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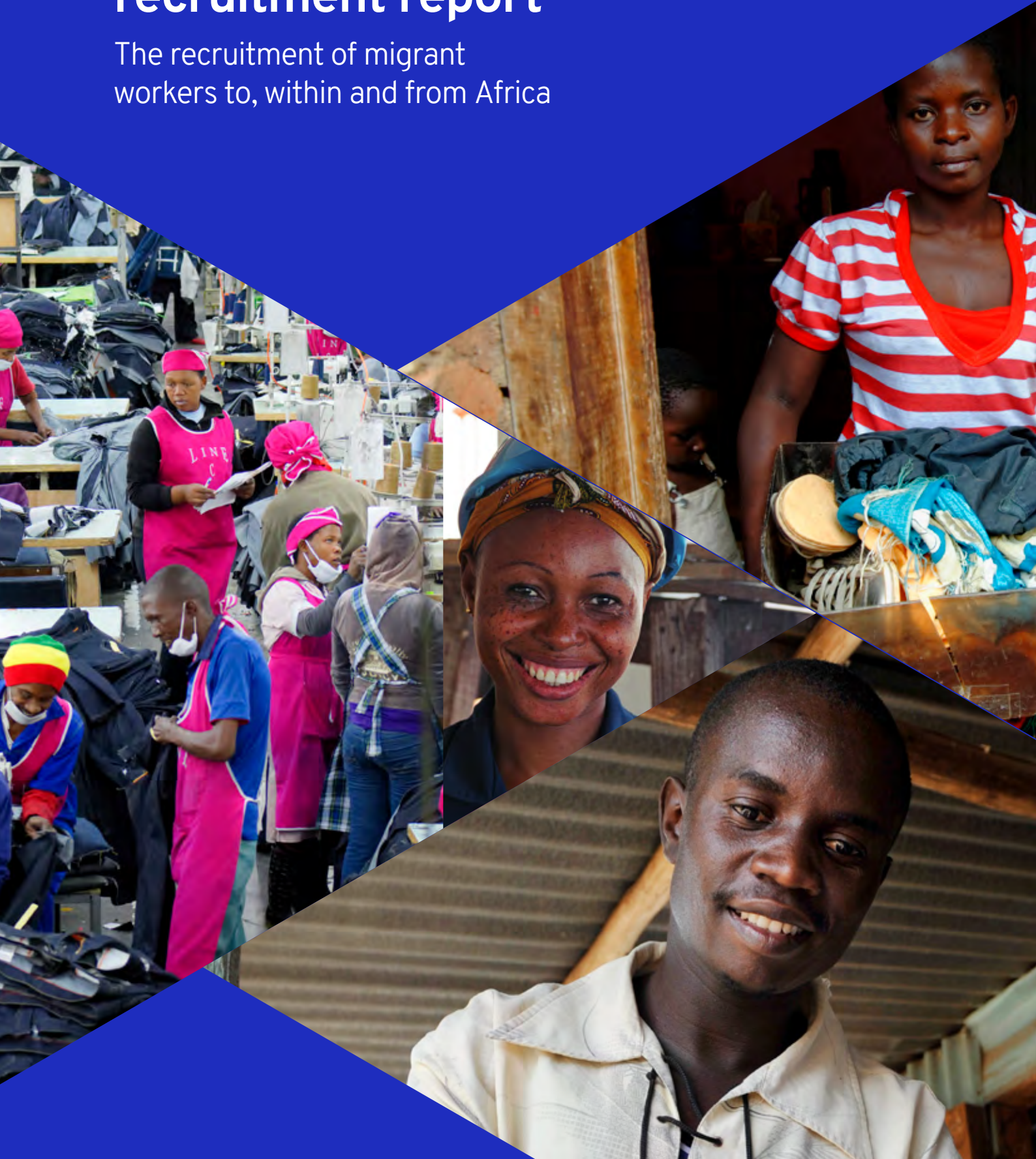


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# ► Africa regional fair recruitment report

The recruitment of migrant  
workers to, within and from Africa





# Africa regional fair recruitment report:

The recruitment  
of migrant workers to,  
within and from Africa

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*Africa regional fair recruitment report: The recruitment of migrant workers to, within and from Africa*  
International Labour Office – Geneva: ILO, 2021.

ISBN 978-92-2-034502-3 (web PDF)

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## ► Foreword

The ILO's 2019 Abidjan Declaration on "Advancing Social Justice: Shaping the future of work in Africa, Realizing the potential for a future of work with social justice" identifies the need for «Strengthening the efficiency of the institutions of work to ensure adequate protection of all workers through (inter alia) promoting fair and effective labour migration governance».

Furthermore, the 2018 AU Revised Migration Policy Framework and Plan of Action (2018-2030) called for national labour migration policies, structures and legislation to:

- (a) Create transparent (open) and accountable labour recruitment and admission systems, based on clear legislative categories and immigration policies that are harmonised with labour laws;
- (b) Align national laws, policies and regulations; bilateral and multilateral agreements; and voluntary codes of conduct with the ILO *General principles and operational guidelines for fair recruitment*;
- (c) Monitor and enforce compliance with recruitment regulations, including standardised contracts of employment which are free, fair, fully consented to, transparent and enforceable;
- (d) Promote consolidation and professionalisation in the recruitment industry, reigning in the maze of subagents that are often involved, with the aim of turning (public and private) recruiters into comprehensive "one-stop shops" for employers and migrants, offering comprehensive services, including training and skills certification, job placement and travel arrangements.

The "Africa Regional Fair Recruitment Report: The recruitment of migrant workers to, within and from Africa" contribute to the implementation of the four recruitment-related areas of the AU Revised Migration Policy Framework and Plan of Action (2018-2030) mentioned before. It also plays a role in the implementation of the 2019 Abidjan Declaration by calling on strengthening the efficiency of

institutions of work such as the Public Employment Service and the Labour Inspection Service in order to improve labour migration outcomes for African migrant workers.

The recruitment process enables national and migrant workers to enter into, and exit from, employment relationships. The report acknowledges that laws and policies – and the enforcement of those laws and policies – often fall short of ensuring fair recruitment of migrant workers to, from and within Africa. Formal recruitment legal processes may be inexistent or inadequate, and even when they do exist they may not be implemented or enforced in practice.

The report comprises an expanded view of the recruitment of migrant workers to disentangle the recruitment, migration and employment aspects of the process, and analyses the practices of the various actors that contribute to each of the three aspects, notably employers, recruiters and other service providers. It recommends that such dimensions be differentiated according to countries of origin and of employment, as well as by occupation, in order to respond to challenges encountered by migrant workers in terms of personal characteristics such as gender and level of education. Those dimensions are interconnected, but may vary in relation to each other and can change over time.

The report demonstrates that various forms of unfairness in recruitment are widespread across Africa, particularly in the case of recruitment across borders, whether by formal or informal recruiters, and whether within Africa or to other regions. Unfairness in recruitment is often associated with the exacerbation of both vulnerability and decent work deficits in employment, as the literature and case study findings confirm. It emphasizes a number of findings from the country case studies on the recruitment of migrant workers in Africa and includes recommendations with a view of making recruitment fairer for national and migrant workers. Its analysis provides decisionmakers with the necessary tools to examine and improve the recruitment of migrant workers.

The report is grounded in a rights-based approach drawing on international labour and other human rights standards. It draws on the work of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), including its relevant general surveys, observations and direct requests. In terms of secondary research, the report draws on ILO research, including work on labour migration and on recruitment fees and related costs. In terms of primary research,

stakeholders interviewed included ILO staff, representatives of ministries of labour and other ministries, workers' and employers' organizations, migrants' organizations, private employment agencies, public employment services, international organizations, and nongovernmental organizations working on recruitment issues. Lastly, it draws on academic literature and grey literature by other United Nations agencies, international organizations and civil society organizations.



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## ► Acknowledgements

The consultant working on data collection, drafting and consolidating this report was Mr Mansour Omeira. The chapters for Morocco, Tunisia, Ethiopia, Kenya, Uganda, Seychelles and Madagascar draw on the work of researchers that are acknowledge in the specific chapter. Special acknowledgements to Ms Heike Lautenschlager for steering the production of the report and doing a thorough review and editing of the same, as well as for guiding the inclusion of North Africa, East Africa and the Indian Ocean country studies. Recognition is given to Ms. Gloria Moreno-Fontes for guaranteeing field work covering Ivory Coast and Burkina Faso and overseeing the organisation of the report.

High appreciations to Ms. Lotte Kejser, Mr. Dino Corell, Mr Augustine Eramah, and Ms Akua Asumadu who supported field work covering Nigeria and Ghana and provided inputs to the text; to Mr. Theo Sparreboom for guiding and supervising field work in Lesotho and South Africa and reviewing the text; as well as to Mr. Abderrahim Amraoui, Ms. Melanie Belfiore, Ms.

Kenza Dimechkie, Ms Maria Gallotti, Ms. Samia Kazi-Aoul, Ms Katherine Landuyt, Mr Henrik Moller, Ms Aurelia Segatti, Ms Clara Van Panhuys, and Ms Ferdaoues Wertani for their vary valuable improvements of the text throughout the peer review process.

Mr John Maloy edited the report and graphic design was completed by ILO's specialised unit. A final special thanks goes to all the government officials, employers and trade union representatives, and migrant workers, without whom the information for this report could not have been gathered.

The production of this report was made possible through the following sources of funding: Global Action to Improve the Recruitment Framework of Labour Migration (REFRAME), funded by the EU; Support to Free Movement of Persons and Migration in West Africa (FMM), funded by the EU and ECOWAS; the Initiative for Labour Migration, Employment and Reintegration in Nigeria and Ghana, funded by GIZ; and regular budget resources from the ILO Regional Office for Africa.

### ► Note on COVID-19

This report was conceptualized, researched (including quantitative and qualitative data collection) and finalized by the ILO prior to the COVID-19 pandemic. The pandemic's impact on the recruitment conditions and the recruitment fees and costs paid by migrant workers is being monitored by the ILO – including through the SDG 10.7.1 methodology. The analyses of laws and policies on recruitment to and from Africa remain relevant as governments plan for the immediate and long-term response to COVID-19. For further information on how COVID-19 has impacted international recruitment practices, please see ILO, "Ensuring Fair Recruitment during the COVID-19 Pandemic", ILO Brief, June 2020.

## ► List of abbreviations

<b>ADDAD</b>	Association for the Defense of the Rights of Household and Domestic Helpers
<b>AEJ</b>	Youth Employment Agency (Côte d'Ivoire)
<b>AGEPE</b>	Employment Research and Promotion Agency (Côte d'Ivoire)
<b>ATCT</b>	Tunisian Agency for Technical Cooperation
<b>ANETI</b>	National Agency for Employment and Self-Employment (Tunisia)
<b>ANAPEC</b>	National Agency for the Promotion of Employment and Skills (Morocco)
<b>API</b>	Agency for the Promotion of Industry and Innovation (Tunisia)
<b>ATUMNET</b>	African Trade Union Migration Network
<b>AU</b>	African Union
<b>AUC</b>	African Union Commission
<b>BLA</b>	bilateral labour agreement
<b>CEACR</b>	Committee of Experts on the Application of Conventions and Recommendations
<b>CENSAD</b>	Community of Sahel-Saharan States
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>COTU-K</b>	Central Organization of Trade Unions Kenya
<b>CTIP</b>	Counter Trafficking in Persons Advisory Committee (Kenya)
<b>EAC</b>	East Africa Community
<b>EEU</b>	External Employment Agency (Uganda)
<b>ETAHT</b>	Edo State Task Force Against Human Trafficking (Nigeria)
<b>EU</b>	European Union
<b>FNJ</b>	National Youth Fund (Côte d'Ivoire)
<b>GHAPEA</b>	Ghana Association of Private Employment Agencies
<b>GIZ</b>	German Corporation for International Cooperation
<b>GOP</b>	Gainful Occupational Permit (Seychelles)
<b>HuCaPAN</b>	Human Capital Providers Association of Nigeria
<b>ICMW</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990
<b>IGAD</b>	Intergovernmental Authority on Development
<b>IOM</b>	International Organization for Migration
<b>IRIS</b>	International Recruitment Integrity System
<b>ITUC Africa</b>	International Trade Union Confederation – Africa
<b>LSP</b>	Lesotho Special Permit (South Africa)
<b>MFPE</b>	Ministry of Vocational Training and Employment (Tunisia)
<b>MGLSD</b>	Ministry of Gender, Labour and Social Development (Uganda)
<b>MoL</b>	Ministry of Labour (generic usage)
<b>MoLSA</b>	Ministry of Labour and Social Affairs (Ethiopia)



MOU	memorandum of understanding
MRC	Migrant Resource Centre
N-SIP	National Social Investment Program (Nigeria)
NAPTIP	National Agency for the Prohibition of Traffic in Persons and Other Related Matters (Nigeria)
NDE	National Directorate of Employment (Nigeria)
NEA	National Employment Authority (Kenya)
NELEX	National Electronic Labour Exchange (Nigeria)
NGO	non-governmental organization
NITA	National Industrial Training Authority (Kenya)
NLC	Nigeria Labour Congress
NLMP	National Labour Migration Policy (Seychelles)
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PES	public employment service
PEA	private employment agency
RSMMS	Mediterranean–Sub-Saharan Migration Trade Union Network
SADC	Southern African Development Community
TORs	terms of reference
TVET	technical and vocational education and training
UACDDDD	Union of Associations and Coordination of Associations for the Development and Defence of the Rights of the Disadvantaged (Mali)
UAERA	Uganda Association for External Recruitment Agencies
UN	United Nations
UNDESA	United Nations Department of Economic and Social Affairs
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
YEDF	Youth Enterprise Development Fund (Kenya)

## ► Definitions of key terms

### Forced or compulsory labour

The Forced Labour Convention, 1930 (No. 29) defines forced or compulsory labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” (Art. 2(1)). Certain forms of forced or compulsory labour are excluded from its scope, such as compulsory military service, normal civic obligations, compulsory labour as a consequence of a conviction in a court of law, cases of emergency, and minor communal services (ILO 2007).

### International migrants

International migrants in any country encompass the foreign population and the foreign-born population (UN 1998). As such, children born to foreign parents in a country are considered international migrants, even if they were born and have always lived in that country.

### International migrant workers

International migrant workers include workers who are international migrants as well as nonresident foreign workers (ILO 2018a). International migrant workers may be either in employment or in unemployment, with those in employment encompassing employees and the self-employed. Since the recruitment process enables workers’ entry into wage employment, the term “workers” includes both employees and jobseekers within the context of recruitment (ILO 2019a).

### Informal economy

The informal economy, as per the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204):

- (a) refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements; and
- (b) does not cover illicit activities, in particular the provision of services or the production, sale, possession or use of goods forbidden by law, including

the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons, and money laundering, as defined in the relevant international treaties (Art. 2).

### Informal employment relationships

Employees are considered to have informal jobs if their employment relationship is “in law or in practice, not subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits (advance notice of dismissal, severance pay, paid annual or sick leave, etc.)” (ILO 2003). Informal employment may exist in formal sector enterprises, informal sector enterprises, or households.

### Modern slavery

Although not defined in law, the concept of modern slavery is used as an umbrella term for “a set of specific legal concepts including forced labour, debt bondage, forced marriage, other slavery and slavery like practices, and human trafficking,” and essentially “refers to situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power” (ILO 2017a, 9).

### Private employment agency

The Private Employment Agencies Convention, 1997 (No. 181) defines a private employment agency as:

any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

- (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
- (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a “user enterprise”) which assigns their tasks and supervises the execution of these tasks;
- (c) other services relating to jobseeking, determined by the competent authority after consulting

the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment (Art. 1).

### Smuggling of migrants

The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime defines the smuggling of migrants as the “procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” (Art. 3(a)).

### Trafficking in persons

The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (Art. 3(a)).

### Worst forms of child labour

The Worst Forms of Child Labour Convention, 1999 (No. 182) defines a child as any person under the age of 18 (Art. 2). It defines the worst forms of child labour as comprising:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children (Art. 3).









# **Executive summary**

Laws and policies – and the enforcement of those laws and policies – often fall short of ensuring fair recruitment of migrant workers to, within and from Africa. Formal frameworks may be inexistent or inadequate, and even when adequate frameworks do exist on paper they may not be implemented or enforced in practice. To make the recruitment of migrant workers fair, governments and social partners in the region need to mainstream fair recruitment into national policies developed through tripartite consultations, as well as ensure an enabling environment for fair recruitment by promoting full, productive and freely chosen employment and decent work for all workers.

In 2014 the ILO launched a global Fair Recruitment Initiative to:

- ▶ prevent human trafficking and forced labour
- ▶ protect the rights of workers, including migrant workers, from abusive and fraudulent practices during the recruitment and placement process (including pre-selection, selection, transportation, placement and safe return); and
- ▶ reduce the cost of labour migration and enhance development outcomes for migrant workers and their families, as well as for countries of origin and destination.

This multi-stakeholder initiative is being implemented in close collaboration with governments, representative employers' and workers' organizations, the private sector and other key partners. A second phase is being launched in 2021.

This report provides a regional overview that is based on 13 case studies encompassing:

- ▶ Morocco and Tunisia in North Africa;
- ▶ Ethiopia, Kenya and Uganda in East Africa;
- ▶ Burkina Faso, Côte d'Ivoire, Ghana and Nigeria in West Africa;
- ▶ Lesotho and South Africa in Southern Africa; and
- ▶ Madagascar and the Seychelles in the Indian Ocean

The report is grounded in a rights-based approach drawing on international labour and other human rights standards. It draws on the work of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), including its relevant general surveys, observations and direct requests. In terms of secondary research, the report draws on ILO research, including

work on labour migration and on recruitment fees and related costs. It also draws on academic literature and grey literature by other United Nations agencies, international organizations and civil society organizations. In terms of primary research, stakeholders interviewed included ILO staff, representatives of ministries of labour and other ministries, workers' and employers' organizations, migrants' organizations, private employment agencies, public employment services, international organizations, and nongovernmental organizations working on recruitment issues.

The migration question in Africa is largely about intracontinental migration, as 53 per cent of the estimated 40.2 million international migrants from Africa have migrated within the continent, and 80 per cent of the estimated 26.5 million migrants in Africa are from the continent. Women represent 46 per cent of international migrants from Africa and 46 per cent of international migrants in Africa. Migration is largely about labour migration, as two-thirds of working-age migrants in Africa are workers. The question of the fair recruitment of migrant workers is thus intertwined with questions concerning migration, decent work and gender equality.

The recruitment process enables workers to enter into, and exit from, employment relationships with employers. An expanded view of the recruitment of migrant workers involves analytically disentangling the recruitment, migration and employment aspects of the process, and analysing the practices of the various actors that contribute to each of the three aspects, including employers, recruiters and other service providers. Such dimensions need to be differentiated according to countries of origin and of employment, as well as by occupation, in addition to the personal characteristics of workers, such as gender and level of education. These dimensions are interconnected, but may vary in relation to each other and can change over time.

The international recruitment of workers from, within and to Africa remains limited, as most migrant workers are recruited locally. The prevalent model of labour migration is that of workers migrating in search of employment (the migration-first pathway). In contrast, the traditional underlying assumption in relevant international normative instruments is the model of workers securing a job in another country prior to migrating (the recruitment-first pathway). Wage employment opportunities remain limited in Africa, which

increases pressure on workers during the recruitment process and weakens their bargaining power. The ILO estimates that in 2018, “employees” represented just 29 per cent of employment in Africa in 2018, slightly more than half the global average. Moreover, informal employment represented more than threequarters of total employment in African countries with recent comparable data available.

There are various forms of unfairness in the recruitment process, which are not independent of each other and may partially overlap. The distinction between these forms, however, is useful for the better understanding of unfair recruitment practices. Forms of unfairness in recruitment include:

- ▶ **deceptive recruitment**, in which the worker is deliberately caused to believe something that is not true, such as the terms and conditions of employment and living conditions;
- ▶ **coercive recruitment**, in which the recruitment is imposed on the worker under the threat of penalty and to which the worker does not agree voluntarily, notably using violence or its threat, abduction, forced marriage, forced adoption or selling of the victim, confiscation of documents, and debt bondage;
- ▶ **abusive recruitment**, in which the position of vulnerability of the worker is abused, with such vulnerability possibly related to difficult socioeconomic situation, irregular migration status, lack of education, lack of information or economic reasons;
- ▶ **discriminatory recruitment**, in which equality of opportunity and treatment in recruitment is nullified or impaired, notably on grounds such as race, colour, sex, age, religion, political opinion, national extraction, social origin, ethnic origin, disability, marital or family status, sexual orientation or membership in a workers’ organization.<sup>1</sup>
- ▶ **corrupt recruitment**, in which the recruiter or a third party influencing the recruitment acts dishonestly in return for money or personal gain, with such acts possibly including offering, promising, giving, requesting or accepting bribes, including bribes from workers or bribes to employers or government officials;
- ▶ **fake recruitment**, in which the private employment agency or the job advertised do not exist, or the job exists but what is depicted as

the recruitment process that the worker goes through is unrelated to the job, and;

- ▶ **worker-fee-charging recruitment**, in which recruitment fees and related costs are borne by the worker.

The various forms of unfairness in recruitment are not necessarily mutually exclusive nor independent. A specific recruitment process may involve more than one form of unfairness. For example, with the same recruitment process workers may be charged recruitment fees and related costs by private employment agencies; induced to bribe decision-makers to increase the chance of being recruited; and with the successful candidate being selected on discriminatory grounds such as religion or political opinion.

Various forms of unfairness in recruitment are widespread across the region, particularly in the case of recruitment across borders, whether by formal or informal recruiters, and whether within Africa or to other regions. Unfairness in recruitment is often associated with the exacerbation of both vulnerability and decent work deficits in employment, as the literature and case study findings confirm.

The report emphasizes a number of findings from the country case studies on the recruitment of migrant workers in Africa which are important to highlight with a view of making recruitment fairer:

- ▶ Mainstreaming fair recruitment into national policies and programmes developed through tripartite consultations, notably by:
  - Developing and implementing labour migration policies;
  - Closing the gap between policy-on-paper and policy-in-practice on labour migration;
  - Strengthening the institutional and technical capacities of ministries of labour;
  - Strengthening the capacity of public employment services;
  - Supporting organizing of migrant workers’ and participation in social dialogue.
  - Promoting coordination and policy coherence among relevant national and international partners;
  - Facilitating labour migration, with an increased focus on the protection of workers relative to the protection of borders;

<sup>1</sup> Based on ILO Private Employment Agencies Recommendation, 1997 (No. 188), Article 8.

- ▶ Protecting workers recruited and placed through private employment agencies, including through effective labour inspection:
  - Regulating the activities of private employment agencies;
  - Monitoring the activities of private employment agencies through labour inspection;
  - Regulating informal recruiters or subagents;
  - Due diligence between recruitment agencies in countries of origin and destination;
  - Eliminating recruitment fees and related costs borne by workers and reducing the costs of labour migration;
  - Combating misleading propaganda regarding migration and migrants.
- ▶ Promoting full, productive and freely chosen employment and decent work for all workers, notably by:
  - Ensuring that recruited migrant workers enjoy their fundamental principles and rights at work;
  - Developing and implementing employment policies;
  - Facilitating the transition from the informal to the formal economy;
  - Preventing and responding to crisis situations;
  - Investing in infrastructure, particularly in the rural economy and in the care economy;
  - Encouraging the continuing development of the competencies and qualifications of workers, including basic, economic, legal, and digital literacy training, as appropriate; and
  - Addressing the needs of specific categories of workers.







# Introduction

1



## ► 1.1 Background and objective

Despite the existence of international labour standards addressing recruitment, national laws and their enforcement often fall short of protecting the rights of workers, and migrant workers in particular. In response to these challenges, the ILO launched in 2014 a global Fair Recruitment Initiative to:

- help prevent trafficking in persons and forced labour;
- protect the rights of workers, including migrant workers, from abusive and fraudulent practices during the recruitment and placement process (including pre-selection, selection, transportation, placement and safe return);
- reduce the cost of labour migration; and
- enhance development outcomes for migrant workers and their families, as well as for countries of origin and destination.

This multi-stakeholder initiative has been implemented in close collaboration with governments, representative employers' and workers' organizations, the private sector and other key partners.

The objective of this report is to provide an analysis of the law, policy, and practice related to the recruitment of migrant workers from 13 African countries and across a larger number of migration corridors. It also aims at identifying strategies for making their recruitment fairer. The report recognizes labour migration processes in their diversity, including in regular and irregular migration situations and in employment in both the formal and informal economies. It considers the international recruitment of migrant workers who secure employment prior to departure from their country of origin (the recruitment-first pathway), as well as the national recruitment of migrant workers who left their country before securing employment (the migration-first pathway). The report sheds light on both good practices and malpractices in the recruitment industry, including in relation to recruitment fees and related costs and resulting living and working conditions. It gives specific attention to migrant workers in vulnerable situations, including those related to the smuggling of migrants and trafficking in persons, as well as those in forced labour and child labour.

## ► 1.2 Methodology and limitations

The report provides a regional overview that is based on case studies encompassing:

- Morocco and Tunisia in Northern Africa;
- Ethiopia, Kenya, Madagascar, Seychelles, and Uganda in Eastern Africa;
- Burkina Faso, Côte d'Ivoire, Ghana, and Nigeria in Western Africa; and
- Lesotho and South Africa in Southern Africa.

The report is grounded in a rights-based approach drawing on international labour standards and other human rights standards. It draws on the work of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), including its relevant general surveys, observations, and direct requests. In terms of secondary research, the report draws on ILO research, including on labour migration and on recruitment fees and related costs. It also draws on academic literature and grey literature by other United Nations (UN) agencies, international organizations, and civil society organizations.

In terms of primary research, semi-structured interviews were conducted with key informants in Burkina Faso, Cote D'Ivoire, Ghana, Lesotho, Nigeria and South Africa, and focus group discussions were undertaken in Ghana, Lesotho and Nigeria to better understand the recruitment of migrant workers and the labour migration process in practice. Data collection tools are provided in Appendix I. Stakeholders interviewed included:

- ILO staff
- representatives of ministries of labour and other ministries
- workers' and employers' organizations
- migrants' organizations
- private employment agencies
- public employment services
- international organizations and
- non-governmental organizations (NGOs) working on recruitment issues.



This report is the first of its kind on the recruitment of migrant workers, in terms of the breadth and depth of its coverage. The diversity across and within countries of origin, transit and destination; the multitudes of legal and policy frameworks; and the complex and rapidly changing realities in practice mean that any report addressing such issues will have several shortcomings. With regard to this report, the case studies were developed by several teams using different methodologies and with different emphases. The empirical evidence

reported is mainly qualitative, given that the collection of quantitative evidence on the question of the recruitment of migrant workers and its fairness is still in its infancy. The report benefited from several rounds of reviews by ILO experts at headquarters and in the field across the continent. The report should thus be read as a synthesis report grounded in normative frameworks and empirical realities that provides the basis for tripartite policy discussions and that points to ways forward.

### ► 1.3 Structure of the report

Chapter 2 develops an analytical framework on the recruitment of migrant workers. This framework is informed by global and African migration policy frameworks, recognizes the growing role of freedom of movement protocols adopted by regional economic communities, and finds its grounding in ILO standards and guidance. The framework offers an expanded view of the recruitment of migrant workers, analytically disentangling recruitment, migration, and employment dimensions, and addressing the specific roles of recruiters, other service providers, and employers. It distinguishes between the “recruitment-first pathway”, whereby workers secure a job prior to migrating, and the “migration-first pathway”, whereby workers migrate in the hope of securing a job after arrival. The distinction between the two pathways has several policy implications, including with respect to recruitment fees, recruitment-related costs and the direct costs of labour migration. Following a discussion of the three dimensions and the role of employers, recruiters, and other service providers, the chapter concludes with a conceptualization of fair recruitment and unfair recruitment as reflected in African realities.

Chapter 3 presents findings from the case studies regarding the recruitment of migrant workers in

law and policy. The case studies share the same structure for ease of reading, as each addresses in turn the following issues:

- labour and migration overview
- policy on recruitment of migrant workers
- regulation of employment
- regulation of recruitment
- recruitment services, fees, and related costs, and
- unregulated recruitment and migration in abusive conditions.

Chapter 4 synthesizes the findings from the case studies and elaborates recommendations based on relevant international normative frameworks, the analyses from the case studies, and the literature. The findings are written in a way that is generalized to all countries of the region, notably in terms of the available empirical evidence. Whereas the principles of fair recruitment are international, national contexts should dictate the ways in which these principles can be implemented through attention to local specificities. Tripartite social dialogue with other relevant stakeholders is key for the successful development, implementation and monitoring of the fair recruitment of migrant workers.



## ► 1.4 Statistical overview

Before analysing the manner through which migrant workers are recruited, it is important to understand the magnitude of migration from, within and to the continent as well as the types of labour migration or mobility patterns. The case studies analysed in the current report cover six of the ten major intercontinental migration corridors and eight of the ten major intracontinental migration corridors of Africa.

Providing an empirical overview of recruitment of migrant workers from, within and to Africa is fraught with significant challenges with respect to the accuracy, reliability and comparability of labour migration statistics in Africa (AUC 2017). The analysis must consequently rely largely on statistical estimates of labour migration stocks. According to ILO estimates based on data from 11 African countries, in 2017 Africa hosted an estimated 13 million migrant workers (30 per cent

women), with migrant workers representing 2.7 per cent of total workers (3.4 per cent among men, 1.9 per cent among women) (table 1). As such, a better understanding of labour migration patterns can be provided by estimates of migration stocks.

According to United Nations Department of Economic and Social Affairs (UNDESA 2019) estimates, which are adjusted for the number of refugees, one in every seven international migrants in the world is from Africa. Of the 40.2 million international migrants from Africa, 53 per cent have migrated within Africa, 26 per cent to Europe, 11 per cent to Asia and 8 per cent to North America. Women represent 46 per cent of international migrants from Africa, ranging from 34 per cent from Gambia to 62 per cent from Madagascar. Table 2 provides estimates of the total number of emigrants from and immigrants to African subregions.

► **Table 1. Migrant workers in Africa, 2017**

	Both	Men	Women	Women's share (%)
<b>Total workers (millions)</b>	<b>478.1</b>	<b>269.8</b>	<b>208.4</b>	<b>43.6</b>
Migrant population aged 15+ (millions)	19.3	11.0	8.4	43.5
Migrant workers (millions)	13.0	9.2	3.9	30.0
Migrant workers' share of all workers (%)	2.7	3.4	1.9	n.a.

n.a. = not applicable.

