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Recruitment
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- ▶ Fair recruitment and access to justice for migrant workers



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► **Fair recruitment and access to justice for migrant workers**

Discussion paper

ILO Fair Recruitment Initiative

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Executive summary

Over 169 million men and women today live and work outside their country of origin in pursuit of decent work and better livelihoods (ILO 2021a). Public employment services and private employment agencies, when appropriately regulated, play an important role in the efficient and equitable functioning of labour markets by matching available jobs with suitably qualified workers. However, it is during the recruitment phase that migrant workers, especially low-wage workers, are particularly at risk of entering a cycle of abuse and exploitation.

A State's regulation of the recruitment of migrant workers should be conducted in a way that respects, protects and fulfils internationally recognized human rights. When these rights are violated, workers – irrespective of their nationality, legal status, gender, religion, ethnicity, caste or any other social or economic considerations – must have the right to access justice and to seek effective remedy.

Recruitment-related abuses can involve one or more of the following:

- charging of recruitment fees;
- deception about the nature and conditions of work;
- retention of passports or travel documents;
- illegal wage deductions;
- debt bondage linked to repayment of recruitment fees and costs; and
- threats if workers want to leave their employers, coupled with fears of subsequent arrest, expulsion or deportation from the country of employment.

Access to justice is central to making human rights, including labour rights, a reality for all workers and individuals. It is premised upon the central tenet of non-discrimination – that every person is entitled, without discrimination and on an equal basis with others, to equal treatment and protection under the law.¹ In addition, a number of international Conventions and instruments guarantee the right to a fair and public hearing and process² as well as the right to an effective remedy.³ For a remedy to be considered effective, it must:

- be accessible, affordable, adequate and timely;
- combine preventive, redressive and deterrent elements; and
- include the right to be treated “equally in all stages of procedure”, regardless of personal characteristics such as gender, race, or ethnicity, among others.

To this end, this working paper focuses on good practices concerning the migrant workers' right to access to justice in the context of their labour recruitment, where recruitment is understood to include the advertising, information dissemination, selection, transport, placement into employment and – for migrant workers – return to the country of origin where applicable. The paper first gives an overview of current gaps in rights protection throughout the labour migration cycle and then outlines the sources of the right to access to justice under international human rights law, international labour standards and instruments, bilateral agreements, and the UN Guiding Principles on Business and Human Rights (UNGPs). It also briefly sets out the processes that may be available for seeking redress, as well as the structural factors that

¹ As per Article 15 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW).

² International Covenant on Civil and Political Rights, Art. 14.

³ Universal Declaration of Human Rights, Art. 8.

Some country of origin governments have established “joint and several liability” systems that peg the responsibility of recruitment abuse on the recruitment agency, which is treated as a co-employer. This allows migrant workers who have suffered abuses to receive restitution that would otherwise be impossible to claim because the employer is outside the jurisdiction of domestic courts in the country of origin.

In addition to the legal remedies mentioned, the increasing use of digital documentation of worker contracts and wage slips may help workers provide evidence of abuses suffered, and many States have created and promoted toolkits that aim to engage and inform migrant workers about their right to access justice.

These efforts are being supported by trade unions and other workers’ organizations that have set up legal awareness guides for workers and legal professionals, “rate-your recruiter” mobile applications for migrants, and websites that support rights-awareness. Trade union-led migrant resource centres are helping workers access legal assistance and support, and new bilateral cross-border cooperation agreements between countries and trade union bodies could provide new avenues for support for workers with pending claims who have returned to countries of origin. In addition, targeted mediation and lobbying by trade unions and non-profit organizations on behalf of workers have been successful in claiming unpaid worker wages.

Proposals for action

To help migrant workers secure their access to justice during the process of their recruitment, the working paper concludes with several proposals for action based on emerging practices for three key stakeholders: (1) governments, (2) labour recruiters and employers, and (3) trade unions and workers’ organizations.

For governments

- Establish within national labour laws equality of treatment between migrant workers and nationals with regard to access to justice.
- Ensure timely resolution of migrant worker grievances.
- Amend labour migration laws that undermine migrant workers’ ability to obtain remedies.
- Improve information on rights and redress.
- Establish joint and several liability for recruitment-related offenses committed by labour recruiters and/or employers.
- Negotiate bilateral labour agreements that include provisions on dispute settlement and access to justice.
- Facilitate migrant workers’ pursuit of their claims, even if they are not physically present in the country.
- Strengthen embassy oversight and systematize consular assistance.
- Improve oversight and accountability of labour recruiters, in line with ILO Standards and the General Principles and Operational Guidelines for Fair Recruitment.
- Provide training to enhance the capacity of labour officers and reduce discrimination.
- Shift the burden of proof on alleged perpetrators in discrimination cases and cases related to violence and harassment.
- Improve legal support, provide access to gender-responsive counselling services, and provide humanitarian support, including for food, housing, and transport.
- Expand branch offices of administrative dispute resolution bodies and other essential labour migration services as a matter of priority.
- Facilitate inter-agency, trade union and civil society coordination on migrant worker remedies.
- Develop access to justice indicators and systems to improve data collection and resolution of migrant worker complaints.
- Allocate funding towards improving access to remedies.

For employers and labour recruiters

- Employers and labour recruiters must respect human and labour rights.
- Provide or facilitate access to effective remedy, including to both judicial and non-judicial remedies.
- Protect workers who report abuse from reprisals.

For trade unions and worker organizations

- Advocate for fair recruitment legislation and policies.
- Actively monitor and investigate the recruitment of migrant workers and the accessibility and effectiveness of remediation mechanisms.
- Support migrant workers to file complaints and protect them from reprisals.

1. Background

Every individual is fully entitled to enjoy all fundamental rights – including human rights and rights at work – in all forms of meaningful participation in political, public and cultural life. Central to the enjoyment of these rights is access to justice without discrimination and on an equal basis with others, which requires full legal equality and equal protection under the law, access to fair dispute resolution and access to remedy.

The ILO has long recognized the fundamental role of access to justice in protecting migrant workers, especially in the context of the organization's work with governments and employers' and workers' representatives to advance a rights-based approach to labour migration in which all relevant international labour standards apply equally to migrant workers and nationals. This includes ILO-supported efforts to eliminate forced and compulsory labour, to regulate the practices of recruitment agencies, and to protect migrant workers from paying unfair and unreasonable recruitment fees and related costs.

This focus on protecting the rights of migrant workers – including workers in an irregular situation – through ensuring migrant workers' access to justice is made manifest in a number of international labour instruments, including (but not limited to) the:

- Forced Labour Convention, 1930 (No. 29);
- Abolition of Forced Labour Convention, 1957 (No. 105);
- Migration for Employment Convention (Revised), 1949 (No. 97);
- Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143);
- Private Employment Agencies Convention, 1997 (No. 181);
- Domestic Workers Convention, 2011 (No. 189);
- Violence and Harassment Convention, 2019 (No. 190); and
- General Principles and Operational Guidelines for Fair Recruitment (2016) and Definition of Recruitment Fees and Related Costs (2018).

As noted above, migrant workers should enjoy access to justice free from discrimination, a principle upheld by a number of key international instruments expressly prohibiting discrimination based on race, nationality, religion, and sex – among others. These instruments include the:

- International Convention on the Elimination of All Forms of Racial Discrimination (1965);
- Convention on the Elimination of Discrimination Against Women (1979);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- Migration for Employment Convention (Revised), 1949 (No. 97); and
- Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).

Despite increased international focus on the abuse of migrant workers during the recruitment process, migrant workers are regularly denied effective and efficient access to justice. They often do not receive appropriate remedies for human and labour rights violations, both in countries of origin and destination, as domestic legal systems are often not adjusted to the particular vulnerabilities of migrant workers. These vulnerabilities are manifold and can include lack of knowledge of laws and legal practices or even just a lack of local language capacity, making it difficult to navigate complex remediation processes. The fear of retaliation by employers and recruiters can inhibit migrant workers' ability to seek justice. Some migrant workers are dependent on their employers not just for their job but also for their residency in the destination

country. As such, they may not seek to access justice, even in cases of employer abuse, for fear that they will be placed in an irregular situation and possibly detained and deported. Onerous recruitment costs sometimes place migrant workers in a situation where they are in debt to their employer, recruiter or another party, making them reluctant to seek justice because of the need to pay off this debt.

Although both women and men are recruited for work abroad, migration experiences are not gender neutral (CEDAW Committee 2009). Women migrants tend to be disproportionately concentrated in marginalised and informal sectors and/or isolated occupations in which labour, physical and psychological abuse and sexual violence are common. Women migrants in such occupations frequently receive limited legal recognition and protection.⁵ In general, women migrant workers often face additional obstacles and restrictions that impede them from realizing their right to access justice. These obstacles are often related to structural discrimination and inequality due to, for example, stereotyping; discriminatory laws, procedural requirements and practices; and an overall failure by many countries to make judicial mechanisms accessible to women generally (CEDAW Committee 2015). This situation can be compounded for women migrant domestic workers, who are often not fully covered under national labour laws, are isolated within the homes of their employers and may have their freedom of movement restricted.

1.1. Defining access to justice

Access to justice is a basic principle of the rule of law. It is a broad concept that has its basis in the full equality of persons before the law, referring to the ability of all individuals, regardless of personal identity or status, to pursue and to obtain proper remedies for grievances suffered, without discrimination and in full conformity with human rights standards (UNDP 2005). Necessary guarantees in this context include the “right to a fair and public hearing” and to due process⁶ and “the right to an effective remedy”⁷.

A grievance, in this interpretation, is defined as an “injury or loss that constitutes a violation of a country’s civil or criminal law, or international human rights standards”⁸. As such, an injury that violates international human rights standards may constitute a legitimate grievance even if it is not explicitly covered under national law. The right to access to justice, therefore, centres on the ability of the rights-holder to exercise his or her rights and encompasses the right to effective remedy for any harm suffered. Many international legal instruments deal with access to justice – and specifically the right to effective remedy – in detail (see Section 3 below).

Access to justice, therefore, is more than just the procedures of remediation, because it is predicated upon the full equality of persons before the law, and because remedy can take various forms. Access to remedy can encompass both formal or informal institutions, judicial or non-judicial mechanisms. For a remedy to be considered effective, it must be accessible, affordable, adequate, and timely and must combine preventive, redressive and deterrent elements (OHCHR 2017). The UN Guiding Principles on Business and Human Rights (UNGPs) further state that non-judicial grievance mechanisms – both state-based and non-state-based – should meet the criteria of being legitimate, accessible, predictable, equitable, transparent, and rights-compatible, while also being a source of continuous learning. Operational-level mechanisms should also meet the additional criterion of being based on engagement and dialogue.⁹

⁶ International Covenant on Civil and Political Rights, Art. 14.

⁷ Universal Declaration of Human Rights, Art. 8.

⁸ Universal Declaration of Human Rights, Art. 8.

⁹ UNGPs, Principle 31.

1.2. Scope of the discussion paper

This discussion paper focuses on mechanisms and approaches for enhancing migrant workers' access to justice, particularly for recruitment-related abuses. The paper outlines the experiences of migrant workers¹⁰ in both regular and irregular situations, and many aspects of this paper may be applicable to workers who migrate within national borders (internal migrants) or migrant workers who are stateless and without a nationality.

The paper's focus is on migrant workers whose pay is below the national average; who are often engaged in employment sectors that are considered "dirty, dangerous and demanding" (so called "3D jobs"); and who consequently face higher risks regarding occupational safety and health (ILO 2016b).

