.²⁸⁹

Temporary work agencies act as recruiter and employer at the same time. According to recent research, the penetration rate of temporary agency work increased by 1 per cent in the old EU member states (EU-15) between 1998 and 2012. The overall share of temporary agency work in overall employment is estimated to be 1.8 per cent. The economic crisis had a negative impact on growth rates, and in some countries, legal restrictions may also limit the operations of temporary work

²⁸⁵ Croatia acceded in July 2013. Some data referred to below, however, only covers EU-27 countries.

²⁸⁶ European Commission, Memo, 25 September 2014: Labour Mobility within the EU; see also: Eurofound: Labour migration in the EU: Recent trends and policies

²⁸⁷ Ibid

²⁸⁸ Statistical Office of the European Communities (EUROSTAT): Migration and migrant population statistics, Data from May 2014, download at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics [accessed 22 June 2015].

²⁸⁹ Until 2007, Poland had a specific regulation which required Polish private employment agencies recruiting for abroad to apply for a separate license.

agencies.²⁹⁰ These figures may, however, underestimate the number of small, sometimes informal, agencies in low-skilled sectors.²⁹¹

There are no precise figures on the number of agencies involved in the recruitment and employment of migrant workers specifically but the following examples illustrate some recent trends suggesting that migration is very much part of the equation. First, it is important to look at the distribution of temporary work by sector. In the majority of European countries, a significant proportion (sometimes the majority) of temporary work occurs in lower-skilled occupations in sectors such as services (hotels or cleaning) and manufacturing.²⁹² Those are also sectors that tend to attract migrant workers. In addition, agriculture and construction are also prominent sectors employing migrant workers (up to 20 per cent in some European countries), and temporary agency work is particularly prominent in those sectors. For example, a study on recruitment strategies of European construction companies in Germany, the Netherlands, Portugal and Italy found that the national labour market was mainly relevant for medium- and highly-skilled workers, whereas low-skilled workers were recruited from abroad or among migrants already living in the country. Contracting arrangements included a) subcontracting to national companies employing foreign workers (mainly non-EU citizens) living in the country, b) subcontracting to foreign companies (EU or non-EU), c) subcontracting to foreign self-employed construction workers, or d) subcontracting to recruitment agencies. The study also found that large companies transferred the recruitment of migrant workers to smaller companies through those subcontracting arrangements.²⁹³

In Eastern Europe, including in new EU member states and Countries of the Commonwealth of Independent States (CIS), the emergence of private recruitment agencies has been a new phenomenon following the collapse of Socialist planned economies. Many agencies have specialised in facilitating emigration, but business opportunities have increased within domestic labour markets. However, ILO Surveys carried out with returned migrants/migration households indicate that the role of private recruitment agencies in overall migration remains low.²⁹⁴ In Moldova, for example, almost 60 per cent of all respondents left through personal networks, and only 7.5 per cent used the services of a private employment agency in either source or destination country. Similarly, in Georgia, around 90 per cent

²⁹⁰ However, restrictions on temporary work agencies are generally not in the spirit of the E.U. Directive and, according to Article 4.1: "Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented." Directive 2008/104/EC of the European Parliament and of the Council of 9 November 2008 on temporary agency work, OJ 2008 L 327/9, Article 4.

²⁹¹ See Andrees, B., *Forced labour and trafficking in Europe: how people are trapped in, live through and come out*, ILO Working Paper, (Geneva 2008); Pereira and Vasconcelos, *Human trafficking and forced labour: case studies and responses from Portugal*, ILO (Geneva 2008).

²⁹² European Parliament: Directorate-General for International Policies, 2013.

²⁹³ Fellini, Ivana, Anna Ferro, and Giovanna Fullin: "Recruitment processes and labour mobility: the construction industry in Europe." *Work, Employment & Society* 21.2 (2007): 277-298.

²⁹⁴ ILO surveys (forthcoming); see also, Andrees, B, *Forced labour and trafficking in Europe: how people are trapped in, live through and come out*, ILO Working Paper, (Geneva 2008).

of migrants left on their own account or through friends and relatives. Only 5.7 per cent used the services of private employment agencies.