**Source:** Author's calculations based on ILO 2018b, table 2.11 and table 2.13.

► **Table 2. Emigrants from and immigrants to Africa, 2014 (in thousands)**

(Sub)region	Emigrants	Immigrants
<b>Africa</b>	<b>40207</b>	<b>26529</b>
Eastern Africa	12536	7908
Middle Africa	4152	3785
Southern Africa	1556	4482
Western Africa	10104	7398
Northern Africa	11859	2956

**Source:** Author's computations based on UNDESA 2019.

► **Table 3. Main migration corridors of Africa, 2019**

Intercontinental migration corridors			Intracontinental migration corridors		
Origin	Destination	Migrant stock (thousands)	Origin	Destination	Migrant stock (thousands)
Algeria	France	1 576	Burkina Faso	Côte d'Ivoire	1 368
Morocco	France	1 020	South Sudan	Uganda	1 100
Egypt	Saudi Arabia	939	South Sudan	Sudan	774
Egypt	United Arab Emirates	886	Mozambique	South Africa	716
Morocco	Spain	712	Sudan	South Sudan	577
Sudan	Saudi Arabia	470	Côte d'Ivoire	Burkina Faso	558
Morocco	Italy	451	Mali	Côte d'Ivoire	522
Tunisia	France	428	Somalia	Ethiopia	478
Egypt	Kuwait	411	South Sudan	Ethiopia	476
Nigeria	United States	310	Somalia	Kenya	453

**Source:** Author's calculation based on UNDESA (2019).

One in every ten international migrants in the world resides in Africa. Africa hosts 26.5 million international migrants, 80 per cent of whom are from Africa. Women represent 47 per cent of international migrants in Africa, ranging from 23 per cent in Equatorial Guinea to 54 per cent in Chad. Table 3 provides an overview of the major intercontinental and intracontinental migration corridors of Africa. Nine of the ten major intercontinental migration corridors relate to North Africa. They include those from:

- Algeria, Morocco and Tunisia to their former colonial power France;
- Morocco to Spain and Italy;
- Egypt to Saudi Arabia, the United Arab Emirates and Kuwait; and
- Sudan to Saudi Arabia.

The tenth corridor is that from Nigeria to the United States of America.

Of the ten major intracontinental migration corridors of Africa, three are within Western Africa: from Burkina Faso and Mali to Côte d'Ivoire, and from Côte d'Ivoire to Burkina Faso. Four involve South Sudan and its neighbouring countries, including from South Sudan to Uganda, Sudan and Ethiopia, and from Sudan to South Sudan. The remaining three are from Somalia to Ethiopia and Kenya in Eastern Africa, and from Mozambique to South Africa in Southern Africa.

The ten major destinations outside Africa include countries in:

- Europe – France, the United Kingdom of Great Britain and Northern Ireland, Italy, Spain, Belgium and Germany;
- North America – United States and Canada; and
- the Arab States – Saudi Arabia and United Arab Emirates.

The ten major destinations within Africa are across the continent, in:

- Western Africa – Côte d'Ivoire, Nigeria and Burkina Faso;
- Southern Africa – South Africa;
- Eastern Africa – Uganda, Ethiopia, Kenya and South Sudan;
- Northern Africa – Sudan; and
- Central Africa – Democratic Republic of the Congo (see table 4).

Of these, seven are covered in this report's case studies.

The 15 major countries of origin for immigrants in Africa are African countries (see table 5). The ten major countries of origin outside Africa include countries/territories in:

- the Arab States – Occupied Palestinian Territory, Syria and Iraq;
- Europe – France, the United Kingdom, Germany, Portugal and Italy);
- South Asia – India; and
- East Asia – China.

► Table 4. Main countries of destination for African emigrants, 2019

Outside Africa		Within Africa	
Destination	Migrant stock (thousands)	Destination	Migrant stock (thousands)
France	4 135	Côte d'Ivoire	2 478
United States	2 192	South Africa	2 341
United Kingdom	1 627	Uganda	1 722
Saudi Arabia	1 568	Ethiopia	1 225
Italy	1 195	Sudan	1 193
United Arab Emirates	1 108	Nigeria	1 128
Canada	1 033	Kenya	971
Spain	990	Democratic Republic of the Congo	930
Belgium	512	South Sudan	862
Germany	503	Burkina Faso	671

**Source:** Author's calculation based on UNDESA (2019).

► Table 5. Main countries of origin for immigrants in Africa, 2019

Outside Africa		Within Africa	
Origin	Migrant stock (thousands)	Origin	Migrant stock (thousands)
Occupied Palestinian Territory	470	South Sudan	2 548
France	249	Burkina Faso	1 549
Syrian Arab Republic	176	Democratic Republic of the Congo	1 384
United Kingdom	168	Somalia	1 245
Germany	132	Sudan	1 161
Iraq	103	Mali	1 140
India	99	Mozambique	923
China	68	Côte d'Ivoire	912
Portugal	63	Central African Republic	746
Italy	61	Benin	631

**Source:** Author's calculation based on UNDESA (2019).

The migration question in Africa is largely about intracontinental migration, as 53 per cent of international migrants from Africa have migrated within the continent and 80 per cent of migrants in Africa are from the continent. Women represent 46 per cent of international migrants from Africa and 46 per cent of international migrants in Africa. Migration is largely about labour migration, as two thirds of working-age migrants in Africa are workers. The question of fair recruitment of migrant workers is intertwined with questions around migration, decent work and gender equality. Given

the diversity across the continent, a case study approach is necessary to develop findings and policy recommendations to make the recruitment of migrant workers in Africa fairer. These findings and recommendations, however, need to be grounded in an analytical framework that brings together international normative frameworks – particularly those enshrined in international labour standards – and the realities of the recruitment of migrant workers in the continent. The next section develops such an analytical framework.







# 2

**The recruitment  
of migrant workers:  
An analytical framework**

The current chapter draws on the normative work of the ILO, global and regional policy frameworks, as well as findings from the case studies to present an analytical framework concerning the recruitment of migrant workers in the African context. It addresses:

- ▶ the recruitment process;
- ▶ recruitment fees, recruitment-related costs and the direct costs of migration;
- ▶ international migrants;
- ▶ international migrant workers;
- ▶ the informal economy;
- ▶ labour recruiters;
- ▶ enterprises and employers;
- ▶ due diligence;
- ▶ the migration process and migration status;
- ▶ smuggling of migrants and trafficking in persons;
- ▶ work that should be abolished;
- ▶ the employment relationship; and
- ▶ fair recruitment and unfair recruitment.

## ▶ 2.1 Global and regional commitments

### 2.1.1 Global and African migration policy frameworks

The promotion of fair recruitment has become a major concern in global and African migration policy frameworks as stakeholders have increasingly recognized the evident links between unfair and irregular recruitment processes and the risks of forced labour, child labour, trafficking in persons and debt bondage. This section examines a selection of the global and regional policy frameworks that have been concluded in recent years that can guide national and regional strategies aimed at improving the recruitment of workers, whether national or migrant.

Globally, the sixth objective of the UN Global Compact for Safe, Orderly and Regular Migration is to “[f]acilitate fair and ethical recruitment and safeguard conditions that ensure decent work”.

Fair recruitment is an important concern in the Sustainable Development Goals (SDGs). For example, Goal 3.c is to “[s]ubstantially increase health financing and the recruitment, development, training and retention of the health workforce in developing countries, especially in least developed countries and small island developing States”. Goal 8.7 is to “[t]ake immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms”. Goal 10.7 calls for facilitating “orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned

and well-managed migration policies”. Indicator 10.7.1 of that goal is “recruitment cost borne by employee as a proportion of yearly income earned in country of destination”. The ILO and the World Bank (2019) have developed guidelines for the collection of statistics for this indicator.

Similar concerns have been noted in regional frameworks developed in the Africa region. The African Union (AU) Revised Migration Policy Framework for Africa and Plan of Action (2018–2030) offers multiple recommended strategies relevant to ensuring the fair recruitment of migrant workers, including:

- ▶ 2.1. (ii) Create transparent (open) and accountable labour recruitment and admission systems, based on clear legislative categories and immigration policies that are harmonised with labour laws.
- ▶ 2.1. (iv) Align national laws, policies and regulations; bilateral and multilateral agreements; and voluntary codes of conduct with the ILO General Principles and Operational Guidelines for Fair Recruitment.
- ▶ 2.1. (vi) Monitor and enforce compliance with recruitment regulations, including standardised contracts of employment which are free, fair, fully consented to, transparent and enforceable.
- ▶ 2.1 (vii) Promote consolidation and professionalisation in the recruitment industry, reigning in the maze of subagents that are often involved, with the aim of turning (public and private) recruiters into comprehensive “one-stop shops” for employers and migrants, offering comprehensive services, including training and skills certification, job placement and travel arrangements.

- ▶ 5.2. (ii) Explore opportunities to put special procedures in place for citizens working overseas, including limiting recruitment fees; introducing licensing requirements, contract registration and review/approval mechanisms that only allow businesses to send workers abroad once a contract is approved by the authorities; putting in place measures to better secure the rights of workers, including frequent labour inspections, due payment of wages, banning deductions from wages for accommodation, and introducing severe ban periods and fines for employers who violate labour requirements.

The 2018 AU Protocol on Free Movement of Persons in Africa stipulates that “the Nationals of a Member State shall have the right to seek and accept employment without discrimination in any other Member State in accordance with the laws and policies of the host Member State” (art. 14(a)).<sup>1</sup>

Earlier, the 2014 African Union Commission’s Ouagadougou + 10 Declaration and Plan of Action on Employment, Poverty Eradication and Inclusive Development in Africa, under Key Priority Area 5: Labour Migration and Regional Economic Integration, refers to several strategies that Member States can adopt to promote fair recruitment. Among these strategies are to “[d]evelop legal frameworks to ensure that the private placement agencies engaged in international recruitments are operating according to national and international standards, including through bilateral and multilateral agreements in consideration of international fair and ethical recruitment and repatriation in order to guarantee availability of skills pool required for the development of African countries.” Another is to “[c]reate institutional mechanisms for regular dialogue on migration, between countries of origin, transit and countries of destination; including issues around travel restrictions (i.e. HIV and AIDS) and create structured recruitment management systems in both the countries of origin, transit and destination.”

## 2.1.2 Freedom of movement protocols in Regional Economic Communities<sup>2</sup>

At a subregional level, eight regional economic communities are active players in Africa’s political economy. These are the:

- ▶ Arab Maghreb Union
- ▶ Economic Community of West African States (ECOWAS)
- ▶ East African Community (EAC)
- ▶ Intergovernmental Authority on Development (IGAD)
- ▶ Southern African Development Community (SADC)
- ▶ Common Market for Eastern and Southern Africa (COMESA)
- ▶ Economic Community of Central African States (ECCAS)
- ▶ Community of Sahel-Saharan States (CENSAD)

For most regional economic communities, provisions on recruitment – where these exist – are contained in free movement protocols or labour migration agreements. Some highlights include the following:

In West Africa, the Economic Community of West African States (ECOWAS) Common Approach on Migration, the ECOWAS Regional Migration Policy, and the ECOWAS General Convention of Social Security all cite fair recruitment. However, the ECOWAS Protocol on the Free Movement of Persons, Residence and Establishment is silent on recruitment.<sup>3</sup>

Article 3 of the Protocol on Freedom of Movement and Rights of Establishment of Nationals of Members States of the Economic Community of Central African States (ECCAS) established the right of freedom of movement for workers – subject to national legislation – but is silent on recruitment practices or costs.<sup>4</sup>

1 The AU Protocol on Free Movement of Persons in Africa has been signed by 32 countries and ratified by Mali, Niger, Rwanda, and Sao Tome and Principe (as of July 2019).

2 This section is based on Z. Jinnah, “Regional Study on Defining Recruitment Fees and Related Costs” (unpublished).

3 The ECOWAS Protocol the Free Movement of Persons, Residence and Establishment is available at: [http://documentation.ecowas.int/download/en/legal\\_documents/protocols/PROTOCOL%20RELATING%20TO%20%20FREE%20MOVEMENT%20OF%20PERSONS.pdf](http://documentation.ecowas.int/download/en/legal_documents/protocols/PROTOCOL%20RELATING%20TO%20%20FREE%20MOVEMENT%20OF%20PERSONS.pdf).

4 The ECCAS Protocol on Freedom of Movement and Rights of Establishment of Nationals of Members States is available at: <http://www.visafree.ccpau.org/wp-content/uploads/2016/12/Protocol-relating-to-Freedom-of-Mvt-and-Right-of-Establishment-in-ECCAS.pdf>.

The Southern African Development Community (SADC) adopted the Labour Migration Policy Framework<sup>5</sup> in 2014 and thereafter the associated 2016–2019 Action plan<sup>6</sup>. The former includes:

- ▶ a recognition of the need for “[h]armonisation of legislations & policies on recruitment & conditions of employment of SADC migrant workers & third country nationals towards a minimum floor of rights”; and
- ▶ efforts to improve data collection by “[m]apping socio-economic actors involved in the organisation of low-skilled migration (labour brokers, recruitment agencies, ethnic networks and associations)”; and
- ▶ efforts to regulate informal and illegal brokers, agencies and work.

The Common Market for Eastern and Southern Africa (COMESA) Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence (adopted in 2001) does not specifically mention recruitment, but does envisage the progressive achievement of free movement.<sup>7</sup>

Finally, the Protocol on the Establishment of the East African Community (EAC) Common Market, which entered into force on 1 July 2010, contains provisions recognizing the free movement of workers (Art. 10). It further “provides for entitlement of workers in regard to application for employment, free movement in Partner States, conclude contracts of employment, and enjoy rights and freedoms of association”.

### 2.1.3 ILO standards and guidance

The ILO understanding of the fair recruitment of workers, including migrant workers, has evolved with changing realities in the world of work, from a state-centric, non-profit vision in 1919 towards a vision of public-private partnership, including with for-profit private employment agencies (PEAs). This conceptual evolution reflects the historical growth of private and for-profit labour recruitment.

The Employment Service Convention, 1948 (No. 88), thus called for “effective co-operation between the public employment service and private

employment agencies not conducted with a view to profit” (Art. 11). Under Convention No. 88, which has been ratified by 20 African countries, the employment service aims to “ensure effective recruitment and placement” (Art. 6), and shall “take appropriate measures to facilitate any movement of workers from one country to another which may have been approved by the governments concerned” (Art. 6(b)(iv)). The Employment Service Recommendation, 1948 (No. 83), stipulates that the employment service should “collect ... information relating to the applications for work and the vacancies which cannot be filled nationally, in order to promote the immigration or emigration of workers able to satisfy as far as possible such applications and vacancies”, and prepare and apply “inter-governmental bilateral, regional or multilateral agreements relating to migration” (Para. 27(2)).

The Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96) – now proposed for withdrawal (ILO 2019b) – enabled ratifying States to indicate whether they aimed for “the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies” or “the regulation of fee-charging employment agencies including agencies conducted with a view to profit” (Art. 2(1)).

Importantly, the same year, the International Labour Conference also adopted the Migration for Employment Convention (Revised), 1949 (No. 97) along with its Annexes and the Migration for Employment Recommendation (Revised), 1949 (No. 86). Both Annexes I and II define in identical terms the notions of recruitment, introduction and placement of migrant workers, and specify that individuals and entities can engage in these operations.<sup>8</sup> The notion of recruitment is broad and the terms of the Annexes are sufficiently flexible to allow more than one form of recruitment. In addition, the Annexes provide that the activities of PEAs should be supervised by the competent authority, and that contracts of employment should be supervised by Member States.

More recently, the purpose of the Private Employment Agencies Convention, 1997 (No. 181), is to “allow the operation of private employment

<sup>5</sup> The SADC Labour Migration Policy Framework is available at: [http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis\\_aba-ba/---ilo-pretoria/documents/meetingdocument/wcms\\_239821.pdf](http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_aba-ba/---ilo-pretoria/documents/meetingdocument/wcms_239821.pdf).

<sup>6</sup> Since the research was completed, SADC has developed the Labour Migration Action Plan (2020-2025)

<sup>7</sup> The COMESA Protocol has been ratified by only two Member States, and signed by three others.

<sup>8</sup> Article 7 of Convention No. 97 and Paragraphs 1(b–d), 13, 14 and 15 of Recommendation No. 86 deal with the recruitment, introduction and placement of migrants for employment. Annexes I and II of the Convention deal with organized migration for employment and contain similar substantive provisions, but differ in terms of coverage.



agencies as well as the protection of the workers using their services” (Art. 2(3)). Article 7 of Convention No. 181 provides that:

1. Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers.
2. In the interest of the workers concerned, and after consulting the most representative organizations of employers and workers, the competent authority may authorize exceptions to the provisions of paragraph 1 above in respect of certain categories of workers, as well as specified types of services provided by private employment agencies.
3. A Member which has authorized exceptions under paragraph 2 above shall, in its reports under article 22 of the Constitution of the International Labour Organization, provide information on such exceptions and give the reasons therefore.

Convention No. 181 has been ratified by Algeria, Ethiopia, Madagascar, Mali, Morocco, Niger, Rwanda and Zambia. The countries of the region vary in terms of the nature and extent of regulation of PEAs in law and practice.

While the protection of workers during the recruitment process has been a primary concern of the ILO over the past century, ILO efforts in this area have increased in intensity since the launch of the Fair Recruitment Initiative in 2014. The 2017 International Labour Conference resolution concerning fair and effective labour migration governance, recognized that fair recruitment is “essential to reducing migrant workers’ exposure to exploitation and abuse, gender-based violence, child and forced labour and trafficking in persons, and to improving skills and jobs matching both in origin and destination countries” (para. 9). The resolution calls for the implementation and promotion of the ILO Fair Recruitment Initiative, and of the General Principles and Operational Guidelines for Fair Recruitment of 2016, which have since been expanded by the adoption of the Definition of Recruitment Fees and Related Costs (ILO 2019). The resolution also refers to the Protocol of 2014 to the Forced Labour Convention, 1930, and the accompanying Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), as their implementation and promotion can support the prevention of recruitment abuses.

The 2014 Protocol stipulates that the measures to prevent forced or compulsory labour include “protecting persons, particularly migrant workers,

from possible abusive and fraudulent practices during the recruitment and placement process” (Art. 2(d)).<sup>9</sup> Recommendation No. 203 refers to preventive measures such as:

- 4(a) targeted awareness-raising campaigns, especially for those who are most at risk of becoming victims of forced or compulsory labour, to inform them, inter alia, about how to protect themselves against fraudulent or abusive recruitment and employment practices, their rights and responsibilities at work, and how to gain access to assistance in case of need.
- 4(i) promotion of coordinated efforts by relevant government agencies with those of other States to facilitate regular and safe migration and to prevent trafficking in persons, including coordinated efforts to regulate, license and monitor labour recruiters and employment agencies and eliminate the charging of recruitment fees to workers to prevent debt bondage and other forms of economic coercion.

It also refers to measures to eliminate abuses and fraudulent practices by labour recruiters and employment agencies as including (Para. 8):

- (a) eliminating the charging of recruitment fees to workers;
- (b) requiring transparent contracts that clearly explain terms of employment and conditions of work;
- (c) establishing adequate and accessible complaint mechanisms;
- (d) imposing adequate penalties; and
- (e) regulating or licensing these services.

In addition to the ILO’s labour standards, various guidance documents provide direction for the ILO and its constituents. The ILO Multilateral Framework on Labour Migration (2006) calls on governments in both origin and destination countries to “give due consideration to licensing and supervising recruitment and placement services for migrant workers in accordance with the Private Employment Agencies Convention, 1997 (No. 181), and its Recommendation (No. 188)” (para. 13). The 2004 International Labour Conference resolution concerning a fair deal for migrant workers in a global economy called for “promoting guidelines for ethical recruitment of migrant workers and exploring mutually beneficial approaches to ensure the adequate supply of skilled health and education personnel that serve the needs of both sending and receiving countries, including through bilateral and multilateral agreements” (para. 24).

<sup>9</sup> In Africa, the Protocol of 2014 to the Force Labour Convention, 1930, has been ratified by Côte d’Ivoire, Djibouti, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Namibia, Niger and Zimbabwe.

## ► 2.2 The recruitment of migrant workers: An expanded view

### 2.2.1 Overview

An expanded view of the recruitment of migrant workers involves analytically disentangling the recruitment, migration and employment aspects of the process, and analysing the practices of the various actors that contribute to each of these three aspects, including employers, recruiters and other service providers. The figure below suggests the key dimensions to consider for analysing the recruitment of migrant workers. Such dimensions need to be differentiated according to country of origin and country of employment, as well as by occupation, in addition to the personal characteristics of the worker, such as gender and level of education. The dimensions are interconnected, but may vary in relation to each other and can change over time. For example, a migrant worker in an irregular situation may have entered the country of destination on a non-work visa; may have initially had a work permit that expired and was not get renewed; or may be working outside the parameters of the work permit, for example for an employer other than the one indicated or for multiple employers. Even when the recruiter is formal, the worker may receive an informal job. For example, in many countries in the Middle East and parts of Asia, the PEAs supplying household workers are formalized and licensed, but domestic

workers are largely in informal employment, often lacking the basic protection of labour and social legislation, either because they are excluded from such laws or because the laws are inadequately implemented. We will consider in turn each of the analytical dimensions.

### 2.2.2 Recruitment-first vs migration-first pathways

The recruitment process enables workers to enter into, and exit from, employment relationships with employers. As per the ILO General Principles and Operational Guidelines for Fair Recruitment, recruitment includes “the advertising, information dissemination, selection, transport, placement into employment and – for migrant workers – return to the country of origin where applicable” (ILO 2019a, 12). Such an understanding of recruitment is broader than what is found in international labour standards. The concept of recruitment in the General Principles includes what Annexes I and II of Convention No. 97 refer to as “introduction”, namely operations for ensuring or facilitating the arrival in or admission to a territory of persons recruited internationally, as well as “placing”, meaning operations for ensuring or facilitating the employment of persons who have been introduced (Annex I

► **Figure. Key dimensions to consider in the recruitment of migrant workers**

Recruitment	Migration	Work and employment	Employer, recruiter and other service providers
<ul style="list-style-type: none"> <li>► Level: Direct or intermediated</li> <li>► Geographic scope: National or international</li> <li>► Fees and related costs: Borne by workers or not</li> <li>► Fairness: Extent of unfair practices</li> </ul>	<ul style="list-style-type: none"> <li>► Process: Regular or irregular</li> <li>► Status: Regular or irregular</li> <li>► Direct costs: Borne by workers or not</li> </ul>	<ul style="list-style-type: none"> <li>► Work: Acceptable or work that should be abolished</li> <li>► Employment: Formal or informal</li> </ul>	<ul style="list-style-type: none"> <li>► Type: Formal public, formal private, informal private, or household</li> <li>► Due diligence: Sufficient or insufficient</li> <li>► Smuggling of migrants: Yes or no</li> <li>► Trafficking in persons: Yes or no</li> </ul>

Art. 2; Annex II Art. 2). The General Principles are “intended to cover the recruitment of all workers, including migrant workers, whether directly by employers or through intermediaries. They apply to recruitment within or across national borders, as well as to recruitment through temporary work agencies, and cover all sectors of the economy” (ILO 2019a, 11). With respect to migrant workers, two dimensions can be disentangled: (i) whether migrant workers are recruited directly or indirectly, and (ii) whether they are recruited nationally or internationally. The recruitment process may either be directly carried out by the employing enterprise or intermediated through the involvement of labour recruiters.<sup>10</sup>

Migrant workers may be recruited either internationally or nationally. Migrant workers recruited internationally follow the recruitment-first pathway: they have a concrete offer of employment before entering the country of employment (ILO, 1999, para. 116). Depending on the circumstances, after their first job, workers recruited internationally may have the possibility of being recruited nationally for another job. Contracts for such workers “should be provided sufficiently in advance of departure from their country of origin” (ILO 2019a, 16).

Migrant workers recruited nationally follow the migration-first pathway, whereby they migrate prior to securing a job.

The provisions of the dedicated instruments on migrant workers apply to both the recruitment-first and the migration-first pathways. This means that they cover both government-sponsored and privately arranged recruitment, as well as workers who migrate outside such programmes in the search for employment. However, Annexes I and II of Convention No. 97 are specific to the recruitment-first pathway, as they only apply to migrant workers who have a concrete offer of employment prior to entry into the country of destination (ILO 2016, para. 97).

The recruitment-first pathway is typical when labour migration is organized, including through bilateral agreements between countries of origin and of employment. The recruitment-first pathway is relevant with respect to intracontinental migration, such as in the organized labour migration of mineworkers and farmworkers in Southern Africa. It is also relevant with respect to intercontinental migration, such as in the recruitment of migrant workers for employment in Europe (notably from North Africa), or the recruitment of workers for employment in the Arab States<sup>11</sup> (notably from East Africa, West Africa and the Indian Ocean). Workers “should be free to terminate their employment and, in the case of migrant workers, to return to their country. Migrant workers should not require the employer’s or recruiter’s permission to change employer” (ILO 2019a, 14). Restrictions on changing employers may exist, particularly in countries that have adopted a sponsorship system (*kafala* in Arabic), which can lead to abuses and exploitation, notably in the Arab States. Efforts have been undertaken to change such systems, including with ILO support.

The migration-first pathway is typical in countries that are part of areas with free movement of persons; it is also the pathway followed by workers who migrate irregularly for employment, whether within or outside Africa. Recognition of the rising importance of the free movement of persons has been reflected in more recent ILO instruments. Thus, according to ILO Definition of Recruitment Fees and Related Costs, “recruitment fees and related costs ... should not lead to direct or indirect discrimination between workers who have the right to freedom of movement for the purpose of employment, within the framework of regional economic integration areas” (ILO 2019a, 28). The national recruitment of migrant workers is particularly relevant for Africa, with the migration-first pathway popularly known as “seeking greener pastures” in English-speaking countries or as “going for an adventure” (*partir à l’aventure*) in French-speaking ones.

10 The ILO General Principles and Operational Guidelines for Fair Recruitment define labour recruiters as: “both public employment services and to private employment agencies and all other intermediaries or subagents that offer labour recruitment and placement services. Labour recruiters can take many forms, whether for profit or non-profit, or operating within or outside legal and regulatory frameworks” (ILO 2019a, 12).

11 The “Arab States” are defined by the ILO as those countries covered by the ILO Regional Office for Arab States in Beirut. These countries are Bahrain, Iraq, Jordan, Kuwait, Lebanon, the Occupied Palestinian Territory, Oman, Qatar, Saudi Arabia, Syria, the United Arab Emirates and Yemen. However, for the purposes of this report, the Arab States will be defined as Jordan, Lebanon and the six countries of the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates).

The rising importance of the free movement of persons is clearly seen in the policy frameworks of the Africa region. The African Union Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment – signed by 32 countries – has been ratified by only four countries (as at July 2019), mostly owing to its recent adoption. According to the 2018 Africa Visa Openness Index, open policy (measuring no-visa policies) was 19 per cent Africa-wide. The top performing regional economic communities with regards to visa openness in their subregion were ECOWAS (100 per cent), the EAC (90 per cent), the Arab Maghreb Union (60 per cent) and the SADC (56 per cent). Of the continent's top 20 most visa-open countries, none were in Central Africa.

### 2.2.3 Recruitment fees, recruitment-related costs and the direct costs of labour migration

The principle that workers should not bear recruitment fees and related costs has been upheld in international labour standards since 1919 (ILO 2018c). Convention No. 181 stipulates that PEAs “shall not charge directly or indirectly, in whole or in part, any fees or costs to workers” (Art. 7(1)). The ILO Domestic Workers Convention, 2011 (No. 189), stipulates that governments shall “take measures to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers” (Art. 15). The Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203) calls for the “coordinated efforts to regulate, license and monitor labour recruiters and employment agencies and eliminate the charging of recruitment fees to workers to prevent debt bondage and other forms of economic coercion” (Para. 4). Article 7(2) of Convention No. 97, and Article 4 of Annex I and Article 4(1) of Annex II of this Convention, state that services provided by public employment services for migrant workers should be rendered free. Charging workers for purely administrative costs associated with recruitment, introduction and placement by public employment agencies is prohibited under Article 4(2) of Annex II to Convention No. 97.

The ILO General Principles and Operational Guidelines on Fair Recruitment, reinforces the provisions of these labour standards, stating that workers “should not be charged any fees or related recruitment costs by an enterprise, its business partners or public employment services for recruitment or placement, nor should workers have to pay for additional costs related to recruitment” (ILO 2019a, 20). According to the ILO Definition of Recruitment Fees and Related Costs, which is to be read in conjunction with the General Principles and Operational Guidelines, recruitment fees and related costs “refer to any fees or costs incurred in the recruitment process in order for workers to secure employment or placement, regardless of the manner, timing or location of their imposition or collection” (ILO 2019a, 28.).

According to the ILO Definition of Recruitment Fees and Related Costs, “[r]ecruitment fees or related costs should not be collected from workers by an employer, their subsidiaries, labour recruiters or other third parties providing related services. Fees or related costs should not be collected directly or indirectly, such as through deductions from wages and benefits” (ILO 2019a, 28).

The Definition further specifies:

Recruitment fees include:

- a. payments for recruitment services offered by labour recruiters, whether public or private, in matching offers of and applications for employment;
- b. payments made in the case of recruitment of workers with a view to employing them to perform work for a third party;
- c. payments made in the case of direct recruitment by the employer; or
- d. payments required to recover recruitment fees from workers.

These fees may be one-time or recurring and cover recruiting, referral and placement services which could include advertising, disseminating information, arranging interviews, submitting documents for government clearances, confirming credentials, organizing travel and transportation, and placement into employment (ILO 2019a, 28).

Recruitment-related costs include those “initiated by an employer, labour recruiter or an agent acting on behalf of those parties; required to secure access to employment or placement; or imposed during the recruitment process” (ILO 2019a, 29).



They may include:

- i. **Medical costs:** payments for medical examinations, tests or vaccinations;
- ii. **Insurance costs:** costs to insure the lives, health and safety of workers, including enrolment in migrant welfare funds;
- iii. **Costs for skills and qualification tests:** costs to verify workers' language proficiency and level of skills and qualifications, as well as for location-specific credentialing, certification or licencing;
- iv. **Costs for training and orientation:** expenses for required trainings, including on-site job orientation and pre-departure or post-arrival orientation of newly recruited workers;
- v. **Equipment costs:** costs for tools, uniforms, safety gear; and other equipment needed to perform assigned work safely and effectively;
- vi. **Travel and lodging costs:** expenses incurred for travel, lodging and subsistence within or across national borders in the recruitment process, including for training, interviews, consular appointments, relocation, and return or repatriation;
- vii. **Administrative costs:** application and service fees that are required for the sole purpose of fulfilling the recruitment process. These could include fees for representation and services aimed at preparing, obtaining or legalizing workers' employment contracts, identity documents, passports, visas, background checks, security and exit clearances, banking services, and work and residence permits (ILO 2019a, 29, emphasis in original).

According to the draft ILO/World Bank Guidelines for the collection of statistics for SDG Indicator 10.7.1, recruitment fees and related costs should generally cover items such as:

- ▶ recruiter/job broker charges
- ▶ visa costs
- ▶ inland transportation expenses
- ▶ international transportation
- ▶ passport fees
- ▶ medical fees
- ▶ insurance fee
- ▶ security clearance fee
- ▶ pre-departure briefing
- ▶ language training

- ▶ skills assessment fee
- ▶ contract approval fee
- ▶ welfare fund fee; and
- ▶ interest payments on debt incurred to cover recruitment costs, among others (ILO and World Bank 2019, para. 24).