The paper addresses the right to access to justice for migrant workers in the context of their labour recruitment, including practical and structural factors that obstruct their ability to access justice and to seek accountability, as well as the processes available for seeking remediation. The paper explores the legal foundation of the right to access to justice for migrant workers in the context of recruitment under:

- international human rights law;
- international labour standards;
- multilateral and operational guidelines;
- bilateral agreements; and
- the UNGPs.

It further assesses barriers and distils promising approaches/solutions. The paper concludes with concrete proposals for governments and social partners on actions for moving forward.

¹⁰ This paper uses the definition of "migrant worker" put forward in Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: "The term 'migrant worker' refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national."

2. Gaps in rights protection in the recruitment of migrant workers

The failure to provide migrant workers access to justice for abuses faced during their recruitment is a major obstacle that makes them vulnerable to exploitation and abuse. Understanding how recruitment is carried out helps to locate where abuses occur in the recruitment process, who is responsible for these abuses, and how they can be remedied. This section examines the various stages of the migration process, from pre-departure through to return, presenting an overview of the common gaps in rights protection found during each stage.

2.1. Pre-departure phase

The recruitment-related abuses that migrants face usually begin before they start work in the destination country. The most common abuses involve migrant workers being charged recruitment fees¹¹, deception about the nature and characteristics of jobs, or the use of coercion to get a worker to enter an employment relationship. In addition, tactics like contract substitution and delayed deployment can be the first link in a chain that places migrant workers at increased risk of forced labour or human trafficking.

Migrant workers may be able to pursue remedies in countries of origin if they discover the abuse prior to their departure. However, workers often discover that they have been deceived about their employment terms only on arrival in the country of destination, where there may be a higher barrier to access to justice due to jurisdictional or practical challenges, such as language barriers or lack of familiarity with available legal assistance and other support mechanisms or organizations.

Women, who generally have fewer assets than men, may be more likely to borrow money from family, friends and/or moneylenders at high interest rates to finance their migration. Women are also more likely to have restricted access to education, training and migration-related information, which puts them at heightened risk of vulnerability and abuse (CEDAW Committee 2009), and tend to pay higher recruitment fees than men in relation to their salary at destination. Bans or restrictions on women migrating for employment, can prompt women to utilize irregular migration channels at an increased cost.¹² In addition, migrant workers using irregular channels are likely to depend on smugglers, traffickers or officials who turn a blind eye or actively participate to enable their irregular entry. This can leave these women migrant workers at heightened risk of harm, exploitation, and other forms of abuses (UN General Assembly, Human Rights Council 2016).

2.1.1. Illegal recruitment fees and related costs and corruption

According to recent research, recruitment fees and costs in most countries of origin and destination tend to be either banned, limited to a percentage of the worker's monthly wage, and/or capped at a maximum amount. However, even when the law prohibits or regulates fee-charging, it has been seen that unscrupulous recruiters and employers charge migrant workers large sums beyond what the law allows in

¹¹ The ILO General Principles and Operational Guidelines for Fair Recruitment states, "No recruitment fees or related costs should be charged to, or otherwise borne by, recruited workers and jobseekers" (ILO 2019a, General Principles, para. 7).

¹² Some countries of origin have placed restrictions on women migrating for domestic work (for example, Sri Lanka and Myanmar), and this can drive up migration costs as well as push women to migrate through irregular channels, where they have even less access to protection (ILO 2020a).

order to secure a job abroad. These payments are sometimes collected in the form of informal/illegal fees or service charges, but they are also collected towards essential items, such as securing visas, air-tickets, travel documents, medical tests, and job trainings. But payments for these legitimate items often far exceed the true cost of these items, and the surplus profit is retained and/or channelled to fund bribes to employers and other placement agencies to secure additional labour supply contracts (ILO 2020a).

In 2015 and 2016, Global Knowledge on Migration and Development (KNOMAD) and the ILO conducted migration and recruitment cost surveys with 5,500 migrants across 19 migration corridors (KNOMAD, n.d.). The data from these surveys was used to support methodological work on developing Sustainable Development Goal indicator 10.7.1: “Recruitment cost borne by an employee as a proportion of monthly income earned in country of destination”. In many of these corridors, recruitment charges were exceptionally high, and had a devastating impact on low-paid workers. Recruitment cost surveys have found that the structure of recruitment costs is highly regressive, with poorer workers with fewer assets and lower wages paying progressively higher fees (KNOMAD 2017).

Box 1. Recruitment cost surveys in Bangladesh

According to the Cost of Migration Survey 2020, a Bangladesh Government assessment that sampled 8,000 migrant households, Bangladeshi migrant workers paid recruiters 417,000 taka (US\$5,000) on average for jobs abroad, amounting to roughly 17 months of average net earnings¹ in the country of destination. The research found that male workers (US\$5,664) paid more than four times what female workers (US\$1,201) paid; unskilled workers (US\$5,735) paid on average more than skilled workers (\$5,126); and workers migrating to Singapore (\$6,890) and Saudi Arabia (\$5,236) paid more than the national average.

¹ Monthly earnings in the survey report referred to “salary/wages earned from the first three months in the country of destination, plus mean monthly other benefits received and minus mean monthly deduction (if any)” (Bangladesh, BBS 2020, viii).

Source: Bangladesh, BBS 2020.

2.1.2. Debts and high interest rates

The practice of charging low-paid workers for overseas jobs often forces them to take loans or sell off personal assets such as land, cattle and other possessions to enter a cycle of debt for several months or even years.¹³ Paying back a high-interest loan is not just stressful; faced with the double burden of clearing their debts and supporting families at home, migrant workers may adopt frugal lifestyles, compromising on the food they eat, where they live, and how they spend their free time. They are also more likely to endure exploitative employment terms and treatment to keep their job. This situation is further complicated when workers are not paid wages, paid lower amounts than initially promised, charged for food and housing, or made to work longer hours. At its worst, it can lead to debt bondage – a forced labour indicator binding a worker to an employer until the debt is cleared (ILO 2012).

¹³ See, for example, ILO, *Recruitment Fees and Related Costs: What Migrant Workers from Cambodia, the Lao People's Democratic Republic, and Myanmar Pay to Work in Thailand*, 2020.

Box 2. Debt bondage in the private sector

The 2017 Global Estimates of Modern Slavery estimated that 16 million men and women were in situations of forced labour in the private sector. The biggest share of adult workers facing forced labour were employed in the domestic sector (24 percent), construction (18 percent), manufacturing (15 percent), and agriculture and fishing sectors (11 percent). The majority, an estimated eight million workers, were in situations of debt bondage.

Source: ILO 2017 [Alliance 8.7].

2.1.3. Deception and contract substitution

Another prevalent problem is deception by recruiters or employers who promise workers better wages, benefits, working and living conditions than what workers experience in the country of destination. They might also mislead workers about the status of their visas or work permits, or force them to work a different job than was agreed upon. These deceptive pledges are sometimes made verbally to the worker, but sometimes the worker will sign a written contract with the agreed upon terms in the origin country only to be coerced into signing another, substitute contract with poorer terms when they reach of the country of destination or as a requirement for dispatch.

2.2. In transit

A migrant worker recruited in their home country may transit through one or more countries before arriving in their country of destination. Workers in transit are often unable to pursue legal remedies because they lack protections under the law or are either unwilling or unable to seek support from the transit country. Workers who have secured jobs and the relevant paperwork may still be stranded in the origin country, or in a transit country, for weeks, sometimes months, waiting for the recruiter to send them abroad. In this stressful situation, workers who do not have jobs – and who may already be burdened with recruitment debt – may be forced to borrow further to pay for their accommodation and food (see box 4 below).

Box 3. Migrant workers in an irregular situation

Article 5 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families defines “migrant workers in an irregular situation” as workers or members of their families who are not authorized to enter, to stay, or to engage in a remunerated activity in the State of employment, either because of a national law or to any international agreements to which that State is a party. Workers in an irregular situation may have entered the State of employment in an unauthorized way and therefore are not permitted to stay, live or work in the country. However, workers in a regular situation can also lose their regular status, such as by overstaying their visas or because national legislation provides that upon loss of employment their residence/work permit is withdrawn.

States tend to limit the ability of migrant workers in irregular situations to access their fundamental rights, including the right to justice, by preventing access to courts and administrative remedy mechanisms or by denying these workers legal advice and support. Migrants in an irregular situation live in fear of detention and deportation by immigration authorities, and as a result often do not file complaints against their employers, even when their rights are violated. Because irregular migration is often criminalized, migrant workers in an irregular situation are treated as criminals. Such criminalization fosters public perceptions and prejudice that migrant workers in an irregular situation are “illegal” or unfair competitors for jobs and social benefits, thereby fuelling discrimination, racism, xenophobia and anti-immigration rhetoric and action, as well as the removal of migrants contrary to human rights obligations.

Source: CMW 2013; ILO 2010; ILO 2016c; ILO 2021c.

Box 4. Domestic workers in Madagascar

As part of a 2018 ILO review of law, policy and practice concerning the recruitment of migrant workers in Madagascar, several prospective and returnee migrant women workers spoke of their experiences in focus group discussions. Many of the returnee women consulted explained that they had to stay in the capital of Antananarivo for several months before departing for their overseas work. One woman described her experience of the delayed departure: “We were between nine and a dozen women housed in bunk bed in small rooms at the agency. We had to wait several months before leaving. ... One person left per month, except sometimes two were sent together.” These stays proved to be expensive for the women, even when they were provided accommodation, as they still had to pay for all other expenses. During these months of waiting some of the women received some basic language instruction, but most received no training at all.

Source: ILO 2019b, 27.

2.3. Arrival in destination

In the event of deception on the part of the recruiter or the employer, it is usually only upon arrival in the country of destination that migrant workers realize that their actual employment situation is different to what they were promised at home. This could be the result of deception concerning one or more of the

following: the validity of the employment contract, the nature/type of job, the wages, working hours, or employment and living conditions. Some of these abuses are likely to be rooted in the original recruitment exercise, while others, such as wage-related abuses or threats of violence and harassment by employers, can be indirect consequences of a fraudulent recruitment cycle.

2.3.1. Retention of identity documents

The practice of withholding passports and other identity documents, including residence permits and medical cards, is a common form of coercion (ILO 2009; ILO 2012). Without legal documentation, workers are discouraged from filing complaints against their employers and are often effectively confined to work and accommodation facilities for fear that they could be detained and even deported. Workers who are unable to access their personal documents on demand, or fear leaving their job because they risk losing their documents, may be at risk of forced labour.

2.4. While employed

Even if workers do receive the jobs and employment terms they were promised before departure, workers can still be subject to labour rights violations during their employment that might be tied to the recruitment process. These can include wage deductions for recruitment fees, housing, and the issue and renewal of identity documents. Migrant workers may also be subject to pay discrimination (that is, being paid less than nationals for work of equal value); might not be paid overtime; suffer occupational safety and health violations; or face restrictions on freedom of movement or on their ability to form and join labour unions.

2.4.1. Non-payment and deduction of wages

The non-payment of wages can have significant and profoundly negative impacts on workers and their families, as well as their communities in the country of origin. These impacts are further complicated if the worker has accumulated debts to pay recruitment charges, as they may be forced to borrow again to support their families. Even when workers are being paid, deductions are sometimes made from their wages to pay for recruitment costs or even to retain their current job. Wage deductions or non-payment of wages that are systematic and intended to prevent the worker from leaving their job can amount to forced labour (ILO 2012).

2.5. After employment but prior to return

When the employment relationship has ended – either because the contract has been terminated or has expired – but while the worker is still residing in the country of employment, they may seek to bring a claim against their employer for abuses they faced. Workers may also wish to claim outstanding wages and social security or other benefits before they return home. Alternately, workers may also be contesting cases brought against them by their employer or the State. The claims made in these cases may be legitimate, false or misleading, or may fall outside the scope of the worker's responsibility.