Regulation and enforcement in EU member states

There have been different phases of regulation. Historically, some EU member states such as the United Kingdom or the Netherlands have allowed private employment agencies to operate in the labour market since the 1960-70s albeit under certain restrictions. Countries of Southern Europe, by contrast, mostly banned private employment agencies until the ILO's International Labour Conference adopted Convention No 181 in 1997, which then prompted a shift in policies and legal reform. Central and Eastern European member states had to introduce new regulations following their accession to the EU in 2002. Bulgaria and Romania joined in 2007, with national legislation that already followed the spirit of the EU's Temporary Agency Worker Directive that would be adopted in 2008.

The Directive on temporary agency work (2008/104/EC), adopted by the European Parliament and the Council in 2008,²⁹⁵ aims to guarantee a minimum level of protection to temporary workers by recognizing temporary work agencies as employers while encouraging greater diversity in contractual employment arrangements. A core principle of the Directive is equality of treatment (Article 5) which is also enshrined in the ILO's fundamental and migrant worker conventions. The principle of non-discrimination applies to all workers, whether they are employed by an employer or enterprise directly or by a temporary employment agency. At the same time, the Directive requires member states to review restrictions or prohibitions on the use of temporary agency work in consultation with social partners (Article 4). The Directive also regulates access to employment that is particularly relevant in this context. According to Article 6, a temporary work agency shall not charge workers any fees "in exchange for arranging for them to be recruited by a user undertaking, or for concluding a contract of employment [...]". The representation of temporary agency workers is also regulated, although it has posed challenges from the perspective of workers' organisations.²⁹⁶ The Directive does not prescribe whether provisions should be transposed through a licensing system. It leaves it open for member states to apply or introduce legislative, regulatory or administrative provisions which are more favourable to workers or to promote or permit collective agreements which are more favourable to workers (Article 9). Non-compliance however should be sanctioned through administrative or judicial procedures. Penalties must be effective, proportionate and dissuasive (Article 10).²⁹⁷

²⁹⁵ Directive 2008/104/EC of the European Parliament and of the Council of 9 November 2008 on temporary agency work, OJ 2008 L 327/9.

²⁹⁶ From precarious to decent work: Outcome document to the Workers' Symposium on policies and regulations to combat precarious employment, ILO/ACTRAV 2012

²⁹⁷ European Commission report on the application of Directive 2008/104/EC on temporary agency work, March 2014

Private employment agencies registered in EU member states cannot recruit third-country nationals who are subject to immigration restrictions unless they directly employ the worker with a view to making him/her available to a third party employer. Within EU member states, private employment agencies can recruit workers in one country and post them in another. This is regulated through the Posting of Workers Directive (96/71/EC)²⁹⁸ and its subsequent Enforcement Directive.²⁹⁹ The Posting of Workers Directive covers workers living in one member state who are being sent to another under the following circumstances: i) an employer posts a worker to another member state on his own account, under his direction and under a contract that the employer has concluded with another party for which the services are intended; ii) an employer posts a worker to an establishment in the territory of the other member states, and iii) the employer is a temporary placement agency that hires out workers to an enterprise that operates in another member state. The Posting of Workers Directive aims to ensure that the rights and working conditions of posted workers are protected throughout the EU and to avoid that service providers in one member state can undercut those based in another EU member state. The Posted Workers Directive establishes a core of mandatory rules regarding the terms and conditions of employment to be applied to an employee posted to work in another member state. These rules will reflect the standards of local workers in the host member state (i.e. where the worker is sent to work).

Since 2004, many private employment agencies in recently acceding EU countries have used posting of workers to gain access to the “old” member States circumventing the Posted Workers Directive. Furthermore while the Directive was originally foreseen to guarantee at least a minimum set of rights for posted workers, the controversial European Court of Justice judgments in *Laval*, *Viking* and *Rueffert* turned it into a “maximum” Directive. It has indeed become difficult for member states to ensure more protection to posted workers than the protection laid down in Art 3(1) of the Directive which the Court has tended to interpret in a restrictive way. The reduced protection of posted workers has been subject to heated discussions and trade unions have taken some cases to court.³⁰⁰

Following much debate, the European Parliament and Council adopted the Posting of Workers Enforcement Directive in May 2014. The aim of the Enforcement Directive is to ensure effective application of protective rules included in the 1996 Directive. In particular, it improves the cooperation in administrative procedures between national authorities in charge of posting (Chapter

²⁹⁸ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997 L 18/1.

