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Intervention Model: For extending social protection to migrant workers in an irregular situation

Key messages

- ▶ Many international instruments, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), state that everyone – including, by implication, migrants with irregular status and workers in the informal economy – is entitled to **social security as a human right**. This is supported by Part III of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), which establishes that all migrants, **irrespective of their legal status**, have the right to social security.
- ▶ The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Migrant Workers Recommendation (No. 151) are relevant to migrant workers in an irregular situation; they establish that migrant workers in an irregular situation should be able to enjoy the basic human rights and equality of treatment with regular status migrant workers with regard to certain rights arising out of past employment, including social security and other benefits.
- ▶ **Migrant children** in an irregular situation are a **particularly protected category**; their right to full social protection even in the absence of legal residence status is affirmed in the Social Protection Floors Recommendation, 2012 (No. 202) and has been mentioned on several occasions by the UN Committee on the Rights of the Child.
- ▶ The **right to health** of migrants in an irregular situation is firmly rooted in international human rights instruments (ICESCR, ICRMW), which require States parties to guarantee, at a minimum, access to emergency healthcare.
- ▶ Migrant workers in an irregular situation are often forced to work in the **informal economy** without access to social protection. They also face a higher risk of exploitation and hazardous working conditions.
- ▶ In order to provide a basic level of social protection, and particularly access to essential healthcare, to these workers, countries may wish to consider the **unilateral extension** of one or more benefits, including coverage under national SPFs. **Campaigns** aimed at regularizing the residence on the national territory are another option to be pursued when seeking to guarantee access to social security and health care.

▶ Why this intervention model?

Drawing from the **ILO Guide on Extending Social Protection to Migrant Workers, Refugees, and their Families** developed in collaboration with ISSA and ITCILO, the **Intervention Models** aim to provide policymakers and practitioners with succinct practical guidance on how to extend social protection to specific groups of migrant workers. The intervention model includes a brief overview of the obstacles, the international legal framework, and a set of proposed policy measures based on existing country practices and international labour standards.

▶ Introduction

Who are migrant workers?

[The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#) (ICRMW) defines a migrant worker as “a person who is to be engaged or has been engaged in a remunerated activity in a state of which he or she is not a national”. The definition in Article 2(1) of the ICRMW intends to cover the self-employed (defined in Article 2(2)(h)). The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143, Part II) defines a migrant worker as “a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker” (Article 11(1)). However, this definition only applies to Part II of Convention No. 143, while Part I of that Convention applies to all migrant workers, including the self-employed. In statistical terms, “international migrant worker” refers to all persons of working age present in the country of measurement, whether or not they are usual residents or non-resident foreign workers (ICLS 2018).

Who are migrant workers in an irregular situation?

Migrants in an irregular situation are defined as those who are not “authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party” (ICRMW, Article 5). Furthermore, the Committee on the Protection of the Rights of All Migrant Workers (CMW) has stated that “the term ‘in an irregular situation’ or ‘non-documented’ is the proper terminology [...] use of the term ‘illegal’ to describe migrant workers in an irregular situation is inappropriate and should be avoided as it tends to stigmatize them by associating them with criminality” (CMW 2013, para. 4).

Why extend social protection to migrant workers in an irregular situation?

Social security is a human right and the overarching principles of equality of treatment and non-discrimination calls on States to develop inclusive social protection laws and schemes (UDHR 1946, ICCPR 1966, ICESCR 1966).

Although social security is a human right, in many countries, migrant workers in an irregular situation are excluded from coverage under the labour and social security legislation and thus do not have access to social protection, including healthcare. During disasters, they often fall between the cracks of response systems, reducing their ability to seek adequate support, increasing their exposure to abuse, exploitation, and trafficking.

Extending social protection to migrants in an irregular situation has many advantages:

- ▶ It provides protection **against economic and social risks**, reducing their vulnerability and enhancing their resilience, employability and productivity.
- ▶ It contributes to improving their **health status** and reducing public health risks (including the transmission of communicable diseases) as well as lowering infant and child mortality rates.
- ▶ It contributes to the **integration** or re-integration of migrant workers in society and can be part of a regularization or formalization process.
- ▶ It contributes to **stronger and financially healthier social security systems** by spreading risk across a larger pool of members and enhancing the financial sustainability of these schemes since migrant workers are often net contributors over their lifetime, and tend to be younger workers. Their integration in contributory mechanisms also reduces pressure on tax-funded social protection mechanisms in countries of destination, or in countries of origin.