The findings from an ILO global comparative study on the definition of recruitment fees and related costs suggest that most African countries in the study prohibit charging fees to workers (ILO 2018c). Such prohibitions may be for both national and international recruitment, as in Algeria, Mali, Morocco, Namibia, South Africa, Zambia and Zimbabwe. The prohibition may be specific to international recruitment, as in Tunisia. Other countries, including Ethiopia, Ghana, Kenya, Nigeria and Uganda, do not prohibit recruitment fees, but do regulate them. For the purposes of the ILO global comparative study, "regulating fees or related costs" was used to mean:

- ▶ articulating a general policy statement that allows labour recruiters to charge fees for their services; or
- ▶ capping of the fees, that is, prescribing a maximum amount to be paid by the hired worker or jobseeker;
- ▶ detailing costs and charges that should not be charged to the workers or describing which costs are to be charged to employers, workers and labour recruiters (ILO 2018c, para. 31).

In general, the dominant forms of "regulating fees or related costs" are the placement of a cap on the payment of recruitment fees (for example, a maximum amount equivalent to one month's salary) and the identification of several categories of costs that can be charged to the worker. Appendix II of this report provides selected references to recruitment fees and related costs in national laws and policies across Africa.

Findings from the field work for this report suggest that the concept of "recruitment fees and related costs" is often used in the sense of "direct costs of labour migration"<sup>12</sup>, but the two concepts should not be used interchangeably. Within the recruitment-first pathway, the two concepts can be considered as approximating each other, although there is no formal definition of the direct costs of

<sup>12</sup> Based on stakeholder interviews.

labour migration. But within the migration-first pathway, the two concepts can diverge significantly, as per the findings from the case studies, because the migration process is not fully subsumed in the recruitment process. As a result, migrant workers recruited nationally typically end up bearing a significant share of the direct costs of labour migration because such costs were incurred prior to the start of the recruitment process. Such costs may include travel and transportation costs, as well as the cost of return.

In other words, the migration-first pathway typically leads to workers directly absorbing a significant share of the direct costs of labour migration. For example, in the recruitment-first pathway, travel and lodging costs are part of recruitment fees and related costs, and as such should not be collected from workers. In the migration-first pathway, however, travel and lodging are costs borne by the workers. Thus, an employer who recruits a migrant worker locally is likely to incur lower costs than if the migrant worker were recruited internationally. Because the employer faces a shorter, less complex recruitment chain, the recruitment fees are lower, and because the worker is already in the country, the employer pays lower recruitment-related costs, particularly in relation to travel and transportation.<sup>13</sup>

In the African context, a broad range of actors – whether for profit or non-profit, or operating within or outside legal and regulatory frameworks – might charge workers fees and other costs during the migration process within the migration-first pathway. The costs borne by workers beyond the scope of the recruitment process may vary greatly depending on whether workers migrate regularly, migrate irregularly or are trafficked. Within irregular migration routes, for example, migrant smugglers may charge for transportation, guiding and escorting during irregular border crossing, accommodation along the route, planning and contacts along the route, information and bribes, and travel documents that may be counterfeit, false or fraudulently obtained. High smuggling fees – for example, approximately US\$4,000 for the Eritrea–Sudan/Ethiopia–Libya/

Egypt land route – can push workers into situations of debt bondage or forced labour (UNODC 2018).

National recruitment of migrant workers is frequent in ECOWAS and the EAC, whether directly or through (typically) informal recruiters. National recruitment is also common in countries with large numbers of migrants, regardless of their migration status. Migrants in an irregular situation may be recruited nationally – including by formal sector employers – but their employment relationship remains informal, which increases their vulnerability.

One effect of the migration-first pathway is to potentially shift the cost burden of recruitment to workers. A narrow focus on the recruitment-first pathway would render invisible the dynamic nature of recruitment costs and related fees, and the importance of considering them in relation to the more general costs, benefits and risks borne by workers and other stakeholders during the labour migration process. It can thus be inferred that if the incidence of the migration-first pathway increases, then SDG Indicator 10.7.1 – “recruitment cost borne by employee as a proportion of monthly income earned in country of destination” – would increasingly underestimate the direct costs of labour migration borne by migrant workers.

## 2.2.4 Migration process and migration status

The migration process may be fraught with significant dangers for persons migrating irregularly. According to the Global Migration Group (2017, 6–7):

Migrants are often obliged to employ dangerous forms of transport or to travel in hazardous conditions. Many will make use of smugglers and other types of facilitator, some of whom may place them in situations of exploitation or subject them to other forms of abuse. Some may be at risk of trafficking as they move. During their journeys, migrants may lack water or adequate food, face violence or have no access to medical care. Many migrants spend long periods in transit countries, often in irregular and precarious conditions, unable to access justice and at risk of a range of human rights violations and abuses, including sexual and gender-based violence and treatment which may amount to torture and

<sup>13</sup> The issue of costs for workers journeying without having entered into a contract or having accepted an offer of definite employment is addressed in the Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (No. 100), which calls for “making provision for reducing travelling expenses to a minimum” (Para. 7(b)), and provides for free medical examinations for migrant workers (Para. 8).

other cruel, inhuman or degrading treatment or punishment. A range of practices may put the health and safety of migrants at risk and expose them to human rights violations. These include: closure of borders; denial of access to effective screening and identification; arbitrary rejection at the border; collective expulsion; violence by State officials and other actors (including criminals and civilian militias); cruel, inhumane or degrading reception conditions; denial of humanitarian assistance; and failure to separate the delivery of services from immigration enforcement.

A visible example of irregular migration is migration from the African continent to Western Europe through the Central Mediterranean Route, given the documented abuses, disappearances and deaths along the journey. Yet the migration of African nationals to Europe is far more likely to be regular than irregular, and irregular migration to Europe has decreased in recent years (IOM 2019a). Most European Union (EU) residence permits issued for Northern and Western African nationals over 2011-2017 were for family reunification. In that period, education permits increased by 28 per cent, whereas work permits decreased by 50 per cent.

Among migrant workers in an irregular situation it is important to distinguish those who migrated irregularly from those who travelled regularly but later ended up in an irregular situation. Based on examples from the case studies, these latter individuals include persons traveling on a tourist visa or student visa who have overstayed their visa and engaged in employment without having the requisite documentation, such as a work permit. In addition, some persons migrate regularly for employment, having a work permit, but eventually overstay their visa or change employers without having the formally required approvals. Focus group discussions in West Africa revealed a rise in the provision of services by companies such as travel agencies that facilitate the issuance of travel visas for stated purposes such as participating in a conference abroad, but actually with the tacit understanding that the traveller's real purpose for traveling is finding employment abroad. Various actors have facilitated irregular migration to circumvent migration bans introduced by governments, particularly in relation to domestic workers; thus undermining the effectiveness of the bans.

Irregular migration is to a large extent the result of the fact that the "demand [for migrant workers] has not been matched by a corresponding increase in

regular migration channels. As a result, employers often resort to migrant workers in an irregular situation to fill the gaps" (Committee on Migrant Workers 2013, para. 1). The Committee on Migrant Workers (2013, para. 2) has warned:

As a deterrent for migrant workers and members of their families in an irregular situation to enter or stay on their territory, States increasingly resort to repressive measures, such as criminalization of irregular migration, administrative detention and expulsion. Criminalization of irregular migration fosters and promotes public perceptions that migrant workers and members of their families in an irregular situation are "illegal", second-class individuals, or unfair competitors for jobs and social benefits, thereby fuelling anti-immigration public discourses, discrimination and xenophobia. Moreover, migrant workers and members of their families in an irregular situation generally live in fear of being reported to the immigration authorities by public service providers or other officials, or by private individuals, which limits their access to fundamental human rights, as well as their access to justice, and makes them more vulnerable to labour and other types of exploitation and abuse.

Irregular labour migration and the employment of workers in an irregular situation have often been referred to in terms of legality, including in the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169). References to the legality of entry, stay and employment of migrant workers should not be interpreted in a way that undermines migrant workers' rights. Crucially, Convention No. 143 stipulates in Article 1 that each ratifying State "undertakes to respect the basic human rights of all migrant workers". So, even though the definitions of "migrant worker" in Convention No. 97, Recommendation No. 86 and Part II of Convention No. 143 are restricted to "persons who migrate or who have migrated from one country to another with a view to being employed otherwise than in their own account" and includes only persons "regularly admitted" as migrant workers, Part I of Convention No. 143 applies to all migrant workers, including those in an irregular situation, and addresses, together with several provisions of the Migrant Workers Recommendation, 1975 (No. 151), questions of irregular migration and the protection of irregular-status migrant workers.

Since terminology around migration is seldom neutral, the current report will refer to “irregular migration” and to “migrant workers in an irregular situation”, avoiding terms such as “illegal migration” or “illegal migrant workers”. This is consistent with several UN documents, including United Nations General Assembly resolution 3449 of 1975 and the ILO’s 2004 resolution concerning a fair deal for migrant workers in a global economy. As the Committee on Migrant Workers (2013, para. 3) has noted, “The 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.”

The substantial number of migrants in an irregular situation points to the importance of regularizing their status. According to the CEACR:

[T]he uncertainty that some migrants in an irregular situation face for long periods of time in trying to regularize that status ... makes them vulnerable to abusive conditions and exploitation including in the workplace. Mindful that the consequences of the slowness of proceedings and the inherent difficulties in detecting illegal employment of migrants could negatively impact on the migrant worker in an irregular situation, the Committee reiterates the importance of a prompt decision as to the assessment of their circumstances and as to whether or not to regularize them, as well as their humane treatment and respect for their basic human rights. It is also important that victims or persons in particular conditions of vulnerability enjoy this kind of specific protection, especially in the context of pre-trial investigations (ILO 2016, para. 325).

## 2.2.5 Work and employment

The “employment relationship” refers to a legal relationship between employee and employer, whereby the employee (often referred to as a “worker”) performs work for the employer under certain conditions in return for remuneration. The employment relationship is “the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law and social security. It is the key point of reference for determining the nature and extent of employers’ rights and obligations towards their workers” (ILO 2005a, para. 5). The Employment Relationship Recommendation, 2006

(No. 198), refers to “the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application” (Preamble). National definitions of the employment relationship should specify clearly the conditions for determining the existence of an employment relationship, such as subordination or dependence. “Triangular” employment relationships arise when workers employed by an enterprise (the “provider”) perform work for a third party (the “user”) that assigns their tasks and supervises the execution of these tasks. Workers in triangular employment relationships should enjoy the same level of protection as those in bilateral employment relationships.

The case studies reveal that triangular employment relationships are on the rise in Africa, including for servicing the public sector. They typically lead to workers having lower levels of protection.

In practice, migrant workers may be recruited into work that should be abolished. The ILO General Principles and Operational Guidelines for Fair Recruitment, for example, specify that “[t]he competent authorities should take specific measures against abusive and fraudulent recruitment methods, including those that could result in forced labour or trafficking in persons”, and that recruitment should be consistent with the prevention and elimination of forced labour and child labour (ILO 2019, 12–13). The notion of work that should be abolished was introduced in the framework of decent work indicators (ILO 2015).

The Abolition of Forced Labour Convention, 1957 (No. 105), provides for suppressing and not making use of any form of forced or compulsory labour:

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a method of mobilising and using labour for purposes of economic development;
- (c) as a means of labour discipline;
- (d) as a punishment for having participated in strikes;
- (e) as a means of racial, social, national or religious discrimination (Art. 1).



The Minimum Age Convention, 1973 (No. 138), provides for the effective abolition of child labour and for “rais[ing] progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons” (Art. 1). It stipulates that the minimum age “shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years”, with the possibility for a Member State whose economy and educational facilities are insufficiently developed to initially specify a minimum age of 14 years, after consultation with the organisations of employers and workers concerned, where such exist (Art. 2). The Worst Forms of Child Labour Convention, 1999 (No. 182), calls for “immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency” (Art. 1).

According to the ILO (2017a), Africa is the region where modern slavery is most prevalent, victimizing 7.6 individuals per 1,000 people: 10.7 per thousand among women and girls, and 4.4 per thousand among men and boys. About 63 per cent of modern slavery victims are in forced labour, including forced labour imposed by private actors, forced sexual exploitation, and State-imposed forced labour. Women and girls are six times more likely to be in forced marriages than men and boys (8.2 versus 1.3 per thousand). Men and boys are slightly more likely to be in forced labour (3.1 versus 2.5 per thousand). Among the means of coercion into forced labour, sexual violence mainly targeted women and girls. An estimated 54 per cent of victims of forced labour exploitation are held in debt bondage, with the highest shares among those forced to work in agriculture, domestic work or manufacturing. A high share of African victims of modern slavery are exploited outside their country of residence.

According to the ILO (2017b), 19.6 per cent of children aged 5 to 17 in Africa are in child labour, and 8.6 per cent in hazardous work. Africa has both the highest percentage and highest absolute number

of children in child labour in the world; sub-Saharan Africa was also the only region in the world with comparable data available that witnessed a rise in child labour between 2012 and 2016. Boys are more likely than girls to be in child labour, whereas girls are more likely than boys to perform household chores, which is not counted in child labour estimates. An estimated 85 per cent of child labour is in agriculture, accounting for about 61.4 million children. Most are in contributing family labour. Situations of state fragility and crisis exacerbate the risk of child labour. A significant share of children in child labour are migrants.

## 2.2.6 Enterprises, recruiters and other service providers<sup>14</sup>

Migrant workers in Africa are typically employed in the private sector, although in some countries there is significant employment of migrant workers in the public sector.<sup>15</sup> Labour recruitment may be provided by the public employment service (PES) or by private employment agencies (PEAs) and at times in cooperation. Cooperation between the PES and PEAs can be promoted through measures including, as per Recommendation No. 188 (para. 17):

- (a) pooling of information and use of common terminology so as to improve transparency of labour market functioning;
- (b) exchanging vacancy notices;
- (c) launching of joint projects, for example in training;
- (d) concluding agreements between the PES and PEAs regarding the execution of certain activities, such as projects for the integration of the long-term unemployed;
- (e) training of staff;
- (f) consulting regularly with a view to improving professional practices.

The changing realities of labour recruitment, including for migrant workers, have led the ILO to increasingly use the concept of the “labour

<sup>14</sup> In the context of recruitment, the term “enterprise” has been used to refer to employers, labour recruiters other than public employment services, and other service providers involved in the recruitment process. The term “employer” refers to a person or an entity that engages employees or workers, either directly or indirectly (ILO 2019a).

<sup>15</sup> In the Seychelles, for example, in the second quarter of 2019, migrants represented 12.3 per cent of workers in the parastatal sector, mainly in administrative and support services, and 5.7 per cent of workers in the government sector, mainly in education and human health and social work. Women represented 3 per cent of migrant workers in the parastatal sector, compared with 38.5 per cent of migrant workers in the government sector.

recruiter”, in addition to that of PES’s and PEAs.<sup>16</sup> The General Principles and Operational Guidelines for Fair Recruitment clarify that the term “labour recruiter” “refers to both public employment services and to private employment agencies and all other intermediaries or subagents that offer labour recruitment and placement services. Labour recruiters can take many forms, whether for profit or non-profit, or operating within or outside legal and regulatory frameworks” (ILO 2019, 12).

Recruiters may be either formal, whether in the public or private sector, or informal in the private sector. They may be for-profit or non-profit. Whether a labour recruiter is for-profit or non-profit is different from the question of whether it charges fees, since non-profit institutions may charge fees. A purpose of Convention No. 181 is to “allow the operation of private employment agencies as well as the protection of the workers using their services” (Art. 2(3)), without any specific reference to whether such agencies are for profit or not.

Given the challenges to fair recruitment and decent work in the public and private sectors, labour recruitment has been increasingly privatized as part of the broader privatization trend characteristic of the dominant development paradigm of recent decades. PEAs that provide services of matching job offers and applications for employment do not become a party to the employment relationship, but may still contribute to recruitment and placement processes within the public and private sectors, depending on the country. PEAs contributing to the recruitment and placement of workers across borders may have specific official regulations that are more stringent. PEAs that directly employ workers to make them available to user enterprises – and thus become a party to the employment relationship – have also become increasingly active in both the public and private sectors, notably with respect to cleaning and security services. PEAs are concentrated in commercially viable recruitment sectors, and both employers and jobseekers often perceive them as more responsive than a supposedly dysfunctional or under-resourced PES, even some actors are potentially exploitative.

Neither the assumption that the private sector is more competent and less corrupt than the public sector, nor the assumption that PEAs are more competent and less corrupt than the staff responsible for recruitment within other private sector enterprises, are necessarily warranted in all contexts. As revealed in the fieldwork, although these assumptions may be accurate in many cases, concerns over PEAs have been raised across the region regarding opaque and substandard terms and conditions of employment – including employment for migrant workers – as well as corrupt political influence regarding the choice of PEAs used for employment in the public sector. For example, PEAs that directly employ workers to make them available to user enterprises may often be referred to as “temporary employment agencies”, but workers often remain stationed in the same user enterprise for years, notwithstanding certain contractual interruptions to avoid the continuity of service that would entitle the workers to a permanent contract in the user enterprise, as per certain legislative frameworks.

The recruitment chains of migrant workers in Africa vary in size and complexity. The longer the recruitment chain, the more layers it has in terms of recruitment agents and subagents. The more complex the chain, the more difficult it is to regulate and monitor its various actors, including actors who are not formally agents, such as when leaders or members of the community or extended family provide recruitment services. The case studies reveal a diversity of formal and informal recruitment actors and processes. Formal and intermediated international recruitment is particularly relevant for workers recruited to the Arab States, including domestic workers, personal services workers, construction workers, drivers and protective service workers. It is also relevant for workers in some intracontinental migration corridors, such as Lesotho–South Africa, notably for mineworkers and agricultural workers. Formal international recruitment is also important for some categories of workers in high-skill occupations, such as managers and professionals, whether placed in Africa or abroad, including in North America and Europe. Such migrant workers,

16 The concept of the labour recruiter – initially introduced in the now-abrogated Recruiting of Indigenous Workers Convention, 1936 (No. 50) – has become relevant at the global level to account for the diversity of recruitment in practice. The Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), calls for the “coordinated efforts to regulate, license and monitor labour recruiters and employment agencies” (Para. 4), and for governments to “take measures to eliminate abuses and fraudulent practices by labour recruiters and employment agencies” (Para. 8).

often referred to as “expatriates”, are typically less likely to be in vulnerable situations. Informal international recruitment can be important where workers enjoy free movement, such as for intraregional migrants in ECOWAS, notably for employment in agriculture and domestic work.

### 2.2.7 Due diligence in the recruitment process

The complexity and length of recruitment chains and the resulting vulnerability of workers to abuse have brought into question the responsibility of the final employer or enterprise that initiated the recruitment of the worker. The ILO General Principles and Operational Guidelines for Fair Recruitment specify that enterprises and PES’s should “respect human rights when recruiting workers, including through human rights due diligence assessments of recruitment procedures, and should address adverse human rights impacts with which they are involved” (ILO 2019a, 19). “Due diligence” refers to an enterprise’s “ongoing process which aims to identify, prevent, mitigate, and account for how it addresses the adverse human rights impacts of its own activities or which may be directly linked to its operations, products or services by its business relationships” (ILO 2019a, 11–12). The UN Guiding Principles on Business and Human Rights provide further elaboration on human rights due diligence, particularly principles 17–21. The International Organization for Migration’s (IOM’s) International Recruitment Integrity System (IRIS) Standard – a voluntary framework for ethical recruitment – explicitly refers to due diligence under its general principle on respect for ethical and professional conduct:

CRITERION B.2: The labour recruiter performs ongoing due diligence on employers and end-user employers to ensure their continued and uninterrupted compliance with applicable laws and labour standards

CRITERION B.3: The labour recruiter performs ongoing due diligence on recruitment business partners and subcontractors to ensure their continued and uninterrupted compliance with applicable laws and the IRIS Principles (IOM n.d.).

Some aspects of IRIS can be further elaborated to avoid a narrow understanding of human rights due diligence, particularly in ensuring that

workers – whether employed by the labour recruiter or only recruited by it – are not recruited into jobs in which their fundamental rights and/or rights at work are violated. For example, IRIS criterion A.4 – “[t]he labour recruiter does not restrict migrant workers’ freedom of association” – is silent regarding the right of employees of the labour recruiter to enjoy freedom of association, and regarding the right of recruited migrant workers to enjoy freedom of association in the jobs they are placed into. This stands in contrast with Convention No. 181, which provides for ensuring that workers recruited by PEAs are not denied the right to freedom of association and the right to bargain collectively (Art. 4). These are important issues, particularly when migrant workers are recruited for employment in jobs in which basic rights, including trade union rights, are systematically violated, potentially throughout the country of employment.

Findings from the case studies reveal important deficits in human rights due diligence by enterprises and PES’s, typically because of limited capacity, but also because of lack of willingness in many cases. Moreover, labour recruiters often have a narrow conception of the adverse human rights impacts that they may cause or contribute to through their activities. For example, a major multinational labour recruiter in Southern Africa has a policy against sexual harassment for its own staff, but not for the workers that it recruits and places. Moreover, its anonymous tip-offs service, administered by a major multinational professional services network, explicitly informs workers not to report sexual harassment, nepotism and racism. In Ghana, leaders of established PEAs expressed divergent views regarding the role that their enterprises need to have regarding due diligence, ranging from a majority view placing the onus of responsibility on official authorities in countries of origin and destination, to a minority view assuming greater responsibility for due diligence because of official authorities’ limited capacity and practice in that regard. The limited conduct of due diligence is often related to the size, contacts and visibility of the enterprise, in that smaller enterprises with more limited contacts and less public scrutiny are less likely to do proper due diligence and instead opt for a minimalistic approach that places the responsibility on other actors.

## 2.2.8 Fair recruitment and unfair recruitment

Based on a review of the literature and the case studies, this section addresses some forms of unfairness in recruitment. The various forms of unfairness in recruitment are not independent of each other and may partially overlap; the distinction between them, however, is useful for a better understanding of unfair recruitment practices. The conceptualization of fair recruitment implies the conceptualization of its antithesis; this, however, is seldom done explicitly.<sup>17</sup>

Outside of international labour standards and the ILO indicators of forced labour, an ILO project has proposed operational indicators of trafficking in persons, including deceptive recruitment, coercive recruitment and recruitment by abuse of vulnerability (ILO 2009). The existence of any of these three forms of unfairness in recruitment is not necessarily synonymous with human trafficking, as it depends, operationally, on the relative strength of specific indicators. The operational definitions of these three forms of unfairness in recruitment are given below,<sup>18</sup> with some updates to the terminology in relation to the (ir)regularity of migration and the (in)formality of employment.

**Deceptive recruitment** refers to recruitment in which the worker is deliberately caused to believe something that is not true. The worker may be deceived about the nature of the job, the location or the employer; conditions of employment; the content or formality of employment; family reunification; housing and living conditions; legal documentation or obtaining regular migration status; travel and recruitment conditions; wages/earnings; promises of marriage or adoption; or access to education opportunities.

**Coercive recruitment** refers to recruitment imposed on the worker under the threat of penalty and to which the worker does not agree voluntarily. It may include the infliction of violence on victims; abduction, forced marriage, forced adoption or the selling of the victim; confiscation of documents; debt bondage; isolation, confinement or surveillance; threat of denunciation to authorities; threats of violence against the victim; threats to inform family, community or the public; violence against family (threatened or actual); or withholding of money.

**Abusive recruitment** refers to recruitment in which the position of vulnerability of the worker is abused. This vulnerability may be related to: family situation; irregular status situation; lack of education (incl. language); lack of information; control of exploiters; economic reasons; false information about law, attitude of authorities; false information about successful migration; personal situation; psychological and emotional dependency; relationship with authorities/irregular situation; abuse of cultural/religious beliefs; difficulties in the past; or difficulty to organize the travel.

Findings from the case studies suggest that other forms of unfairness in recruitment include discriminatory recruitment, corrupt recruitment, fake recruitment and worker fee-charging during recruitment. As noted earlier, the various forms of unfairness in recruitment are not necessarily mutually exclusive or independent. A specific recruitment process may involve more than one form of unfairness. For example, within the same recruitment process a worker may be charged recruitment fees and related costs by PEAs; induced to bribe decision-makers to increase their chance of being recruited, and be selected on discriminatory grounds, such as religion or political opinion. Tentative descriptions of these forms of unfairness in recruitment are provided below.

<sup>17</sup> Examples from international labour standards include:

- The Indigenous and Tribal Peoples Convention, 1989 (No. 169), provides for measures to ensure that “workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude” (Art. 3(c)).
- Convention No. 181 refers to preventing abuses and fraudulent practices in recruitment through bilateral agreements (Art. 8(1)).
- Convention No. 182 refers to the forced or compulsory recruitment of children for use in armed conflict as one of the worst forms of child labour (Art. 3(a)).
- Convention No. 189 refers to preventing abuses and fraudulent practices in recruitment of domestic workers (Art. 15(d)).
- The Protocol of 2014 to the Forced Labour Convention, 1930, refers to “protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process” (Art. 2(d)).
- The HIV and AIDS Recommendation, 2010 (No. 200), stipulates that real or perceived HIV status should not be a ground of discrimination preventing the recruitment of workers (Para. 10).
- Recommendation No. 203 provides measures to eliminate abuses and fraudulent practices by labour recruiters and employment agencies (Para. 8).

<sup>18</sup> Based on ILO 2009.



**Discriminatory recruitment** refers to recruitment in which equality of opportunity and treatment in recruitment is nullified or impaired. Discrimination may be on grounds such as: race, colour, sex, religion, political opinion, national extraction, social origin, age, disability, family responsibilities, language, matrimonial status, nationality, property, sexual orientation, gender identity and expression, sexual characteristics, state of health or trade union affiliation.

**Corrupt recruitment** refers to recruitment in which the recruiter or a third party influencing the recruitment acts dishonestly in return for money or personal gain. Such acts may include offering, promising, giving, requesting or accepting bribes, such as bribes from workers or bribes to employers or government officials.

**Fake recruitment** refers to recruitment in which the PEA or the advertised job do not exist, or in which the job exists but what is claimed to be the recruitment process is actually unrelated to the job. Fake recruitment often involves scammers posing as labour recruiters. Recommendation No. 188 stipulates that “[t]he competent authority should combat unfair advertising practices and misleading advertisements, including advertisements for non-existent jobs” (Para. 7).

**Worker fee-charging during recruitment** refers to recruitment in which recruitment fees and related costs are borne by the worker.

The case study analysis suggests that various forms of unfairness in recruitment are widespread across the region, particularly in the case of recruitment across borders, whether by formal or informal recruiters, and whether within Africa or in other regions. Unfairness in recruitment is often associated with exacerbated vulnerability and decent work deficits in employment, as the literature and case study findings confirm. Yet this is not always the case. For example, in a situation wherein decent jobs are scarce, workers may be willing to pay recruitment fees and related costs and even bribes, if necessary, to secure a job with good terms and conditions of employment. A “good” job may be secured through discriminatory recruitment, meaning that the person hired would not have occupied the job under conditions of equality of opportunity. Given the complexity of unfairness in recruitment, however, its conceptualization and empirical operationalization, as well as its relationship with terms and conditions of employment, would benefit from further consideration.









3

**The recruitment  
of migrant workers  
in law and policy:  
Findings from  
the case studies**

This chapter presents findings from the 13 case study countries regarding law and policy related to the recruitment of migrant workers to assess how the global, regional and subregional commitments discussed in the previous section are translated at the national level. The case studies reflect the expanded view of the recruitment of migrant workers proposed above, with differing emphasis according to specific national contexts. Each case study is organized around six headers for readability and ease of reference:

- ▶ labour and migration overview;
- ▶ policy on recruitment of migrant workers;
- ▶ regulation of employment;

- ▶ regulation of recruitment;
- ▶ recruitment services, fees and related costs; and
- ▶ unregulated recruitment and migration in abusive conditions.

The case studies draw extensively on legislation and policy documents. For ease of reading, however, quotation marks are not used in this section. Some of the case studies provide additional information regarding the recruitment of migrant workers in practice, gathered through desk research, key informant interviews and focus group discussions.

## ▶ 3.1 North Africa

### 3.1.1 Tunisia<sup>1</sup>

#### Labour and migration overview

Most Tunisian migrants reside in Western Europe. According to UNDESA (2019) estimates, in 2019 there were about 813,000 Tunisian migrants abroad (44 per cent women), with 53 per cent in France, 16 per cent in the United States, 13 per cent in Italy and 5 per cent in Germany. Meanwhile, Tunisia hosted about 58,000 migrants (48 per cent women), with 18 per cent from Algeria, 16 per cent from Libya, 15 per cent from France and 10 per cent from Morocco. Tunisia is a significant origin and transit country for migrants and refugees arriving in Italy by sea, through what is known as the Central Mediterranean route (Frontex 2019). Nationals of Tunisia, Eritrea and Sudan are among those taking this route.

#### International legal framework and national policy on recruitment of migrant workers

Tunisia has ratified the eight ILO fundamental Conventions as well as ILO Convention No. 88. It has not ratified Protocol of 2014 to the Forced Labour Convention, 1930, nor ILO Conventions Nos 97, 143, 181 and 189. It has yet to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members

of their Families, 1990 (ICMW). It is a member of the Arab Maghreb Union and of the Community of Sahel-Saharan States (CENSAD).

While the draft National Migration Strategy does not include a specific section on the fair recruitment of migrant workers, its fourth strategic objective – promoting regular migration of Tunisians and preventing irregular migration – refers to strengthening public and private employment intermediaries, both in Tunisia and in host countries. Under its fifth strategic objective – protecting the rights of migrants, including asylum seekers and refugees in Tunisia – the National Migration Strategy recognizes and guarantees the protection of the rights of immigrants, regardless of their status and situation. The policy commits the government to taking a gender sensitive approach to the protection of the most vulnerable migrants, including as well as to migrant workers employed in the informal sector.

#### Regulation of employment

The Labour Code (1996) stipulates that the employment of foreign workers is governed by the provisions regulating the entry, stay, and work of foreigners in Tunisia (art. 7). Any foreigner who wishes to engage in paid work of any kind in Tunisia must have an employment contract and a residence permit bearing the words “authorized to engage in paid work in Tunisia” (sect. 258-2). The

<sup>1</sup> This section is based on ILO, *Diagnostic sur les processus de recrutement des travailleurs en Tunisie* (2019c).



employment contract is concluded for a period not exceeding one year, renewable once only. The contract may be renewed more than once when it concerns the employment of foreigners in their companies operating in Tunisia as part of the implementation of development projects approved by the competent authorities. The contract and its renewal must be approved by the Minister of Employment. A model contract and the conditions for its issue and renewal are set by Order of the Minister of Employment.

