



MIGRANT WORKERS IN AN IRREGULAR SITUATION THROUGH NO FAULT OF THEIR OWN



International
Labour
Organization

Pathways and response options in the Arab States

WHAT IS A MIGRANT IN AN IRREGULAR SITUATION?

Governments and societies often make very simple binaries between 'illegal' and 'legal' migrant workers. The reality is more complicated.

A migrant in an irregular situation or undocumented migrant is someone who is not authorized to enter, stay or work in the country of destination.¹ There are many pathways to an irregular situation, and migrants often have little control over the complex factors that determine their migration status. **While some migrant workers² in the Arab States become irregular willingly, most do so beyond their control and through no fault of their own**, for example through administrative errors, through the action (or inaction) of their sponsor/employer, or through escaping an abusive situation. Irregularity is not a stable condition, and migrants can easily slip from being regular to irregular over time.

In the Arab States, most migrants enter lawfully (for work, tourism or pilgrimage) and at a later stage end up being in an irregular situation; frequently being subject to harassment, arrest, detention and deportation without trial, and at greater risk of forced labour and trafficking.

Data on the estimated number of migrants in an irregular situation in the Arab States is not readily available. While governments often have

data on deported or regularized migrant workers and border arrests, these figures do not provide a complete picture.³ While it is the sovereign right of all States to control their borders and regulate labour migration, the human rights, including fundamental labour rights, of all migrants, regardless of their status, must be protected in adherence with international law.⁴

States in the Arab region should also recognise that migrant workers falling into an irregular situation can be a by-product of the very laws and policies that seek to govern labour migration, amongst others stemming from the role entrusted upon sponsors/employers regarding the legality of a migrant workers' situation.⁵

BOX 1

Target 8.7 of the Sustainable Development Goals calls on States to take immediate and effective measures to eradicate forced labour, modern slavery and human trafficking. **Target 8.8** concerns securing decent work for migrant workers; and **target 10.7** calls on States to facilitate orderly, safe, and responsible migration and mobility of people. The preamble of the adopted Agenda of the Sustainable Development Goals emphasizes the importance of addressing the needs of the poorest and most vulnerable.

¹ It is "the sovereign right of member States to determine which non-nationals may enter and remain in their territories and it is left to each State to determine the manner in which it organizes or refuses the potential entry of migrant workers" (ILO General Survey 2016, paragraph 274). As per the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), Article 5: "... migrant workers and members of their families: (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party; (b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article."

² The term 'migrant worker' is used throughout this paper in accordance with international norms, in particular, Article 11 of the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), which defines a 'migrant worker' as a "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". It is important to note that governments in the Arab States tend to prefer to use the term 'temporary foreign contract labourers' or 'temporary expatriate workers'.

³ See de Bel Air (2017) Irregular Migration in the Gulf States: *What Data Reveal and What They Conceal* in 'Skilful Survivors: Irregular Migration to the Gulf', (ed.) Shah and Fargues.

⁴ It must also be recognized that protecting the rights of migrants can override State border controls in certain situations, for example when applying the principle of non-refoulement to those migrants at risk of human rights abuses if denied entry.

⁵ For further information see: ILO (2017) *Employer-Migrant Worker Relationships in the Middle East: Exploring scope for internal labour market mobility and fair migration*.

WHY 'IRREGULAR' AND

NOT 'ILLEGAL'?

The prevailing discourse associates migrants in an irregular situation with criminality, and views irregular migration as a security issue. Migrant workers in an irregular situation are frequently referred to as 'illegals', 'aliens' or 'infiltrators' in the media across the region (and globally). While actions can be considered illegal where they are in breach of certain residency or work authorizations, a human being can never 'be' illegal. In fact being in an irregular situation can make migrant workers vulnerable to abusive conditions and labour exploitation. Moreover, use of the term 'irregular' or 'non-documented' by UN agencies is required according to a 1975 UN General Assembly resolution.⁶

Designating certain groups of people as 'illegal' also has important implications for the public perception of migrant workers. Criminalization fosters public perceptions that migrant workers in an irregular situation are 'illegal' or unfair competitors for jobs and social benefits, thereby fuelling discrimination and xenophobia.⁷

HOW DOES THE SPONSORSHIP

SYSTEM INCREASE VULNERABILITY

TO FALLING INTO IRREGULARITY?

Central to the situations by which a worker can become irregular is the *kafala* sponsorship system. In placing legal responsibility for workers' visas and permits with the employer, the worker does not have control of their legal status. Tying workers to one sponsor also means that any work with another employer is 'illegal'. This is problematic as the threat of ending up in an irregular situation forces many migrant workers to endure difficult and exploitative conditions, rather than to leave their employer. Once a worker is in an irregular situation, it will be difficult for him or her to leave the country through legal channels without paying large fines or facing imprisonment.

PATHWAYS INTO IRREGULARITY:

HOW DO MIGRANT WORKERS END UP

IN AN IRREGULAR STATUS?