Box 5. RADAR Program for migrant workers in the United States of America

The RADAR Program, a new recruitment violations database set up by the Mexican non-profit ProDESC, helps lay the path for enforcement of US labour and immigration laws to hold US employers jointly liable for recruitment-related abuses committed by their Mexican recruiters. This programme addresses a key challenge in joint-liability litigations that require employers to have had prior knowledge of their recruiters' actions, which are in practice extremely difficult to prove. Once a worker complaint has been lodged on RADAR, ProDESC combines corporate research and employer engagement to reach out to all supply chain actors – including to the employer, the recruiter and the brand – to notify them about the specific abuse and the actors involved, and to provide guidance to prevent future violations. Meanwhile, ProDESC also helps lawyers representing migrant workers whose cases have been logged in the RADAR database by providing evidence that employer-defendants had or (should have had) knowledge about recruitment-related abuses in their supply chain.

Source: ProDESC, n.d.; ProDESC 2017.

2.6. On return

Migrant workers who have returned to their country of origin may have several options to pursue a legal claim against their employers or recruiters. Ideally, migrant workers who have returned home should still be able to pursue a claim against an employer or recruiter in the destination country. Some measures to facilitate the pursuit of such claims include, but are not limited to, workers attending hearings in the destination country via videoconference or being represented in court by a lawyer or a trade union representative (see box 6). Furthermore, returned workers may be able to access justice against recruiters in the country of origin for recruitment-related abuses, although systemic barriers may make it difficult to receive full redress (Farbenblum, Taylor-Nicholson, and Paoletti 2013). Migrant workers could, in principle, pursue remedies even when located in a third country other than countries of origin or destination, although there are often substantial challenges involved in seeking redress when outside the jurisdiction of both the country of origin and destination.

Box 6. Resolving labour disputes in Hong Kong, China

In September 2018, the labour tribunal in Hong Kong, China, for the first time allowed video testimony in a tribunal hearing. A Filipina domestic migrant worker who had worked in Hong Kong, China, attended her hearing and submitted evidence, all via video conferencing from the Philippines.¹ Permitting workers to provide testimony via video conference could improve their access to dispute resolution bodies and encourage them to pursue their cases even after their return to countries of origin.

¹ At the moment, workers who want to use video conferencing must request for it at the Hong Kong High Court, where facilities to support video testimonies are limited. Provided the court approves, the claimant needs to testify in front of an independent observer and provide a significant amount of documentation, which can be expensive and time-consuming.

Source: FADWU 2019.

3. The right to access to justice

Access to justice is central to making human rights – including labour rights – a reality for all individuals and all workers. It is premised upon the central tenet that every person – be they migrant or national – is entitled, without discrimination and on an equal basis with others, to equal treatment and protection under the law.¹⁴ This principle is affirmed in Article 1 of the 1948 Universal Declaration of Human Rights, and further elaborated in the two Covenants that form the International Bill of Human Rights. Article 2 of both the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) affirms the principle of non-discrimination and that each State Party has the legal obligation to take measures to respect, protect and fulfil the rights contained in the two Covenants.

In relation to migrant women's access to justice, it is important to underscore that the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides, in Article 2, that States must adopt legislative measures and sanctions prohibiting discrimination against women; establish legal protections for women on an equal basis with men; and repeal/abolish existing laws/regulations and customs that discriminate against women. These requirements and how to achieve them are further elaborated upon in the General Recommendation on Women's Access to Justice, which notes that the right of access to justice for women is "essential to the realization of all the rights protected under the Convention" and "a fundamental element of the rule of law and good governance" (CEDAW Committee's 2015, para. 1).

A non-discriminatory, fair, effective, and legal process is a central pillar of a society bound by the rule of law, and essential to settle disputes and to provide remediation where a wrong has been committed. For instance, the Convention on the Rights of Persons with Disabilities, 2006, establishes in Article 13 that States must "ensure effective access to justice for persons with disabilities on an equal basis with others", and this includes the provision of necessary procedural accommodations and safeguards that would facilitate the participation, both direct and indirect, of persons with disabilities at all stages of the judicial process.

While the right to a fair process and trial¹⁵ most readily brings to mind civil and criminal justice, these are not the only forms of remediation. In human rights treaties and international labour standards the right to an effective remedy or access to remedy also encompasses mechanisms outside the judicial setting. In the context of labour migration, access to remedy includes adequate, affordable, and prompt legal assistance for victims of labour abuses; grievance mechanisms that are both accessible and affordable; the right to a fair and public hearing; and decisions being made within a reasonable time. It also comprises the right to information, as well as translation and interpretation through translators or other relevant language services.

It is not sufficient that migrant workers have access to a free or affordable grievance mechanism; it is equally important that such mechanisms guarantee effective and appropriate remedies for the complainant, where abuse has occurred.¹⁶ They must be able to access remedies to address alleged abuses and fraudulent practices in recruitment, without fear of retaliatory measures – including blacklisting, detention or deportation – regardless of their legal status, personal identity, absence or presence in the State (ILO 2019a, Operational Guideline A.8). Equal treatment and access to justice means governments should promote policies that aim at identifying and eliminating legal and practical barriers to dispute resolution mechanisms

¹⁴ CEDAW, Art. 15.

¹⁵ International Covenant on Civil and Political Rights, Art. 14.

¹⁶ Universal Declaration of Human Rights, Art. 8.

that may unduly impact migrant workers, including complex administrative procedures, unreasonable costs, fear of discrimination and retaliation, or the fear of detention and deportation.

For this reason, while international and regional human rights instruments have sought to affirm the importance of the right to effective remedy (see section 3.1 below), ILO constituents have developed international labour standards to provide content and guidance on the right to effective remedy within the context of the world of work (see section 3.2 below). This guidance encompasses appropriate steps to ensure victims can secure redress and reparations, including compensation and rehabilitation, for rights violations related to recruitment through judicial, administrative, legislative or other appropriate means under state-based mechanisms.¹⁷

Furthermore, non-state-based mechanisms can be administered by business enterprises, industry associations or multi-stakeholder groups. Quasi-judicial bodies (human rights or equality institutions, for example) have an advisory and monitoring role, and can also receive complaints. These mechanisms may use adjudicative, dialogue-based, or other culturally appropriate and rights-compatible processes.¹⁸

3.1. United Nations and regional human rights treaties

The right to an effective remedy is outlined under various international and regional human rights instruments, as per tables 1 and 2 below.

Table 1. United Nations human rights instruments addressing the right to effective remedy

Instrument	Article	Human rights guarantees on effective remedy
Universal Declaration of Human Rights	Art. 8	Everyone has the right to an effective remedy determined by competent national tribunals for violations of legal or constitutional rights.
International Covenant on Civil and Political Rights (ICCPR)	Art. 2(3)	States must guarantee rights to effective remedy for rights and freedoms violated either by state officials or private parties. Remedies are to be state-based and determined by competent judicial, administrative or legislative authorities, with the possibility of judicial remedy. Remedies must be enforced when granted.
International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)	Art. 6	States must ensure protection and remedies through national tribunals and state institutions to all people within their jurisdiction for acts of racial discrimination. All persons have the right to seek reparations for any damage suffered as a result of racial discrimination.
Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)	Art. 2 Art. 15	States must adopt legislative measures and sanctions prohibiting discrimination against women. States must establish legal protections for women on an equal basis with men, and repeal/abolish existing laws/regulations and customs that discriminate against women. States must accord to women equality with men before the law, including a legal capacity identical to that of men and the same opportunities to exercise

¹⁷ UNGPs, Principle 25.

¹⁸ UNGPs, Principle 28.

		<p>that capacity in civil matters, in particular equal rights for women to conclude contracts and administer property. State must treat women equally in all stages of procedure in courts and tribunals.</p> <p>Note: In 2015, the body of independent experts monitoring CEDAW issued General Recommendation No. 33 on Women's Access to Justice, which expands on Arts 2 and 15 by focusing on the following aspects of the right to access to justice: justiciability, availability, accessibility, good quality, provision of remedies and accountability of justice systems (CEDAW Committee 2015).</p>
Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)	Art. 83	<p>States must guarantee migrant workers and their families the right to effective remedy for violated rights and freedoms.</p> <p>Remedies are to be state-based and determined by competent judicial, administrative or legislative authorities, with possibility of judicial remedy.</p> <p>Remedies must enforced when granted.</p>
International Convention on the Rights of Persons with Disabilities	Art. 13	<p>States must ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of necessary procedural accommodations and other safeguards, to facilitate their direct and indirect participation in legal proceedings at all stages of the judicial process.</p> <p>In 2020, the UN Human Rights Council Special Rapporteur on the rights of persons with disabilities, the Committee on the Rights of Persons with Disabilities and the Special Envoy of the Secretary-General on Disability and Accessibility issued the International Principles and Guidelines on Access to Justice for Persons with Disabilities, expanding on Art. 13 on effective access to justice for persons with disabilities.</p>

Table 2. Regional human rights instruments addressing the right to effective remedy

Instrument	Article	Human rights guarantees on effective remedy
European Convention on Human Rights	Art. 13	States must provide effective remedy to those whose freedoms and rights have been violated before a national authority, even if the violator is acting in official capacity.
Charter of Fundamental Rights of the European Union	Art. 47	All persons whose rights are guaranteed under European Union law have access to effective remedy before a tribunal when these protections are violated. Guarantees include a fair and public hearing before an independent tribunal within a reasonable time, as well as access to legal aid, legal support and representation.
American Convention on Human Rights	Art. 25	<p>All persons shall have access to effective and prompt remedies before a competent tribunal for violation of fundamental rights under the constitution, or other laws.</p> <p>States are to develop the possibility of judicial remedies.</p> <p>Remedies must be enforced once granted.</p>

Arab Charter on Human Rights	Art. 12	All persons are equal before the law, and have access to a legal remedy before courts at all levels.
	Art. 23	States must guarantee rights to effective remedy for rights and freedoms violated either by state officials or private parties.
Association of Southeast Asian Nations (ASEAN) Human Rights Declaration	Art. 5	All persons have the right to an effective and enforceable remedy for violation of legal and constitutional rights, which is to be determined by a court.

3.2. International labour standards

International labour standards are legal instruments that form a crucial component of the international framework on labour recruitment and employment-related issues. They consist of either Conventions (and Protocols), which are legally binding international treaties that can be ratified by Member States, or Recommendations, which constitute non-binding guidance. Table 3 provides an outline of international labour standards directly relevant to access to justice, remedies and dispute resolution mechanisms.