²⁹⁹ Directive 2014/67/EC of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), OJ 2014 L 169/11.

³⁰⁰ European Foundation for the Improvement of Living and Working Conditions: *Posted Workers in the European Union*, (Dublin, 2010), pp. 26-32.

III), an area of work that has often been reported as too weak.³⁰¹ It further clarifies the definition of “posting” that inter alia aims to combat fraud, such as the creation of “letter-box” companies (Chapter I) and the responsibilities of member states to ensure compliance with the provisions of the 1996 Directive. It also specifies obligations of posting companies to cooperate with enforcement authorities (Chapter IV). The Enforcement Directive states that member States “shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable” (Article 12, see also Annex of Directive 96/71/EC). The Enforcement Directive stipulates that “Member States may, after consulting the relevant social partners in accordance with national law and/or practice, take additional measures on a non-discriminatory and proportionate basis in order to ensure that in subcontracting chains the contractor of which the employer (service provider) is a direct subcontractor can be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions to common funds or institutions of social partners [...]” (Art. 12). Member states may also provide for more stringent liability rules under national law regarding the scope and range of subcontracting liability. The Enforcement Directive hence seeks to improve the enforcement of rights enshrined in Directive 96/71/EC and the handling of complaints by strengthening cross-border enforcement and clarifying the scope of liability. Member states have until June 2016 to transpose the Enforcement Directive into national law. Recently the European Commission has announced a targeted review of the Posted Workers Directive.

As a result of these Directives, laws and practices in EU member states are relatively homogenous. There has also been a continued increase in the strength of legal regulation to protect agency and posted workers, especially with regards to equal treatment and liability.³⁰² The majority of member states require private employment agencies to hold a license, although some categories may be excluded. Another common feature across EU member states is that agencies cannot charge any recruitment fees to workers although certain ancillary services (e.g. transportation, accommodation etc.) are covered by workers and sometimes deducted from their wages.³⁰³ There is also strong consensus on the principle of equal treatment that applies to all workers recruited and employed by private employment agencies.

In Poland, for example, regulation of private employment agencies was first introduced through the 2003 Law on Employment of Temporary Agency Workers, which included a licensing system.³⁰⁴ All

³⁰¹ European Agency for Fundamental Rights: *Severe labour exploitation: workers moving within or into the European Union*, (Vienna, 2015), pp. 93-94.

³⁰² See also World Employment Social Outlook (WESO): *The changing nature of jobs*, ILO 2015.

³⁰³ See e.g., Pereira and Vasconcelos, *Human trafficking and forced labour: case studies and responses from Portugal*, ILO (Geneva 2008), p. 23.

³⁰⁴ Jones, K. 2014. “It was a whirlwind. A lot of people made a lot of money.” The role of agencies in facilitating migration from Poland into the UK between 2004 and 2008. *Central and Eastern Migration Review*. Warsaw University.

agencies, whether they provide temporary work or recruit workers for work in other countries, are required to hold a license. Licensing was initially under the responsibility of the Ministry of Labour and was decentralized to regional authorities (“*marszalek*”) in 2005. Private employment agencies and is been apply for a one year license after which they can apply for a permanent license. They have to report on their activities on an annual basis to the regional authorities. Following ratification of Convention No. 181 in 2001, the Czech Republic introduced the Employment Act, 435/2004. The Act stipulates that private employment agencies must hold a license that is issued by the Ministry of Labour.

In Slovakia, the Parliament approved amendments to the Labour Code (Act No. 311/2001) in December 2014 to bring the law into line with EU Directives. Private employment agencies require a license that can last for three years before renewal has to be requested. Labour inspectors have the mandate to check on temporary work agencies to ensure compliance, including equal treatment of workers. Fees can be charged but are also subject to restrictions and controls.³⁰⁵ The revised Labour Code (Act XVI) introduced the principle of joint liability between agencies and employers for the non-payment of wages.

Finland has taken a different approach, abolishing its private employment agency licensing system in 1994 and requiring only that temporary work agencies notify the occupational safety and health authority.³⁰⁶ They also need to register like other companies too. Finland also transposed the EU Directive (2008/104/EC) into national law by amending the Employment Contracts Act in 2012, and therefore prohibits fees to be charged to workers. In addition, the Private Employment Agencies Association (HPL) published Rules for Recruiting Foreign Employees that also prohibit the charging of fees to foreign workers. In Finland collective bargaining is very strong, encouraged by the Employment Contracts Act 2001 and implemented at the company and sectoral levels.