There are many means through which migrant workers may end up in an irregular situation, in most cases, through no fault of their own. These include:

- A worker's employer fails to renew the work and residency permits in time. If the worker continues working despite the expiry of his or her permits, the work is considered irregular and the worker and employer are subject to disciplinary action, such as fines or prison time; or deportation in case of the worker.
- The proper administrative/legal procedures are not followed by the employer(s) during a transfer of sponsorship, and therefore the new employer is not the official sponsor, pushing the worker into an irregular situation.
- Due to the actions of the employer, a migrant worker is not able to leave the country despite the expiration or cancellation of his or her visa. For instance if the employer refuses to pay for the return airfare or fails to return the migrant worker's passport.
- A migrant worker holding a valid work permit is reported as having 'absconded' by the employer, without actually having been absent from work (i.e. 'fake absconding'). Absconding is an administrative offence that may result in fines, detention and deportation, or a ban on re-entry for the worker. It may also result in employers not having to pay a return ticket and end of service benefits.
- A migrant worker works for employer(s) other than the sponsor listed on the visa – which is in breach of the *kafala* sponsorship system and considered an administrative violation. This includes migrant workers who have experienced abuse in the workplace and have sought employment elsewhere.
- A migrant worker is in a 'free visa' arrangement, whereby the worker pays the sponsor initial and yearly fees to renew their residency and employment visas while they work for another employer. Many migrants do not realise that this is an administrative violation and that they automatically move into an irregular situation as a result.
- A lawfully employed migrant worker may find himself or herself in an irregular situation by the mere loss of employment, for example dismissal, as

⁶ General Assembly Resolution 3449 of 8 December 1975 on measures to ensure the human rights and dignity of all migrant workers calls on the United Nations organs and specialised agencies concerned to "utilize in all official documents the term "non-documented or irregular migrant workers" to define those workers that illegally and/or surreptitiously enter another country to obtain work".

⁷ See ILO: Promoting fair migration, General Survey concerning the migrant workers instruments, Report of the CEACR, ILC, 105th Session, Geneva, 2016, para. 294.

under the *kafala* sponsorship system, work permits and residence permits are linked and tied to one employer. The loss of employment results in the work permit becoming invalid or residence permit being revoked or cancelled and the migrant is no longer permitted to remain in the country.

- A migrant worker enters and works on a tourist visa (or other non-work visa). Due to fraudulent recruitment and placement procedures, the worker may have been told to enter on a tourist visa and work outside regular channels.
- A migrant worker has experienced abuse and is awaiting the outcome of a legal case. A migrant worker's work and/or residency permit may expire during this period, due to lengthy court cases. This serves as a major disincentive for workers to report any abuse.
- People who were trafficked into the country. People who were trafficked into the country have been deceived about the nature and purpose of their migration, even though they may have entered with the appropriate legal documentation. They may be working for an employer who is not their sponsor, or they may be completely unregistered in the country if they entered the country unlawfully.

Being in an irregular situation has many negative impacts on migrant workers' lives. Migrant workers in an irregular situation will not feel comfortable in engaging with any government services or moving freely. For example, a migrant worker who is ill may not visit a hospital for fear that their irregular situation will be uncovered. A migrant worker in an irregular situation who is experiencing labour exploitation will not feel comfortable seeking help from a labour inspector or police officer. Migrant workers may be forced to pay bribes to escape confrontation with the police or other officials. Hence the state of being irregular may actually force workers to engage in clandestine or illegal practices.

Migrant workers in an irregular situation are also vulnerable to deportation without due process. Many countries have set quotas for deportation, with the explicit aim of reducing the migrant population, and labour inspectors are sometimes paid 'bonuses' for every worker in an irregular situation they identify during inspections (see point F below for appropriate responses). This has led to aggressive detention and deportation campaigns, during which the workers may not have access to legal representation to contest their deportation and may be held in detention for indefinite periods of time, in breach of international standards. Article 8 of the Arab Charter on Human Rights asserts that *"everyone has the right to liberty and security of person and no one shall be arrested, held in custody or detained without legal warrant and without being brought promptly before a judge"*.

Those who employ migrant workers in an irregular situation are also subject to sanctions – including fines and prison time.

BOX 2

Good practice: In January, 2007, the Association of Southeast Asian Nations (ASEAN) adopted a Declaration on the Protection and Promotion of the Rights of Migrant Workers, which contains the general principle that destination and origin countries "shall, for humanitarian reasons, closely cooperate to resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented."

WHAT ARE GOVERNMENTS

DOING ABOUT IT?

Since the 1990s, governments' typical response to migration in an irregular situation in the Arab States has been to strengthen border controls and implement periodic amnesty programmes, through which migrant workers in an irregular situation are able to 'regularize' their situation and return to their country of origin without penalty. However these programmes do not address the fundamental reasons that push migrant workers into an irregular situation in the first place.

BOX 3

What does international law say?

Regardless of nationality, residence or migrant status, the fundamental principles and rights outlined in the eight ILO fundamental conventions addressing forced labour, child labour, trade union rights and non-discrimination in employment and occupation apply to all workers. The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, affirms this and calls for special attention to vulnerable groups, including migrant workers. The UN Guiding Principles on Business and Human Rights are underpinned by the Fundamental Principles and Rights at Work.

The ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) obligates States parties to respect the basic human rights of all migrant workers (Article 1). It also stipulates that if a migrant worker has lived and worked lawfully in the country, loss of employment should not be considered a trigger for automatic withdrawal of their residence or work permit (Article 8). Furthermore, the migrant worker should also be entitled to enjoy equality of treatment with nationals in particular of guarantees to security of employment. Article 9 of Convention No. 143 further guarantees migrant workers, whose situation cannot be regularized, equality of treatment with migrant workers in a regular situation with respect to rights arising out of past employment regarding remuneration, social security and other benefits.⁸

The nine core international human rights treaties apply to all human beings, including migrants. A particularly relevant core human rights instrument is the **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)**, which sets out a range of human rights, including labour rights, which apply to all migrant workers, including those in an irregular situation (Part III, Articles 8-35). In addition to these rights, the Convention provides additional rights for migrant workers who are documented or in a regular situation (Part IV, Articles 36-56).

Under Article 2 of the **International Covenant on Civil and Political Rights (ICCPR)** – which many Arab States have ratified – States are obligated to ensure that the rights in the ICCPR are provided to everyone “without distinction of any kind” and to uphold the rule of law and ensure access to justice for all people on the State’s territory in the event of violation of any of these rights.

WHAT IS THE BUSINESS CASE?

There are strong economic and labour market efficiency arguments for addressing irregularity of migrant workers in the Arab States. Employers need a dynamic and flexible workforce, and maintenance of workers’ residence and work permits under the *kafala* sponsorship system is a considerable administrative burden to employers and labour suppliers and hampers business

flexibility. Workers in an irregular situation face detention and deportation, meaning worksites may lose workers suddenly. Furthermore, detention is costly to governments (an estimate in Jordan indicates that the cost of detaining one migrant comes at a price of USD 1,000 per month).⁹ Regularizing migrant workers who are in an irregular situation allows employers to engage workers already in the destination country – thereby saving on time, cost and the bureaucracy involved in recruiting a worker from abroad, and reducing the risk of being associated with exploitative recruitment practices.

WHAT ARE THE RECOMMENDED WAYS FORWARD?

The means through which the majority of migrant workers become irregular are not criminal actions, but situations that are rectifiable through administrative actions on the part of the relevant government ministries.

A. Make migrant workers responsible for renewing their own visas, work and residence permits. To prevent a scenario whereby a worker falls into an irregular situation due to administrative oversight or an act of negligence by the employer, migrant workers should be made responsible for the renewal of their own visas (at reasonable or no cost). To reduce travel costs and save time for migrant workers, innovative models for permit renewal should be explored, including online mechanisms, mobile units that visit work sites, and migrant drop-in centres. Awareness raising campaigns and translation services should also support workers’ capacity for permit renewal.

B. Issue residency permits with a validity of at least two months longer than the employment contract. This ensures an ‘administrative leeway’ period, allowing time for the contract to be renewed with the same employer, for the worker to be transferred to a new employer, or for the worker to settle their affairs and return home. This is especially important to protect migrant workers in the instance of dismissal or early termination of contract.¹⁰ It would also ensure that migrant workers would not feel compelled to remain in an abusive situation for fear of falling into an irregular situation.

⁸ See chapters 5 and 7 of: ILO: *Promoting fair migration*, General Survey concerning the migrant workers instruments, Report of the CEACR, ILC, 105th Session, Geneva, 2016.

⁹ Tamkeen (2017) *Walled in by Alienation: Working and living conditions of migrant workers in Jordan*

¹⁰ In line with Paragraph 31 of ILO Recommendation No. 151 (accompanying Convention No. 143).

C. Allow migrant workers to resign and terminate their employment contract (with sufficient notice), without losing valid immigration status.

A migrant worker should be able to end a contract for any reason without losing their legal right to remain in the country, by giving reasonable notice (in line with the stipulations of the contract) and without needing to obtain written approval from the current employer. In the event of an abusive situation, a migrant worker should be able to terminate their contract immediately, without losing legal status.

D. Migrant workers pursuing legal recourse must receive visa extensions.

A visa extension (or bridging visa) should be issued to persons wishing to pursue legal recourse against their employer through labour tribunals and/or criminal courts until their claims have been resolved.

E. Institute a separation (or 'firewall') between labour inspection and immigration control.

Migrant workers in an irregular situation must still benefit from the services of labour inspectors (whose primary role is to determine conditions of work¹¹), police officers, and public services such as hospitals. Authorities should provide services and assistance without discrimination – regardless of the migrant worker's status.¹²

F. Ensure that the costs of expulsion are not borne by the migrant worker, in line with Article 9(3) of ILO Convention No. 143.

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¹¹ As per ILO Labour Inspection Convention, 1947 (No. 81)

¹² Principle 13, Guideline 4 of the GMG (2017) *Draft Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations* stipulates that states must “establish clear and binding firewalls between between public or private service providers and immigration enforcement authorities.”