► Conventions and Recommendations

The [Universal Declaration of Human Rights](#), the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR), the [Convention on the Rights of the Child](#) (CRC), the [Convention on the Elimination of All Forms of Racial Discrimination](#) (CERD) and the [Convention on the Elimination of All Forms of Discrimination against Women](#) (CEDAW) make no distinction as to the immigration status of the beneficiary, including with respect to migrants' social protection rights set out in these Conventions.

The [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#) (ICRMW) as well as several ILO conventions do make a distinction.

The [Migrant Workers \(Supplementary Provisions\) Convention, 1975 \(No. 143\)](#) grants migrants in an irregular situation equality of treatment in respect of **rights arising out of past employment**, notably with regards to social security (Article 9(1)). However, migrants in an irregular situation shall be entitled to a specific right only if, according to the legislation of the country of destination, such right is granted to lawfully employed migrants. Likewise, the accompanying [Migrant Workers Recommendation, 1975 \(No. 151\)](#) provides equality of treatment for "migrant workers whose position has not been or could not be regularized" (para 8(3)), and further states that migrant workers who leave the country of employment should be entitled to the reimbursement of certain social security contributions (para 34(1)(c)(ii)). These migrant workers should also be entitled to **work injury** compensation independent of their legal status (para 34(1)(b)). Similarly, the [Employment Injury Benefits Convention, 1964 \(No.121\)](#) requires equality of treatment between nationals and non-nationals as regards employment injury benefits without referring to the person's residence status (Article 27).

In addition, the right to **health** is firmly rooted in international human rights instruments, which impose upon ratifying States to guarantee, at the minimum, access to emergency healthcare regardless of migrants' status.

Table 1. ILO Conventions and Recommendations relevant to migrant workers in an irregular situation.

Relevant conventions		Migrants in an irregular situation
R204	Transition from the Informal to the Formal Economy Recommendation, 2015	X
R202	Social Protection Floors Recommendation, 2012	X (children)
C189	The Domestic Workers Convention, 2011	X
C184	Convention on Safety and Health in Agriculture, 2001	X
C181	Private Employment Agencies Convention, 1997	X
R151	Migrant Workers Recommendation, 1975	X
C143	Migrant Workers (Supplementary Provisions) Convention, 1975	X
C121	Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980]	X
C19	Equality of Treatment (Accident Compensation) Convention, 1925	X

On several occasions, the **Committee on the Rights of the Child** has expressed the opinion that children in an irregular situation or children whose parents lack a regular migration status should enjoy equal access to social protection, including health services, psychological care, and disability care (CRC 2002). The full access to social protection for children, independent of their legal status, has also been affirmed by Article 6 of the **Social Protection Floors Recommendation, 2012 (No. 202)**, according to which States should provide the basic social security guarantees to all children, as defined in national laws and regulations, whether they are residents or not.

▶ Obstacles, barriers, protection gaps and challenges

In many countries, migrants in an irregular situation live in constant fear of detention or deportation and may even face criminal prosecution on the sole ground of their irregular residence status. Even when they have lived and worked in the country for many years, they are excluded or can become excluded from the social protection system as a result of a change affecting the regularity of their residence in the country. In addition to these, further obstacles include, among others:

- ▶ **The lack of documentation** – This is a major obstacle to accessing benefits as it does not allow them to prove their identity, length of stay and source of income which may prevent them from regularizing their status and accessing social security benefits.
- ▶ **Eligibility requirements related to employment and residence** – These often exclude migrant workers in an irregular situation from accessing contributory and tax-financed social protection.
- ▶ **Their conditions of work** – Migrant workers in an irregular situation are particularly vulnerable to hazardous conditions of work, work injury, sickness, abuse and exploitation, circumstances that worsen during crises. Because of their status, the authorities may not be aware of their existence or may not consider them when developing public assistance measures.
- ▶ **The lack of awareness about their rights and the risk and fear of detention and deportation** – A major obstacle that prevents migrant workers in an irregular situation from claiming their benefits and exercising their right to healthcare and other services and to request legal assistance.