Table 3. International labour standards that address access to justice, remedies and dispute resolution mechanisms

International labour standard	Article/Paragraph	Guarantees/recommendations
Migration for Employment Convention (Revised), 1949 (No. 97)	Art. 6(1)(d)	Concerning migrant workers in a regular situation, States shall apply, without discrimination based on nationality, race, sex or religion, treatment that is no less favourable than that applied to nationals, including with regard to access to legal proceedings.
Private Employment Agencies Convention, 1997 (No. 181)	Arts 10 and 14	States must ensure adequate procedures and machinery to investigate complaints related to abuse and fraudulent practices of recruitment agencies.
Domestic Workers Convention, 2011 (No. 189)	Arts 16–17	States must ensure that all domestic workers have effective access to courts and other dispute resolution mechanisms, and these protections should be on par with those available to workers generally.
Violence and Harassment Convention, 2019 (No. 190)	Art. 10	States must: <ul style="list-style-type: none"> • ensure easy and appropriate access to remedies through courts and other dispute resolution bodies in cases of violence and harassment; • provide for sanctions, where appropriate; • ensure effective access to gender-responsive complaint mechanisms, services and support for victims of gender-based violence; and • ensure government bodies are adequately equipped and empowered to deal with violence and harassment in the world of work.
Protocol of 2014 to the Forced Labour Convention, 1930	Arts 1 and 4	Each State shall take measures to provide victims protection and access to appropriate and effective remedies, such as compensation, and to sanction perpetrators of forced labour. All victims of forced or

	<p>Para. 32</p> <p>Para. 33</p> <p>Para. 34</p>	<p>A migrant worker who has lodged an appeal against the termination of their employment should be allowed sufficient time to obtain a final decision thereon.</p> <p>A migrant worker who is the object of an expulsion order should have the right of appeal before an administrative or judicial body. This appeal should stay the execution of the expulsion order, and the migrant workers should have the same right to legal assistance as national workers and have the possibility of being assisted by an interpreter.</p> <p>A migrant worker (regardless of their legal status) who leaves the country of employment should be entitled to any outstanding remuneration and benefits owed. If there is any dispute over these claims, the worker should be able to have their case presented before the competent body and have the same right to legal assistance as national workers.</p>
Employment Relationship Recommendation, 2006 (No. 198)	Para. 14	Disputes related to conditions and terms of an employment relationship should be settled by relevant tribunals and arbitration authorities.
Social Protection Floors Recommendation, 2012 (No. 202)	Paras 3(o) and 7	States should ensure efficiency and accessibility of complaint and appeal procedures related to social security.
Forced Labour (Supplementary Measures), 2014 (No. 203)	Para. 12	Victims of forced labour should have access to justice, and other appropriate and effective remedies, including compensation and damages.

3.3. Bilateral agreements and memoranda of understanding

The movement of migrant workers across borders is also regulated by bilateral agreements and memoranda of understanding (MOUs) between States outlining specific responsibilities and actions required from each of the State Parties to accomplish their common objectives. Bilateral agreements create legally binding rights and obligations.¹⁹ MOUs on the other hand are less formal, and provide general guidelines of cooperation, and set out operational issues and plans on an issue of mutual interest (ILO 2015a). The Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families has recommended that States establish bilateral agreements that would facilitate migrant workers who have returned to their country of origin to have access to justice in the country of destination, including to claim unpaid wages and to file complaints about abuse (CMW 2010).

¹⁹ Vienna Convention on the Law of Treaties, Art. 6.

3.4. The UN Guiding Principles on Business and Human Rights

Endorsed in 2011 by the UN Human Rights Council, UN Guiding Principles on Business and Human Rights (UNGPs) are a set of guidelines for States and companies to prevent, protect and remedy human rights abuses in business operations. The UNGPs rest on three pillars: (i) State's duty to protect human rights; (ii) corporate responsibility to respect human rights; and (iii) access to remedy for victims of human rights abuse. According to Principle 25 of the UNGPs, as part of their duty to protect against business-related human rights abuse, "States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. The UNGPs define grievance mechanisms as "any routinized State-based or non-State-based, judicial or non-judicial process[es] through which grievances concerning business-related human rights abuse can be raised and remedy can be sought".²⁰ The UNGPs also note that to ensure access to remedy for business-related rights abuses the State must also facilitate public awareness and understanding of the available grievance mechanisms, including how to access them and any support that may be available.²¹

3.4.1. State-based judicial and non-judicial mechanisms

Under the UNGPs, state-based judicial and non-judicial mechanisms must form the basis of a wider system of remedy.²² Most countries have judicial mechanisms in the form of courts and tribunals to review and remedy labour rights abuses. State-based non-judicial mechanisms are mechanisms operated by state institutions but do not constitute a judicial process, meaning they exist in parallel to traditional judicial avenues. These include government-run complaints offices, national human rights institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD), and ombudsperson offices.²³ Non-judicial mechanisms are often seen as a potentially faster, cheaper and more easily accessible alternative to judicial alternative (Rodríguez 2017). Concerning state-based mechanisms, States have obligations to promote public knowledge and understanding about these various mechanisms and to provide financial and technical guidance to those seeking remediation.

Laws governing labour migration in many countries set up parallel non-judicial mechanisms involving mediation, conciliation, and arbitration for migrant workers to bring claims against recruiters. These institutions typically form part of the overseas labour government departments and accept complaints and investigate various recruitment charges brought against recruiters.²⁴ Usually, where a settlement is not reached through non-judicial mechanisms, migrant workers can file a case in court. In several countries²⁵, migrant workers are first required to attempt grievances resolutions by mediation, arbitration and conciliation under the state's non-judicial grievance mechanisms, although some legislation excludes certain categories of migrant workers (e.g. domestic workers, informal economy workers or agricultural workers) from accessing these quasi-judicial bodies. Only when these mechanisms are exhausted can workers seek judicial remedies (ILO 2016c). Workers who migrated outside government-regulated systems,

²⁰ UNGPs, Principle 25.

²¹ UNGPs, Principle 25.

²² UNGPs, Principle 25.

²³ UNGPs, Principle 25.

²⁴ For example, see the Labour Relations Department and Labour Dispute Settlement Committees in Qatar; departments under the Ministry of Labour and Vocational Training and Provincial Departments of Labour and Vocational Training in Cambodia; and the Department of Foreign Employment and the Foreign Employment Tribunal in Nepal.

²⁵ For example: Bahrain, Burkina Faso, Madagascar, Mozambique, Sudan, Viet Nam, Cambodia and Honduras.

such as through non-licenced recruiters or through irregular arrangements, are often excluded from this state-based framework.

3.4.2. Non-state-based grievance mechanisms

Non-state-based grievance mechanisms are operated by private or other non-governmental actors without the involvement of the State. These can include a variety of measures, including corporate grievance mechanisms; mechanisms set up by international organizations, including international finance institutions; and other initiatives by multi-stakeholder bodies, industries, or certification bodies. These mechanisms are not intended to replace state-based judicial and non-judicial mechanisms, but rather to complement them. That said, non-state-based mechanisms may, in some cases, substitute for other state-based mechanisms where the State is not able or willing to provide effective remedy.²⁶

Box 7. A robust internal complaint mechanism

HCL, a recruitment agency that recruits healthcare workers, primarily nurses from India and the Philippines for the UK National Health Service (NHS), has set up a comprehensive internal complaint mechanism for any recruitment-related abuses. The mechanism is triggered in a variety of ways. At the basic level, workers who have suffered any form of recruitment abuse, such as paying recruitment fees for example, can file a complaint with HCL. The claim is investigated, and any fees paid are reimbursed, even if they were paid to an HCL subcontractors.

HCL's dispute system is not limited to complaints it directly receives from workers. Claims may also be brought on behalf of workers by service users such as NHS patients or partner hospitals. Even if workers are not formally seeking remedies but are providing critical feedback or advice based on their own recruitment journey, the dispute resolution process is triggered. To ensure complaints are handled effectively, HCL's complaints policy, any active complaints and the remedy process are reviewed directly by the managing director and the senior management team.

Source: Calenda 2016.

²⁶ UNGPs, Principle 28.

4. Emerging good practices related to access to justice

Migrant workers can face several obstacles to accessing remedies for recruitment-related abuses, even when, in principle, their legal rights are established in law. There may be legal issues that mean that migrant workers (or certain groups of migrant workers) are not adequately protected under relevant laws and regulations or are otherwise directly or indirectly excluded from legal coverage. Even when legal protections are in place, migrant workers may face accessibility barriers that hinder or fully impede their ability to effectively utilize these mechanisms. In addition, there may be enforcement barriers, that is, decisions and penalties are not properly implemented.

Although these hurdles apply to both men and women, migration is not “gender-neutral” (CEDAW Committee 2009), and the experiences of women migrant workers seeking remedies is distinct and by and large more adverse than the experiences of their male counterparts owing to sex and gender-based discrimination. A prime example of this is the case of migrant domestic workers, who are typically women and who are often explicitly excluded from labour law coverage, which can effectively exclude them from remedy processes available to migrant workers in less female-dominated occupations. Social, regional and cultural factors, including caste, religion, ethnicity, language, cultural differences or other statuses, can also block or hinder the path to effective redress for recruitment-related harm. Access to remedies for migrants in an irregular situation is further limited due to their immigration status, which not only heightens risks of exploitation, but also puts them at a unique risk of detention and deportation.

The above being the case, this section of the working paper discusses good practices related to access to justice for migrant workers and presents a number of examples currently being piloted around the world. The examples below should not be viewed as universal models for remedying recruitment-related challenges. The practices below have been developed for specific national and regional contexts, and it is recognized that there may still be significant obstacles for migrant workers, even among these briefly profiled practices. Instead, these examples should be thought of as a guide that could provide insights and lessons learnt in regard to remedying recruitment-related harm.

4.1. Providing information about legal rights

Migrant workers may have limited knowledge about their legal rights, the terms related to their employment contracts and the channels of redress for harm suffered.²⁷ Government authorities often do not sufficiently commit to raising worker awareness at home and abroad. Governments may either fail to carry out pre-departure programmes, or where they do exist, these initiatives may be inaccessible or poorly resourced. Recruiters may withhold information about complaint/dispute resolution mechanisms.

Women migrant workers’ access to information is frequently limited as a result of gender-based discrimination, including reduced access to education and labour markets, a general undervaluing of “women’s work” and other gender-based disparities. Women are also more likely to obtain recruitment information from informal sources, including their husbands, relatives, or acquaintances. Compared to male migrants, women are also more likely to be hired on dependent/accompanying visas, making them more vulnerable to abuse, as their visa is tied to another person (CEDAW Committee 2009).

²⁷ See, for example, Sarah Paoletti et al. 2014, 145; ILO 2019b, 34; and Five Corridors Project 2021a, 126.

Migrant workers' lack of knowledge concerning rights and remedies is a function of the unequal power relationship between influential and experienced recruiters and the low-paid workers they recruit. It can be difficult for migrants employed in remote locations or confined to their worksites or dormitories to obtain guidance. They may also be banned from joining cultural groups or trade unions. Language is a problem even after workers decide to pursue their case, as courts and dispute resolution body proceedings are typically conducted in the official language of the country of destination, which migrant workers often cannot speak, read, or understand. Translation and interpretation services, where present, are typically understaffed.

In several countries, including Uganda²⁸, Nepal²⁹ the Philippines³⁰, recruitment agencies are by law required to either conduct pre-departure briefings or ensure migrant workers attend a training. These sessions, when implemented properly, can serve as an important mechanism for migrant workers to learn about their rights and about relevant grievance mechanisms.

Promising practices

A domestic workers trade union in Argentina, the Unión Personal Auxiliar de Casas Particulares (UPACP), works to improve awareness and access to new labour policy changes in Argentina. In collaboration with the Government, the UPACP has developed a website, a smartphone app and introduced video toolkits³¹ about domestic worker rights, including on wages, freedom of association and paid leave. The mobile app makes this information easier to access, and provides contact information for organizations and government offices where workers can seek remedies. This particular government–trade union model is being explored for replication in other South and Central American countries (ILO 2020b).

Toolkits have been developed by governments and non-governmental organizations (NGOs) to improve awareness among migrant workers seeking justice. Migrant healthcare workers – particularly Indian and Filipino nurses in countries of destination such as Denmark, Finland, Germany and Norway – have access to a tool developed by Public Services International that outlines grievance mechanisms in specific migration corridors and who workers can contact in times of distress.³²

The NGO Justice Without Borders has developed practitioner's manuals for lawyers and service providers to help them understand common legal problems that migrant workers face, as well as a screening tool to identify potential claims and assist migrant workers to make an informed decision about lodging claims in Singapore and Hong Kong (China).³³

The International Trade Union Confederation (ITUC) has developed the Recruitment Advisor, an internet-based ratings platform of labour recruiters that is being tested in Indonesia, Kenya, Nepal and the Philippines (ITUC 2018). In the process of development is a complaint mechanism function

²⁸ Uganda, [Rules and Regulations Governing the Recruitment and Employment Of Ugandan Migrant Workers Abroad](#), section 4(d).