In 2020, the Ministry of Vocational Training and Employment validated the mainstreaming of labour migration in the draft National Employment Strategy due for validation in 2021. In parallel, the Ministry also initiated the development of a draft National Strategy of International Employment and the Protection of Migrant Workers (SNEI) which establishes key principles and strategic positions intended to shape national stakeholders' intervention and inter-ministerial coordination around 5 main pillars: Inclusive and transparent governance; an integrated information system on international employment; an agile training framework and system aligned with the needs of international employment; an efficient and effective recruitment and placement system for international employment; a strategy at the service of the country's economic and social development priorities. The SNEI, which will be submitted for final validation in 2021, has been developed to complement both the NMS and the NES, and draws substantially on the ILO's Fair Recruitment approach.

In 2019, the Ministry of Employment and the Office in charge of the fight against trafficking, among others, collaborated to draft new legislation enabling the systematic inspection of private employment agencies by introducing dissuasive criminal penalties, in view of ensuring fair and ethical recruitment processes for young Tunisians seeking work opportunities abroad. Enforcement is supported by the creation of a new specialised body of inspectors, focused on controlling private recruitment agencies placing Tunisians abroad.

The Ministry of Employment with ILO's support, developed comprehensive guidance and tools to build the new inspectorate capacity. This defines a control approach for PEAs with reference to the General Principles and Operational Guidelines of the ILO (2019), the ILO Conventions C181 (on private recruitment agencies), C89 (on the forced labor) and C143 (on migrant workers) dans this new Law controlling PEAs.

## Regulation of recruitment

The Labour Code prohibits private labour recruiters from recruiting workers nationally. Workers are recruited nationally either through public employment offices or directly (art. 280). The recruitment of foreigners cannot be carried out when there are Tunisian nationals who have the relevant skills for the job. Any employer who has recruited a foreign worker is required to register them within 48 hours in a special register in accordance with the model set by order of the Minister responsible for employment. This register must be presented to labour inspection officials upon request (Art. 261 new).

## Involvement of PEAs in the national labour market

PEAs, whether fee-charging or not, were abolished under the Labour Code (art. 285). Even so, two types of PEAs are involved in national labour recruitment in Tunisia.

First, there is an exception derived from the 2016 Investment Law, which enshrines the principle of freedom of investment and refers to a government decree to be issued within a maximum period of one year that will establish the list of investment activities subject to authorization. On the basis of the investment provisions in the Act, several companies with the expressed corporate purpose of providing "investment advice and staff selection" – including subsidiaries of multinational PEAs such as Adecco or Manpower – have set up in Tunisia after receiving approval from the Agency for the Promotion of Industry and Innovation (API). Creation of PEAs is also subject to prior authorization from the minister responsible for employment on the advice of the commission created for this purpose at the Ministry of employment. The composition and mode of management of the aforementioned advisory commission are governed by government decree.

It is within this "investment" context that these companies have become involved in recruitment for all types of jobseeker profiles, and the activity of these agencies extends to all the various stages of recruitment: pre-selection, selection, support and placement. There therefore seems to be a discrepancy between the spirit of the law and the reality of the practice – the activity practised is not exactly the one authorized. This is all the more so since the 2016 Investment Law does not set any conditions for the establishment of these PEAs other than the general requirement of obtaining

API approval. The terms and conditions for protecting workers is also at the discretion of these PEAs, whether it is the non-payment of fees, the obligation to provide information, the prohibition of deception, the verification of contracts, the monitoring of placement and the possibilities for recourse available to workers in the event of abuse.

The second exception involves non-state enterprises involved in recruitment that have gained recognition under the Commercial Code on the basis of their labour intermediation activities being commercial activity, even though these activities are in violation of article 285 of the Labour Code. These “service offices”, as they are known, are legally established as commercial service companies. Article 2 of the Commercial Code considers brokerage or mediation to be a commercial activity by nature, even if the conclusion of that activity is ultimately a civil act. These offices are therefore formally involved in – and seem to have particularly specialized in – the domestic work and security sectors. This niche business – based on the provisions of the Commercial Code and, it seems, taking advantage of a certain indifference from the supervisory authorities – is flourishing, according to interviews. According to a key informant interviewed in September 2016, “There is nothing easier than opening [a service] office. I have a colleague who recently opened an office; she can barely read and write.”

### Recruitment of Tunisians to work abroad

Regarding recruitment of Tunisians for work abroad, the Directorate of Emigration and Foreign Labour of the Ministry of Vocational Training and Employment (MFPE) has the mandate for the development of migration policies and programmes at the central level. The MFPE is also responsible for participating in the negotiation of migration agreements, the prospecting and enhancement of placement opportunities abroad and for the reintegration of migrant workers upon their return.

The operational role regarding recruitment abroad is assigned to the National Agency for Employment and Self-Employment (ANETI). The International Employment Division is currently a department

under the Employment Directorate, but it is destined to become a full-fledged directorate within ANETI. The International Employment Division is the government body operating at the central level with regard to job prospecting, collecting international offers and contacting overseas companies interested in the recruitment of Tunisian workers. International job offers received by employment offices are forwarded to the International Employment Division.

Decree No. 97-1930 establishing the powers and functioning of the employment offices does not contain specific provisions concerning the protection of jobseekers. However, a manual of procedures for international placement has been prepared by ANET<sup>2</sup>, with the support of ILO projects to strengthen services for migrants and ensure consistency in the quality of these services.

Act No. 72-35 of 27 April 1972 provided for the creation of the Tunisian Agency for Technical Cooperation (ATCT) as a public institution initially responsible for promoting international technical cooperation by prospecting for employment opportunities abroad, as well as being responsible for the identification, selection and placement of public servants with at least a secondary or technical school-leaving certificate. Private sector workers were initially excluded from ATCT activities, but have since been brought within its scope of work<sup>3</sup>. The ATCT is currently under the supervision of the Ministry of Investment Development and International Cooperation.

Unlike with national recruitment – where PEAs are only able to operate by virtue of exploiting legal loopholes (as described above) – the recruitment of Tunisian workers for international placement is legally shared between public and private operators. This liberalization of foreign placement is the result of extensive tripartite consultations held in 2008, which led to the adoption of this measure in the presidential election platform of outgoing President Ben Ali in 2009. The legal framework regulating this activity was therefore adopted with Act No. 49-2010 of 1 November 2010 supplementing Act No. 75-1985 of 20 July 1985 on the Regime Applicable to Technical Cooperation

<sup>2</sup> In cooperation with the ILO as part of the ILO programme for the promotion of productive employment and decent work for young people in Tunisia

<sup>3</sup> Per Act No. 85-75 of 20 July 1985, on the Regime Applicable to Technical Cooperation Personnel, as amended and completed by Act No. 2007-66 of 18 December 2007.

Personnel and implementing Decree No. 2010-2948 of 09 November 2010 laying down the conditions, modalities and procedures for granting authorization for private institutions to carry out placement activities abroad.

Through the development of new legislation, the Labour Ministry in Tunisia is enabling the systematic inspection of private employment agencies in view of ensuring fair recruitment processes for young Tunisians seeking work opportunities abroad. Enforcement is supported by the creation of a new specialised body of inspectors with the authority to issue dissuasive criminal penalties focused on controlling private recruitment agencies placing Tunisians abroad. In 2019, the “Law on the organisation of the exercise of the activities of placement of Tunisians abroad by private agencies” (or Recruitment Law) was approved by the Council of Ministers. The new law extends the state’s authority to deliver sanctions to agencies that do not comply with defined operational and procedural standards. To implement the Recruitment Law, a job description was defined for the new inspectorate and validated by relevant ministries (May 8, 2019). The new inspectorate is composed of executives from regional employment offices, with one inspector per governorate and six inspectors from the Tunis office, thus totaling thirty inspectors.

### **Recruitment of migrant workers for employment in Tunisia**

The recruitment of foreigners cannot be carried out when there are Tunisian nationals who have the relevant skills for the job. The process of verifying the existence or nonexistence of a Tunisian candidate for a job that has been offered to a worker from abroad is done by communicating the potential migrant worker’s request for authorization to the relevant regional employment office. The regional employment directorate then decides, on the basis of the response from the employment offices, whether there are Tunisian nationals suitable for the position offered. Given the rate and structure of unemployment in Tunisia, this requirement effectively prevents low-skilled foreign workers from obtaining a contract or the regularization of their status.

Some exceptions are provided for in special texts and in the bilateral agreements concluded between Tunisia and other countries. These exceptions are aimed at encouraging foreign investment and

cover occupations such as: Managing Director, Chairman of The Board, Supervisory Officers, certain medical professions, and certain positions in non-profit organizations. Under an agreement with Morocco from 1966, Moroccan nationals are guaranteed explicitly the right to work in Tunisia. All such exceptional situations are not subject to a labour-market test.

### **Recruitment services, fees and related costs**

Decree No. 2010-2948 of 9 November 2010, set the conditions, modalities and procedures for granting authorization for private institutions to carry out placement activities abroad, and it stipulates that it is prohibited for such institutions to receive directly or indirectly, in whole or in part, financial compensation or any other costs from the candidate for a placement abroad (art. 4).

### **Unregulated recruitment and migration in abusive conditions**

The Organisational Act on Preventing and Combating Trafficking in Persons, No. 2016-61 was adopted 3 August 2016. In practice, the two predominant methods for recruiting migrant workers to work in Tunisia are indirect recruitment by organized networks of informal intermediaries or direct recruitment by unscrupulous employers, who are mainly interested in the possibility of applying wage levels below collective agreements and having a workforce whose informality provides much sought-after flexibility. In both cases, verbal contracts dominate the scene without any legal guarantee. The employment relationship between the workers interviewed and their employer is very informal, exposing them to a wide range of abuses and broad denial of their rights. Migrant workers, recruited from their countries of origin, are victims of numerous deceptions about the real conditions of reception and work in Tunisia. Recurrent abuses during the recruitment process include payment of exorbitant recruitment fees, confiscation of identity documents, threats and debt bondage.

Based on a study of recruitment practices in construction, domestic work, and hotels and catering, it appears that the informal economy is the main place where migrant workers in these sectors can be integrated, and in most cases, migrant workers occupy unenviable positions in the labour market

hierarchy. Unpaid or underpaid, unaffiliated with the National Social Security Fund, and without work permits, these workers have a precariousness that is favoured in certain identified segments and sectors of the Tunisian economy. This hyper-precariousness in administrative, material and social terms reinforces the vulnerability of migrant workers and exposes them all the more to violence committed by recruiters and employers.

The current system, which was designed as a deterrent to the recruitment of low-skilled migrant workers, actually works more like a trap, enabling the prosperity of certain illicit transit networks and condemning irregular migrant workers to immobility and invisibility. As a result, these workers constitute an available pool that weakens the general working conditions in certain segments of the economy, which creates tensions with Tunisian workers. All migrant workers surveyed obtained their information on employment in Tunisia from very informal sources. They were not familiar with the Tunisian public employment services. These migrant workers have to overcome both the difficulties related to restrictive conditions of access to the formal labour market, but also more subjective difficulties, such as the language barrier, that make it difficult for them to access their rights and impedes their relations with administrative and public authorities.

With respect to Tunisian migrants abroad, deceptive recruitment, which is already a feature of migration towards European destinations, seems to be on the rise toward the Gulf and West African destinations, as indicated by various sources. Cases have been reported of young women recruited for jobs such as secretarial work, baby-sitting or domestic work finding themselves in situations of forced sex work after the victims had emigrated regularly. Such cases have been reported in Côte d'Ivoire, Jordan and Lebanon. The President of the Association of Tunisians in Qatar has denounced an upsurge in fraudulent recruitment leading either to social distress, with the migrants finding themselves without resources to return to Tunisia, or to situations of exploitation, abuse or sex work.

Looking ahead, regulating formal and informal PEAs will require strengthening inspection and

sanctions to enable MFPE labour inspectors to investigate and intervene throughout the recruitment process across economic sectors. Revisions to the Labour Code will need to align it with fair recruitment principles, notably by ensuring the prohibition of charging recruitment fees or related costs to workers and reinforcing the principle of non-discrimination in recruitment by both PES and PEAs. Enabling the registration of domestic work vacancies by the PES can benefit domestic workers and their employers. The ratification of relevant instruments such as Conventions Nos 97, 143, 181 and 189, as well as Protocol of 2014 to the Forced Labour Convention, 1930, can provide the framework and direction for national legal and policy reforms.

### 3.1.2 Morocco<sup>4</sup>

#### Labour and migration overview

Most Moroccan migrants reside in Western Europe. According to UNDESA estimates, in 2019 there were about 3.14 million Moroccan migrants abroad (48 per cent women), with 33 per cent in France, 23 per cent in Spain, 14 per cent in Italy and 6 per cent in the Netherlands. Meanwhile, Morocco hosted about 99,000 migrants (50 per cent women), with 38 per cent from France and 14 per cent from Algeria. Morocco is a significant origin and transit country for migrants and refugees heading to Spain, through what is known as the Western Mediterranean route (Frontex 2019).

#### International legal framework and national policy on recruitment of migrant workers

Morocco has ratified seven of the eight ILO fundamental Conventions. Additionally, it has ratified ILO Convention No. 18, as well as ILO Convention No. 97, excluding the provisions of Annexes I-III, with Convention No. 97 entering into force for Morocco on 14 June 2020. Morocco has also ratified the ICMW. Morocco has not yet ratified Conventions Nos 87, 88, 143, 189, nor the Protocol of 2014 to the Forced Labour Convention, 1930. Morocco reintegrated into the African Union in January 2017. It is a member of the Arab Maghreb Union and CENSAD.

<sup>4</sup> This section is based on the following report prepared for the ILO: A. Bouharrou and R.F. Meknassi, "Réalisation d'un état des lieux de la législation nationale en matière de protection des droits des travailleurs migrants au Maroc" (unpublished).



The National Strategy on Immigration and Asylum of 2014 does not include a specific section on the fair recruitment of migrant workers. However, two objectives of the national strategy – facilitating access to employment for regular immigrants (No. 12), and aligning the national conventional framework with international standards on the rights of migrant workers (no. 21) – are particularly relevant to fair recruitment.

### Regulation of employment

The Labour Code prohibits any discrimination against workers on the grounds of race, colour, sex, disability, marital status, religion, political opinion, trade union membership, national extraction or social origin (art. 9). The Penal Code (art. 431-1) defines discrimination as any distinction between natural persons on the grounds of national or social origin, colour, sex, family status, state of health, disability, political opinion, trade union membership, membership or non-membership, real or supposed, of a particular ethnic group, nation, race, or religion. Also constituting discrimination is any distinction between legal persons on the grounds of origin, sex, family status, state of health, disability, political opinions, trade union activities, membership or non-membership (real or supposed) of a particular ethnic group, nation, race, or religion of the members or certain members of such legal persons.<sup>5</sup>

Migrant workers may join trade unions, but cannot be members in charge of the administration and management of the union, who must be of Moroccan nationality (Labour Code, art. 416), nor can they be elected as representatives (art. 439).

The Penal Code, as modified by Act No. 2714 of 2016, addresses trafficking in persons under chapter VIII, section VI, and defines exploitation as including forced labour (art. 481-1). The Labour Code sets the minimum age for employment at 15 years, and the minimum age for hazardous work at 18 years. The restrictive provisions contained in the Labour Code are applicable only to the employers and workers subject to it, with sectors of a “purely traditional nature”<sup>6</sup> being excluded (art. 4).

With respect to domestic workers, Act No. 19-12 of August 2016 on the Working and Employment Conditions of Domestic Workers applies to both national and migrant workers, and sets at 18 the minimum age for employment as domestic worker.

Child labour outside of wage employment can disproportionately affect young migrants because the obligation to secure a basic education, which partially protects Moroccan children, is not enforceable for them. The dropping-out of children of poor parents and their employment in domestic activities or in the worst forms of child labour, such as begging and prostitution, are of concern when it comes to vulnerable migrants. The situation affects both young foreign migrants in Morocco and increasingly young Moroccan children abroad (notably in Spain and France) after emigrating irregularly or being abandoned by their families.

### Regulation of recruitment

In addressing recruitment, the Labour Code defines intermediation as encompassing any operation aimed at matching labour supply and demand as well as any services offered to jobseekers and employers for the promotion of employment and professional integration (art. 475). The Labour Code stipulates that public employment services are to be provided free of charge to jobseekers and employers (art. 476). Act No. 51-99 established the National Agency for the Promotion of Employment and Skills (ANAPEC), which is responsible for matching job offers with job applications; receiving, informing and orienting jobseekers; and investigating job offers from abroad and prospecting all placement opportunities abroad for national candidates for emigration (art. 3). In 2006, ANAPEC carried out its first major recruitment operation for temporary migration. The operation, which recruited workers for the harvesting of red fruits in Spain, involved 5,000 women workers and the mobilization of 240 ANAPEC agents. Similar operations were subsequently organized for France, with a contingent of 400 persons assigned to Upper Corsica to pick kiwifruit in November–December 2007. The programme continues to this day.

<sup>5</sup> Discrimination is punished by imprisonment of one month to two years and a fine of 1,200 to 5,000 dirhams, when such discrimination consists of: refusing the supply of a good or service; hindering the normal exercise of any economic activity; refusing to hire, sanction or dismiss a person; or making the supply of a good or service or job offer subject to a condition based on a discriminatory ground. Inciting discrimination or hatred between people is also punishable by imprisonment from one month to one year and/or a fine (art. 431-5).

<sup>6</sup> A sector of “purely traditional nature” is defined to include the manufacturing of traditional products intended for trade.

Ministry of Employment and Vocational Training Decision No. 1/Taechir/2019 of July 2019 regulates the visa process for foreign workers to be employed in Morocco, including the categories of foreign workers exempt from the certificate issued by ANAPEC. For non-exempt foreign workers, the request for approving an employment contract for a foreign worker must include a certificate delivered by ANAPEC, certifying the absence of national candidates to occupy the job proposed to the foreign worker. ANAPEC's intervention in that regard was not provided for either in the Labour Code or in the Act that founded the agency.

The Labour Code stipulates that PEAs may only operate after authorization by the government's labour authority (art. 477). The Code's definition of PEAs is restricted to legal persons; whereas both legal and natural persons can be considered PEAs under Convention No. 181. The services provided by PEAs encompass matching job applications and offers; other job search or professional integration support services for jobseekers; and hiring employees to temporarily place them at the disposal of a third party (the "user"). Services provided to users are thus of a temporary nature. PEAs are prohibited from discriminating on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin. They are also prohibited from discrimination based on the selection of persons deprived of freedom of association or collective bargaining. They may, however, engage in affirmative action (art. 478). PEAs are to process jobseekers' personal information in a manner that respects their privacy, limiting themselves only to indications about their aptitudes and professional experience (art. 479). All foreign employment contracts concluded by PEAs are subject to prior approval by the labour authority (art. 489).

Act No. 19-12 stipulates that domestic workers – whether Moroccan or migrant – may be recruited through PEAs, but prohibits natural persons from engaging, for remuneration, in labour intermediation for the recruitment of domestic workers (art. 4).

Morocco has signed bilateral labour agreements (BLAs) with:

- ▶ Germany (1963);
- ▶ France (1963, Agreement on Residence and Employment signed in 1987 and published in 2011);
- ▶ Belgium (1964);
- ▶ the Netherlands (1969);
- ▶ Libya (1983);
- ▶ Qatar (1981, additional protocol in 2011);
- ▶ Iraq (1981);
- ▶ United Arab Emirates (1981, protocol of cooperation on employment and labour in 2007);
- ▶ Jordan (1983);
- ▶ Spain (2001, 2007, agreement on the movement of persons, transit and readmission of irregular migrants signed in 1992 and published in 2013); and
- ▶ Italy (2005, executive protocol in 2007).

Morocco has also signed bilateral settlement agreements with Algeria (1963, modified in 1969), Senegal (1964) and Tunisia (1964). They provide that nationals of these countries are to equality of treatment with Moroccan nationals and therefore are to enjoy the same rights as the latter, in accordance with the legislation and regulations in force. However, their implementation seems to be limited to the exemption from visa requirements for entry and for employment contracts.

The Labour Code regulates the recruitment of Moroccan workers abroad (arts 512–515) and the employment of foreign workers in Morocco (arts 516–519), along with provisions common to both (arts 520–521).

Any employer wishing to recruit a foreign worker must obtain an authorization from the labour authority. The authorization is granted in the form of a visa linked to the employment contract, and the date of the visa is the date on which the employment contract takes effect. Any modifications of the contract must be made in line with the visa that has been granted. The authorization may be withdrawn at any time by the labour authority (art. 516).

The employment contract reserved for foreign workers must conform to the model set out by the labour authority (art. 517), set out in subsequent orders<sup>7</sup>. The model contract for foreigners specifies the documents the employer is required to attach to the contract, including a certificate issued by ANAPEC indicating the unavailability of a Moroccan national with the skills required to fill the position. This applies both for issuing the contract and for renewing it.

Decree No. 2-17-355 of 31 August 2017 establishes a model employment contract for women and men domestic workers, including migrants. This model contract covers the duration and nature of employment, the trial period, weekly working hours, remuneration, as well as weekly rest, annual leave and public holidays.

Moroccan workers travelling to a foreign country to take up employment must have an employment contract approved by the competent services of the destination country and by the Moroccan labour authority. These contracts must be in accordance with labour agreements concluded between the States or employing organizations, where they exist. The labour authority selects emigrants based on their professional qualifications and physical aptitudes, and carries out all the necessary administrative emigration formalities in coordination with the administrations and employers concerned.

### Recruitment services, fees and related costs

The Labour Code prohibits PEAs from charging workers fees or costs directly or indirectly, in part or in whole (art. 480). There is, however, an exception to this rule in case the worker is recruited for employment abroad. The Code stipulates that any fees charged to a worker benefiting from a contract for employment abroad are to be determined in accordance with terms of reference (TORs)<sup>8</sup> that the PEA will commit to respecting when they submit their licensing application (art. 489). The TORs are designed as a unilateral commitment, therefore do not specify the beneficiaries, the notification rules and the sanctions for violations.

The model TORs require PEAs to inform candidates for employment abroad about the amount of any fees they may have to bear if they receive a contract for employment abroad, and the time limit for the collection of these fees by the PEA. The amount is capped at one month's average net salary calculated over the year, as per the contract. Fee payments may only be received by the PEA after the applicant has obtained the contract duly approved by the labour authority of the country of employment. The agency must issue a receipt for these payments and transfer the money to a fund that must be maintained pursuant to section 486 of the Labour Code. The PEA must return this amount to the worker if the contract cannot be completed for a reason not attributable to the worker. This refund must be made within a period of no more than one month from receipt of the applicant's request. The Labour Code also stipulates that PEAs through which a foreign employment contract has been concluded must bear the costs of the worker's return to his or her country and all costs incurred by the worker in the event of nonperformance of the contract for reasons beyond the worker's control (art. 490).

The fourth commitment in the model TORs relates to foreign employment that is conditional on an internship or special paid training. If the PEA provides, supervises or deems useful such training, then it must guarantee that the candidate will receive an employment contract at the latest one month after the end of the internship or training. If at the end of the training the worker does not obtain a contract, the worker is entitled to reimbursement by the agency of all costs incurred for this purpose. Distinguishing between the costs of training, migration and recruitment may be a concern in practice.

With respect to the employment of foreign workers in Morocco, their contract must stipulate that in the event of refusal to grant the authorization, the employer undertakes to bear the costs of returning the foreign worker to their country of nationality or country of residence (art. 518). The text, however, is silent on repatriation when the contract expires, either by reaching the end of its term or by early termination.

7 The Order of the Minister of Employment and Professional Training No. 350-05 of 9 February 2005 established a model employment contract for foreigners. This model contract was amended by the Order of the Minister of Labour and Professional Integration No. 3350-18 of 30 October 2018, following the promulgation of Act No. 19-12 relative to domestic workers.

8 In February 2005 the Minister of Employment and Vocational Training Order No. 349-05 specified these TORs that PEAs must undertake to respect.

In an effort to ensure transparent advertisement of job offers, the Labour Code requires that persons in charge of a newspaper, magazine or other publication that has published an offer for employment, are to provide to labour inspection or labour authority officials, upon their request, all necessary information concerning the names and addresses of the advertisement.

In order to leave the national territory, Moroccan workers recruited to work abroad must be provided with a medical certificate less than one month old and with any documents required by the regulations of the host country, in addition to the employment contract (Labour Code, art. 513).

### Unregulated recruitment and migration in abusive conditions

Sections 50 to 56 of Act No. 02-03 on the entry and residence of foreigners in the Kingdom of Morocco, illegal emigration, and immigration specify penalties regarding irregular migration. The Act punishes incoming and outgoing irregular migrants by a fine of 3,000 to 10,000 dirhams and/or imprisonment from one to six months without prejudice to the provisions of the Penal Code applicable in this regard (art. 50). It thus criminalizes persons migrating irregularly. The Act also specifies penalties for migrant smugglers.

The Penal Code, as modified by Act No. 27-14 of 2016, addresses trafficking in persons under chapter VII, section VI (arts 448.1–448.14). Act No. 27-14 also created a national commission in charge of coordinating measures to combat and prevent trafficking in persons. Decree No. 217740 of 6 July 2018 established the composition and modalities of the national commission, and its members were named in May 2019.

In practice, Morocco became the main departure point for irregular migrants to Europe in 2018 (Frontex 2019). Nationals from Morocco, Guinea, Mali and Algeria are among those taking this route. Recent reports suggest that the number of irregular migrants reaching Spanish coasts fell significantly in 2019, as EU and Spanish support for the Moroccan Royal Navy has enabled it to further assist Spanish operations in returning migrants to their point of departure. A concern, however, is that migrants trying to reach Europe are increasingly taking more dangerous routes by departing from the western coast of Morocco, making them more vulnerable to deception, abuse and accidents during their journey.

Cases of the kidnapping of migrants and the demand for ransom from their families have been reported in Morocco, as well as in Spain with the migrants' families back in Morocco. In Morocco, confiscation of travel documents by employers, including those of domestic workers; non-payment of wages at maturity; and fraudulent debt are common means of enforcing forced labour on vulnerable workers, particularly migrants in an irregular situation.

Looking ahead, Morocco is well placed to ratify Convention No. 87 and to reform the Labour Code to ensure freedom of association for migrant workers. As Morocco has made significant advances in terms of the regulation of domestic work in recent years, the ratification of Convention No. 189 can further consolidate progress. Morocco can develop a policy document on fair recruitment for national and migrant workers. The ratification of relevant instruments such as Conventions Nos 143 and 88, as well as the Protocol of 2014 to the Forced Labour Convention, 1930, can provide an international normative grounding for law and policy reforms in that regard.



## ► 3.2 East Africa

### 3.2.1 Uganda<sup>9</sup>

#### Labour and migration overview

Uganda stands out as Africa's largest refugee-hosting countries and receives asylum-seekers and migrant workers from neighbouring countries. Intra-regional labour mobility is facilitated by the East African Community (EAC), which includes Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and Uganda. According to UNDESA (2019) estimates, in 2019 Uganda hosted about 1.73 million migrants (52 per cent women), with 63 per cent from South Sudan and 18 per cent from the Democratic Republic of the Congo. Asian nationals, especially Indians and Chinese, also form a large share of the migrant workers in Uganda. Meanwhile, there were about 735,000 Ugandan migrants abroad (51 per cent women), with 42 per cent in Kenya, 20 per cent in South Sudan, 13 per cent in Rwanda, 11 per cent in the United Kingdom and 7 per cent in the United States. Ugandans often migrate to neighbouring countries for work, especially Kenya. Low-skilled labour migration to Middle Eastern countries – often through PEAs – is also common. Ugandan migrant workers, especially women, have been exposed to exploitation and human trafficking in these flows.

#### International legal framework and national policy on recruitment of migrant workers

Uganda has ratified the ICMW and Convention No. 143. It has not ratified Convention No. 97. Uganda is a member of the EAC, IGAD and COMESA. The draft national migration policy of 2012 has a section on labour migration, with policy objectives geared towards protecting the rights of migrant workers and developing a national labour externalization programme. The National Employment Policy of 2011 refers to cooperation with governments of countries of destination and the regulation and monitoring of recruitment for employment abroad as important areas with respect to employment abroad. The Policy seeks to avoiding decent work deficits experienced by

workers, including breaches of contract, unsafe working conditions and sexual harassment.

On 22 January 2016 the Government imposed a ban on the labour migration of domestic workers to the Middle East, due to reports of exploitation and abuse. The ban was lifted on 1 April 2017. The Government proceeded to sign a BLA with the Saudi Arabian Government on 31 December 2017, which for the first time allowed Ugandan professionals to seek employment in Saudi Arabia. The Government also signed an amended BLA on domestic workers with the Saudi Arabian Government, which updated the original 2015 agreement. This revised BLA aims to specifically streamline the operations of the labour externalization sector with a focus on fighting against trafficking and curbing violations of workers' rights. After the signing of these BLAs, the Saudi Arabian Government instructed its embassy in Uganda to once again start issuing visas to Ugandan migrant workers. The Ugandan Ministry of Gender, Labour and Social Development (MGLSD) works closely with Saudi Arabian authorities to monitor the deployment and movement of Ugandan migrant workers to and from Saudi Arabia. Saudi Arabia has an online visa database system called Musaned. Once the MGLSD has approved the contract of a Ugandan migrant worker destined for Saudi Arabia, it will enter the person's data (such as passport number, name, age and gender) into the Musaned database, after which Saudi Arabia will issue a visa to the migrant worker. Through this system the MGLSD is notified when Ugandan migrant workers enter and reside in Saudi Arabia.

The Ugandan Government states that it is promoting safe migration to the Middle East through BLAs, which, in addition to the BLAs with Saudi Arabia, it has also signed with Jordan. It is developing BLAs with Bahrain, Kuwait, Lebanon, Qatar and the United Arab Emirates. The BLAs are not publicly available and could not be reviewed for this study. By November 2018, a Joint Implementation Committee had been set up for the BLA with Jordan, but one has not yet been established to monitor the BLAs with Saudi Arabia. The 2015 Guidelines on Recruitment and Placement of

<sup>9</sup> This section is based on ILO, *An Assessment of Labour Migration and Mobility Governance in the IGAD Region: Country Report for Uganda* (2020a).

Ugandan Migrant Workers Abroad addresses BLAs in section 20. These instruments were developed in response to the abuse experienced by low-skilled migrant workers in the Middle East, many of whom are women domestic workers.

### Regulation of employment

Uganda has ratified the eight ILO fundamental Conventions. It has not ratified the Protocol of 2014 to the Forced Labour Convention, 1930. The Employment Act, 2006, addresses discrimination in employment and states that migrant workers and members of their families that are lawfully in Uganda should enjoy equality of opportunity, which shall be promoted and guaranteed by the minister responsible for labour, by labour officers and by the Industrial Court (sect. 6(2)). It prohibits discrimination in employment on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, HIV status or disability, which has the effect of nullifying or impairing the treatment of a person in employment or occupation, or of preventing an employee from obtaining any benefit under a contract of service (sect. 6(3)). It prohibits forced labour (sect. 5), prohibits the employment of children under the age of 12 years (sect. 32(1)), and regulates the employment of children under the age of 14 years (sect. 32(2)).