Belgian law permitted the establishment of private employment agencies in the Temporary Agency Work Act of 1987, which has been subject to several amendments since then. The latest amendment was adopted in 2013. On 16 July 2013 at the National Labour Council (CNT-NAR), the social partners concluded Collective Agreement 108 on temporary work and temporary agency work. New procedures to monitor the temporary agency workforce now oblige ‘customers-users’ and temporary work agencies to notify trade unions when temporary agency workers are employed in companies (Collective Labour Agreement 108, of June 2013). Private employment agencies need authorisation from one of three regional Approvals Commissions on which the social partners have representation.

<http://www.ceemr.uw.edu.pl/vol-3-no-2-december-2014/articles/it-was-whirlwind-lot-people-made-lot-money-role-agencies> [accessed 22 June 2015].

³⁰⁵ See Direct Request (CEACR), adopted 2012

³⁰⁶ Chapter 5, section 21a of the Act on the supervision of Occupational Safety and Health and Appeal in Occupational Safety and Health Matters.

They have to demonstrate that they comply with social legislation and owe no money to the National Office for Social Security.

In the United Kingdom, the Employment Agencies Act, 1973 (EAA) introduced licensing requirements, which were removed in 1994. The Gangmasters (Licensing) Act was adopted in 2004 and emerged out of a long-standing public – private consensus to better regulate private employment agencies operating in the low wage sectors of the UK economy. The tragic deaths of 23 Chinese women and men who were collecting cockles in Morecambe Bay in England led to a desire to partially re-introduce licensing. Private employment agencies supplying workers (whether British nationals or migrants) for temporary work in agriculture, horticulture, shell-fish gathering, fish processing, forestry, dairy farming, processing and packaging of food and drink products were brought under the remit of the Gangmaster Licensing Authority (GLA) that was established with a mandate to “safeguard the welfare of workers whilst ensuring that labour providers remain within the law.”³⁰⁷

Box 3.9: Enforcement: the example of the Gangmasters’ Licensing Authority (GLA)

The GLA is widely acknowledged to have, thus far, adopted a number of innovative approaches to monitoring and enforcement. Firstly, the GLA was operating in low-wage sectors into which an increasing number of women and men from the new EU member states of Central and Eastern Europe (e.g. Poland) were being recruited by private employment agencies. Awareness of this fact led to an early decision to require agencies whose home-base was in these countries but that supplied workers into the UK to also apply for a license with the GLA and to comply with its terms and conditions. In other words, the GLA imposed an extra-territoriality aspect to the licensing conditions. This has led to a number of cross-border contacts and initiatives with regulatory authorities in those countries.

Secondly, the GLA enshrined eight key standards into a licensing Code of Practice. Applicant agencies must satisfy these before being granted a license as well as continue to comply in order to retain the license. The standards are:

- The license holder, Principal Authority, and any person named or specified in the license must, at all times, act in a ‘proper and fit’ manner.
- The license holder must comply with all relevant pay and tax requirements.
- A worker must not be subjected to physical or mental mistreatment by a PRA. Threats must not be made to workers.
- A license-holder who provides, or effectively provides, accommodation must ensure the property is safe for the occupants.

³⁰⁷ Gangmasters’ (Licensing) Act 2004.

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- A worker must be able to take the rest periods, breaks and annual leave to which they are legally entitled.
 - A license-holder must cooperate with the labour user to ensure that: responsibility for managing the day to day health and safety of workers has been agreed and assigned, a suitable and sufficient health and safety risk assessment has been completed (and recorded where required) before work commences, and any risks identified are properly controlled.
 - All vehicles and drivers used to transport workers must be legally compliant, safe and roadworthy.
 - License-holders must not charge fees to workers for any work-finding services. License-holders must not make ancillary services conditional on the worker paying fees.

Thirdly, the GLA takes an 'intelligence-led' approach towards monitoring and enforcement. Specially trained officers liaise with other relevant regulatory bodies in the UK - for instance, the tax and minimum wage enforcement body and the health and safety executive. Compiled intelligence is used to prioritize the targeting of agencies for inspections. If an agency does not pay its taxes or has been reported for a violation of workplace safety, this is used by the GLA as an indicator that the agency is at risk of breaking the GLA Code of Practice.