²⁹ Nepal, [Foreign Employment Act \(2007\)](#), sections 27–28.

³⁰ Philippines, [Migrant Workers and Overseas Filipinos Act of 1995](#), section 19(c).

³¹ These video toolkits (in Spanish) are available at: https://www.upacp.org.ar/?page_id=3017#derechosLaborales.

³² These toolkits are available at: https://www.ilo.org/dyn/migpractice/migmmain.showPractice?p_lang=en&p_practice_id=130.

³³ The practitioner's manuals are available at: <https://forjusticewithoutborders.org/research/practitioners-manuals/>.

that will alert civil society groups and activists of the case and help them to provide legal assistance to migrant workers in need.

European Union (EU) regulations such as the [Employers Sanctions Directive \(2009/52/EC\)](#) require Member States to “systematically and objectively” inform migrant workers in an irregular situation about the employer’s obligations to pay wages, social security contributions and taxes.³⁴ Following a labour inspection, Italy’s National Labour Inspectorate issues workers in irregular situations a form that explain their rights, their employer’s duties and how to enforce their rights, including how to report claims to the police and seek redress (FRA 2021, 27).

4.2. Preventing and remedying retaliation and discrimination

One of the biggest barriers migrants face is retaliation or threats of retaliation from employers and recruiters.³⁵ Across the world, workers report being intimidated and threatened when they face employers and recruiters in court or mediation. Often, employers will make or threaten to make a counterclaim as a measure to delay proceedings or to coerce the worker to accept a lower remedy offer or drop their case altogether. Laws in several countries enable employers to report migrant workers as “runaways”, and some employers falsely accuse migrant workers of theft, malpractice, and other crimes that put them at risk of detention and subsequent deportation (Migrant-Rights.org 2020). Workers also experience discrimination on the grounds of their nationality, skin colour, their occupation and social background.³⁶

Women migrant workers are particularly vulnerable to reprisals, either because of gaps in legislation protecting them, exploitative policies, or threats of gender-based violence. Migrant domestic workers may be bound by “live-in requirements” that compel them to stay at their employer’s residence, isolating them in such a way that they may not be able to access complaint and redress systems.³⁷ Women migrant workers are also more likely than men migrants to face particular forms of reprisals, including gender-based violence and harassment, and are less likely to report abuses (UN Economic and Social Council, Commission on Human Rights 1998). Women also face stigma and fear of being ostracized when they press charges, especially if the abuses involve sexual violence (Paoletti et al. 2014).

Migrant domestic workers in the Arab States who approach recruitment agencies in distress after fleeing abusive employers are often sent back to their abuser on the grounds that the workers are violating the terms of their contract, which oblige them to work for their employers for the full duration of the agreement. To get the workers to comply, recruiters can subject domestic workers to further abuse, including verbal

³⁴ [Directive 2009/52/EC of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals](#), art 6(2).

³⁵ Some examples: A study in Hong Kong (China) found that in 14 out of 35 cases where domestic workers brought a complaint to the labour tribunal, the employer filed a counterclaim (FADWU 2019). In Jordan, counterclaims impact workers’ genuine complaints of abuse and exploitation because judges assume workers may be lying (Tamkeen 2019). In Nepal, workers who filed cases or demanded more compensation than what was offered by recruitment agencies were threatened and feared retaliation (Paoletti et al. 2014).

³⁶ See, for example, ILO 2016d, which addresses the situation of Pakistani migrant workers, and FRA 2019, which addresses the perspective of migrant workers in the European Union.

³⁷ See, for example, clause 3 of the Hong Kong (China) Standard Employment Contract for a Domestic Helper Recruited from Outside Hong Kong, a specimen form of which is available at: <https://www.immd.gov.hk/eng/forms/forms/id407.html>.

threats, denial of food and water, physical abuse, and acts of sexual harassment and violence (Human Rights Watch 2016).

Policies that prevent or limit the ability of migrant workers to change employment might create a significant dependency on the employer, and accordingly indirectly prevent migrant workers from feeling able to enforce their rights. Facilitating change of employment, in law and in practice would help prevent migrant workers remaining in abusive conditions, some of which are caused by systems where a migrant's residence and employment permit is tied to a single employer or sponsor (ILO 2021c). Migrant workers who have filed a complaint should be given sufficient time to remain in the country of destination to pursue complaints and obtain redress, and should have the possibility to change employers when a judgment is pending. The right to bring legal proceedings, including the right to appeal, should not be illusory because of a fear on the part of migrant workers – founded or not – of expulsion from the country ILO (2016c, paras. 465, 468 and 518).

Promising practices

Having trade union representatives and community leaders represent migrant workers in formal or informal proceedings against employers can help reduce the fear of retaliation. In 2020, the Malaysian Trades Union Congress (MTUC) helped thousands of workers affected by the national lockdowns receive unpaid wages through informal mediation. The MTUC-led Migrant Workers Resource Centre did not file formal mediation complaints but instead lobbied and pressured human resource personnel and company management to pay workers their wages. In one case involving 10,455 workers and 13 sub-contractors, the MTUC contacted the sub-contractors directly on behalf of the five community leaders representing the workers' wage theft claims. In a similar case involving 4,441 workers in seven companies, the MTUC contacted the companies directly on behalf of the workers as a single group. Due to the persistence of the MTUC, the employers in both cases agreed to pay due wages to the migrant workers (Migrant Forum in Asia 2021).

Governments from countries of origin and destination should consider setting up safe houses for migrant workers should they choose to pursue their complaints in the country of destination. Kuwait's government-run 500-bed shelter provides women migrants accommodation and assistance with regularizing their papers and with pursuing complaints for the non-payment of wages, visa trading and other forms of exploitation (United Nations Kuwait 2020). Compared to other institutions in this region, the shelter has a higher bed capacity and workers can gain admission with limited documentation. In some countries, trade unions and civil society groups establish safe houses for migrants who do not have a place to live while pursuing remedies and irrespective of their legal status and gender. A potential model to reference is the "Work Out" programme in southern Italy supported by the Italian Episcopal Conference, which operates boarding houses to defend workers at risk of employer reprisals, while also supplying legal assistance (FRA 2019).

The [Criminal Code of Canada](#) (section 425.1) prohibits employers from retaliating, or threatening to retaliate against a worker in relation to a complaint that has been made to authorities, and those found guilty can be imprisoned for up to five years. These prohibitions are also present in regional regulations such as the Ontario Employment Standards Act, and employment standard officers can order the employer to reinstate the aggrieved worker and to compensate workers for any harm caused (Canada, Government of Ontario, n.d.).

The ability to file an anonymous complaint against an employer can help protect migrants from acts of retaliation. Qatar has launched a new complaints platform that facilitates the anonymous filing of migrant worker complaints. Ordinarily, migrant workers in Qatar must provide either their national ID or visa number to file grievances, but whistle-blowers can do so as long as they provide a valid mobile number (Migrant-Rights.org 2021).

Some countries allow migrant workers to search for a new employer while pursuing a complaint against their previous employer. In Canada, migrant workers are permitted to apply for an open permit that allows them to search for a new employer/job in the labour market for up to 12 months if they are experiencing abuse or are at risk of abuse (Canada, Government of Canada, n.d.). Ireland allows migrant workers who have entered Ireland on a valid employment permit and who have suffered human rights abuses or lost their regular status through no fault of their own to legally find new employment (Ireland, DETE, n.d.). Public employment exchanges, such as the ones found in Germany, can help workers who have suffered recruitment-related abuses find alternative employment, thereby getting workers back into gainful employment while their claim is being processed (ILO 2015b).

The statute of limitations for migrant workers to file a complaint against their employer has been extended in certain jurisdictions around the world. For example, British Columbia's 2018 [Temporary Foreign Worker Protection Act](#) (section 33.2), extended the original six-month statute of limitations to two years, recognizing that workers may face particular barriers, including reluctance to bring a recruitment-related claim until they have changed their employer or difficulties in obtaining legal assistance.

4.3. Addressing regulatory gaps to report abuse

Labour laws may exclude certain occupations or categories of workers from their application, including agricultural, domestic and sex workers. Domestic workers comprise a particularly vulnerable category given their isolated places of employment, yet only 10 per cent are covered by national labour legislations to the same extent as other workers. About one-third of all domestic workers – some 15.7 million – are completely excluded from labour legislations (ILO 2013e). About 83 percent of domestic workers worldwide are women (GFMD 2012).

Often, countries do not fully regulate the perpetrators of recruitment abuse, and workers may struggle to bring a case against a third party not regulated under the law.³⁸ Laws and regulations in most countries authorize recruitment through licensed employment agencies that must register with the government and comply with national regulations (ILO 2021). These laws also tend to either prohibit or not recognize the use of other recruitment intermediaries, including brokers, sub-agents, and personal networks, but all of these are heavily involved in recruitment around the world. Because these actors are outside the regulatory framework, workers can face challenges bringing complaints against them.

³⁸ For example, legislation in Brazil does not prohibit international labour recruitment, but neither does it recognize the specificity of international migration or recruitment actors that facilitate international migration. Although migrant workers seeking remedies could in principle bring a case against a recruitment agency under Brazil's penal code for fraud, corruption, slavery and trafficking, cross-border migration requires stand-alone legislation to address the scale and complexity of international recruitment (ILO 2017).

Promising practices

Costa Rica's [General Law of Migration and Alien Affairs \(No. 8764\)](#) is an example of a progressive legal framework for labour migration that highlights constitutional human rights guarantees, including gender equality and access to justice in line with the international treaties that Costa Rica has ratified.

In the EU, the [Employers Sanctions Directive \(2009/52/EC\)](#) recognizes explicitly the rights of all workers, including those in an irregular situation, and the [Victims' Rights Directive \(2012/29/EU\)](#) sets up a policy framework for basic standards on the rights, support and protection available to all victims of crime. Under the Victims' Rights Directive, countries have obligations to ensure that survivors are recognized and treated with respect; protected from intimidation and reprisals; provided general, immediate and long-term of support; and granted access to justice, including the right to receive compensation and restoration.

In 2017, Qatar passed [Law No. 15 Pertaining to Domestic Workers](#), which provides legal guarantees to migrant domestic workers, including by imposing fines for violations and referring disputes to the complaints procedure under Qatar's labour law.

In 2021, the UK Supreme Court in a landmark judgement ruled that a group of Uber drivers should be classified as workers entitled to minimum wages and holiday time periods, as opposed to the company's position that their drivers are independent contractors. This could be a major precedent for workers tied to gig economy services elsewhere who are demanding better wages and benefits (Satariano 2021).

The Labour Code in France expressly recognizes the rights of undocumented and irregular migrant workers and offers safeguards equal to regular workers regarding prohibition of employment during prenatal and postnatal periods; the right to breastfeed; hours of work, rest and paid holidays; health and safety at work; and determination of seniority in the company (PICUM 2020, 17).

4.4. Improving remedy processes

It is common for employers to terminate migrant workers' contracts, stop paying wages, and oust them from their dormitories as reprisals for filing complaints. As a result, migrant workers, who are often the primary wage-earner in their household, must dip into their savings or take on debt to pay court filing fees, travel costs, room and board, and support for their family. The practice of worker-paid recruitment fees further aggravates migrant workers' financial situation, as men and women workers who are already repaying debts accrued for their recruitment may be required to borrow further as they wait for their cases to be processed. In some countries, tribunals may be required by law to resolve disputes within a fixed time period, but in practice, timelines are rarely observed. Migrants' lack of financial capacity can also be applicable to seeking redress in their home country, as they may not be able to bear the costs of a court case in their country of origin if they have returned from abroad empty-handed (Islam 2019, 23).