The Employment Act, 2006, allows written and oral employment contracts (sect. 24). Oral contracts are foreseen for illiterate persons. Section 26(1) requires that a contract of service made with an employee who is unable to read or understand the language in which the contract is written shall be attested to. Section 26(2) further requires that a magistrate or labour officer draw up a written document as attestation, and before attesting to the contract verify that the employee has agreed to the contract out of their free will; that the contract complies with the Employment Act; and that the employee has duly understood the terms of the contract before consenting to it. A copy of the document recording the attestation will be given to the employer and the employee, but the original will remain with the magistrate or labour officer. Protection of the employee is further ensured in section 26(4), which states that a contract that should have been, but was not, attested to as provided for under this section may be enforced at the instance of the employee, and the absence of attestation shall not prejudice in any way the rights of the employee.

Migration into Uganda is facilitated through an e-immigration system that allows online applications for entry, residence and study permits and passes. Twenty-four countries are exempted from paying visa entry fees. Work permit classes, processes and fees are well explained on Ministry of Internal Affairs' Directorate of Citizenship and Immigration's website. Work permits are costly (Kenya is the only IGAD Member State that has been waived work permit fees); are issued only if a Ugandan cannot fill the position; and are tied to the employer. One of the requirements for migrant workers to be granted the right to work in Uganda is the submission of an employment contract to the immigration authorities. The employment authorities retain copies of contracts, *inter alia* to ensure the protection of migrant workers.

### Regulation of recruitment

Uganda has not ratified ILO Conventions Nos 88, 181 and 189. The Employment Act, 2006, defines recruitment as including all operations undertaken with the object of obtaining or supplying the labour of persons who do not continuously offer their services at the place of employment.

The Rules and Regulations Governing the Recruitment and Employment of Ugandan Migrant Workers Abroad, 2005, requires that PEAs issue migrant workers with employment contracts that conform to the standard employment contract (sect. 68(3)), which is a written government-approved employment contract stipulating a specific period of employment and formulated through tripartite consultation individually adopted and agreed upon by the principal/employer and the Ugandan migrant worker. The Rules and Regulations also specifies the minimum requirements for the contract (sect. 67). Moreover, the 2015 Guidelines on Recruitment and Placement of Uganda Migrant Workers states that all selected migrant workers should receive a written employment contract that is enforceable, clear and in a language the migrant worker understands. The employer should deliver the employment contract to the migrant worker prior to departure, and with adequate time for the migrant to review all provisions before signing (sect. 15.3.1). The External Employment Agency (EEU) ensures that the employment contracts of Ugandan migrant workers who are deployed abroad through PEAs conform to the standard employment contract. They keep copies of the contracts to ensure the protection of these migrant workers.

The Employment Act, 2006, states that to operate a PEA, a recruitment permit issued by the commissioner in the ministry responsible for labour is required (sect. 38). The Employment Regulations, 2011, addresses PEAs in part IV, sect. 12. It requires PEAs to be registered under these Regulations and to possess a valid operational licence, which is issued by the commissioner in the ministry responsible for labour. The Rules and Regulations Governing the Recruitment and Employment of Ugandan Migrant Workers, 2005, states that an application for a licence to operate as a PEA must be made in writing to the EEU (sect. 7). The documents that should accompany the application include:

- ▶ proof of a minimum capital of 10 million Ugandan shillings; and
- ▶ proof of clearance from the Criminal Investigation Department, the EEU and other Government agencies of all members of the board of directors or partners and employees of the agency.

The 2015 Guidelines on Recruitment and Placement of Uganda Migrant Workers Abroad explain the registration and licensing process of PEAs in a more accessible format. Other requirements that need to be fulfilled when applying for a PEA licence include:

- ▶ proof of possession by the chief executive officer of a bachelor's degree and at least three years' business experience;
- ▶ list of all officials and personnel involved in the recruitment and placement, together with their appointment, bio-data and two copies of passport-size pictures, as well as their clearances from the Interpol; and
- ▶ presentation of a bank guarantee.

The bank guarantee is specified in Annex II as 50 million shillings; the cost of the licence application form is 100,000 shillings; and the certificate of licence costs 500,000 shillings. The bank guarantee aids the protection of migrant workers, as it is used by the Government to pay wages in the event that they have been withheld from migrant workers, or to return workers to Uganda if they face challenges in their country of destination and it is deemed necessary to repatriate them.

The Guidelines on Recruitment and Placement state in section 7.2.1 that applicants seeking a PEA licence need to be trained in and pass two modules of the Certificate for Employment Agencies test, which is conducted by the Department of Employment

Services. The training aims to build the knowledge of PEA staff on the legislative framework, as well as management and counselling. Sect. 7.2.2 states that the Department of Employment Services is responsible for informing officials and staff of licensed agencies and representatives of foreign employers on the requirements, standards, laws and regulations related to the recruitment and employment of Ugandan migrant workers. Section 10(5) of the Rules and Regulations Governing the Recruitment and Employment of Ugandan Migrant Workers, 2005, indicates that the validity of a PEA licence is two years. Section 13 states that the renewal of a licence must be applied for on or before the expiry date of the licence; and needs to be supported by a number of documents, including a renewed bank guarantee. Employers' and workers' organizations contributed to the development of the licensing system for PEAs.

The Guidelines on Recruitment and Placement of Uganda Migrant Workers Abroad states in section 6 the principles upon which the Guidelines are based, including that:

- ▶ no migrant worker shall be discriminated against on the basis of race, colour, sex, religion, political opinion and social origin (6.1.1);
- ▶ all parties shall refrain from exploitation, treatment of migrant workers as commodities and accord them greater human dignity and protection (6.1.2); and
- ▶ no migrant workers shall be hired or recruited using forced or compulsory means nor be coerced into signing a contract without ascertaining their terms and conditions of work (6.1.3).

Section 32 of the Guidelines covers the roles of stakeholders, and requires associations of PEAs to develop a binding code of conduct and ethics; to gather information on high risk agencies and regularly screen their members and new membership applications; and to sensitize their members on the code of conduct and ethics.

On 26 July 2017, the Uganda Association for External Recruitment Agencies (UAERA) adopted a code of conduct that all its members must adhere to. Principle 14 – respect for the worker's rights – calls for the promotion of equitable, objective and transparent principles for the calculation of agency workers' wages. Failure to pay wages on time to workers will result in deregistration and disciplinary

action from the UAERA. Other relevant principles include respect for safety at work; respect for laws; and refraining from bidding down wages. Principle 21 – sanctions for non-compliance – states that members shall face a disciplinary committee if they do not conform to the code. Moreover, the UAERA has undertaken three monitoring visits to Jordan in the last three years to examine locations where its members deploy Ugandan domestic workers. Ugandan migrant workers can contact the UAERA or its members if they face challenges, and they will, in turn, contact the MGLSD or the relevant Ugandan mission.

Section 25 of the Guidelines on Recruitment and Placement of Uganda Migrant Workers Abroad is titled Complaints and Grievance Procedures, and states that complaints can be made in writing or by telephone against an agency or employer with the Department of Employment Services or to the nearest Ugandan mission. Section 11 of the Guidelines covers the inspection of PEAs, which shall be undertaken by the EEU. They will inspect the premises, facilities and relevant documents before the issuing of a licence or in case of transfer of office, and will also undertake spot inspections and routine inspections. Section 7.6 states that the renewal of a licence shall be based on performance, and can be cancelled, including in the following cases: illegal recruitment, involvement in trafficking in persons, and violating the Rules and Regulations. The Minister of State for Youth and Children Affairs indicated in a statement on 18 May 2018 that to counter illegal activities by PEAs, the Government has suspended, cancelled and not renewed the licences of some agencies, and adopted a four-party employment contract, whereby PEAs in Uganda and in recipient countries are jointly liable. The four-party employment contract requires the PEA in Uganda (who identifies the potential Ugandan migrant worker) and the PEA in Jordan (who identifies the employer in the country of destination) to both sign a contract. In addition, the migrant worker and the employer sign the employment contract.

The Ministry of Gender, Labour and Social Development (MGLSD) launched the External Employment Management Information System in April 2018, through which the licensing of PEAs takes place online. In the two-year period leading up to May 2018, the Government licensed 95 PEAs. During the reporting period for the US Department

of State's 2018 *Trafficking in Persons Report*, the Ugandan Government reported that more than 80 illegal recruitment agents and companies were investigated and closed, and that some of the staff were prosecuted for illegal recruitment for the purpose of human trafficking.

## Recruitment services, fees and related costs

Recruitment fees and related costs can, according to the law, be borne directly by migrant workers. The Rules and Regulations Governing the Recruitment and Employment of Ugandan Migrant Workers, 2005, addresses in section 29 the fees chargeable to migrant workers by PEAs. They may be charged up to 50,000 shillings for recruitment and deployment services as administration costs. They may also be charged a placement fee to cover related costs, such as a trade or skill test, medical examination, passport and visa costs. These fees may only be collected once the employment contract has been signed, and receipts need to be issued upon payment.

Section 70(1) of the Rules and Regulations Governing the Recruitment and Employment of Ugandan Migrant Workers, 2005, obliges every licensed PEA to provide every worker deployed abroad with a pre-departure orientation seminar. The seminar can only be given by:

- ▶ a licensed PEA accredited to deliver pre-departure orientation;
- ▶ an association of licensed agencies;
- ▶ an NGO focused on the concerns of migrant workers;
- ▶ embassies, consuls or diplomatic attachés of countries where workers will be deployed; or
- ▶ other persons or organizations that have been authorized to conduct these seminars by the EEU (sect. 70(2)).

Section 72 requires the approval and accreditation of all pre-departure orientation seminar programmes, tie-ups and trainers by the EEU. Section 73 states that the EEU will supervise and monitor the pre-departure orientation activities of licensed agencies. The pre-departure orientation venue will be inspected by the EEU as often as it deems necessary, including spot checks. A worker will be given a certificate of attendance by the agency upon completion of the seminar



(sect. 75), copies of which will be submitted to the EEU. Workers who are deployed overseas by the EEU will be given a pre-departure orientation seminar by the EEU (sect. 76).

The 2015 Guidelines on Recruitment and Placement of Uganda Migrant Workers Abroad further describes the pre-departure orientation given to Ugandan migrant workers in section 21. The duration should be at least three days, and it should include a legal orientation on the relevant laws, and, inter alia, cover immigration, health, and social welfare and temporary protection. As part of the orientation, the employment contract needs to be read through and the rights and obligations of the migrant worker explained, including in terms of:

- ▶ the duties and obligations of employers;
- ▶ the workplace and living conditions;
- ▶ the job skills required;
- ▶ the location and telephone number of the Uganda Embassy in the country of destination; and
- ▶ where and how to seek assistance in case of distress.

Cultural and social orientation will also be given to capture the way of life in the country of destination and, inter alia, focus on the general rights and obligations of citizens, public health services, the education system and the social welfare system. Moreover, psycho-social orientation will cover cultural aspects, and linguistic orientation will cover basic language skills.

According to the MGLSD, there was no pre-departure orientation until July 2017. By November 2018, approximately 15 companies had been authorized to provide the training. The training materials of these companies have been vetted by the MGLSD. At the time, only domestic workers were given pre-departure training, which consisted of a seven-day course that included health and safety, basic language skills, and occupational skills, such as operating a washing machine. PEAs pay for the pre-departure training for these migrant workers, which is a requirement for PEAs to deploy these migrant workers abroad. The MGLSD developed the pre-departure training curriculum for domestic workers and is working on expanding it to cover other sectors.

## Unregulated recruitment and migration in abusive conditions

Protection efforts have catered to Ugandan migrant workers in an irregular situation. The MGLSD has, for example, assisted Ugandan migrant workers in Riyadh, Saudi Arabia, regardless of whether they were regularly deployed or not. This assistance included the provision of consular services, visits to detention centres, providing replacement travel documents and arranging the safe return of the stranded migrants to Uganda. To further enhance the protection of migrant workers, the MGLSD plans for labour attachés to be appointed in Middle Eastern countries. In November 2018, it had a labour liaison officer in Abu Dhabi, the United Arab Emirates.

The Prevention of Trafficking in Persons Act, 2009, prohibits trafficking in persons, and provides for the prevention and prosecution of perpetrators and the protection of victims. Ugandan law allows foreign trafficking victims to stay in Uganda while the investigation of their case is ongoing and to apply for residence and work permits. In 2016, 14 trafficking investigations, the prosecution of 32 defendants in 20 cases, and the conviction of 16 traffickers under the Act were recorded. It was the first year that the Government of Uganda sought the criminal prosecution of two PEAs under the Prevention of Trafficking in Persons Act. In 2017 the Government reported 145 trafficking investigations, the prosecution of 52 defendants in 50 cases, and the conviction of 24 traffickers. Other instruments that have been developed to address trafficking include:

- ▶ a national action plan to combat trafficking in persons;
- ▶ a national awareness strategy on the prevention of trafficking, victim identification and assistance guidelines for adult and child trafficking victims; and
- ▶ an anti-trafficking training curriculum for the Directorate of Citizenship and Immigration Control.

Moreover, regulating PEAs and signing BLAs with destination countries are some of the measures the Government has put in place to prevent the trafficking of Ugandan migrant workers abroad.

Looking ahead, an important step in implementing a fair recruitment policy is prohibiting charging recruitment fees and related costs to workers. The Government should actively inform migrant workers of their rights and obligations, and the remedies available to them in case of violations of their rights. The Government should also bolster their efforts to ensure that migrant workers in Uganda have equal access as nationals to the courts to better enforce their rights. In light of the efforts that the Government is making to promote fair recruitment, ratification of relevant instruments such as Conventions Nos 97, 88, 181 and 189, as well as the Protocol of 2014 to the Forced Labour Convention, 1930, can provide the normative basis for further legal and policy reform.

### 3.2.2 Kenya<sup>10</sup>

#### Labour and migration overview

Kenya is mainly a destination and transit country for people in mixed migration flows from East Africa. Migrants transit Kenya to reach South Africa, the Middle East and North Africa, West Africa, Europe and North America. Most migrants in Kenya are from African countries, and the majority from East African countries. According to UNDESA (2019) estimates, in 2019 Kenya hosted 1.05 million migrants (50 per cent women), with 43 per cent from Somalia, 30 per cent from Uganda and 8 per cent from South Sudan. Meanwhile, there were about 525,000 Kenyan migrants abroad (53 per cent women), with 29 per cent in the United Kingdom, 26 per cent in the United States, 7 per cent in Uganda, 5 per cent in South Africa, 5 per cent in Mozambique, 5 per cent in the United Republic of Tanzania and 5 per cent in Australia. Kenya is, to a lesser extent, a country of origin for migrants in mixed migration flows. Kenyan emigrants stand out for being skilled and educated and for leaving for employment abroad through regular channels. The destinations they travel to for education and work include Uganda, the United Republic of Tanzania, Botswana, Lesotho, South Africa, the United States, Europe and the Middle East. Low-skilled Kenyan migrant workers mostly migrate to the Middle East, which is facilitated through PEAs. Abuse and trafficking have been reported in these migration flows.

#### International legal framework and national policy on recruitment of migrant workers

Kenya has ratified ILO Convention No. 97, excluding the provisions of Annexes I to III, and Convention No. 143. It has yet to sign and ratify the ICMW. Kenya is a member of the EAC, IGAD and COMESA. The draft national migration policy and strategy of 2017 recognizes the abuse and exploitation of Kenyan workers abroad, especially low-skilled workers, and the specific challenges faced by women. It calls for various interventions to protect migrant workers' rights, including concluding BLAs, pre-departure training and the effective regulation of PEAs. The Diaspora Policy of 2014 also calls for mechanisms to enhance the protection of Kenyan migrant workers, including:

- ▶ the development of BLAs;
- ▶ strengthening the regulatory framework for employment agencies;
- ▶ conducting pre-departure training for migrant workers; and
- ▶ facilitating the registration of Kenyans abroad through Kenya's diplomatic missions.

#### Regulation of employment

Kenya has ratified seven of the eight ILO fundamental Conventions. It has not ratified Convention No. 87 and the Protocol of 2014 to the Forced Labour Convention, 1930. The Employment Act, 2007, prohibits forced labour in section 4. According to the Government, regular migrant workers in Kenya are covered by Kenya's national labour laws and policies, unless specified otherwise.

The Employment Act, 2007, contains provisions for written and oral employment contracts. Section 9 under Part III – Employment Relationship – requires that a contract of service that amounts to three months of working days or more, or which requires work that could not be expected to be completed within three months, should be written. The law requires that the contract state the particulars of employment, including the:

- ▶ description of employment;
- ▶ place and hours of work;

<sup>10</sup> This section is based on ILO, *An Assessment of Labour Migration and Mobility Governance in the IGAD Region: Country Report for Kenya* (2020b).

- ▶ remuneration and the intervals at which remuneration is paid; and
- ▶ conditions relating to:
  - annual leave;
  - sick pay and sick leave;
  - pension; and
  - the length of notice to terminate employment; and
  - the period of employment.

To ensure that workers understand their employment contracts, it is stated in section 9(4) of the Employment Act, 2007, that if an employee is illiterate or cannot understand the language that the contract is written in, the employer needs to have the contract explained to the employee in a language that the worker understands. Moreover, as specified in section 10(7), the onus is on the employer to prove or disprove an alleged term of employment that was unfulfilled in the case of legal proceedings, if the employer fails to produce a written contract. Part XII of the Employment Act, 2007, on “Dispute Settlement Procedure”, states that complaints regarding fulfilment of a contract can be lodged by the aggrieved party with the Industrial Court, which has since been renamed the Employment and Labour Relations Court.

In the case of the deployment of Kenyan workers abroad, the following needs to be specified in the contract:

- ▶ the period that the employee is expected to work outside of Kenya, which is required if the employee has to work outside of Kenya for more than one month;
- ▶ the currency the employee will be paid in if working outside of Kenya;
- ▶ any benefits due to deployment abroad; and
- ▶ terms and conditions relating to the employee’s return to Kenya (Employment Act, sect. 10(e)(1)).

Part XI of the Employment Act, 2007, on Foreign Contracts of Service requires that contracts of Kenyans working abroad be signed by the parties thereto and attested to by a labour officer. The labour officer shall only attest to it if they are satisfied of the employee’s consent to the contract, and of the absence of fraud, coercion or undue influence. Moreover, the terms and conditions

of employment should be contained in the contract and comply with the provisions of the Act. Labour attachés have been assigned to Kenyan missions in Qatar, Saudi Arabia and the United Arab Emirates to enhance the protection of Kenyan migrant workers.

With respect to migrant workers’ access to employment in Kenya, obtaining a work permit can be a lengthy process. Article 45(2) of the Kenya Citizenship and Immigration Act, 2011, states that the employer needs to lodge an application for the employment of a foreign national to engage in employment. A work permit class D is issued in the case of specific employment being offered by a specific employer to a person who has skills or qualifications that are not available in Kenya and whose employment is believed to benefit Kenya.<sup>11</sup> The non-refundable processing fee for this work permit is 10,000 Kenyan shillings (US\$98). If this work permit is issued in accordance with its objectives, it would serve labour market needs. Labour market needs are also addressed in principle by requiring an employer to train a Kenyan citizen for the position that a work permit is granted for. The training should take place for the duration of the work permit, with the idea being that a Kenyan national would take on the role upon expiration of the migrant worker’s permit.

Labour mobility and labour migration are facilitated through the EAC Common Market Protocol for EAC citizens, who have been waived work permit fees in Kenya. The Government encourages establishment and investment in Kenya through various incentives for foreign investors, including by offering a number of work permits for foreign staff.

National labour law requires the workplaces of migrant workers to be inspected. The extent to which migrants’ workplaces are de facto investigated, and whether the responsible authorities have the necessary resources, including adequately trained labour inspection staff, requires further investigation. Regular labour migrants in Kenya have access to the Employment and Labour Relations Court to settle employment disputes. The Kenya National Human Rights and Equality Commission is responsible for monitoring, investigating and enforcing human rights. The extent to which the rights of migrant workers are enforced is unclear.

11 For more details, see <https://fns.immigration.go.ke/infopack/permits/>.

## Regulation of recruitment

Kenya has ratified ILO Convention No. 88. It has not ratified Conventions Nos 181 and 189. The National Employment Authority (NEA), which falls under the Ministry of Labour and Social Protection, provides public employment services, for which it registers Kenyan jobseekers and links them with job opportunities locally and internationally. The NEA also:

- ▶ provides advisory services on employment policy issues;
- ▶ registers and regulates PEAs;
- ▶ provides information on registered employment agencies;
- ▶ verifies job offers;
- ▶ ensures implementation of pre-departure training;
- ▶ promotes the protection of Kenyan labour migrants;
- ▶ provides youth internship services, including seeking for opportunities and placing applicants in internship positions; and
- ▶ supports negotiations on BLAs.

Kenya has signed BLAs with Qatar and the United Arab Emirates, as well as with Saudi Arabia on the recruitment of Kenyan domestic workers. These agreements contain provisions to address the vulnerabilities faced by migrant workers. Provisions contained in the BLA with Qatar include:

- ▶ detailed conditions of employment to be specified in recruitment applications;
- ▶ the ministry responsible for labour in Kenya providing migrant workers with information on working conditions and living expenses in Qatar;
- ▶ the repatriation of Kenyan workers by the Government of Qatar on the expiry of their work contracts;
- ▶ the employer paying for the return travel of migrant workers, including their leave travel; and
- ▶ the employment contract to be defined as an individual contract between the worker and employer in accordance with a model contract attached to the agreement.

As noted above, the NEA registers and regulates PEAs and provides information on registered PEAs. It also inspects PEAs to ensure compliance. The

list of registered PEAs, which indicates the duration for which they are licensed, is available on NEA's website. The registration system for PEAs is laid out in the Labour Institutions Act, 2007 (revised 2014 edition), and in the supplementary Private Employment Agency Regulations, 2016. The Regulations specify in Part II the registration process for PEAs.

The registration requirements include:

- ▶ the PEA must be registered as a limited liability company under the Companies Act, and at least one Kenyan has to own shares in it;
- ▶ it has a minimum share capital of 5 million shillings;
- ▶ it is licensed to carry out business within the country of intended operation;
- ▶ it has a registered fully equipped physical office of at least 225 square feet;
- ▶ it has provided a guarantee of 1.5 million shillings with a reputable bank or insurance agency in Kenya, to be used for repatriation and/or paying wages and other entitlements in the event of default by the employer;
- ▶ the directors have attained at least an O-level certificate or the equivalent; and
- ▶ the directors should have valid Police Clearance Certificates issued by the Directorate of Criminal Investigations, which must be renewed every twelve months from the date of issuance.

An application for registration to operate a PEA has to be made in writing to the Director of Employment and include a completed application form, certified copies of academic and professional certificates of the PEA's managers and directors, and a copy of an operating licence from the relevant county authority (sect. 4). If the requirements are met, a registration certificate is issued, which is valid for one year (sect. 5). Job vacancies must be advertised, either within the PEA premises, in public offices or through the media (sect. 9(2)), and the Director of Employment must be notified of all job opportunities and visas for employment (sect. 9(1)).

The Labour Institutions Act, 2007 (revised 2014 edition), covers the cancellation of PEA registration certificates and changes to the terms of these certificates, as well as penalties. Section 56(7) states that the Director of Employment may cancel the registration of a PEA or change the conditions of its registration following an inquiry. Section 58 of the



Act specifies that Employment Officers may search the premises of PEAs, without notice, to prevent, investigate or detect an offence committed by them. Section 61 explains that a person who contravenes any provision of the Act, for which there is no specified penalty, may be fined up to 50,000 shillings or be imprisoned for up to three months.

As noted above, the NEA monitors PEAs. PEAs are only registered to operate for one year, after which time they need to apply for a renewal, which will not be granted in the case of known unethical practices. To renew the registration certificate, an application has to be submitted at least one month before the expiry of the certificate, and be accompanied by a number of documents, including proof that the agency has renewed the bank guarantee.

The 2016 Code of Conduct for Private Recruitment Agencies was developed through the collaboration of various government agencies and PEAs with a view to establish a selfregulatory regime.<sup>12</sup> The Code draws on the rules and regulations of other jurisdictions, such as the:

- ▶ 2002 Revised Rules and Regulations Governing Overseas Employment of Land-Based Workers of the Philippine Overseas Employment Administration;
- ▶ Ministry of Overseas Indian Affairs Immigration Act and Rules, 1983, and
- ▶ codes of ethics of different associations in the recruitment industry in Kenya, including the:
  - Association of Private Recruitment Agencies Kenya;
  - Kenya Association of Employment Agencies; and
  - Diaspora Welfare Association of Kenya.

The Code of Conduct aims to eliminate the maltreatment of Kenyan workers abroad and unfair labour practices, especially in the Middle East. It

applies to all PEAs that operate within the jurisdiction of Kenya. It specifies that it is to be used together with the:

- ▶ Constitution of Kenya, 2010;
- ▶ 2007 ILO Guide to Private Employment Agencies, Regulation, Monitoring, and Enforcement;
- ▶ five labour acts:
  - Labour Institutions Act, 2007;
  - Employment Act, 2007;
  - Labour Relations Act, 2007;
  - Work Injury Benefits Act, 2007; and
  - OSH Act, 2007;
- ▶ ILO Convention No. 181;
- ▶ National Industrial Training Act, 2012; and
- ▶ National Social Security Fund Act, 2013.

### Recruitment services, fees and related costs

The 2016 Private Employment Agency Regulations of the Labour Institutions Act, 2007, states that employers will be charged a service fee for the recruitment, documentation and placement of workers (sect. 7). Section 8 of the Regulations further states:

A foreign contract of employment shall specify the party responsible for the payment of the –

- (a) visa fee;
- (b) airfare; and
- (c) medical examination:

Provided that reasonable administrative costs may be charged by the agent in respect of trade test, occupational test and the administrative fees shall not exceed the job seeker's proposed one month's salary.

It should be noted that the text of the Regulations specifies in a sidebar that section 8 is specifically addressing "Cost to be met by agents or

<sup>12</sup> The participants in this process were the:

- Office of the Attorney General;
- Directorate of National Intelligence Services;
- Directorate of Immigration and Registration of Persons;
- Ministry of Foreign Affairs;
- Kenya Association of Private Employment Agencies;
- Domestic Workers Association of Kenya;
- Kenya Private Recruitment Agencies;
- Diaspora Welfare Association of Kenya;
- Global Development Association;
- Association of Private Recruitment Agencies; and
- Ministry of labour and Social Protection.

employer” – not by the migrant worker. However, costs related to deployment can be charged to a migrant worker, such as administrative costs and trade tests. These charges are capped at one month’s salary of the migrant worker. To enhance the protection of migrant workers, they should not face any of these charges.

Kenya serves as an example of good practice in the IGAD region in making information on permits and passes as well as requirements for the admission, employment and residence of migrant workers easily accessible, by making this information available online. Entry visas can be obtained online, and Kenya is in the process of moving all foreign national services online.

With respect to outbound migration, potential Kenyan migrants can receive information on opportunities for regular labour migration and on the dangers of irregular labour migration from the Central Organization of Trade Unions – Kenya (COTU-K), trade union organizations and NGOs. Kenyan migrant workers in distress can contact their embassies and labour attachés for assistance, and migrant domestic workers can also contact COTU-K.

The NEA is responsible for ensuring the implementation of pre-departure training, which all migrant workers destined for the Middle East should receive. However, discussions with key informants suggest that it is not strictly enforced. A pre-departure training curriculum has been developed by the NEA, the National Industrial Training Authority (NITA), the Kenya Institute of Curriculum Development, and the Youth Enterprise Development Fund (YEDF) for domestic workers who are destined for the Middle East. It primarily focuses on domestic work skills, but also covers cultural practices, life skills, information related to travel, and the rights and obligations of workers. NITA will deliver the training with other accredited trainers, while the NEA will issue the certificates to those who have completed the training. The training will be funded by the PEAs. The YEDF has been delivering pre-departure training since 2008, for migrant workers destined for the Middle East, for which it has collaborated with the IOM. They normally train 6,000 youths per year, which is their annual target.

Reintegration-related activities are carried out by different NGOs and IOs, while the Government has provided some trauma counselling in the past.

Furthermore, the YEDF provides different types of loans to groups and individuals – including returnees – on the basis of a business plan in order to start businesses. The YEDF also offers mentorship, financial training, business counselling and business clinics for groups. Reintegration support is provided to trafficked persons by NGOs, such as Awareness Against Human Trafficking (HAART). Moreover, the IOM runs an Assisted Voluntary Return and Reintegration programme, with most returnees in the programme coming from Europe.

### Unregulated recruitment and migration in abusive conditions

Protection mechanisms aimed at migrants in Kenya are geared towards regular labour migrants, with no notable mechanisms to protect migrant workers in an irregular situation.

With respect to human trafficking, Kenya enacted the Counter-Trafficking in Persons Act in 2010. The Act established the Counter Trafficking in Persons Advisory Committee (CTIP), which consists of:

- ▶ the permanent secretaries of the ministries responsible for immigration; foreign affairs; gender and children; labour;
- ▶ the Attorney General;
- ▶ the Commissioner of Police;
- ▶ a representative of the Kenya National Commission on Human Rights;
- ▶ two representatives from civil society;
- ▶ one representative from COTU-K; and
- ▶ one representative from the Federation of Kenya Employers.

The Department for Children’s Services, in the Ministry of Labour and Social protection, hosts the CTIP. The Victim Protection Act, 2014, aims to further enhance the protection of victims of crime and abuse of power, and to provide victims with better information and support services aimed at: securing reparations and compensation for victims; and offering special protection to vulnerable victims. The Act also established a Victim Protection Trust Fund, which can provide assistance to victims.

Looking ahead, the Government should reflect on the protection challenges faced by Kenyan labour migrants in labour migration flows to the Middle East as well as other key corridors, and how these challenges can be addressed in the National Labour Migration Policy. Efforts to regulate the

recruitment of Kenyan workers for work abroad can be advanced by ratifying relevant instruments such as Conventions Nos 181 and 189, as well as the Protocol of 2014 to the Forced Labour Convention, 1930. A major concern will be to abolish the practice of PEAs charging recruitment fees and related costs to migrant workers – a practice that is not in line with fair recruitment principles. Moreover, ratification of Convention No. 87 is an important step to ensure the protection of freedom of association to both national and migrant workers.