▶ How to extend social protection to migrant workers in an irregular situation?

To extend social protection to migrant workers in an irregular situation, it is important for policy makers to consider the specific challenges and obstacles that these workers may face to access and benefit from social protection. States can consider the following policy measures which are **not mutually exclusive**.

Measures

- 1. Regularization** – Countries of destination may facilitate the regularization of migrant workers through measures ranging from the simplification of administrative procedures and the reduction of legal loopholes to widespread regularization campaigns.
- 2. The unilateral extension of basic social protection to migrants in an irregular situation** – through the development of inclusive policies, laws, and schemes including the provision of employment injury protection and access to healthcare. Countries should aim at guaranteeing rights derived from past employment, especially in the context of employment injuries and diseases.
- 3. The conclusion and enforcement of bilateral/multilateral social security agreements or the inclusion of social security provisions in BLAs** - can facilitate the regularization and formalisation of migratory flows. Indeed, the mere existence of these agreements can be an incentive to migrate through regular channels and work in the formal economy and benefit from social protection.
- 4. The additional adoption of complementary measures** - to address administrative, practical, and organizational obstacles faced by migrants in an irregular situation. These include dialogue and cooperation between countries of origin and destination; the establishment of regional non-binding policy documents or frameworks; the assurance of coherence between migration, employment and social protection policies; as well as strengthening the control and monitoring of recruitment agencies.

▶ How to extend social protection to migrant workers in an irregular situation?

Examples

- ▶ In 2004, **Argentina** signed a new migration law (No. 25871/2004), which not only recognized that migration is a human right, but also eased regularisation, provided for equality of treatment, as well as guaranteed family reunification and migrant access to social assistance, health, and education – irrespective of migration status. In 2005, the “Patria Grande” Programme was implemented with the aim to promote the regularization of migrants in an irregular situation originating from MERCOSUR and its associated countries.
- ▶ In **Panama**, according to their social security legislation Act No. 51 of 27 December 2005 migrants in an irregular situation can access the social security system under the same conditions as other workers.
- ▶ In **Japan** and the **Republic of Korea**, the Labour Standards Act (Act No. 49 (1947), Chapter VIII) and the Industrial Accident Compensation Insurance Act (1963), as amended, sects 5(2) and 6, respectively, provide that all workers are eligible to receive industrial accident compensation, regardless of their legal status.
- ▶ In the **United States**, migrants in an irregular situation have received compensation of up to US\$2.85 million for injuries owing to an unsafe environment.
- ▶ **Mexico’s** 2014 Migration Act (sect. 8) and **Uruguay’s** 2007 Migration Act (Act No. 18.250, sect. 9) guarantee access to healthcare for all persons within their territory, irrespective of migration status (ILO 2016). In **Germany**, migrant workers in an irregular situation have access to emergency medical care and can request reimbursement of costs without fear of denouncement or deportation since the procedure is confidential (OHCHR 2014). Furthermore, 18 EU countries provide emergency healthcare to migrants in an irregular situation as well as **Switzerland** and the **United Kingdom**, with some countries providing higher levels of protection.
- ▶ In the **Southern African Development Community**, the 2007 Code on Social Security states, that “Illegal residents and migrants in an irregular situation should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country”.

► Extending social protection to migrant workers in an irregular situation: A three-step-process

The below step-by-step process and checklist draws on the [Social Protection Floors Recommendation, 2012 \(No. 202\)](#) para. 14 (see box 1) and the ILO guide on [Social Protection Assessment Based National Dialogue \(ABND\)](#).

The ABND Guide provides guidance on how to identify social protection gaps, set priorities and develop national social protection strategies to extend coverage and strengthen social protection systems, in line with [ILO's two-dimensional strategy](#)

that aims to guarantee at least a basic level of social protection to all (social protection floors) and progressively higher levels of protection. These strategies may include: i) the improvement of the scheme in terms of benefit level or scope; ii) the creation of new social protection schemes; iii) the expansion of existing schemes to new groups or categories of workers.