Women migrant workers carry a heavier burden in this respect, as they typically have fewer assets to sell or mortgage compared to men, and due to social or familial customs may be required to remit a larger portion of their wages than what is expected of male migrants. As such, women are also more likely to become dependent on loans from family, friends or moneylenders, perhaps secured at usurious rates, in order to pay recruitment costs (CEDAW Committee 2009).

Pursuing a claim is less difficult when a strong social network of friends, colleagues and family are able to provide encouragement, support and advice. Migrants who choose not to pursue remedies do so in part because of the feelings of isolation and loneliness they experience while abroad. Women employed in the caregiving sector as nurses, in food processing, and most notably as domestic workers tend to have more limited mobility compared to male migrants. They may also be at greater risk of confinement at their workplaces and boarding houses, which will likely limit their access to information about legal rights or the status of their case, further exacerbating emotions of being alone and having no one to turn to.

Promising practices

The Abu Dhabi Judicial Department in the United Arab Emirates has set up mobile labour courts to address wage violations. Under this mechanism, a mobile court bus staffed by officers of the Abu Dhabi Labour Court travel to worker accommodations throughout Abu Dhabi to address wage-related claims (Sebugwaawo 2019). Where workers receive a favourable verdict, the court ensures on-the-spot payment of dues. Between January 2019 and June 2020, the mobile court claims to have settled wage disputes by 53,000 workers amounting to 577 million dirhams (US\$157 million) (Sebugwaawo 2020). Another promising practice in the emirate is one-day courts operated by the Abu Dhabi Judicial Department to settle select labour disputes, violations by tourists, and tourist offences in one day. These cases are allocated to the one-day courts by the public prosecutor after it has been determined that these cases do not require further investigation or detailed evidence (Dajani 2018).

Governments can refer to legislation such as Cambodian Ministry of Labour and Vocational Training *Prakas* No. 249 (2013), which set up a transparent two-tier complaint mechanism with clear timelines for mediation and legal action.³⁹ Under this mechanism, if mediation proceedings have been unsuccessful, labour authorities are required to transfer the complaint for legal action within 20 days of the complaint being lodged. An 18-month ILO evaluation found that 500 complaints were resolved, and workers received \$220,000 in compensation for various recruitment-related violations (ILO 2016e). Qatar's Dispute Settlement Committees, which replaced the country's labour court, adopt a similar approach. They are required by law to issue a verdict within six weeks from the time a complaint is registered.⁴⁰

Some countries issue migrant workers special residency permits that enable them to pursue wage claims against employers, even when their contracts have been terminated. However, these permits are often issued for time periods shorter than what it might take the courts to process their case, and in most situations, do not entitle the holder to work in the country. For example, Malaysia issues migrants with active cases a Special Pass valid for 30 days and that can be extended up to 90 days. Singapore's Ministry of Manpower issue workers special permits for salary and work injury claims. However, it does not extend the permit to workers seeking remedies for violations by recruiters, including for reimbursement of illegal fees, meaning that workers will have to forego their claims and return to their home countries.

³⁹ An ILO (2016e) survey has found that over 80 per cent of migrant worker complaints in Cambodia are resolved in three months or less.

⁴⁰ As per Council of Ministers Decision No. 6 of 2018 Establishing the Labour Dispute Committees and Developing the Rules and Procedures to Be Followed by Them, available (in Arabic) at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=107857&p_country=QAT&p_count=5.

The Philippines Overseas Employment Administration can exert leverage over recruitment agencies and employers unwilling to cooperate with mediation/conciliation proceedings against them by removing or threatening to remove their accreditation. This method helps ensure recruiters participate in mediation and conciliation proceedings in good faith and helps to enforce employer/recruiter-paid settlements, including compensation owed to workers (Five Corridors Project 2021b, 80).

In criminal cases in the Netherlands, if the offender does not compensate the victim, the State makes a pre-payment to the victim eight months after the final verdict is announced and collects it back from the perpetrator.⁴¹ Similarly, Qatar's Workers Support and Insurance Fund is set up to ensure workers are paid their wages when companies fail to pay. The Fund is triggered after workers receive a successful award at the Labour Dispute Resolution Committees and employers refuse to/fail to repay their dues.⁴²

Trade unions in Singapore have established humanitarian funds like the Migrant Workers' Assistance Fund to respond to pressing situations when migrant workers seek remedy. These funds support migrant workers who cannot access food and drinking water, accommodation, mobile phone credit, and/or health and social services. In Singapore, law societies in collaboration with private law firms and migrant worker NGOs have formed an alliance called the Migrant Workers' Group to provide free legal assistance to migrant workers.⁴³

The government-run Thai migrant welfare fund – the Fund for Job-Seekers Working Abroad – is funded by migrant worker contributions ranging from \$10 to \$17 per worker, based on the country of destination. One of the benefits the fund offers is legal assistance for labour dispute cases, with the fund providing Thai migrant workers up to 100,000 Thai baht (US\$3,000) to hire a lawyer in the country of destination (ILO 2021b).

The Migrants Rights Violation Reporting System (MRVRS) developed by the Migrant Forum in Asia (MFA), a civil society network, records, stores and manages information about human rights and labour rights violations against migrant workers and members of their families.⁴⁴ Once a complaint has been made, the coordinator in the MFA Secretariat notifies the national coordinators in the concerned countries, who will then notify the appropriate network members and/or partners to assist in the case.

4.5. Documentation and evidence

Across the world, formal and informal recruiters charge migrants exorbitant fees and provide false information about wages, benefits and employment facilities. These recruiters sometimes deny workers copies of their contracts, receipts of recruitment charges, or copies of other bills related to medical tests, tickets and visas.

⁴¹ As per the Policy Rule for Extending the Advance Payment Scheme for Old Compensation Measures Still Outstanding at the CJIB, 2011, available (in Dutch) at: <https://wetten.overheid.nl/BWBR0030755/2011-12-02>.

⁴² As per Law No. 17 of 2018 Establishing the Workers' Support and Insurance Fund, available (in Arabic) at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=107337&p_count=13&p_classification=01.02.

⁴³ Bassina Farbenblum et al. 2021 at: <https://bit.ly/3PRJ1Ou>

⁴⁴ The MRVRS app is available at: <https://mfasia.org/migrant-rights-violation-reporting-system/>.

Women face particular challenges presenting documentation and evidence of recruitment or employment abuses as they are often not provided with or given control over such documentation throughout the course of their lives. For example, where women-dominated occupations – such as domestic work – are excluded from legal definitions of work, they may not be provided work contracts. Women migrant workers may not possess wage receipts, as payments made could be made into accounts not accessible by them. In some cases, these documents, if available, are in the possession of male guardians or spouses.

Workers seeking remedy for a recruitment-related harm are typically required to bring documentation proving transactions made with the recruiter, and evidence of the particular violations they are seeking remedies for. It can be extremely difficult for certain categories of workers, such as domestic workers, to provide proof of the abuse suffered, including that they were overworked, worked on statutory and weekly holidays, or verbally or even physically abused. In the case of domestic workers, any witnesses that could attest to the abuse are likely to be members of the employers' family, who are unlikely to corroborate the worker's version of events (FADWU 2019). Workers in an irregular situation may be unable to prove a work relationship with an employer or provide evidence of their identity and residence. If they do not possess employment contracts or have been hired through sub-contractors or labour suppliers, there may be no information on their employment relationship, and workers may be uncertain or reluctant to pursue a case (ILO 2016c).

Promising practices

The setting up of national wage payment systems in many countries, including all of the Arab Gulf States, that require employers to deposit workers' wages into their bank accounts electronically can help settle wage resolution cases without workers having to show up in person for court proceedings (GLMM 2017). Governments can go further by replicating jurisprudence from Australia, which transfers the burden of proof to employers when they have failed to document worker payments by issuing salary slips to them, a requirement under the labour law.⁴⁵

Saudi Arabia's Ministry of Human Resources and Social Development (2020) has proposed establishing a new Labour Relations Initiative that would provide digital documentation of worker contracts, a key point of evidence for promised recruitment, working and living conditions. A new online arbitration platform – "Wedy" – when implemented, could further help workers access justice.

The EU's [Employers Sanctions Directive \(2009/52/EC\)](#) helps provide basic protections for undocumented workers by presuming a minimum three-month employment relationship between workers and their employers with the onus on the employers to prove the employment relationship was less than three months and the burden on the worker to prove it was more than three months. The Netherlands has a presumption of six months of employment.⁴⁶

By cooperating with governments and other workers' organizations in countries of destination and origin, trade unions can help build cross-border bilateral cooperation agreements. A framework for reference is the ILO [Model Trade Union Agreement on Migrant Workers' Rights](#), which was developed in 2008 in conjunction with the ITUC. The model agreement was first used as the basis

⁴⁵ See Australia's Fair Work Act 2009, section 557C.

⁴⁶ As per article 23 of the Foreign National Employment Act (PICUM 2020, 27).

for agreements between Sri Lanka-based unions and unions in Bahrain, Jordan and Kuwait in 2009, and its use has since expanded to other countries in Asia, Africa and Latin America (ILO, n.d.-a).

4.6. Complaint mechanisms and government support

Legal aid and other support services are designed to promote equality before the law, but it is rare for workers to receive dedicated support through the life cycle of a case. Legal aid services are often understaffed, with few lawyers available and willing to take up migrant cases pro-bono or otherwise.⁴⁷ Labour officers staffed at complaint platforms often discourage workers from filing complaints and instead urge them to settle outside the formal complaint mechanisms. Even when not actively discouraging workers, labour investigators can sow doubt and confusion by questioning the workers who are seeking remedies (Tamkeen 2019). Supporting migrants with their claims is often only one part of a labour officer's job, and remedy mechanisms may be understaffed or poorly resourced (Paoletti et al. 2014). This is true for origin country embassies in destination countries. Some countries of origin do not have embassies in places of destination, and even if they do, there are no dedicated labour attachés.

Women migrant workers face unique barriers when seeking to approach courts and dispute resolution bodies. Remedy mechanisms are often male-dominated, which can potentially spur patriarchal attitudes to abuses faced by women, and create an environment that is disrespectful to and inhospitable for women. Law enforcement bodies in some countries can have prejudices against women and assume that they are either lying about or exaggerating their claims.⁴⁸ Often dispute resolution services are inconveniently located. In many countries, they are situated only in the capital city. This creates a physical barrier for those seeking redress, as they may not be aware of the grievance mechanism or have the time and financial means to cover a lengthy journey from their place of work.

Promising practice

The recruitment industry in the Netherlands has set up a complaints mechanism through the SNCU (Foundation for Compliance with Collective Agreements in the Temporary Employment Sector). At the SNCU employers and employees can lodge complaints, which the foundation then reviews. In 2007, the Government reported that the SNCU's investigations had found that a small group of private employment agencies were routinely abusing the law. As a consequence of the SNCU's actions, the Government has introduced measures to enforce relevant laws and strengthen the Labour Inspectorate, which together with the SNCU has increased inspections of non-certified temporary employment agencies and of user enterprises hiring staff through such agencies. In this regard, as of 2009, the SNCU conducts 200 inspections per year (van Liemt 2013).