### 3.2.3 Ethiopia<sup>13</sup>

#### Labour and migration overview

Ethiopia is an origin, transit and destination country for mixed migration flows in the Horn of Africa. It is the second-largest refugee hosting country in Africa, with refugees largely originating from the IGAD region. According to UNDESA (2019) estimates, in 2019 Ethiopia hosted about 1.25 million migrants (49 per cent women), with 38 per cent from Somalia, 38 per cent from South Sudan and 18 per cent from Eritrea. Regular labour migration to Ethiopia is largely limited to the highly skilled, such as foreign companies that bring in senior management staff, often from Asian countries, or expatriates who work in the aid sector. In 2019, the country hosted about 892,000 refugees. Most refugees originate from South Sudan, Somalia, Eritrea and Sudan. Ethiopia also serves as a transit country for refugees and migrants from Somalia, Somaliland and Eritrea, who travel through Ethiopia to Sudan and Libya, on the way to Europe. In 2019, there were about 872,000 Ethiopian migrants abroad (47 per cent women), with 27 per cent in the United States, 18 per cent in Saudi Arabia, 9 per cent in Israel and 7 per cent in Sudan.

Unemployment, poverty and political factors drive outward Ethiopian migration, which largely entails low-skilled labour migration, such as for domestic work, to the Middle East. To address reports of abuse and trafficking in these flows, the Government of Ethiopia has strengthened the regulation of the PEAs that facilitate these flows, and has concluded BLAs with destination countries in the Middle East, namely Jordan, Qatar, Saudi Arabia and the United Arab Emirates.

In search of work and a better life, Ethiopians also undertake the perilous journey through Sudan and Libya to Europe, and the journey south towards South Africa. The assistance of smugglers is generally required to travel these migration routes, and migrants are vulnerable to abuse and exploitation. Little information is available on the labour migration of Ethiopians within the IGAD region, but they are known to engage in domestic work and construction in Djibouti, in the hospitality sector in South Sudan, and in seasonal agricultural work in Sudan.

#### International legal framework and national policy on recruitment of migrant workers

Ethiopia has not ratified the ICMW or ILO Conventions Nos 97 and 143. It is a member of COMESA and IGAD. Ethiopia does not have a labour migration policy or a migration policy. The National Employment Policy and Strategy of 2017 calls for protecting the rights and safety of international labour migrants from Ethiopia, including through bilateral and multilateral labour agreements, assistance for migrant workers, and curbing irregular migration. With respect to foreign nationals employed in Ethiopia, Policy and Strategy calls for their legal protection, including eliminating any form of employment and occupational discrimination between foreign nationals and Ethiopians. Labour Proclamation 377/2003 covers labour migrants coming into Ethiopia, but does not apply to Ethiopian labour migrants going abroad. The Overseas Employment Proclamation No. 923/2016 is the legal framework for Ethiopians working abroad.

#### Regulation of employment

Ethiopia has ratified the eight ILO fundamental Conventions. It has not ratified the Protocol of 2014 to the Forced Labour Convention, 1930.

Labour Proclamation No. 1156/2019, which gives workers and employers the right to establish and join workers' and employers' unions and associations, also applies to migrant workers coming to Ethiopia. It prohibits discrimination on the grounds covered in Discrimination (Employment

<sup>13</sup> This section is based on ILO, *An Assessment of Labour Migration and Mobility Governance in the IGAD Region: Country Report for Ethiopia* (2020c).

and Occupation) Convention, 1958 (No. 111), as well as on the grounds of nationality, HIV/AIDS status and disability.

Labour Proclamation No. 1156/2019 also tasks the Ministry of Labour and Social Affairs (MoLSA) with the responsibility of determining how foreign nationals are to be employed in Ethiopia (arts 171(e) and 176). Foreign nationals may only be employed in Ethiopia with a work permit from the Ministry of Labour and Social Affairs (MoLSA), which is also tasked with determining the types of work requiring work permits and the manner by which work permits are secured. Skills gaps are identified through the process of issuing work permits to incoming labour migrants. If MoLSA determines that a foreign national is not required for the work, then the work permit may be cancelled.

The Refugees Proclamation No. 1110/2019 recognizes the right of recognized refugees and asylum-seekers to engage in wage employment under the same circumstances as the most favourable treatment accorded to foreign nationals pursuant to relevant laws (art. 26(1)). Restrictive measures on the employment of foreign nationals are not applicable to recognized refugees or asylum-seekers who are married to an Ethiopian national or who have a child of Ethiopian nationality (art. 26(9)).

## Regulation of recruitment

Ethiopia has ratified ILO Conventions Nos 88 and 181. It has not ratified Convention No. 189.

The MoLSA regulates labour migration, in co-operation with the other concerned bodies, and is responsible for the implementation of Ethiopia's Overseas Employment Proclamation No. 923/2016. In collaboration with Ministry of Foreign Affairs, it plans to assign labour attachés to Ethiopian missions in countries with which Ethiopia has BLAs. Ethiopia has concluded BLAs with Jordan, Kuwait, Qatar and Saudi Arabia.

The Labour Proclamation No. 1156/2019 defines PEAs as including:

- ▶ local employment exchange service providers that are not party to an employment relation;
- ▶ providers that enter into an employment relationship with workers and then supply their labour to user enterprises; and
- ▶ providers who combine both types of services (art. 13).

Ethiopia has a standardized system for licensing PEAs that recruit Ethiopians for overseas employment, which is laid out in the Overseas Employment Proclamation. Prior to drafting and promulgation, the Proclamation was discussed at meetings where the Confederation of Ethiopian Trade Unions and the Ethiopia Employers Federation were present. Article 21 of the Proclamation requires any person who wishes to operate an overseas employment exchange service to obtain a licence from the MoLSA, and a separate licence for every country they wish to operate in. Only an Ethiopian citizen or business can obtain a license, and they need to have a base capital of at least 1 million Ethiopian birr (art. 22). To obtain a licence, a completed application form and a number of documents need to be submitted, including:

- ▶ a certificate of business registration and a trade name, enabling the applicant to operate as an agency;
- ▶ a criminal record clearance certificate; and
- ▶ a document that verifies that the PEA has a decent office in the destination country or a representative from the country who is licensed to engage in overseas employment exchange services (art. 24).

A licence is valid for one year (art. 25), and renewal applications need to be submitted one month prior to its expiry, along with documents including a general report on the status of deployed and returned workers (art. 33).

There are a number of cases in which a licence cannot be issued, such as if a previous licence has been revoked and the prescribed remedies to address rights violations have not been applied, or if the applicant has been charged (and the case is still pending) or prosecuted for human trafficking, smuggling of migrants, organized crime, terrorism, drug trafficking or money laundering (art. 23).

As per article 20 of the Overseas Employment Proclamation, inspectors are tasked with monitoring PEAs to ensure that they fulfil their obligations. This monitoring includes entering the offices of PEAs during working hours and examining necessary documents, such as records and accounting books. Before a licence is issued or renewed, the inspectors verify whether the PEA has the necessary expertise to conduct the recruitment process, pre-employment orientation and counselling services. They ensure that the agency has



provided workers with information on the working conditions and situation in the destination country, and with pre-departure training. Moreover, the inspectors monitor agencies so as to prevent the illegal recruitment and deployment of workers, and report findings to the MoLSA.

Part five of the Overseas Employment Proclamation No. 923/2016 describes contraventions that would lead to the suspension of an agency's license, including:

- ▶ failure to remedy violations of workers' rights, safety and dignity;
- ▶ withholding a worker's wage or remittances; and
- ▶ failure to refund the expenses of a worker who was not deployed for a reason not attributable to the worker (art. 42(2)).

It also lists contraventions that would lead to the revoking of a license, including:

- ▶ recruiting and deploying a worker below the age of eighteen;
- ▶ withholding a travel document and other information of the worker before or after deployment; and
- ▶ forcing a worker to relinquish their rights and benefits through fraudulent practices or under duress (art. 42(3)).

Moreover, the Proclamation (arts 42–51) contains steps for the submission of oral and written complaints by migrant workers to MoLSA, as well as how these complaints will be followed up on, and the consequences for the pertaining PEA, which could be the suspension or revocation of their license.

Ethiopia is promoting written, understandable and enforceable employment contracts, as well as the registration of these contracts, with a view to ensure the protection of migrant workers. The Overseas Employment Proclamation No. 923/2016 permits three types of overseas recruitment channels (art. 3) and stipulates their conditions:

- ▶ recruitment through public employment services, based on intergovernmental agreements (art. 4);
- ▶ recruitment through PEAs; and
- ▶ direct employment, in the event that:
  - the employer is staff of an Ethiopian mission;
  - the employer is an international organization; or

- the jobseeker acquired the position independently, with the exclusion of domestic work (art. 6(2)).

In the case of all three types of recruitment channels, written employment contracts need to be submitted to the MoLSA for approval. PEAs need to submit to the MoLSA for approval a written contract signed by the employer, the PEA and the worker (art. 37), based on the model contract prepared by the Ministry (art. 17). Other terms, conditions and benefits can be stipulated in the employment contract if it does not contravene Ethiopian law or policy and is more beneficial to the worker than the minimum standards of the model contract (art. 18). Once the MoLSA approves a work contract, it will be registered. Moreover, the ILO has developed a model employment contract for the MoLSA, which conforms to international labour migration standards.

### Recruitment services, fees and related costs

The Labour Proclamation No. 1156/2019 requires PEA as to provide its services “without charging directly or indirectly any fee from the worker” (art. 13). The Overseas Employment Proclamation No. 923/2016 states that a PEA's licence is revoked if it receives payment in cash or in kind from a worker for overseas employment services (art. 42(3)(i)).

However, the Overseas Employment Proclamation No. 923/2016 does require migrant workers to fund certain expenses related to recruitment and placement. Article 4 of the Proclamation states that the MoLSA can provide recruitment and placement services to governmental organizations in countries of destination based on government-to-government agreements. In this context, the employer covers the following expenses of the employee:

- ▶ entry visa fee to the country of destination;
- ▶ round trip transport costs;
- ▶ work permit fee;
- ▶ residence permit fee;
- ▶ insurance coverage;
- ▶ visa costs and costs related to document authentication paid to the embassy of the destination country; and
- ▶ employment contract approval service fee, which is paid to the MoLSA (art. 10(1)).

The migrant worker covers the following expenses:

- ▶ passport issuance fee;
- ▶ costs associated with the authentication of contract of employment received from overseas;
- ▶ criminal record clearance certificate;
- ▶ medical examination fee;
- ▶ vaccination fee;
- ▶ birth certificate issuance fee; and
- ▶ expenses for certificate of occupational competence (art. 10(2)).

If the worker is not deployed for reasons not attributable to the worker, then the agency or employer would refund the worker these expenses (art. 10(3)).

With respect to foreigners working in Ethiopia, the MoLSA may charge service fees for the issuance, renewal or replacement of work permits (Labour Proclamation No. 1156/2019, art. 176(4)).

The Confederation of Ethiopian Trade Unions provides information on the dangers of irregular migration to aspiring Ethiopian migrant workers. The Overseas Employment Proclamation No. 923/2016 requires the MoLSA to undertake regular pre-employment and pre-departure awareness raising to citizens who show interest to take-up overseas employment pertaining to the conditions of receiving countries, the required skill for a job position they are taking, their rights and duties and similar other matters (art. 8). In addition, the Proclamation requires labour inspectors to ensure that employment agencies have given orientation on general conditions of work, situation of receiving countries, and pre-employment and pre-departure orientation and counselling services to workers destined for overseas (art. 20).

With the support of the EU, the ILO and UN Women developed the *Pre-Departure Training Manual for Ethiopian Migrant Domestic Workers* in 2016. The Government has trained awareness-raising facilitators in certain migration prone localities on how to provide pre-employment and pre-departure training to potential migrant workers. Moreover, the Overseas Employment Proclamation No. 923/2016 requires migrants to obtain a certificate of occupational competence. Regional technical and vocational education and training (TVET) agencies provide occupational training in collaboration with the MoLSA and the ILO. TVET agencies and MoLSA have developed occupational

standards for labour migration sectors, such as domestic and care work. In addition, certain NGOs, such as AGAR and WISE, plan to provide pre-departure basic life skills training. On-arrival training is not taking place for incoming migrant workers.

Ethiopia does not have a return and reintegration policy or strategy, but service provision to returnees has increased since the deportation of Ethiopian migrants from Saudi Arabia in 2013. There is the need to develop a clear policy framework for reintegration, which clarifies the roles and responsibilities of the agencies engaged in reintegration activities and a need to designate the lead government agency to be tasked with overseeing reintegration efforts.

### Unregulated recruitment and migration in abusive conditions

Migration from Ethiopia is largely irregular, mainly due to limited options for regular economic migration, and with most Ethiopians travelling to the Middle East, while others move south towards South Africa, or west through Sudan and Libya to Europe. Many Ethiopian migrants are recruited by local brokers, returnees, relatives and friends, who may make false promises of a better life in the destination country. Their irregular status renders these migrants vulnerable to abuse and exploitation. However, research suggests that Ethiopian migrants are often aware of the risks they may face on their journey and choose to migrate despite the risks (RMMS, 2014). This seems to point at the cultural significance of migration, as well as its importance as a livelihood strategy for families and communities.

In October 2013 the Government of Ethiopia banned low-skilled migration to the Middle East in response to the abuse and trafficking of Ethiopians in transit and destination countries. The ban also followed the expulsion of irregular Ethiopian migrants from Saudi Arabia in 2013–14. MoLSA data indicate that 480,480 citizens regularly migrated to the Middle East between 2011 and 2013. However, many more migrated irregularly and became victims of trafficking and exploitation. The labour migration ban was lifted on 30 January 2018, and on 9 October 2018, the Government announced that overseas employment services to the Middle East could begin again the following day. Therefore, regular low-skilled

migration to Middle Eastern countries with which the Government has bilateral agreements can now take place.

The prevention of human trafficking is addressed in the Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Proclamation No. 909/2015; the Anti Trafficking Strategic Plan 2015/16–2019/20; and the Overseas Employment Proclamation No. 923/2016. These instruments were developed in response to the abuses experienced by lowskilled migrant workers in the Middle East, most of whom are women domestic workers.

Looking ahead, the Government should develop a labour migration policy through a wholeofgovernment approach that involves all the ministries engaged in labour migration governance, and that includes social partners, international

organizations, NGOs and academia in the policy development process. The Anti-Human Trafficking and Smuggling of Migrants Task Force could be considered as a forum for discussions on the policy. The ratification of relevant instruments such as Conventions Nos 29, 97, 143 and 189, as well as the Protocol of 2014 to the Forced Labour Convention, 1930, can provide the normative basis for the policy. The policy should capture the numerous facets of labour migration, such as regional economic integration, migration and development, and the protection of migrant workers, including those in an irregular status and low-skilled labour migrants in African countries of destination with which Ethiopia does not have BLAs. The Overseas Employment Proclamation No. 923/2016 should be revised, and migrant workers should not be liable for any placement or deploymentrelated expenses.

## ► 3.3 West Africa

### 3.3.1 Burkina Faso

#### Labour and migration overview

Burkina Faso is a net emigration country. According to UNDESA (2019) estimates, in 2019 the country hosted about 718,000 migrants (52 per cent women), with 78 per cent from Côte d'Ivoire, 5 per cent from Mali and 5 per cent from Ghana. Meanwhile, there were about 1.58 million Burkinabe migrants abroad (44 per cent women), with 87 per cent in Côte d'Ivoire. According to UNESCO (2019) estimates, 59 per cent of the population aged 15-plus was illiterate in 2018 (67 per cent of women, 50 per cent of men). The National Survey on Employment and the Informal Sector (ENESI) of 2015 estimated the total population at 18.45 million persons, including about 65,000 migrants. More than two-thirds of heads of households had no education. About 95 per cent of employment in the country was in the informal sector economy (81 per cent in urban areas, 99 per cent in rural areas). Wage employment represented 11 per cent of total employment. Women represented 52 per cent of total employment.

#### International legal framework and national policy on recruitment of migrant workers

Burkina Faso has ratified the ICMW as well as ILO Conventions Nos 97 and 143. It is a member of the ECOWAS and CENSAD. Burkina Faso's National Migration Strategy of 2016–2025 does not include a specific section on the fair recruitment of migrant workers. The Strategy places migration in its historical context, emphasizing the colonial legacy of forced recruitment and forced migration. It relates how the French colonial plan in the 1920s was to specialize the territories of the then Upper Volta in the provision of labour for the major projects in French West Africa. Fleeing the harsh rigours of colonization, the local population headed towards the Gold Coast (now Ghana), where the British colonial system of indirect rule was relatively more flexible, and salaries were much higher than those paid in Côte d'Ivoire. The Gold Coast was the main destination for emigration, receiving two to three times more Voltaic emigrants than Côte d'Ivoire. Radical measures to direct flows towards Côte d'Ivoire were then taken in the 1930s, with the forced recruitment into that country of any individual convicted of idleness. When in the 1940s forced labour was abolished, other mechanisms took over to ensure

the supply of labour to Côte d'Ivoire, including the establishment of the Syndicat interprofessionnel pour l'acheminement de la main-d'œuvre (SIAMO) by employers in Côte d'Ivoire in 1952.

The National Migration Strategy considers the continued importance of emigration from Burkina Faso since its independence in 1960 as part of a logical extension of this colonial heritage. It notes that Côte d'Ivoire remains the main destination of emigration, as well as the main origin of returning migrants, although departures to that country have slowed down since the 1980s. Moreover, returns of migrants have increased as a result of the Tabou events of 1999, characterized by massive repatriations and expulsions. The second strategic axis of the Strategy calls for protecting and guaranteeing the rights of Burkinabe emigrants and returnees. It notes that migrants are most often victims of discriminatory acts and practices, including exploitation, mass expulsion, persecution, and other abuses. It specifies measures such as raising awareness about the provisions governing migration and the dangers of irregular migration, strengthening mechanisms for the implementation of migration agreements and Conventions, and strengthening Burkina Faso's diplomatic and consular representation abroad.

The National Employment Policy of 2008 refers to combating all forms of discrimination against migrant workers and to strengthening the awareness, information and training of potential migrant workers, those abroad and returnees, on their fundamental rights at work in countries of destination.

Upper Volta signed three bilateral agreements with African countries that are still in effect: the Convention on the Recruitment and Employment of Upper Volta Workers in Côte d'Ivoire (1960); the Convention on the Establishment and Movement of Persons between Mali and Upper Volta (1969); and the Agreement between Upper Volta and the Gabonese Republic (1973). In 2009, Burkina Faso signed an agreement with France on the Concerted Management of Migratory Flows and Solidarity Development.

## Regulation of employment

Burkina Faso has ratified the eight ILO fundamental Conventions. It has not ratified the Protocol of 2014 to the Forced Labour Convention, 1930.

The Labour Act No. 028-2008/AN of 2008 prohibits any discrimination in employment and occupation on the grounds provided in Convention No. 111, as well as on the grounds of disability and pregnancy (art. 4). It prohibits forced or compulsory labour (arts 5–6) as well as the worst forms of child labour (art. 153). Articles 107–133 address the right to collective bargaining, and articles 275–306 address freedom of association. Workers may freely join a union of their choice in the context of their occupation. Members responsible for the management and administration of a trade union must be of Burkina Faso nationality or nationals of a State with which reciprocal agreements on trade union rights have been concluded; non-national workers can become trade union leaders after having resided continuously for at least five years in Burkina Faso (art. 281).

## Regulation of recruitment

Burkina Faso has not ratified ILO Conventions Nos 88, 181, or 189.

The Labour Act regulates placement and temporary work activity (arts 18–28). It defines placement activity as the provision of labour intermediation to find a job for a worker or a worker for an employer. The placement activity may be public or private. In the latter case, it can be conducted with a view to profit. Provision of services relating to jobseeking that do not set out to match specific offers of and applications for employment – such as the provision of information – is also treated as a private placement activity (art. 18).

The Labour Act defines a temporary work agency as any natural or legal person whose main activity is to make workers available to users according to a specific qualification (art. 19). The collective recruitment of workers for employment outside the country is prohibited, unless prior authorization has been obtained from the Minister of Labour after consulting the ministers of Employment, Foreign Affairs, and Territorial Administration (art. 22). Placement activities may only be carried out after authorization by the Minister of Labour and following the opinion of the Minister of Employment (art. 24).



Opening a private placement agency or a temporary work agency requires compliance with the conditions laid down by regulation by the ministers of Labour and Employment, following the opinion of the Consultative Labour Commission (art. 25). According to the Public Service of the Administration of Burkina Faso website, the procedure for securing the prior administrative authorization imposed on any natural or legal person who wishes to work in the placement or temporary work sector does not have any required documents, though there are associated costs of 40,000 CFA francs, including 10,000 CFA francs for the stamp. It notes, however, that the texts relating to PEAs are under revision. Private placement agencies and temporary work agencies are forbidden from subjecting their workers to any form of discrimination (Labour Act, art. 26). In the event of a strike or lockout initiated in accordance with the procedure for settling collective labour disputes, as defined by the Labour Act, operations related to permanent placement in the companies concerned are to be immediately halted (art. 28).

The National Employment Agency (ANPE) was created by Decree No. 2004523/PRES/PM/MTEJ of 23 November 2004, replacing the National Employment Promotion Office, which had been created in 1974. The ANPE enjoys administrative and financial autonomy and is placed under the authority of a tripartite board of directors, as well as under the technical supervision of the Ministry of Employment and the financial supervision of the Ministry of Economy and Finance. Among its responsibilities are to organize and monitor the collective recruitment of Burkinabe personnel for employment abroad, and to implement a monitoring mechanism for foreign workers employed in the country. With EU-funded support by the IOM, the ANPE has also provided training on selected subjects, such as business management, the operation of cooperatives, and animal husbandry techniques, aimed at the reintegration of returnees, notably from Libya.

Decree No. 2011-118/PRES/PM/MAECR of March 2011 on the powers, composition, organization and functioning of the National Commission for Refugees specifies that the executive body of the Commission includes a Directorate of Local Integration and Planning, which is responsible for assessing the employment and social integration needs of refugees and asylum-seekers, supporting refugees in finding employment, and

facilitating their social integration, as well planning and implementing activities and projects for refugees (art. 40).

### Recruitment services, fees and related costs

The Labour Act stipulates that private placement agencies and temporary work agencies shall not charge jobseekers, directly or indirectly, in whole or in part, any fees or other costs (art. 27). Exceptions may be granted for certain categories of workers and for services specifically identified by the Minister of Labour, after consulting the Consultative Labour Commission. In practice, Burkinabe migrant workers are often charged fees that can be exorbitant, with such fees either paid in advance or from wages, often the entirety of the first wage. The payment of recruitment fees in advance is often a collaborative endeavour to which the extended family contributes when he/she is not able to pay them. In some cases, particularly when children are recruited, notably based on traditional child fosterage practices, no fee is paid, but the tacit agreement is that the recruiter would cover the expenditures of the child, including provision of education and training, and benefit in return from the proceeds of the child's labour.

With regard to migrant workers in Burkina Faso, the visa attached to their employment contract is free of stamp and registration duties, but subject to the payment of fees, the amount and terms of which are determined by a joint act of the ministers of Labour and of Finance (Labour Act, art. 58). Joint Order No. 2004-299/MTEJ/MFB of 22 June 2004 set the visa fees for foreign workers' contracts into four brackets based on the worker's gross monthly remuneration. The lowest bracket sets the visa fee at 25 per cent of one month's salary for salaries of less than 100,000 CFA francs, and the highest at 35 per cent of one month's salary for salaries of more than 1 million CFA francs. These fees are due each time a contract is renewed.

### Unregulated recruitment and migration in abusive conditions

Act No. 029-2008/AN on the Fight Against Trafficking of Persons and Similar Practices of May 2008 provides that anyone who engages in the smuggling of migrants is liable to imprisonment for a term of five to ten years. The same penalties apply for fraud, falsification, or counterfeiting related to:

- ▶ visas;
- ▶ travel documents;
- ▶ any other documents used to prove the status of residents or nationals of Burkina Faso or any other country; or
- ▶ documents used in granting the status of refugee, stateless person, displaced person, or victim of trafficking in persons.

Act No. 025-2018/AN on the Penal Code addresses trafficking in persons (arts 511-1 to 511-517) and the smuggling of migrants (arts 511-18 to 511-21). Trafficking in persons is punishable by a term of imprisonment of five to ten years and a fine of 1 million to 5 million CFA francs. The penalty is 11–21 years' imprisonment and a fine of 2 million to 10 million CFA francs if the offence was committed under aggravating circumstances. The penalty is life imprisonment if the victim died, suffered permanent mutilation or disability, or the purpose of trafficking was the removal of organs. The smuggling of migrants is punishable by imprisonment from five to ten years and a fine of 5 million to 10 million CFA francs. The penalty is imprisonment of 11–21 years and a fine of 5 million to 20 million CFA francs, when the offence endangers or risks endangering the lives or safety of the migrants concerned, or it subjects migrants to inhuman or degrading treatment, including exploitation. That is, the penalties of the smuggling of migrants are more stringent than those of trafficking in persons, which is problematic, given that human trafficking is a crime against a person, whereas migrant smuggling in and of itself is not a human rights violation.

In practice, most Burkinabe migrants go to their main destination – Côte d'Ivoire – by land. They may travel individually, having the contacts among community members at the destination that they should seek upon arrival. They may travel in small groups, as in the example of girls leaving their village to avoid forced marriages and moving together gradually from town to town until they reach their destination, working odd jobs along the way, notably in petty trading, restaurant work and domestic work. They may also have their travel arranged by recruiters, who are often informal. Recruiters work on the basis of the trust people grant them. Such trust may be developed as result of recruiters being members of the extended family or community, and can be strengthened through good relations with community leaders. Fake

recruitment is widespread given the widespread demand for jobs, the unavailability of such jobs, and a lack of oversight regarding recruitment practices. Such conditions are also a breeding ground for deceptive, coercive and abusive recruitment. While traveling within ECOWAS Burkinabe migrants are engaging in regular migration, but they may still be requested to pay additional fees along the way as if they were being smuggled, with reports of having to pay border officials even though this should not be the case.

Looking ahead, a priority for the Government is to ensure that adequate resources are invested in the development and implementation of action plans for the National Migration Strategy of 2016–2025. The issue of fair recruitment should be further advanced in such action plans, building on the goal of non-discrimination that is already emphasized in this context. To address the multiple forms of unfairness in recruitment, ratification of relevant instruments – notably the Protocol of 2014 to the Forced Labour Convention, 1930, and Conventions Nos 88, 181 and 189 – should also be prioritized.

### 3.3.2 Côte d'Ivoire

#### Labour and migration overview

Côte d'Ivoire is a net immigration country. According to UNDESA (2019) estimates, in 2019 the country hosted about 2.55 million migrants (45 per cent women), with 54 per cent from Burkina Faso, 20 per cent from Mali and 7 per cent from Guinea. The General Population and Housing Census of 2014 reported 22.7 million inhabitants in the country, including 5.5 million migrants (24.1 per cent of the total population). Worth noting is that 3.9 million persons have not had their birth declared at the civil registry, more than three-quarters of whom were in rural areas. The Regional Integrated Survey on Employment and the Informal Sector of 2017 estimated the employed population at 7.7 million persons, including 1 million foreign-born persons (30 per cent women). An estimated 51 per cent of foreign-born employed men were in agriculture, 39 per cent in services and 9 per cent in industry. An estimated 43.4 per cent of foreign-born employed women were in agriculture, 48 per cent in services, and 8 per cent in industry. According to UNESCO (2019) estimates, 53 per cent of the population aged 15+ was illiterate in 2018 (60 per cent of women, 46 per cent of men).

UNDESA (2019) estimates that in 2019 there were about 1.11 million Ivorian migrants abroad (51 per cent women), with 50 per cent in Burkina Faso, 17 per cent in Mali, 9 per cent in France and 7 per cent in Ghana. According to the Organisation for Economic Co-operation and Development (OECD) (2019), in 2017 there were 6,500 new Ivorian migrants in Italy (14 per cent women). In 2018, there were 5,295 new asylum requests by Ivorians in France, and 1,685 in Italy.

### International legal framework and national policy on recruitment of migrant workers

Côte d'Ivoire has not ratified the ICMW or ILO Conventions Nos 97 and 143. It is a member of ECOWAS and CENSAD. Côte d'Ivoire does not have a labour migration policy or a migration policy. The National Development Plan of 2016–2020 refers to the elaboration of a migration policy as an indicator of developing a mechanism to control migration flows, but a migration policy has yet to be developed.

### Regulation of employment

Côte d'Ivoire has ratified the eight ILO fundamental Conventions as well as the Protocol of 2014 to the Forced Labour Convention, 1930, which will enter into force in November 2020.

The Labour Code (No. 2015-532 of 2015) defines workers regardless of their sex, race and nationality (art. 2). It stipulates that every job vacancy must be reported to the PES, be advertised in a national large-circulation daily newspaper and possibly via other means of communication. If after a period of one month from the first publication, no Côte d'Ivoire national has satisfied the required profile, the employer is authorized to recruit any other candidate – that is, a migrant worker (art. 11.1). Reports suggest that this condition prioritizing national workers was supported by local workers' organizations partly because of concerns that employers often favour recruiting migrant workers, who typically have lower levels of bargaining power than nationals. In practice, however, the condition is often not respected and has contributed to corruption in the recruitment process, with some reports suggesting that migrant workers coming to work in Cote D'Ivoire may pay from 500,000 to 3 million CFA francs to secure a job.

### Regulation of recruitment

Côte d'Ivoire has not ratified ILO Conventions Nos 88, 181 or 189. It has ratified Convention No. 96, and has accepted the provisions of Part III of that Convention.

The national employment service – the Youth Employment Agency (AEJ) – was established in 2015 through Decree No. 2015-228, following the dissolution of the Employment Research and Promotion Agency (AGEPE) and the National Youth Fund (FNJ), and in the process dropped the representation of workers' organizations on its board. The administrative and technical supervision of the AGEPE had been exercised by the Minister of Employment and its financial supervision by the Minister of Economy and Finance. The AEJ, by contrast, is under the Ministry for the Promotion of Youth and Youth Employment. Whereas the Management Advisory Committee of the AGEPE included six government representatives and one representative of each of employers and workers, the Advisory Council of the AEJ includes 12 government representatives, four private sector representatives, and representatives of development partners, including the World Bank, the United Nations Development Programme, and the French Development Agency – but it lacks any representation from workers. The AEJ does not address migration issues explicitly, although it has recently participated in an IOM reintegration event to present its services to returnees.

Decrees Nos 96-193 and 96-194 of 1996 regulate fee-charging PEAs in relation to placement and temporary work, respectively. Decree No. 96-193 defines a fee-charging placement agency as any natural or legal person registered in the commercial register (after authorization by the Minister of Labour) who carries out, as a mere intermediary and for remuneration, operations for the placement of workers with employers. The Government has indicated to the CEACR that it keeps an updated list of approved PEAs on the AEJ website; however no such list was readily accessible at the time of writing, as the most recent one found through online search was dated. The privatization trend with respect to labour intermediation is reflected in a 2017 AEJ request for expressions of interest (AMI/001/AEJ/17) for the selection of a PEA to handle the recruitment of AEJ agents.

## Recruitment services, fees and related costs

Decree No. 96-193 stipulates that remuneration of the PEA for its services is payable by the employer (art. 13).