The ILO recommends the development of inclusive and comprehensive social protection strategies and schemes. Below an example of the steps that can be followed to extend social protection to migrant workers in an irregular situation within such a framework.



Step 1: Set up coordination and implementation arrangements

- Identify the key stakeholders (e.g., Ministry of Labour, other relevant Ministries, workers' and employers' representatives, recruitment agencies, social security institutions, labour inspectors, NGOs/CSOs, academia);
- Create a tripartite working group to drive the situational analysis and consultation process (step 2 and 3 below) to develop the policy measures for the extension of social protection to migrant workers in an irregular situation. This working group should identify its lead, working modalities and objectives. It may also be involved in the implementation and monitoring;
- It may be necessary to create technical sub-working groups as relevant (e.g., legal, actuarial/financial, communication, etc.) that will accompany the steps below and report back to the tripartite working group;
- Identify potential technical and financial partners.

Step 2: Undertake a situational analysis

A situational analysis aims to provide a comprehensive overview of the social protection landscape in a country and a better understanding of the characteristics and needs of migrant workers, their coverage levels and the obstacles they face accessing social protection. It is an essential step to inform the decision-making process and policy reforms.

- Conduct a desk review of available information and carry out interviews and focus group discussions including with workers in an irregular situation, selected employers, and other relevant key stakeholders identified under step 1. When doing so, it is essential to obtain both qualitative and quantitative information.
- In case of substantial information gaps, it may be necessary to conduct a survey;
- Take into account gender considerations in the primary data collection process, interviews and analysis;
- Collate the information gathered in a situational analysis report that should include at least the following information:
 - laws, policies, and social security agreements (bilateral/multilateral) relevant for the social protection coverage of migrant workers in an irregular situation;
 - where possible, the demographic profile of migrant workers in an irregular situation, information on gender, age, country of destination, employment status, occupation, sector. Sources may include interviews, social security statistics, qualitative and quantitative studies, needs assessments, administrative records;
 - functioning and capacity of social security institutions, labour inspection and other relevant administrative bodies responsible for managing and delivering social protection benefits;

- ▶ recent actuarial studies and other relevant documents to establish the current financial status of the social security schemes;
 - ▶ ratification and implementation of UN and ILO conventions;
 - ▶ bilateral labour agreements or MoUs or other relevant temporary labour migration schemes, free movement protocols, regional labour migration frameworks;
 - ▶ the practical barriers that (migrant) workers in an irregular situation face in accessing social protection (e.g., lack of information, lack of documentation, language barriers, complex administrative procedures, fear of deportation).
- ▶ Review relevant national policies (e.g., employment, migration, education and training) to ensure coherence of the recommendations;
 - ▶ Analyse information, identify protection gaps, and propose recommendations in line with ILO standards and international good practice. This includes a legislative gap analysis to determine the extent to which national laws, regulations and practices, relevant to individuals in an irregular situation, are aligned with international labour standards on social protection and migration.

Step 3: Consultations to develop policy measures for the extension of social protection to migrant workers in an irregular situation

- ▶ Organize a tripartite meeting to present and discuss the findings and recommendations of the situational analysis and to identify adequate and gender responsive policy measures (see list of possible measures above) reflecting national priorities;
- ▶ Undertake a feasibility and costing study of the selected policy measures, using for example the [ILO Rapid Assessment Protocol \(RAP\) model](#);
- ▶ Organize a tripartite meeting to present and discuss the findings of the RAP and to agree on the policy measures to be implemented, pending validation by the concerned authorities (e.g., parliament, ministry of labour);
- ▶ Develop a road map to support the implementation of the selected policy measures, establish a monitoring and evaluation mechanism and a communication strategy.