Trade unions have also set up migrant resource centres which provide migrant workers including workers in an irregular situation with legal advice and assistance in many countries. For example, the Austrian Confederation of Trade Unions (OGB) has opened a centre for migrant workers in an

⁴⁷ In the United States, legal aid for migrant workers is restricted by national laws that prioritize legal aid funding for American nationals. Further, legal aid funding in the United States is confined to a limited category of non-citizens, blocking other categories of workers, including low-wage workers on the J-1 visa programme and most H-2B workers from applying for support (Costa and Martin 2018).

⁴⁸ See, for example, Human Rights Watch 2011 and Human Rights Watch 2016.

irregular situation, including victims of trafficking in persons, and provides legal aid and advice to workers. The Single Confederation of Workers of Colombia (CUT) indicated that it has helped to establish a specialized migration platform to defend the rights of migrant workers, and the German Confederation of Trade Unions (DGB) has established legal aid offices like through the project Faire Mobilität. In Thailand, migrant resource centres in partnerships with NGOs such as the Human Rights and Development Foundation (HRDF) have played a major role in providing gender-responsive services to women migrants in Thailand, including legal assistance in several high-profile cases of abuse where workers faced discrimination and ill-treatment when they approached the legal system. By drawing attention to the situation of women migrant workers seeking remedies, the HRDF is also campaigning for legal and practical reforms to remedy mechanisms in the country (Harkins and Åhlberg 2017).

4.7. Cross-border jurisdiction issues

Recruitment-related crimes are often committed by entities and actors who operate across national boundaries. However, cross-border remedy initiatives are rare, and extra-territorial liabilities for human rights harms are limited by territorial and jurisdictional considerations.

A popular model for regional cooperation is the practice of bilateral labour agreements between countries of origin and destination. However, the scope of these agreements is often overly broad, and despite policymakers trying to present migrant worker protections as a major objective, the remedy provisions offered in these agreements, if present at all, are frequently vaguely worded. Indeed, most bilateral labour agreements do not reflect the right to remedy. A 2015 ILO review of 147 bilateral agreements around the world found that only 36 (roughly 25 per cent) made reference to dispute resolution procedures⁴⁹ or access to justice (ILO 2015a).

In recent years, national legislation introduced in the Philippines, Bangladesh, Indonesia and Ethiopia has held labour recruiters financially liable for wage discrepancies between what was promised to migrant workers and what was eventually paid. These laws set up a “joint and several liability” system that pins the responsibility of recruitment abuse on the manpower agency, as a co-employer, because the employer is outside the jurisdiction of domestic courts in countries of origin (Jureidini 2016).

Promising practices

By cooperating with governments and other workers’ organizations in countries of destination and origin, trade unions can help build cross-border bilateral cooperation agreements. As noted in section 4.5 above, a framework for reference in this regard is the ILO [Model Trade Union Agreement on Migrant Workers’ Rights](#), which was developed in 2008 in conjunction with the ITUC.

⁴⁹ Remedies under bilateral agreements are typically sought via a two-step approach. The first step is to strive for an amicable settlement between the parties. If this fails, agreements provide for a judicial review. However, amicable settlement provisions often lack clear guidelines on the procedures to be followed, and do not provide for interpretation or legal assistance where necessary. Amicable settlements are also likely to be inappropriate and insufficient when serious abuses of human rights have occurred. See, ILO, *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review*, 2015.

Some bilateral agreements and their supporting guidelines provide a framework for enforcement, monitoring and public reporting. For example, New Zealand's Recognised Seasonal Employer scheme utilizes inter-agency agreements between New Zealand and a number of Pacific Island States, with simple evaluation criteria placed in the agreement text against which success can be assessed and biannually reviewed (ILO, n.d.-b; ILO 2016c).

4.8. Lack of or loss of documented status

Not having the documentation to legally work and live in a country is one of the biggest barriers for access to justice facing migrant workers. Law enforcement authorities are often obliged to report migrant workers in an irregular situation, and many countries do not have mechanisms that protect migrants with irregular status from immigration offences when they bring a labour complaint. The complex fear and real risk of detention and subsequent deportation cause many migrants in an irregular situation to endure abuse or to find other employers instead of bringing a claim.

The ILO supervisory bodies have clearly stated that cooperation between the labour inspectorate and immigration authorities should be carried out cautiously keeping in mind that the main objective of the labour inspection system is to protect the rights and interests of all workers, and to improve their working conditions, rather than the enforcement of immigration law (ILO 2016c, paras 477 and 482). They have further expressed concern that the legislative requirement for public officials to report criminal offences may prevent migrant workers in an irregular situation from requesting assistance from essential public services, filing complaints of violations of basic human rights and claiming rights from past employment; such rights may "remain merely theoretical if migrant workers in an irregular situation who report violations of these rights are immediately expelled" (ILO 2016c, para 498).

Women migrant workers in an irregular situation are often even more vulnerable to ill treatment and other forms of violence and harassment, including sexual violence, beatings, threats, psychological abuse, and denial of access to medical care by their employers and government authorities (CMW 2013). Should they decide to pursue a case, they may find it difficult to access women's shelters or secure housing. In court, undocumented women migrant workers in the caregiving sector, which often includes domestic workers, can face barriers to accessing the justice system, as they are less likely to be able to provide evidence of a work relationship or prove their conditions at work (OHCHR 2015).

For many migrant workers, loss of employment often means loss of work and residence permit, especially in countries when work and residence permits are linked and tied to one employer. This leaves migrant workers vulnerable to irregularity, and subsequent repatriation or deportation. Protecting migrant workers from such automatic withdrawal of their work and residence permit work solely due to loss of employment is critical in the context of measures to prevent abusive conditions associated with irregularity in the context of migration (ILO 2021c). The ILO migrant workers instruments (1975) consider that migrant workers who have resided lawfully in the territory, but lose their employment prematurely, should not fall into an irregular situation but be protected and entitled to equality of treatment with nationals regarding security of employment, provision of alternative employment, relief work and retraining (Convention No. 143, Art. 8; Recommendation No. 151, paras 30-31).

Promising practices

Labour courts in Germany and the Republic of Korea are not obliged under national laws to check the residence status of workers or to report migrants with irregular status to immigration authorities, unless they have positive knowledge about the migrant's status.⁵⁰ However, it is rare for labour courts in both countries to report undocumented workers, and judges are not liable for prosecution if they do not report. Undocumented workers in Belgium can file complaints to the Labour Inspectorate without fear of being reported to immigration authorities, as the Labour Inspectorate maintains confidentiality and does not share personal data with immigration authorities (PICUM 2020).

The Chamber of Labour in Austria operates on a membership model under which workers make contributions as part of their social insurance. It supports all worker members in cases of labour and employment disputes with advice, assistance, and legal information, irrespective of their legal status in the country (PICUM 2020).

In the United States, New York City authorities take some measures to ensure the protection of undocumented workers' rights. This effort is led by the Department of Consumer and Worker Protection (DCWP) which enforces the city's paid sick and safe leave and fair scheduling laws. The DCWP does not ask workers about their immigration status, and even if they find out about their status, they do not voluntarily disclose this information.⁵¹ On the national level, there is an MOU between the Department of Labor and the Department of Homeland Security that aims to prevent immigration interference during labour disputes at a workplace and outlines the agencies' shared commitment to protecting workers against retaliation and intimidation by employers who use threats of immigration enforcement (NELP 2016).

⁵⁰ Assumptions and suspicions of a worker's status are not considered adequate grounds for reporting (PICUM 2020, 22).

⁵¹ See, for example, [United States, New York City Department of Consumer and Worker Protection \(DCWP\), "Immigrant Workers"](#), and [United States, New York City DCWP, "Worker Rights"](#).

5. Proposals for action based on emerging good practice

The barriers migrant workers encounter to access justice are cross-cutting and exacerbate financial and psychological harm for workers and their families. Barriers can have three kinds of impacts. First, workers completely give up on their claims to compensation, to rehabilitation, to restitution. Second, workers are forced to settle for less than what they are entitled to. Third, in the vast majority of cases, rights violations go unpunished, with nothing to deter future misconduct.

This section provides recommendations on ways governments, businesses and workers' organizations can move forward with removing these barriers and improve migrant workers' access to remedies. Achieving unfettered access to justice for migrant workers, without discrimination and on the equal footing with nationals, will allow for more equitable recruitment, better ensure decent working conditions and rights at work for all, and more fully realize the opportunities that labour migration offers to migrant workers, their families and communities, and countries of origin and destination.

5.1. For governments

Establish within national labour laws equality of treatment between migrant workers and nationals in regard to the right to access justice

Access to remedies for recruitment-related harms should be a central element of a country's labour legislation. To ensure equality and gender responsiveness in the legal system, the law should provide all migrant workers, irrespective of their legal status, gender, ethnicity, religion or other statuses, access to justice on an equal basis with nationals, including equality of treatment with regard to the judicial process.

Ensure timely resolution of migrant worker grievances

Migrant workers' cases must be tracked, case progress must be monitored, and complaints must be addressed expeditiously. Dispute resolution mechanisms should set targets including an outer time limit for resolution of complaints and ensure that women migrant workers have equal access to courts and to gender-sensitive dispute resolution mechanisms. Governments should set up temporary accommodation centres for women migrant workers who seek to leave abusive employers, spouses/partners, or other relatives, and provide facilities for safe housing during the process of seeking remediation.

Amend labour migration laws that undermine migrant workers' ability to obtain remedies

Reducing migrant workers' dependency on individual employers and limiting the power exercised by employers over them are important aspects in ensuring that equal treatment is applied to migrant workers in practice, including with regard to legal proceedings. Governments should amend laws that prevent workers from changing their employers or put them at risk of possible deportation while pursuing remedies. To this end, migrant workers should be given sufficient time to bring a complaint, have access to legal assistance and dispute mechanisms, and be permitted to remain in the country and work while their cases are being resolved. Appropriate flexibility to change workplaces should be provided in law and in practice for all migrant workers in cases of abuse and discrimination, including allowing migrant workers the possibility to change employers while a judgment is pending. Furthermore, labour laws should contain explicit prohibitions against retaliation by employers and recruiters towards workers who raise complaints, and this prohibition must be ensured in practice.

Improve information on rights and redress

There must be effective access to support measures, including free, adequate, and accurate information on redress mechanisms and how to use them, in languages that migrant workers can understand. All migrant workers, including women migrants, must have access to free legal aid and free professional translation and interpretation services when making use of judicial and non-judicial remedy mechanisms.

Establish joint and several liability for recruitment-related offenses committed by labour recruiters and employers

It is difficult, if not impossible, to holding employers and labour recruiters to account when they are situated in a different country from the country where a complaint has been lodged, which represents a major obstacle to obtaining effective remedies for migrant workers. Governments should enact joint and several liability mechanisms that make labour recruiters liable for human and labour rights abuses experienced by workers they have recruited during their employment abroad.

Negotiate bilateral labour agreements that include provisions on dispute settlement and access to justice

Governments of origin and destination countries should negotiate and enter into bilateral labour agreements that outline concrete enforcement, monitoring and public reporting mechanisms to address issues including recruitment fees, worker contracts, employment and living conditions, gender-based and other forms of discrimination, and swift access to remedies. Where such agreements already exist, both State Parties should examine whether the existing agreement adequately addresses these issues, and if necessary, negotiate a new agreement that will strengthen worker protections, including access to justice. Workers' and employers' organizations should be consulted in this process.

Facilitate migrant workers' pursuit of their claims, even if they are not physically present in the country

The cost burden for migrant workers to access complaints/remediation mechanisms, including judicial proceedings, should be reduced so that all migrant workers are capable of pursuing a claim in the event of suffering a recruitment-related abuse. Migrant workers, irrespective of their identity and gender, should also be able to be represented by an individual or organization of their choice, including lawyers or other representatives, trade unions or NGOs. Governments of destination countries should assist migrant workers to pursue a claim even if they have returned to their country of origin, either through enabling them to be represented in court, or to participate via remote means, such as video conferencing.