Concerning migrant workers in Côte d'Ivoire, Order No. 6421 of 15 June 2004 amending Order No. 1437 of 19 February 2004 on the regulation of the recruitment and visa fees of non-national staff stipulates that visa costs are to be borne by the employer (art. 6). These visa fees are determined in relation to the worker's salary as follows:

- ▶ for non-African workers, the equivalent of one month's salary for a fixed-term employment contract, and one and a half months' salary for a permanent contract;
- ▶ for African workers, the equivalent of half a month's of salary for a fixed-term employment contract, and three-quarters of a month's salary for a permanent contract (art. 7).

The Order does not apply to some categories of workers, including:

- ▶ those paid on the basis of results, except if they are employees;
- ▶ executive management (for example, chief executive officer, director general, deputy director general);
- ▶ agricultural labourers; and
- ▶ domestic workers.

An employer in breach of this Order shall be fined – in addition to the payment of contract visa fees – three months' worth of the worker's salary per year of breach (art. 10).

## Unregulated recruitment and migration in abusive conditions

In practice, the migration-first pathway is prevalent among workers seeking employment in Côte d'Ivoire. Reports suggest that only a minority of workers placed in the country are recruited internationally following the recruitment-first pathway. Such workers are typically in high-level positions such as managers or professionals, and are typically referred to as expatriates rather than migrant workers. They may be either recruited directly by the employer or via a PEA.

Recruitment into agricultural employment in Côte d'Ivoire is often undertaken by informal recruiters.

Recruiters may contact plantation owners to offer them the services of migrant workers. In such cases, the contract may be signed prior to migration. Part of the salary is in kind, and the monetary part may only be paid at the end of the year. Following a season of employment, the worker may return to their country of origin and bring back family members, with the employer thus getting the work of a family for the cost of employing one person.

Migrant child labour occurs in agriculture. Migrants may be subject to harassment or unfair treatment, such as being requested to pay for the schooling of their children even though schooling is free, thus pushing them to employ their children. Additionally, in informal recruitment more generally, a worker who secures a job via a family member may become beholden to that family member. In other cases, it is the informal recruiter that receives the salary of the worker and then pays the worker only small portion of it representing as little as a 15-kilos bag of rice a year accompanied with a single payment of 100,000 CFA (around 150 euros). Migrant workers interviewed regretted the weak role that cooperatives play in improving their labour rights.

Stereotypes regarding nationalities are widespread and contribute to occupational job segregation by nationality: for example, street vendors from Niger, security guards from Burkina Faso, agricultural workers from Burkina Faso, domestic workers from Burkina Faso. Questions of nationality and identity are fraught with political tension, as both national and migrant stakeholders interviewed allude to them but avoid discussing them explicitly. These questions are inseparable from the history of the subregion, a history that itself has different narratives, ranging from a widespread vision in the country of Côte d'Ivoire as an El Dorado that has dried up and can no longer sustain foreigners, to a more critical vision of immigration as an extension of colonial practices. A social distinction is typically made between the autochthonous populations, those first installed in a site; allochthonous populations, newcomers to the site but from within the country; and allogenic populations, newcomers from other countries.

Several forms of unfairness in recruitment resulting in labour exploitation are widespread. Fake recruitment often involves scammers who pose as recruiters and request payment from workers. Some more elaborate scams involve waiting a



certain period, then calling back the worker for a supposed job interview, which can only be setup if the worker pays a certain amount in advance. Advertisements for recruitment are unorganized, and posters advertising for recruitment are visible in the streets and public spaces, without any verification of their legitimacy. Workers are often charged recruitment fees, and in some cases, the fee can amount to the whole of their first month of salary. Workers are often subjected to discrimination during the recruitment process, with discrimination normalized as a way to cater to the needs of the employer, including with respect to nationality, age, physical appearance and personal characteristics like docility. Domestic workers, many of whom are women and girls, are an important group that is particularly vulnerable to such discrimination, which is often compounded with other abuses, such as having to sleep on the floor under the house stairs or a balcony even on rainy days, or domestic workers sleeping in the bedroom of an adult man who can aggress them sexually.

Changes in recruitment pose new challenges. Both the public and private sectors are increasingly outsourcing placement and employment to PEAs. Temporary work agencies are notably important in the security sector and the cleaning sector, with various occupations often segregated based on nationality. Interviewees indicate that temporary work agencies charge significant fees to employers while wages paid to workers represent only a limited fraction of what user enterprises are charged (e.g. security guards). Temporary work agencies may make workers available to the user enterprise over periods of many years, a practice that benefits the “temporary” agency as well as the user enterprise, which does not consider itself the employer of such longterm workers, with the workers caught in between when they want to exercise their rights, even as stipulated in national legislation.

Labour inspectors are under-resourced, and they often lack means of transportation, and other resources. Some migrant workers interviewed expressed concern that the labour inspectors of their locality may be on the payroll of their employer, and as such prefer to resort to labour inspectors in Abidjan, thereby increasing their responsibilities.

Act No. 2016-1111 of December 2016 on the Fight Against Trafficking in Persons prescribes a penalty of five to ten years’ imprisonment for trafficking in

persons (art. 4). The penalty is imprisonment for 10–20 years and a fine of 10 million to 50 million CFA francs if the offense is committed against a minor under the age of 18 (art. 6). Further penalties are provided for in the law in cases committed under aggravating circumstances.

Looking ahead, the priority for the Government is to put in place a national migration policy as committed to in the National Development Plan of 2016–2020. Such policy should explicitly address the goal of achieving fair recruitment for migrant workers. It should also seek to ratify and apply relevant instruments, including ILO Conventions Nos 88, 181 and 189. Moreover, the public employment service should restore the representation of workers on its board in line with tripartism, and be provided an increased role in addressing recruitment issues for all workers.

### 3.3.3 Nigeria

#### Labour and migration overview

Nigeria is a net emigration country. According to UNDESA (2019) estimates, in 2019 Nigeria hosted about 1.26 million migrants (45 per cent women), with 29 per cent from Benin, 19 per cent from Ghana, 13 per cent from Mali, 12 per cent from Togo and 9 per cent from Niger. Meanwhile, there were about 1.44 million Nigerian migrants abroad (47 per cent women), with 22 per cent in the United States, 14 per cent in the United Kingdom, 10 per cent in Cameroon, 9 per cent in Niger, 6 per cent in Benin and 6 per cent in Italy. According to UNESCO (2019) estimates, 38 per cent of the population aged 15-plus was illiterate in 2018 (47 per cent of women, 29 per cent of men).

According to the OECD (2019), in 2018 there were 225,000 Nigerian-born migrants in the United Kingdom (52 per cent women) and 106,100 in Italy (41 per cent women). In 2017 there were 23,300 new Nigerian migrants in Italy (27 per cent women), 10,000 new Nigerian migrants in the United Kingdom, and 5,500 new Nigerian permanent migrants in Canada (47 per cent women). Nigeria was among the top ten countries of origin among asylum applicants in OECD countries every year from 2014 to 2018. In 2018, the number of new asylum requests from Nigeria in the OECD was 36,850, including 10,170 in Germany, 9,599 in Canada, 5,510 in Italy, 3,464 in the United States and 2,985 in France.

## International legal framework and national policy on recruitment of migrant workers

Nigeria has ratified the ICMW and ILO Convention No. 97, excluding the provisions of Annexes I to III. It has not ratified Convention No. 143. Nigeria is a member of ECOWAS and of CENSAD. Nigeria has a number of recent policies that explicitly address recruitment, including the National Labour Migration Policy, the National Migration Policy, and the National Employment Policy.

The National Policy on Labour Migration of 2014 has among its objectives promoting and protecting the rights of Nigerian labour migrants in recruitment for employment abroad through supervision and monitoring of recruitment activities. It refers to the application of Convention No. 181 and associated Recommendation No. 188 to prevent trafficking and other forced labour outcomes by stopping unscrupulous intermediaries, agencies and employers from luring migrants into exploitative employment, especially domestic workers. It also calls for constant monitoring of PEAs involved in the recruitment of Nigerians for employment abroad to eradicate excessive fees, false job offers, misleading propaganda relating to emigration, provision of credits with high interest rates for travel, and job-brokering services, as well as the use of forged documents. The Policy refers to holding PEAs to high standards of conduct, and penal provisions should be present and regularly applied to address offences. It commits the Government to closely supervising and monitoring the recruitment activities of overseas employment promoters or agencies to minimize malpractices and abuses against those seeking overseas jobs, and in addition to the cancellation of licenses, to introduce criminal proceedings against serious offenders.

The National Migration Policy of 2015 also addresses labour migration issues, one objective being to strengthen mechanisms regulating the activities of PEAs to prevent the exploitation of potential Nigerian labour migrants. According to the National Labour Migration Policy, PEAs are to register with the Federal Ministry of Labour and Employment for the purposes of regulating and monitoring PEA activities to forestall bogus job advertisements, trafficking in persons, smuggling and other fraudulent activities. The Policy calls for special attention to the recruitment and

deployment of the most vulnerable categories of workers, including women domestic workers. It specifies that for Nigerians travelling abroad, the recruiter must inform the intending migrant worker about their contract of employment in the presence of an authorized Labour Officer before the migrant embarks on their journey. The Policy recognizes the importance of pre-departure training and counselling for migrant workers, noting that since most Nigerian labour migrants travel under private arrangements, protection against scams and bogus agencies needs to start at home to ensure that PEAs do not exploit the ignorance and vulnerability of potential migrants, including by charging exorbitant recruitment fees.

The National Employment Policy of 2017 aims to promote the goal of full employment as a priority in national, economic and social policy, and to enable all men and women who are available and willing to work to attain secured and sustainable livelihoods through fully productive and freely chosen employment and work. The Policy seeks to ensure nondiscrimination and equality of treatment for all workers, migrants and nationals abroad and at home. It commits the Government to well-coordinated, fair and efficient recruitment processes by all employers that is devoid of manipulation, discrimination and other malpractices. It notably aims to eliminate open or disguised discrimination against women workers in recruitment and to discourage the maltreatment of migrant workers, including in relation to racism, racial discrimination, xenophobia and related intolerance. It provides that job advertisements shall not state any requirement related to sex, age, ethnicity, religion or other personal attributes except where such attribute are inherent requirements for the job. It also provides for ensuring that workers recruited by PEAs are not denied the right to freedom of association and the right to collective bargaining. The Policy specifies that all costs associated with recruitment must be borne by the employer and such costs shall not be passed directly or indirectly, wholly or in part to jobseekers. It seeks to regulate and supervise multiple levels of recruitment, including the activities of labour contractors and PEAs. PEAs are to inform outbound migrant workers, as far as possible in their own language or in a language with which they are familiar, of the nature of the position offered and the applicable terms and conditions of employment.

The Labour Migration Unit at the Federal Ministry of Labour and Employment is tasked with the responsibility of addressing the movement of skilled and unskilled persons within and outside Nigeria, as well as building the capacity of Foreign Service officers, immigration officers, police and other law enforcement officers to deal with and manage the movement of persons across Nigerian borders and irregular migration issues.

### Regulation of employment

Nigeria has ratified the eight ILO fundamental Conventions. It has not ratified the Protocol of 2014 to the Forced Labour Convention, 1930.

The Labour Act (Chapter 198) of 1990 regulates the employment of young persons (sects 59–64). It prohibits forced labour (sect. 73), but does not address discrimination. The Child's Rights Act (No. 26) of 2003 prohibits subjecting children to forced or exploitative labour, including as "domestic help" outside their home or family environment. A person committing an offence in that regard is liable on conviction to a fine not exceeding 50,000 Nigerian naira or imprisonment for a term of five years or both. If the offence is committed by a body corporate, those responsible are deemed to have jointly and severally committed the offence and may be liable on conviction to a fine of 250,000 naira (sect. 28). It prohibits the worst forms of child labour, with offenders liable on conviction to imprisonment for a term of ten years (sect. 30).

The Immigration Act of 2015 stipulates that a non-national cannot accept employment (not being employment with the federal, state or local governments) without the consent in writing of the Comptroller General of Immigration. A person desirous of entering Nigeria for employment must produce that consent; failure to do so makes the person liable on conviction to a fine of 1 million naira or deportation or both as a prohibited immigrant (sect. 36). A person desirous of employing a non-national must make application to, and receive permission from, the Comptroller-General of Immigration, including in relation to the repatriation of the worker and the worker's dependents (sect. 38).

### Regulation of recruitment

Nigeria has ratified ILO Convention No. 88. It has not ratified Conventions Nos 181 and 189.

The National Employment Policy of 2017 seeks to establish and maintain functional and timely information about job openings, sectoral changes, geographical imbalance and other labour and income trends, notably through the National Electronic Labour Exchange (NELEX), upgrading existing employment exchanges to job centres provided with solar electricity, and establishing a Board of Social Partners and other stakeholders for the administration and coordination of NELEX. It also seeks to establish a minimum of two Community Employment Centres in all of the 744 local government areas. According to the National Labour Migration Policy of 2014, the NELEX platform can collect information about job-seekers and employers from anywhere in the world. NELEX centres should provide information about regular means of securing visas for work purposes and registered and licensed PEAs

In practice, Nigeria's PES platforms currently seem fragmented and would benefit from consolidation. They include the National Directorate of Employment (NDE), established by the National Directorate of Employment Act No. 24 of 1989. One of the NDE's objectives is to obtain and maintain a data bank on employment and vacancies in the country, with a view to acting as a clearing house to link jobseekers with vacancies, in collaboration with other government agencies (sect. 2(c)). Currently, however, it seems more focused on employment generation projects. The NELEX platform website, which was upgraded with funding by the European Union, hosts the online presence of the Migrant Resource Centre (MRC), as well as forms for international and local recruitment licences, lists of accredited PEAs and quarterly reports. It also provides links to the addresses of Federal Ministry of Labour and Employment offices across the country. The MRC webpages included basic descriptions of the services provided on MRC physical premises, but without providing any guidance online, suggesting a model whereby information is only shared in face-to-face meetings.

Part II of the Labour Act (Chapter 198) of 1990 regulates recruitment, including:

- ▶ recruiters and recruiting generally (sects 23–32);
- ▶ recruiting for employment in Nigeria (sects 33–35);
- ▶ recruiting for employment outside Nigeria (sects 36–44);
- ▶ enforcement provisions (sects 45–47); and application (sect. 48).

The Labour Act forbids recruitment of any citizen for employment as a worker in Nigeria or elsewhere except in pursuance of an employer's permit or recruiter's licence. The Minister of Labour and Employment has the possibility of waiving the need for a permit or licence under specific conditions<sup>14</sup> and can issue a certificate to recruit citizens as workers in Nigeria (sect. 23). The Act defines labour contractors as persons who undertake to provide another party with the services of workers while themselves remaining the employers of the workers in question (sect. 48).

The Labour Act defines a fee-charging employment agency as:

- (a) an agency conducted by any person who acts as an intermediary for the purpose of procuring employment for a worker or supplying a worker to an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either employer or worker; or
- (b) an agency for conducting the placing services of any company, institution, agency or other organisation which, although the agency is not conducted with a view to obtaining any pecuniary or other material advantage, levies from either employer or worker for those services an entrance fee, a periodical contribution or any other charge, but excludes any organisation for the production of newspapers (or other publications) which are not produced wholly or mainly for the purpose of acting as intermediaries between employers and workers (sect. 71(3)).

The establishment and operation of a fee-charging employment agency requires the written consent of the Minister of Labour and Employment (sect. 71(1)).

Under the Labour Act, the National Council of Ministers may by order prohibit the recruitment

or engagement of citizens for employment outside Nigeria in any territory named in the order (sect. 36). Citizens cannot leave the country under a foreign contract before undergoing medical examination to ensure their fitness to work and being brought before an authorized labour officer and certified as duly recruited, and verifying, among other things, that the citizen has not been subjected to illegal pressure or recruited by misrepresentation or mistake, and is not abandoning dependents (sect. 39). Persons engaging in forms of deception in recruitment are liable to a fine not exceeding 1,000 naira or to imprisonment for a period not exceeding one year, or to both (sect. 72).

### Recruitment services, fees and related costs

The Labour Act stipulates that the Minister of Labour and Employment may make regulations providing for the supervision and control of fee-charging PEAs and prescribe the scale of fees which PEAs may charge (sect. 71(2)). The Act allows for charging fees to either the employer or to the worker (sect. 71(3)), an issue that the National Employment Policy (2017) seeks to rectify.

The Labour Act specifies that no citizen recruited for employment in Nigeria can be employed until the worker is confirmed to be medically fit for the job and an authorized labour officer has issued a certificate verifying, among other things, that the recruited worker understands and agrees to the terms of employment and has not been subjected to illegal pressure or recruited by misrepresentation or mistake (sect. 33).

Regarding recruitment for work abroad, within 30 days after the expiration of a foreign contract, the employer or the employer's agent must offer to provide the worker with a return passage for the worker and the worker's family, if any, to the place of recruitment, together with proper accommodation and maintenance on the journey (sect. 38(2)).

Migrant Resource Centres have been prioritized by the Government to provide information and orientation on migration and fair recruitment. In practice, workers often have difficulty physically accessing such centres from their place of residence, and the centres themselves are often

<sup>14</sup> These conditions include workers formally commissioned in writing to recruit for their own employer without receiving any remuneration or advantage from recruiting, and without making advances of wages to the workers recruited (sect. 23(2)).



under-resourced. Both a physical upgrade of the centres as well as a technical upgrade in terms of information materials and online presence is underway with the support of development partners.

The Human Capital Providers Association of Nigeria (HuCaPAN) is the umbrella organization of registered/licenced recruiters in Nigeria, and it has a code of conduct developed with the support of the Federal Ministry of Labour and Employment, the Nigeria Employers' Consultative Association (NECA) and the ILO. Principle 4 of the code is that PEAs shall not charge directly or indirectly, in whole or in part, any fees or costs to prospective employees and workers, for services directly related to temporary assignment or permanent placement.

In practice, the stigmatization of returnees who are perceived to have failed in their migration experience is widespread, often because of comparisons with unrealistic standards and expectations. Women who were victims of sexual assault or sexual exploitation, including those who became pregnant or had a child, are often blamed for their situation. Return and reintegration programmes have been developed with the support of various organizations, with the need for greater coordination and policy coherence voiced by various actors. Experience suggests that returns labelled as "voluntary" were often decided upon under duress, with the alternative often being detention and eventual deportation. Various reports suggest that some returnees, even after participating in the return and reintegration programme, often intend to migrate again. The IOM has introduced innovations to its service delivery in that regard, including by focusing on non-financial support, as well as in providing support to groups rather than individuals; group members would monitor and dissuade their peers from migrating again. Concerns have been raised with respect to the sustainability of the enterprises created, as well as to the fact that their activities are mainly in the informal economy. The German Corporation for International Cooperation (GIZ) has tried to contribute to wage employment by supporting voluntary and forced returnees to be placed in paid internships, with the hope of them being offered employment by the employers afterwards. The International Centre for Migration Policy and Development has developed a pilot project on reverse migration for the return of migrants from Austria through a public-private partnership.

## Unregulated recruitment and migration in abusive conditions

Nigeria has several institutions in place to address human trafficking issues. The Immigration Act of 2015 established the Directorate of Migration and the Divisions of Regular and Irregular Migration within the Nigeria Immigration Service. The Act prohibits the smuggling of migrants (sect. 64). The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act (2005) established the National Agency for the Prohibition of Traffic in Persons and Other Related Matters (NAPTIP).

As of July 2019, the Nigerian passport enabled visa-free access to 45 countries, including 14 ECOWAS members, ranking it 98th of 109 on the Henley Passport Index. In comparison, a Ghanaian passport enabled visa-free access to 64 countries. In addition, reports have suggested that persons with a Nigerian passport are less likely to receive a visa than those with a Ghanaian passport, other things being equal. It has been suggested that some Nigerian nationals have resorted to getting a Ghanaian birth certificate for a fee, using it as a basis for a Ghanaian passport and increased chances of having visa approval.

The official Immigration Statistics for 2018 report provides a summary of migration cases, which included:

- ▶ 209 irregular migrants intercepted;
- ▶ 34 suspected smugglers of migrants arrested;
- ▶ 453 human trafficking and child labour victims rescued;
- ▶ 78 human traffickers arrested;
- ▶ 127 human trafficking and child labour victims referred to NAPTIP;
- ▶ 28 human trafficking and child labour traffickers referred to NAPTIP; and
- ▶ 423 victims of trafficking in persons and smuggling of migrants reunited with family.

According to NAPTIP, in 2018, the agency received a total of 1,076 cases, fully investigating 206 cases and apprehending 823 suspects (45 per cent women). More than one-fifth of the cases received – and about a quarter of cases fully investigated – concerned to foreign travel aimed at promoting prostitution. In 2018, 1,173 victims were rescued (84 per cent women), about one-third of whom had been trafficked for purposes of sexual exploitation or prostitution externally or for foreign travel that promotes prostitution.

The Nigeria Labour Congress (NLC) has organized with other partners a National Trade Union Platform on Labour Migration in Nigeria. The Platform has a WhatsApp group, and holds quarterly meetings. Among the activities of the NLC and the National Trade Union Network on Migration was a June 2019 rally to protest the violation of African migrant workers' rights in Gulf Cooperation Council countries. In its letter to the Ambassador of the United Arab Emirates, the NLC called for the protection of migrant workers' rights; genuine reform to the *kafala* system; removal of exit visas; decent wages and working conditions, including for migrants, particularly domestic workers; access to justice; and labour rights, including freedom of association.

The establishment of the Edo State Task Force Against Human Trafficking (ETAHT) in August 2017 has been an important step forward. According to its July 2019 activity report, a survey undertaken by the task force with more than 4,000 returnees from Libya revealed that more than three-quarters had opted for the migration-first pathway, most via irregular channels. Women represented about one-third of the returnees. More than a third of men returnees were aged 18–25, compared with about two-thirds of women; in total, 97 per cent of returnees were aged 18–40. Nine in ten returnees had an economically viable skill prior to migrating. About two-thirds had completed secondary education, whereas a quarter had completed primary education. More than three-quarters had gotten the idea of traveling from friends. Economic considerations, joblessness, and family pressure were the main reasons to migrate for three quarters of men and women. The travel route to Libya typically takes 20 to 40 days, costing about US\$700, with every returnee having witnessed many deaths, mostly caused by hunger, dehydration, sickness, childbirth, beating, gunshot wounds and drowning. About half the surveyed Libya returnees had intended to migrate to Italy, and about a quarter to Germany.

The ETAHT has undertaken advocacy and sensitization activities, including by visiting traditional rulers and community leaders, major markets and churches; organizing town meetings and door-to-door sensitization; and developing materials discouraging irregular migration on TV and radio. It has also provided returnees with training, three-month stipends, counselling and follow-up, particularly for the seriously traumatized, as well as other events. From August 2017 to July 2019, 60

cases of human trafficking had been identified, 11 completely investigated and charged in court, with the suspects remanded into prison custody.

Looking ahead, the way forward for Nigeria will be to translate policy on paper – including the National Labour Migration Policy, the National Migration Policy, and the National Employment Policy – into policy in practice. Securing resources for implementation of the policies; ensuring that institutional memory and developed capacities are retained within the Federal Ministry of Labour and Employment; and consolidating the PES are also critical priorities. The ratification of relevant instruments such as Conventions Nos 143, 181 and 189, as well as the Protocol of 2014 to the Forced Labour Convention, 1930, would strengthen the normative basis of the envisaged policy implementation.

### 3.3.4 Ghana

#### Labour and migration overview

Ghana is a net emigration country. According to UNDESA (2019) estimates, in 2019 Ghana hosted about 467,000 migrants (47 per cent women), with 22 per cent from Togo, 17 per cent from Nigeria, 16 per cent from Cote d'Ivoire, 14 per cent from Burkina Faso and 7 per cent from Liberia. Meanwhile, there were about 971,000 Ghanaian migrants abroad (47 per cent women), with 24 per cent in Nigeria, 18 per cent in the United States, 15 per cent in the United Kingdom, 11 per cent in Cote d'Ivoire, 5 per cent in Italy and 5 per cent in Togo. According to UNESCO (2019) estimates, 21 per cent of the population aged 15-plus was illiterate in 2018 (26 per cent of women, 17 per cent of men).

#### International legal framework and national policy on recruitment of migrant workers

Ghana has ratified the ICMW. It has not ratified ILO Conventions Nos 97 and 143. Ghana is a member of ECOWAS and of CENSAD.

The National Employment Policy (2014) has the overall objective of adopting an intersectoral and integrated approach towards achieving full, decent, productive and freely chosen employment for all Ghanaians who are able and willing to work, thereby improving living conditions within the framework of equity, security and dignity. The Policy expresses concern regarding the impact

of highly skilled emigration on labour shortages in critical sectors such as health and education. It refers to the need for orientation services for outbound migrants before arrival in destination countries and reintegration into the national economic upon return, along with the effective protection of migrant workers' rights. The Policy also considers it as an obligation for the Government to put in place a coordination structure for labour migration activities, including the regulation of PEAs, harmonization of data sources to inform policy, and reduction of informal means of sending remittances.

The National Labour Migration Policy (2020) refers to violation of the rights of immigrants in Ghana and of the rights of Ghanaian emigrants by employers and PEAs as key issues to be tackled. It notes risks associated with irregular migration, migrant smuggling through the Sahara Desert to Europe, and human trafficking to Europe and the Gulf States. It links unfair recruitment practices to the extortion of exorbitant recruitment fees from migrants, debt bondage, seizing of travel documents, and insecure (precarious) contracts. The Policy calls for ratifying Convention No. 181 and implementing the ILO General Principles and Operational Guidelines for Fair Recruitment.

The Policy also calls for regulating PEAs through:

- ▶ effective licensing schemes;
- ▶ codes of conduct;
- ▶ publishing the list of licensed PEAs;
- ▶ monitoring and penal provisions to address offences by PEAs, including withdrawal of recruitment and placement licences in cases of violations; and
- ▶ requirements for insurance bonds to be used to offer monetary compensation to internal and international migrant workers when a PEA fails to meet its obligations.

The Policy specifies the need to establish and implement stiffer penalties to deal with PEAs and government officials who violate rules governing fair and ethical recruitment. It seeks to empower and strengthen Ghana's diplomatic missions to provide information to Ghanaian migrant workers and to critically review and assess foreign-based

recruitment agents and employers hiring Ghanaian nationals. Concrete actions put forward in the draft policy concerning diplomatic missions include assigning qualified labour attachés, training staff and providing sufficient budget for such functions. The Policy further aims to enhance the capacity of Public Employment Centres and to mandate them to provide tailored information and orientation to potential emigrants, returned migrants and immigrants on: legal migration channels, recruitment processes, pre-departure issues, challenges of migration, requirements for re-engagement (for return migrants), responsibilities of PEAs, human trafficking and xenophobia, among others. In addition to developing their physical infrastructure, the aim is to develop up-to-date relevant content, including using digital technology. The centres also provide services to support entrepreneurship.

### Regulation of employment

Ghana has ratified the eight ILO fundamental Conventions. It has not ratified the Protocol of 2014 to the Forced Labour Convention, 1930.

The Labour Act, 2003 (Act 651), prohibits discrimination on grounds of gender, race, colour, ethnic origin, religion, creed, social or economic status, disability or politics (sect. 14). It also prohibits forced labour (sect. 116).

The National Labour Migration Policy has noted that some of the procedures for obtaining work permits and citizenship are quite complex. It notes contradictions between some national legislative instruments and subregional protocols; for instance, ECOWAS citizens not being allowed to engage in economic activities reserved for Ghanaians. The Immigration Service Act of 2016 stipulates that the functions of the Immigration Service include issuing visas for entry into the country and permits for residence or work in the country (sect. 4).

### Regulation of recruitment

Ghana has ratified ILO Convention No. 88 and Convention No. 96 and has accepted the provisions of Part II of Convention 96<sup>15</sup>. It has not ratified Conventions Nos 181 and 189. It has

15 The ILO's Governing Body has decided that the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96) is outdated. The International Labour Conference will consider abrogating this Convention, so that it is no longer part of the ILO's body of international labour standards. A decision on Convention No. 96 will be taken by the Conference in 2030.

ratified the Labour Act, 2003 (Act 651), under Part II, regulates public employment centres and PEAs. Concerning public employment assistance, the Youth Employment Agency Act, 2015, established the Youth Employment Agency, which aims to develop, coordinate, supervise and facilitate the creation of jobs for the youth in the country.

The Labour Act, 2003 (Act 651), defines a PEA as a body corporate that acts as an intermediary for the purpose of procuring employment for a worker or recruiting a worker for an employer (sect. 175). Section 7, which regulates PEAs, stipulates that an agency may recruit workers for employment in a country outside Ghana if it is authorized to do so under its licence and if there exists an agreement between the Government and that of the other country. Moreover, a PEA shall submit to the Minister of Employment and Labour Relations not later than 14 days after the end of every three months figures in respect of workers recruited for employment, whether in Ghana or outside Ghana, during that three-month period.

The Labour Regulations, 2007, defines PEAs following Convention No. 181 and provides additional regulations for them. For example, a person who wants to establish a PEA must:

- ▶ register the agency with the Registrar-General as a body corporate before applying to the Minister of Employment and Labour Relations for a licence;
- ▶ pay a licence fee of 5 million Ghanaian cedis; and
- ▶ pay a security deposit of 25,000 cedis as security to cover operations in case of repatriation of illegal or illegitimate worker who may be sent abroad by them or have to be repatriated at a cost to the country (sect. 3(1)).

Within one month of the licence application, the premises, facilities and staff of the PEA are to be inspected to inform the decision regarding issuance of the licence (sect. 3(5)). The Regulations introduces prohibitions of the recruitment of children for work outside the country and of trafficking in persons (sects 2126), according to the definition of human trafficking as per the Human Trafficking Act, 2005 (Act 694). The Regulations stipulate that where children are trafficked, the consent of the child, parent or guardian of the child cannot be used as a defence against prosecution under Act 694 regardless of whether or not there is evidence of abuse of power, fraud or deception on the part

of the trafficker or whether the vulnerability of the child was taken advantage of (sect. 23).

With regard to conditions for foreign employment and assignment of contract, the Regulations (sects 28, 30) stipulate that:

- ▶ The Chief Labour Officer shall ensure that an employer does not engage a worker under a foreign contract without proper documentation;
- ▶ The Chief Labour Officer shall ascertain from the country of origin of the employer or agent of the employer recruiting the worker, the corporate background of the agent and the genuineness of the employment offer;
- ▶ An employer shall not assign a contract without the consent of the worker and the endorsement by the Chief Labour Officer or a Labour Officer; and
- ▶ Before making the endorsement, the Chief Labour Officer or a Labour Officer shall ascertain whether the worker has freely consented to the assignment.

As noted above, the Immigration Service Act of 2016 stipulates that the functions of the Immigration Service include ensuring the application and enforcement of laws relating to the immigration and employment of non-Ghanaians in the country (sect. 4). This is problematic given that the enforcement of labour legislation is the responsibility of the Ministry of Employment and Labour Relations. Moreover, good practice suggests that firewalls should be instituted between the enforcement of immigration laws and of employment laws.