Conclusions

This working paper discusses how existing international labour standards protect workers from abusive and fraudulent recruitment practices as well as their relevance to ensuring fair recruitment within and across countries. It highlights the role of the ILO supervisory bodies that have provided consistent comments (in observations, direct requests and general surveys) on recruitment practices relating to the Forced Labour and Private Employment Agencies Conventions (No. 29 and No. 181 respectively), each of which deals with different but related issues. Several examples presented throughout the paper demonstrate a positive impact of this approach, especially when it is coupled with technical assistance, which the ILO is currently strengthening under the umbrella of the ILO Fair Recruitment Initiative.

International labour standards provide for a certain degree of flexibility as to the models of regulations and enforcement that are being transposed into national law. The paper presents three basic regulatory models, namely prohibitive legislation, licensing and registration systems, which are not exclusive of each other.

Growing labour market complexity has led to the increased involvement of private recruitment agencies alongside other important actors, such as public employment services. Legislation prohibiting private recruiters only exists in a limited number of countries and is usually restricted to certain activities, primarily related to migration. However, in some countries, particularly in Europe, the Maghreb and East Asia, public employment services continue to play a major role in job matching, both domestically and internationally.

The predominant approach to regulation present in all of the regions reviewed is licensing. Most countries, however have employed a mixed approach in their legislation. Licensing schemes are often limited to private employment agencies operating in specific sectors (e.g. domestic work and agriculture) or certain types of labour recruiters (e.g. providing cross-border recruitment services; temporary work agencies), while either prohibiting others, or simply requiring them to be registered.

Some common elements and criteria are generally present in the regulation of private recruiters and employment agencies. For example, the majority of countries reviewed have provisions related to the charging of recruitment fees from workers. There is growing recognition in national legislation that fees should not be charged to workers. The majority of countries reviewed have prohibited fee charging to workers, while a few, specifically in Asia, have opted for a ceiling on recruitment fees. Other elements that commonly recur among countries surveyed include: requiring private recruiters to provide security deposits or bonds, listing approved or licensed recruiters on a public registry,

imposing reporting requirements, and detailing sanctions (such as suspensions, fines or license revocations) for non-compliance.

Efforts have also been taken in some countries to employ joint liability schemes that establish the scope of liability of employers and labour recruiters for fraudulent or abusive recruitment or labour practices. While this paper identifies several examples, challenges still exist with joint liability schemes, particularly in the cross-border context where implementation requires the collaboration of both countries of origin and destination.

Regional and bi-lateral agreements on labour migration and immigration laws also have an impact on regulatory models with respect to cross-border recruitment. In some countries, in particular those receiving large numbers of low-skilled migrant workers, immigration laws may tie the worker to a specific employer. This puts particular responsibility on recruiters to “find the right match” while also increasing the risk that workers may be subject to employment abuses linked to the recruitment process. Regulatory approaches to cross-border migration must therefore ensure that fair recruitment practices are encouraged by consistent and comprehensive labour and immigration laws and policies.

Criminal laws, in particular those targeting the crime of trafficking in persons, including for the purpose of forced or compulsory labour, or elements thereof, may also play an important role in the regulation of recruitment. While a review of criminal laws was beyond the scope of this paper, for regulations to be comprehensive, it is important to consider the entire spectrum of fraudulent and abusive recruitment practices and ensure that complementarity exists between criminal, immigration, and labour laws.³⁰⁸

Information regarding the enforcement of recruitment regulations remains scarce. Legislation reviewed that specifically addressed private employment agencies rarely introduced comprehensive monitoring or enforcement mechanisms. Despite these challenges, several emerging practices have been identified. They demonstrate a variety of possible approaches, including collaboration with the private sector and other stakeholders. Some countries have set up special enforcement units with broad investigatory powers, while others have established web-based tools to improve the coordination of investigations across borders. While enhanced enforcement measures and innovative methods are encouraged, clear mandates must also be established to ensure appropriate coordination between relevant and interrelated agencies, with due recognition that the primary duty of labour inspectors is to protect workers and not to enforce immigration law.