Strengthen embassy oversight and systematize consular assistance

Countries of origin must provide embassies an active mandate to assist and swiftly resolve disputes involving their nationals. Country of origin governments should increase their number of labour attachés – including women attachés; provide training to labour attachés on handling cases; in a responsive and gender-sensitive manner; maintain a systematic complaints database to track the status and progress of each case; recruit translators and interpreters; provide individualized assistance; and conduct specialist trainings to deal with complaints in a gender-sensitive manner.

Improve oversight and accountability of labour recruiters, in line with ILO Standards and the General Principles and Operational Guidelines for Fair Recruitment

Governments in countries of origin and destination should properly and effectively regulate the conduct of private recruitment agencies. Labour inspectors can be given the mandate to inspect recruitment agencies to ensure enforcement of licencing conditions. Governments should issue administrative guidelines that would require employers, labour recruiters and other intermediaries to make available relevant information

all books of accounts, recruitment fee payments, personal information files, and visa and immigration documents to workers and/or their representatives upon request and without delays.

Provide training to enhance the capacity of labour officers and reduce discrimination

Officers and officials responsible for resolving labour complaints must be trained to handle cases sensitively and with respect for migrant workers' circumstances and backgrounds, as well as to not discriminate against migrant workers on the grounds of sex, caste, race, religion or any other ground. Introduce a zero-tolerance policy for discrimination in order to ensure prevention of such behaviours and practices among officials, and address cases of discrimination through disciplinary and other measures. In cases where power differentials skew gender equality or equality on the basis of race, language, religion, sexual orientation or any other personal or individual characteristic, the burden of proof rules should be revised to ensure fair treatment.

Place the burden of proof on alleged perpetrators in discrimination cases and cases related to violence and harassment

In cases where power imbalance skew gender equality or equality on the basis of race, language, religion, sexual orientation or any other personal or individual characteristic, the burden of proof rules should be revised to ensure fair treatment.

Discrimination and violence and harassment in the workplace are serious violations of workers' rights, but can be difficult to definitively prove, as they often rest on the word of the accuser against the word of the alleged perpetrator. Many such violations leave no tangible evidence and do not occur in front of witnesses, leaving victims vulnerable to abuse without recourse to justice. Shifting the burden of proof is a useful means of correcting a situation of inequality and, in proceedings related to discrimination and violence and harassment, it should lie with the alleged offender in order to give victims a fairer chance of receiving justice and recompense.

Improve legal support, provide access to gender-responsive counselling services, and provide humanitarian support, including for food, housing, and transport

Facilitate access to justice through free legal aid programmes for migrant workers at all stages of the remedy process and ensure access to interpreters and translators, as well as lawyers with expertise in labour and migration law. Take steps to ensure that women are equally represented in labour courts and other redress mechanisms, including women serving as judges, lawyers, and judicial and administrative labour officers. Governments should support workers seeking remedies, as they may be facing urgent financial and psychological risks and require immediate humanitarian relief.

Expand branch offices of administrative dispute resolution bodies and other essential labour migration services as a matter of priority

Administrative dispute resolution bodies should be situated in locations that are accessible for all workers. Where this is not the case, tribunals and dispute resolution bodies should be decentralized and expanded, so that workers can lodge complaints at a centre that is close to them. Ensure that the location and physical environment of these dispute bodies are well-lit, secure and can be safely accessed by women.

Facilitate inter-agency, trade union and civil society coordination on migrant worker remedies

Improve cooperation between government, trade unions and NGOs – including across borders – to provide effective responses to migrant worker complaints. This includes:

- formalizing the referral process from front-line service providers to organizations and institutions with the capacity to assist and resolve cases;

- encouraging civil society groups to support the process of remediation and to increase provision of specific assistance to women migrant workers and those from other marginalized groups;
- allowing workers, their families or their appointed representatives to lodge complaints, and allow appointed representatives to attend proceedings on the worker's behalf; and
- adopting multi-disciplinary approaches, including partnerships between trade unions in both countries of origin and destination to develop joint measures for legal support.

Develop access to justice indicators and systems to improve data collection and resolution of migrant worker complaints

Adopt indicators to measure access to justice for migrant workers and develop a comprehensive system of robust data collection and analysis on complaints. After completion, the data should be aggregated and analysed to inform policy and practice, and the statistics made publicly available so as to facilitate research and analyses on access to justice for migrant workers during the recruitment process.

Allocate funding towards improving access to remedies

Governments should allocate funding to labour departments that provide functions related to labour recruitment. This must include funding for: recruitment and training of staff, expansion of migrant worker services, improvements in legal support for all migrant workers, provision of humanitarian assistance, women-specific funds, cross-border travel and coordination of budgets to assist in access to effective remedy. Governments should also increase grants and other funding for migrant resource centres, trade unions and civil society groups, and repeal or amend laws that make it cumbersome for civil society groups and trade unions to receive foreign donations and grants.

5.2. For employers and labour recruiters

Employers and labour recruiters must respect human rights

All employers and labour recruiters should respect internationally recognized human rights, including the fundamental principles and rights at work and relevant international labour standards, when recruiting migrant workers. Employers and recruiters should provide accurate information about prospective jobs and living conditions, not charge workers recruitment fees or related costs, and should not restrict workers' freedom of movement. Employers and recruiters should also conduct periodic human rights due diligence assessments of their supply chain, and address any adverse human rights issues observed in their own operations or within their supply chains. Employers' organizations can play an important role in raising awareness about due diligence and the need to respect international human rights and labour standards, when recruiting migrant workers.

Provide or facilitate access to effective remedy, including to both judicial and non-judicial remedies

Employers and labour recruiters should provide or facilitate effective access to appropriate remedies to address worker complaints. Employers and recruiters should not interfere with or restrict workers' efforts to attain appropriate remedies through established judicial or non-judicial mechanisms. If a formal complaint has been lodged by a worker or a family member, employers and recruiters should respect their right to seek remedy. This does not mean that employers or recruiters should not defend themselves in the event that they disagree with the substance of a complaint; rather it entails cooperating, coordinating and complying with law enforcement, foreign employment officers and other authorities in all stages of the remediation process to ensure that justice is done. Recruitment agencies and employers should also address the grievances of migrant women and sexual minorities in a gender-sensitive manner, adopting special procedures and mechanisms. Facilitating the remediation of worker complaints serves to improve worker satisfaction, improve business practices and ultimately improve business performance.

Protect workers who report abuse from reprisals

Employers and employment agencies should not retaliate against or blacklist workers who report recruitment abuses or fraudulent recruitment practices anywhere in their supply chain, and should provide special protections for whistle-blowers, pending the investigation or resolution of a grievance or dispute.

5.3. For trade unions and workers' organizations

Advocate for fair recruitment legislation and policies

Workers' organizations have an instrumental role in promoting fair recruitment and social dialogue in bipartite and tripartite mechanisms and collective bargaining agreements. Social dialogue is a vital aspect of ensuring fair recruitment and access to remedies, particularly when it comes to advising governments on legislation and policy, especially regarding the development of labour laws (or the strengthening of existing laws) that cover recruitment and the right to remedies. Workers' organizations should also seek to involve themselves in the negotiation (and renegotiation) of bilateral labour agreements to ensure that migrant workers are adequately protected and their ability to access to justice is secured.

Actively monitor and investigate the recruitment of migrant workers and the accessibility and effectiveness of remediation mechanisms

Through collaboration with government labour systems and/or by complementing the work performed by the state inspectorate or employers, trade unions should seek to have a key role in determining whether fair recruitment principles are being respected by recruiters and employers, and in checking whether complaint and dispute resolution mechanisms are available, accessible and functioning properly and effectively. If migrant workers are found to be experiencing recruitment-related abuses or if remediation mechanisms are not providing adequate relief, trade unions and workers' organizations should denounce such abuses and failings, and work to increase awareness of these matters among workers, government and civil society in order to promote positive change.

Support migrant workers to file complaints and protect them from reprisals

Trade unions and workers' organizations must continue to facilitate migrant workers' access to grievance mechanisms and provide concrete practical support during the remediation process. They must protect migrant workers by:

- providing assistance to access remedy mechanisms;
- facilitating the development of worker networks by organizing workers;
- informing workers about their legal rights and remedies; and
- defending workers from reprisals or threats of reprisal.

Protection from reprisals or threats of reprisal is particularly important in the context of women migrant workers lodging complaints, owing to the heightened risks of gender-based violence and the stigma that may be attached to victims of sexual assault.

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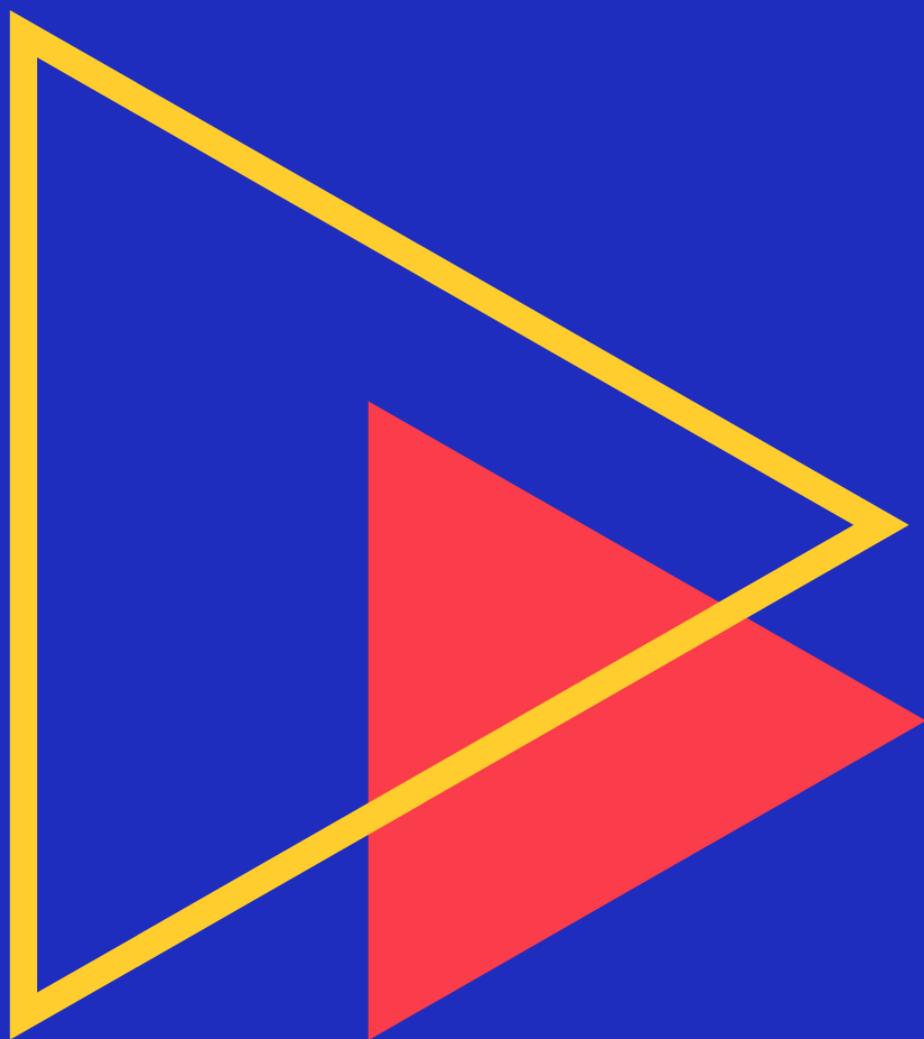
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