Box 1: Social Protection Floors Recommendation, 2012 (No. 202) para. 14

When formulating and implementing national social security extension strategies, Members should:

- (a) set objectives reflecting national priorities;
- (b) identify gaps in, and barriers to, protection;
- (c) seek to close gaps in protection through appropriate and effectively coordinated schemes, whether contributory or non-contributory, or both, including through the extension of existing contributory schemes to all concerned persons with contributory capacity;
- (d) complement social security with active labour market policies, including vocational training or other measures, as appropriate;
- (e) specify financial requirements and resources as well as the time frame and sequencing for the progressive achievement of the objectives; and
- (f) raise awareness about their social protection floors and their extension strategies, and undertake information programmes, including through social dialogue.

▶ Checklist

This checklist can guide policy makers and practitioners in identifying the key issues and actions to consider when deciding to regularize and/or extend social protection to migrant workers in an irregular situation.

Consultations/methodology

- ▶ Have you consulted migrant workers in an irregular situation on the challenges they face, especially in relation to accessing social protection?
- ▶ Are there trade unions, NGOs/CSOs providing direct assistance to migrant workers in an irregular situation? And have you consulted them?
- ▶ Have you consulted with other key stakeholders (e.g., employers, healthcare providers, social security administrators, recruitment agencies, labour inspectors, etc.) to assess the protection gaps and practical barriers faced by migrant workers in an irregular situation?
- ▶ Have gender considerations been taken into account in the consultation process?

Availability of statistics/information

- ▶ Do you have data on migrants' profile, occupation, education, disaggregated by sex/gender, nationality, and age?
- ▶ Is there adequate information regarding the social protection programmes/schemes that can be accessed by migrant workers in an irregular situation as well as on their respective entitlements? Is such information present in relevant languages and across relevant sectors?
- ▶ Has a fiscal space assessment in social protection been carried out recently?

Legal and practical considerations

- ▶ Has your country ratified and implemented the key UN and ILO Conventions and Recommendations relevant for migrant workers in an irregular situations' social protection (see table 1)?
- ▶ To what extent are the social and economic rights of migrants in an irregular situation recognized in national laws and legislation?
- ▶ Are there policies and measures in place aimed at facilitating the transition from the informal to the formal economy (e.g., extending mandatory social insurance coverage, enhancing access to non-contributory and usually tax-financed benefits)?
- ▶ Does your country have strong mechanisms in place to control and monitor recruitment agencies in order to ensure that migrant workers are provided with a contract and decent working conditions, including social protection?
- ▶ Concerning social protection programmes/schemes in your country:
 - ▶ Do they cover migrant workers in an irregular situation and for which contingencies?
 - ▶ Are non-contributory programmes based on residence, or nationality and as such exclude migrants in an irregular situation or are provisions made that explicitly allow for their inclusion?
 - ▶ Are administrative procedures simple and easy to follow for migrant workers in an irregular situation?
 - ▶ Are these programmes and schemes gender-sensitive given that women migrant workers in an irregular situation experience increased vulnerabilities?
 - ▶ To what extent does the criminalization of migrants in an irregular situation have implications for their enjoyment of (basic) social security including access to healthcare?
 - ▶ Do the programmes and schemes have effective complaint mechanisms in place for migrant workers and their families, irrespective of their status?
- ▶ Are there bi- or multilateral social security agreements?
 - ▶ Do they address workers in sectors that traditionally employ informal/irregular workers?
 - ▶ Have these agreements entered into force or is their enforcement being hindered by limited institutional capacities, a lack of training and information on the content of the agreement as well as on how to implement it, a lack of data and information exchanges, etc.?

► Checklist

- Are there bilateral labour agreements or MoUs in force?
 - Do they cover a wide array of migrant workers, especially those that are most prone to migrate through informal channels?
 - Do they include provisions on social security and which contingencies are covered?
 - Do they refer to existing social security agreements or national legislation?
 - Do these provide for equality of treatment between migrant workers and nationals?
 - Do these lay out monitoring as well as complaint mechanisms for migrant workers?
 - Do these adequately ensure the exchange of information between countries?
- Have you considered complementary measures addressing the administrative, practical, and organizational obstacles faced by migrant workers in an irregular situation? This could include awareness raising campaigns, translation of indispensable information related to social security schemes, as well as the implementation of complaint, monitoring and investigation mechanisms, etc.

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