Effective enforcement is also closely linked to remedies, the ability of victims to denounce abusive and fraudulent recruitment practices and to hold the perpetrators accountable for their actions. While

³⁰⁸ For further information on complementary criminal law responses to recruitment issues, see UNODC, *The Role of Recruitment Fees and Abusive and Fraudulent Practices of Recruitment Agencies in Trafficking in Persons* (Geneva 2015).

current enforcement mechanisms are heavily focused on sanctioning unscrupulous actors, more emphasis is needed on the victims of these actions and the remedies available to them.

The ILO Fair Recruitment Initiative will pursue action through its four pillars:

1. Enhance global knowledge on national and international recruitment practices

- Further in-depth research on national and international labour recruitment is required in order to identify good practices. Research should focus on assessing underlying factors that contribute to the vulnerability of workers to fraudulent and abusive recruitment practices as well as the socio-economic impact of regulatory measures.
- As adequate enforcement mechanisms are the weakest link in most countries, further research is required to identify and document innovative enforcement schemes that have effectively tackled recruitment abuses.
- Future research should also assess the complementary role of statutory and voluntary regulation, such as professional codes of practice and other self-regulation mechanisms (e.g. due diligence processes, establishment of operational-level grievance mechanisms).
- A better understanding of the business model of labour recruiters, including the costs of cross-border recruitment, is essential. The ILO will continue its work on migration and recruitment costs with the World Bank through the Global Knowledge Partnership on Migration and Development (KNOMAD).

2. Improve laws, policies and enforcement to promote fair recruitment

- Upon request, ILO will provide technical assistance on legal and policy reform, building on the knowledge collected. Regulatory frameworks should address the entire spectrum of fraudulent and abusive recruitment practices through a combination of labour, immigration and criminal laws. Those laws should also include adequate sanctions for labour recruiters, including where appropriate, for the offence of trafficking in persons.
- Member States, in consultation with social partners, should consider adopting innovative provisions which address labour recruitment governance gaps such as joint-liability schemes, transparency and reporting requirements in public procurement contracts as well as positive incentives to foster the formalization of the recruitment business.
- Capacity building for enforcement authorities can be offered to promote effective responses against abusive and fraudulent recruitment practices. ILO can also facilitate exchange of promising practices between enforcement authorities across countries to ensure efficient implementation of legislation as well as cooperation among relevant government agencies,

workers' organizations employer's organizations and representatives of private employment agencies.

- Bilateral and multilateral agreements should be further strengthened to address recruitment abuses through a transparent and consultative process, grounded in international standards. Such agreements should improve the governance of international labour recruitment to ensure coherence between national laws and policies, including those relating to employment, skills and education.

3. Promote fair business practices

- Under the Fair Recruitment Initiative, pilot projects are planned to promote fair business practices in several migration corridors. They aim to strengthen the protection of migrant workers against abuses and to demonstrate the benefits to businesses and workers of fair recruitment approaches.
- The ILO, other UN agencies, employers' organisations and other stakeholders should continue raising awareness among labour recruiters, private employment agencies and public employment services on due diligence and best practices on how to eliminate abusive and fraudulent recruitment practices.

4. Empower and protect workers

- Workers need to be empowered in order to better protect themselves against abusive and fraudulent recruitment. The right to freedom of association and collective bargaining should be respected and promoted so that workers who are recruited through labour recruiters and employment agencies can also enjoy it.
- Member States should ensure that migrant workers who have experienced abusive and fraudulent recruitment practices or subsequent exploitation have access to justice and effective remedies such as compensations. Special complaints procedures could be put in place for low skilled workers, in particular migrant workers, who often find it difficult to access to justice.

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Annex

Countries Reviewed – By Region

Middle East	S/SE Asia	East Asia	Africa	Americas	Europe
Israel	Bangladesh	China	Algeria	Brazil	Albania
Jordan	India	Japan	Ethiopia	Canada	Belgium
Lebanon	Indonesia	Malaysia	Kenya	Mexico	Bosnia
Qatar	Nepal	Myanmar	Morocco	Panama	Bulgaria
UAE	Philippines	South Korea	Nigeria	Paraguay	Czech
	Fiji	Thailand	South Africa	Suriname	Finland
		Vietnam	Zambia	Uruguay	Georgia
				United States	Hungary
					Italy
					Lithuania
					Macedonia
					Moldova
					Netherlands
					Poland
					Portugal
					Serbia
					Slovakia
					Spain
					Tajikistan
					Russia
					UK