According to the Ministry of Employment and Labour Relations, 1,589 workers were placed into overseas employment by PEAs (686 men and 903 women) in 2017, compared with 2,372 in 2016. This decrease was the result of a ban on overseas recruitment taking effect in May 2017. The major destinations were Saudi Arabia (1,145), Qatar (307) and Dubai (117). Of the 1,589 placed, 871 were domestic workers in Saudi Arabia, virtually all women. For men, the largest category was labourers (191). Workers often migrate with insufficient knowledge of what to expect in transit and in the country of employment (Ghana 2018).

Ghana has signed a memorandum of understanding (MOU) with Italy in 2006 to facilitate labour migration from Ghana to Italy, and an MOU



with Jordan in 2016 to facilitate the movement of domestic workers to Jordan. No full bilateral agreement has been signed with either destination country. Ghana and Qatar signed a bilateral agreement on labour migration in 2018.

### Recruitment services, fees and related costs

The Labour Act, 2003 (Act 651), stipulates that the charging of fees to workers is allowed. The Minister of Employment and Labour Relations may make regulations prescribing the scale of fees chargeable by the PEAs (sect. 174(h)). The Act also specifies that a PEA must refund fifty percent of the fees paid by a client to it, if it is unable to secure a job placement for the client within three months (sect. 7(7)). The Act stipulates that on termination of employment in the case of a foreign contract, the employer is responsible to pay to the worker the expenses and necessities for the journey and repatriation expenses in respect of the worker and accompanying members of his or her family (sect. 18).

With respect to travel, the Labour Regulations (2007) stipulate in section 34 that the expenses of the journey of an employee engaged under a foreign contract and of the members of the employee's family authorized to accompany the employee to the place of employment, including those incurred for protection during the journey, shall be paid by the employer. These expenses include "the necessities for the journey", including services and items required by a person being engaged in a foreign contract. The provision of transport includes repatriation.

Under section 35 on termination of contracts, the Regulations stipulate that where an employer is unable to fulfil the contract or if, owing to sickness or accident, the worker is unable to fulfil the contract, the contract may be terminated by either party and the worker is entitled to remuneration earned, deferred pay and compensation due to the worker in respect of sickness or accident, as well as repatriation of a member of the worker's family who has accompanied the worker to the place of employment. A worker is entitled to repatriation expenses unless the agreement for the termination

of the contract otherwise provides. Section 36 on repatriation specifies the circumstances in which an employee engaged under a foreign contract and the member of the employee's family authorized to accompany the worker to the place of employment are repatriated at the expense of the employer. The Labour Regulations are silent on other related recruitment costs.

According to principle 3 of the Ghana Association of Private Employment Agencies (GHAPEA) Code of Conduct, PEAs may charge fees for their services, however these fees must be "appropriate" in relation to costs of the agency. No definition of "appropriate" is provided. In practice, concerns have been reported with respect to the internal workings of the GHAPEA, with internal conflicts and disagreements regarding its strategic direction. At the time of writing its website was not accessible.

In 2019, the Ghana Statistical Service conducted a pilot survey in four administrative districts in the Ashanti, Bono and Bono East regions to pilot the measurement of recruitment costs of migrant workers in line with SDG indicator 10.7.1: Recruitment cost borne by employee as a proportion of monthly income earned in country of destination.<sup>16</sup> Findings from the survey indicate that some 90 per cent of households interviewed paid recruitment costs, and that the recruitment cost indicator was lower for skilled migrant workers, i.e. "that it takes a shorter period for skilled migrant workers to earn enough in a shorter period to cover their recruitment costs than unskilled workers" (Ghana 2020).

With respect to return and reintegration, the IOM (supported by EU funding) has been an important actor. The IOM provides returnees with assistance upon arrival, including the provision of pocket money to cover immediate needs. Returnees are eligible as well for reintegration support based on their needs, which includes counselling, education and vocational training, and psychosocial and medical support. The IOM also offers referrals for other services or in-kind support through individual, collective or community projects. GIZ is providing advice on migration and employment through the Ghanaian-German Centre for Jobs, Migration and Reintegration.

<sup>16</sup> The survey was implemented in collaboration with the ILO, World Bank, EU and GIZ through the EU funded REFRAME programme and the GIZ funded Initiative for Labour Migration, Employment and Reintegration in Nigeria and Ghana. The survey covered a total of 1,098 people.

## Unregulated recruitment and migration in abusive conditions

Ghana is a country of origin of migrants in an irregular situation in Europe and North America, whether these persons entered the countries of destination irregularly or entered regularly then overstayed their visa or started employment in breach of their visa. Beyond migration in the subregion, which is typically by land, migration to other destinations is typically by air.

Irregular migration has undermined the effectiveness of the May 2017 ban mentioned above, as service providers circumvented it by adding a transit country in the migrant worker's journey to the Middle East. Witnesses have noted that workers would travel individually to a neighbouring country, then assemble there and travel as an organized group to the country of destination. Although such practices may increase the likelihood of the workers getting a job abroad, there is no vetting of their contracts by Ghanaian authorities and no formal record of them as workers abroad. As such, these workers are more vulnerable to abuses than other migrant workers may face, such as the extortion of abusive fees, debt bondage and seizing of travel documents.

The Human Trafficking Act, 2005 (Act 694), amended in 2009, prohibits trafficking in persons and specifies the offenses related to it. A person trafficking another person or acting as an intermediary for the trafficking of a person is liable on summary conviction to imprisonment for a term of not less than five years (sect. 2). A person who provides another person for purposes

of trafficking – even where the first person is a parent – is liable on summary conviction to a term of imprisonment of not less than five years (sect. 3). A person who “uses a trafficked person” is liable on summary conviction to a term of imprisonment of not less than five years (sect. 4). The Act provides for the rescue, rehabilitation and reintegration of trafficked persons, and for the establishment of a Human Trafficking Fund and a Human Trafficking Management Board. With the support of United Nations Office on Drugs and Crime, a draft law on smuggling of migrants is under development.

Among migrants in an irregular situation in Ghana, some engage in activities reserved by the Ghana Investment Promotion Centre Act, 2013 (Act 865), only for Ghanaians, such as:

- ▶ petty trading or selling of goods in a stall at any place;
- ▶ operation of a taxi or car hire service in an enterprise that has a fleet of less than 25 vehicles;
- ▶ operation of a beauty salon or a barber shop; and
- ▶ retail of finished pharmaceutical products; and

According to the National Labour Migration Policy, this also applies to artisanal and small-scale mining which is similarly reserved for Ghanaians

Looking ahead, implementing the National Labour Migration Policy offers a promising way forward. The draft policy proposes the ratification of ILO Conventions Nos 97, 143, 181 and 189. Also relevant for ratification is the Protocol of 2014 to the Forced Labour Convention, 1930, which the Policy already takes as part of its normative basis.

## ► 3.4 Southern Africa

### 3.4.1 Lesotho

#### Labour and migration overview

Lesotho is a net emigration country. It is landlocked and surrounded by South Africa. According to UNDESA (2019) estimates, in 2019 Lesotho hosted about 7,000 migrants (46 per cent women), with 40 per cent from South Africa. Meanwhile, there were about 342,000 Basotho migrants abroad (49 per cent women), with 97 per cent in South Africa. According to UNESCO (2019) estimates, 23 per cent of the population aged 15-plus was illiterate in 2014 (15 per cent of women, 32 per cent of men).

#### International legal framework and national policy on recruitment of migrant workers

Lesotho has ratified the ICMW. It has not ratified ILO Conventions Nos 97 and 143. Lesotho is a member of the Southern African Development Community (SADC).

Lesotho has developed a draft national labour migration policy which was adopted by Cabinet in February 2020. Concerns have been raised regarding the consultation process with the most representative workers' and employers' organizations in the process of developing the draft policy. The draft policy identifies the regulation of recruitment of Basotho workers for employment abroad as a key challenge in light of reportedly high levels of fraudulent recruitment practices and the inadequacy of the current regulatory system. The draft policy refers to the ILO General Principles and Operational Guidelines for Fair Recruitment as a guiding framework and aims to establish consistent legislative, regulatory and operational frameworks that promote and enforce fair recruitment that relies on professional and capacitated PES's and PEAs.

The draft policy notes the 2017 Labour Migration Management Assessment's conclusion regarding the negative impact of decades of recruitment and placement of Basotho workers in South Africa. Specific issues raised in this regard are:

- the limited contribution to development and poverty reduction;
- lack of accompanying measures such as education in welfare and education;

- and the high burden of occupational disease borne by workers' households and the Lesotho public health system, in particular silicosis, the prevalence of which stands among the highest worldwide.

The 2017 Labour Migration Management Assessment also specifies measures to strengthen the regulation of recruitment of Basotho workers for employment abroad, including:

- addressing gaps in the regulation of PEAs;
- professionalizing PEAs;
- the prevention of trafficking, smuggling, forced labour and forms of fraudulent recruitment;
- better coordination between units in charge of vetting contracts; and
- pre-departure training and sensitization of migrant workers to the conditions of work and labour legislation in the country of destination.

#### Regulation of employment

Lesotho has ratified the eight ILO fundamental Conventions and the Protocol of 2014 to the Forced Labour Convention, 1930, which will enter into force for Lesotho in August 2020.

The Labour Code Order of 1992 prohibits discrimination on the basis of race, colour, sex, marital status, religion, political opinion, national extraction or social origin (sect. 5(1)). It also prohibits sexual harassment (sect. 5(2)), the prohibition of which also encompasses the offer of employment or threat of dismissal or threat of imposition of any other penalty against another person in the course of employment as a means of obtaining sexual favours (sect. 200). The Order guarantees freedom of association to all workers, employers and their respective organizations (sect. 6), and prohibits forced labour (sect. 7). Child labour is prohibited in any commercial or industrial undertaking other than a private undertaking in which only members of the child's own family (up to five in number) are employed (sect. 124(1)), and a child is defined as any person under the age of 15 years (sect. 3).

Part XII of the Labour Code Order of 1992 regulates the employment of non-nationals. It forbids the employment of non-nationals without a valid certificate of employment (work permit) issued by the Labour Commissioner. Both the employer and the non-national worker who violate this provision are

liable on conviction to a fine of 1,000 Lesotho maloti or six months' imprisonment, or both (sect. 165). Before a work permit is granted, the National Employment Service must certify that no citizen of Lesotho is at that time qualified and available for the job. A work permit is valid for no more than 24 months, and may be cancelled or extended at the discretion of the Labour Commissioner (sect. 166). Both the employer and the non-national worker must produce evidence of having a work permit within four days from being requested to do so by the Labour Commissioner (sect. 167).

In practice, a major challenge is that this process contains gaps between the Ministry of Labour and Ministry of Home Affairs, as the former controls work permits and the latter controls entry visas and residence permits. There have been reported cases of migrant workers receiving visas and residence permits, only to be later denied work permits. The work permit process at the Ministry of Labour remains paper-based, despite attempts to digitize the process. A concern raised by key informants in relation to the work permits issued to migrant workers is that they often refer to the occupation as "manager", even when the worker lacks the basic skills for such an occupation and is recruited to work in an elementary occupation or as plant or machine operator. Although it is not wholly clear why this may be the case, the implication is that employers are recruiting migrant workers whose skills are already available in the country, to the detriment of Basotho workers. Another concern is that National Employment Service decisions regarding whether the skills needed for a job are already available in the country are being made in a context of limited labour market information and are not based on sufficient consultation with employers. This issue could be improved through strengthening of the labour market information system (e.g. through skills surveys) and better coordination with employers. Concerns were also raised regarding the need to develop TVET resources to better address skill gaps.

## Regulation of recruitment

Lesotho has not ratified any of ILO Conventions Nos 88, 181 and 189.

According to the Labour Code Order of 1992, the functions of the National Employment Service include facilitating the placement of unemployed persons in employment (sect. 21).

Part X of the Order regulates "labour agents", which according to the Order are defined as "a person who engages in the business of procuring, recruiting, hiring, engaging, supplying or forwarding persons to be employed wholly or partly outside Lesotho" (sect. 138(2)). As such, the Order does not address PEAs recruiting workers for employment in Lesotho, whether from Lesotho or from other countries. The Code prohibits labour agents from engaging in recruitment unless they hold a valid license issued by the Labour Commissioner, typically valid for 12 months (sect. 141 (1)). In considering an application for such a license, the Labour Commissioner must respect a number of stipulations, such as: meet criteria to ensure they are a "fit and proper person to hold a licence"; deposit of a security for the payment of wages or other obligations that may arise; provide proof of having provisions in place to "safeguard the health and welfare of the person being recruited"; and having the capacity to take into account the provisions of the relevant ILO Conventions and Recommendations on migrant workers (sect. 140(2)(e)). Licenses are further subject to the provisions of the Labour Code and any regulations issued thereunder.

The Minister is also authorised to specify certain license conditions in relation to:

- a) restricting the number of persons that may be recruited in any area
- b) closing any area to recruitment
- c) recruiting for jobs in specific sectors only
- d) the amount of the advanced wages that may be paid to an employee or person recruited (sect. 140 (3)(a-d))

PEAs (labour agents) are required to keep records, books, accounts and statistics of their recruitment operation and may be asked to produce these for an attesting officer. Any labour agent failing to keep such records or furnishing false information shall be guilty of an offence punishable by a fine or imprisonment for six months or both.

The Labour Code also identifies certain individuals who are not permitted to engage in recruitment activities, including chiefs, headmen, or persons employed in the public service or by any chief or headman. Persons doing so are guilty of an offence and will be subject to a fine, imprisonment or both (sect. 146).

Every person recruited by a labour agent must appear before an attesting officer, who shall ensure



that the recruitment procedure has followed the provisions of the Labour Code (sect.149(1)).

As regards employment contracts, Part XI of the Labour Code regulates contracts of foreign service, and addresses, among other things, particulars that are to be contained in contracts of foreign service as may be necessary to define the rights and obligations of the parties involved (sect. 153(2)). The Code also stipulates that foreign contracts are to be written, attested by a designated attesting officer<sup>17</sup>, and registered with that same officer (sects. 154–155). The minimum age of workers recruited for employment abroad is set at 18 (sect. 156), and details are provided regarding the medical examination, acclimatization, and immunization of the recruited workers (sects 157–158). The Order also regulates the termination of contracts of foreign service as a result of illness, the maximum period of contracts of foreign service, the transfer and extension of contracts, and the possibility of the Minister of Labour and Employment requiring a guarantee from the employer to cover deferred pay (sects 161–164).

The Labour Code Order allows for the voluntary deferment of a portion of the remuneration of workers employed abroad (sect. 83(2)(b)). The deferment of wages requires the voluntary consent of the employee and the concurrence of the attesting officer, with the amount of any wages deferred to be paid to the employee on completion of the contract, or in the case of a contract of foreign service not later than as soon as is reasonably practicable after the return of the employee to Lesotho (Labour Code Order, Fourth Schedule, sect. 3). In practice, migrant workers and their families often face challenges in accessing deferred wages.

### Recruitment services, fees and related costs

The Labour Code Order stipulates that the services provided by the National Employment Service are to be charged to employers, and in no case may such charges be passed on to employees or candidates for employment (sect. 21(2)(c)).

The fees for the attestation of contracts of foreign services are to be paid by the overseas employer (sect. 155(3)). The Labour Code Order stipulates

that the transport to the place of employment of persons recruited for employment abroad is at the expense of the employer (sect. 150). Employers are responsible for returning the recruited worker to the place of recruitment in cases including when the worker is found by an attesting officer (from the Ministry of Labour) to have been recruited by misrepresentation, fraud, illegal pressure or mistake (sect. 151). Before attesting the signature of the worker on the contract of foreign service, the attesting officer must verify that the worker has fully understood and freely consented to the contract and that this consent has not been obtained by coercion or undue influence or as a result of misrepresentation or mistake (sect. 154(3)(c)).

In practice, a concern raised by employers in South Africa is that workers may use transportation paid by the employer only to move to another job in the country of destination. In the event that this worker dies in South Africa, then the initial employer has to cover the costs of repatriation, even though the worker was employed in a different region. Moreover, regarding medical screening, whereas arrangements have been put in place for mineworkers recruited through regular and formal channels, they are not in place for farmworkers, whether recruited formally or informally. In addition, while employers pay transportation from the point of recruitment to the point of employment, workers pay transportation from their village to the point of recruitment. With respect to transportation over long distances, workers often are denied lodgings and have to sleep in the vehicles. Some overseas employers also deduct transportation costs from the first salary, in contravention of Lesotho law.

### Unregulated recruitment and migration in abusive conditions

Trafficking in persons is an important concern, which has been exacerbated by prevalent unemployment and underemployment. Lesotho adopted the Anti-Trafficking in Persons Act in 2011 and the Anti-Trafficking in Persons Regulations in 2015.

In practice, as per interviews and focus group discussions, there are several protection gaps pointing to limited implementation of laws and

<sup>17</sup> For more details concerning the attestation process, please see the section on “Recruitment services, fees and related costs” below.

policies: Domestic workers, farmworkers and mine-workers are the main groups of migrant workers from Lesotho, with domestic workers the most vulnerable to abuse. All three groups of migrant workers are mainly employed in South Africa. The domestic workers and farmworkers are typically recruited via formal PEAs, and mineworkers typically via informal PEAs. Transport is mainly by land. The borders with South Africa are porous, and as such irregular migration is widespread. Mineworkers recruited for employment in illegal mines in South Africa endanger their lives given the absence of any form of protection and oversight. Fake recruitment, namely the luring of workers with lucrative non-existent jobs is highlighted in the Lesotho Labour Policy of 2018. Contract substitution concerns have been raised regarding workers signing a contract in Lesotho, then having to sign another contract that is detrimental to them in South Africa, particularly in farm work and often in a language they do not understand. Cases were shared of Basotho workers recruited for employment in South Africa being forced to work in another country, such as Uganda and even as far away as India. In such cases the companies hiring the workers may send them to sister companies abroad, without consulting or informing the workers. There are health risks involved, as in a reported case of a worker dying from malaria because they had not received the requisite medical precautions. Confiscation of passports exists but is less prevalent than in the past. The Lesotho Special Permit (LSP) provided in South Africa to regularize migrants in an irregular situation does not provide information on details of employment. Many PEAs are active without registration or regulation. PEAs in Lesotho seeking to recruit migrant workers from other countries are currently not covered in the Labour Code Order.

Looking ahead, it will be important to update the legislation concerning the recruitment of migrant workers in light of changing realities. Issues to be taken into account include the diversity of occupations that Basotho workers engage in abroad, including domestic work, as well as the reality that there are increasing numbers of migrant workers in Lesotho. Regarding PEAs, their regulation needs to be in line with Convention No. 181, ensuring that PEAs can be regularly established to provide various services, including recruiting migrant workers from abroad to meet labour market demands. Ratification of ILO Conventions Nos 97, 143, 88, 181 and 189 can provide a normative framework as well as the basis for technical support in their application.

The capacity of the Ministry of Labour and Employment will need to be supported, including in terms of the digitization of recruitment processes. Consultation processes with social partners will need to be strengthened, including through the involvement of social partners throughout the policy-making process, and giving social partners sufficient time to develop their positions will also help ensure the inclusiveness of the process. With respect to bilateral agreements, in addition to reviewing the frameworks with South Africa, BLAs with other countries – developed in consultation with social partners and relevant stakeholders, including migrant associations – can help mitigate the risks associated with overdependence on South Africa as a country of destination.

### 3.4.2 South Africa

#### Labour and migration overview

South Africa is a net immigration country. According to UNDESA (2019) estimates, in 2019 the country hosted about 4.22 million migrants (44 per cent women), with 17 per cent from Mozambique, 9 per cent from Zimbabwe and 8 per cent from Lesotho. Meanwhile, there were about 825,000 South African migrants abroad (52 per cent women), with 28 per cent in the United Kingdom, 24 per cent in Australia, 13 per cent in the United States and 7 per cent in New Zealand. According to UNESCO statistics, 13 per cent of the population aged 15-plus was illiterate in 2017 (14 per cent of women, 12 per cent of men). According to the OECD (2019), in 2018 the number of South African-born migrants were 228,000 in the United Kingdom and 189,200 in Australia. In 2017, there were 4,800 new South African permanent migrants in Australia and 5,200 new migrants to New Zealand. In 2018, there were 200 new asylum requests from South Africans in Ireland.

#### International legal framework and national policy on recruitment of migrant workers

South Africa has not ratified the ICMW or ILO Conventions Nos 97 and 143. It is a member of the SADC.

South Africa has developed a draft national labour migration policy, which is in the process of being revised and disseminated for consultations. The Department of Home Affairs' White Paper on

International Migration for South Africa (2017) refers to the need to put in place adequate policy, strategies, institutions and capacity for attracting, recruiting and retaining international migrants with the necessary skills and resources. It proposes a risk-based approach to international migration, without which it expects that instability would increase, thus undermining development and job expansion, which in turn would generate xenophobia and more instability. The discussion on recruitment focuses on the recruitment of migrants with critical skills from abroad to close skills gaps and transfer skills to citizens. A notable absence in the white paper is any discussion on the protection of migrants already being recruited into other, lower-skilled sectors, such as agriculture and mining.

### Regulation of employment

South Africa has ratified the eight ILO fundamental Conventions. It has not ratified the Protocol of 2014 to the Forced Labour Convention, 1930.

The Employment Services Act (No. 4 of 2014) defines a foreign national as an individual who is not a South African citizen or does not have a permanent residence permit issued under the terms of the Immigration Act (No. 13 of 2002). Part of the purpose of the Employment Services Act is to facilitate the employment of foreign nationals in the South African economy, where their contribution is needed in a manner that (according to the Act):

- ▶ gives effect to the right to fair labour practices;
- ▶ does not impact adversely on existing labour standards or the rights and expectations of South African workers; and
- ▶ promotes the training of South African citizens and permanent residents (sect. 2(h)).

An employer may not employ a migrant worker prior to the worker producing an applicable and valid work permit (sect. 8). Moreover, the Minister of Labour, may, after consulting the Employment Services Board, make regulations to facilitate the employment of foreign nationals; such regulations may include the following measures:

- (a) The employers must satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy, before recruiting a foreign national;
- (b) the employers may make use of public employment services or private employment

agencies to assist the employers to recruit a suitable employee who is a South African citizen or permanent resident; and

- (c) preparation of a skills transfer plan by employers in respect of any position in which a foreign national is employed (sect. 8(2)).

Importantly, the Act also stipulates that an employee who is employed without a valid work permit is entitled to enforce any claim that the employee may have in terms of any statute or employment relationship against his or her employer or any person who is liable in terms of the law (sect. 8(4)). An employer may not require or permit a foreign national to: (a) perform any work which such foreign national is not authorized to perform in terms of his or her work permit; or (b) engage in work contrary to the terms of their work permit (sect. 9).

### Regulation of recruitment

South Africa has not ratified ILO Conventions Nos 88 and 181. It has ratified Convention No. 189.

The Employment Services Act refers to:

- ▶ providing comprehensive and integrated free PES's;
- ▶ coordinating the activities of public sector agencies whose activities impact on the provision of employment services; and
- ▶ providing a regulatory framework for the operation of PEAs (sect. 2(2)).

The Act defines a PEA as any person who provides employment services for gain (sect. 1). Criteria for the registration of PEAs are provided under section 13 of the Act. Prohibited acts with respect of PEAs include:

- ▶ providing false employment services information;
- ▶ providing any employment service that it is not authorized to perform in terms of its certificate of registration;
- ▶ counterfeiting, altering or transferring its registration certificate; or
- ▶ retaining the original identity documents or original qualification certificates of work seekers (sect. 14).

The Act also regulates the cancellation of registration of PEAs (sect. 18), as well as reviews of decisions made by the registrar (sect. 19).

South Africa has BLAs with Mozambique (1974 and 2003), Botswana (1973), Swaziland (1975), Lesotho (1973, 2006 and 2013<sup>18</sup>), the Democratic Republic of Congo (2004), the United Republic of Tanzania (2007), Namibia (2008) and Zimbabwe (2009). The agreements signed in the 1970s were primarily to tighten the regulation of the entry of workers in the mining industry

### Recruitment services, fees and related costs

The Employment Services Act stipulates that PES's are to be provided free of charge to members of the public in a manner that is open and accessible (sect. 5). The responsibilities of the PES include:

- ▶ facilitating the exchange of information among labour market participants, including employers, workers and work seekers, PEAs, sector education and training authorities and training providers, and
- ▶ facilitating the employment of foreign nationals in a manner that is consistent with the Employment Services Act and the Immigration Act (sect. 5(1)(h-i)).

With respect to PEAs, the Act provides that no person may charge a fee to any jobseeker for providing employment services to that work seeker (sect. 15(1)). Yet it adds that the Minister of Employment and Labour may, after consulting the Employment Services Board, by notice in the Gazette permit PEAs to charge fees in terms of a specified fee to specified categories of employees or for the provision of specialized services (sect. 15(2)). A PEA must not deduct any amount from the remuneration of an employee or require or permit an employee to pay any amount in respect of the placement of that employee with an employer (sect. 15(3)). Regulations are also provided regarding retention of information by PEAs (sect. 16) and confidentiality of information collected (sect. 17).

### Unregulated recruitment and migration in abusive conditions

The term “illegal foreigner” is prevalent in legislation and policy documents, which contributes to criminalizing irregular migrants, which is problematic. The Immigration Act stipulates that, under certain conditions, without the need for a warrant, an immigration officer may arrest an “illegal foreigner” or cause them to be arrested, and shall, irrespective of whether such foreigner is arrested, deport them or cause them to be deported and may, pending their deportation, detain them or cause them to be detained (sect. 34(1)).

In practice, South Africa has large numbers of migrants in an irregular situation, many of whom are employed informally. Some enter the country on visitor visas and try to find a job once in the country. Only a minority finds a job online prior to entering the country. Community networks help migrants find jobs. Workers from some countries of origin, such as Zimbabwe, may resort to the services of transporters – or *omalayitsha* – who in addition to providing services such as money transfer and the transportation of goods, offer the service of sending one's passport to be stamped by state officials as if the worker had exited the country, although the worker remains in South Africa. The logic behind getting the passport stamped is that if the worker is subsequently deported, since the visa in their passport has not been overstayed, the worker is not deemed “undesirable”<sup>19</sup> and has the possibility of returning to South Africa. The fee for such a service was estimated at 600–700 South African rands in August 2019. Workers from Lesotho, however, do not have access to such a service, and thus those who overstay their visa are more likely to be deemed “undesirable”.

Key informants have suggested that more than two-thirds of workers in illegal mines are undocumented migrants. To regularize migrants in irregular situations, South Africa has introduced special dispensation for nationals of Zimbabwe and Lesotho. The application process for the Lesotho Exemption Permit, which replaced the Lesotho

18 The revised agreement between South Africa and Lesotho covers 5 areas of cooperation, namely: (a) dispute resolution mechanisms and institutions; (b) social dialogue mechanisms and institutions; (c) compensation in respect of occupational diseases and injuries to citizens of both countries working in either country; (d) training of arbitrators; (e) social security. It also provides for a review of the Labour Agreement signed in 1973.

19 Section 30 of the Immigration Act (No. 13 of 2002) presents the conditions under which a foreign national might be “declared undesirable by the Department [of Home Affairs]”.



Special Permit (LSP), is only applicable to existing holders of the LSP, which are numbered at 90,314 persons. Submissions were open from 18 November 2019 to 31 March 2020, and the permit will be issued for a maximum of four years, from 1 January 2020 to 31 December 2023.

Xenophobia, particularly Afrophobia, is reportedly on the rise, with acts of violence sometimes even targeting South Africans who are perceived by the aggressors to be foreigners, with some cases of aggression leading to deaths among victims.

In the March 2008 Labour Court of South Africa case of *Discovery Health Limited v. Commission for Conciliation, Mediation and Arbitration and Others* (JR 2877/06), Labour Court Judge Van Niekerk asked whether “a foreign national who works for another person without a work permit issued under the Immigration Act is an ‘employee’ as defined by the Labour Relations Act”. He noted that “[t]he right to fair labour practices is a fundamental right. There is no clear indication from the terms of s 38(1) of the Immigration Act (or any of the Act’s other provisions) that the statute intends to limit that right, or accomplish more than to penalise persons who employ others on unauthorised terms.” Moreover, “the Act does not penalise the conduct of any person who accepts or performs work that is not authorised. The Act does not explicitly proscribe contracts concluded with those who are engaged to render work in circumstances where their engagement is unauthorised, nor does it provide that contracts are not enforceable in those circumstances.” Judge Van Niekerk warned of:

“[the potential] abuse that might easily follow a conclusion to the effect that the legislature intended that contract be invalid where the employer party acted in breach of s 38(1) of the Act. This is particularly so when persons without the required authorization accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorized engagement) to initiate any right of recourse against those who engage them.”

The judge held that “[b]ecause a contract of employment is not the sole ticket for admission into the golden circle reserved for ‘employees’”, the fact that the worker’s contract was contractually invalid only because the employer had employed him in breach of section 38(1) of the Immigration Act “did not automatically disqualify him [the worker] from that status [that is, employee status]”.

Looking ahead, the ratification and application of relevant international labour standards, such as ILO Conventions Nos 97, 143, 88 and 181, as well as the Protocol of 2014 to the Forced Labour Convention, 1930, can signal official commitment to fair labour migration. The finalized national labour migration policy will need to ensure the fair recruitment of all migrant workers, not only those with critical skills. A critical issue for the Government will be to reframe the conversation regarding labour migration and the recruitment of migrant workers. Legal and policy terminology regarding the “illegality” of persons needs to be modified, and measures need to be taken to proactively fight misleading propaganda encouraging xenophobia and violence against migrant workers. Dialogue and cooperation with the governments of countries in key corridors will need to be furthered. Ensuring that workers’ rights are protected irrespective of their migration status will help curtail abusive practices and reduce vulnerabilities that are exposed by an irregular status. Further initiatives for the regularization of workers in an irregular situation and provisions to help avoid such irregular situations will be key.

## ► 3.5 Indian Ocean

### 3.5.1 Madagascar<sup>20</sup>

#### Labour and migration overview

Madagascar is a net emigration country, with most Malagasy migrants residing in France. According to UNDESA (2019) estimates, in 2019 there were about 185,000 Malagasy migrants abroad (62 per cent women), with 81 per cent in France (including 9 per cent in Réunion) and 5 per cent in Comoros. Meanwhile, Madagascar hosted about 35,000 migrants (43 per cent women), with 34 per cent from Comoros, 28 per cent from France, 6 per cent from China and 5 per cent from India.

There is currently a ban on labour migration from Madagascar, which is of particular importance when considering the recruitment of Malagasy women for work abroad, as in practice, women are being pushed into irregular migration and recruitment channels. There are two different restrictions currently in place:

1. Decree No. 2013-594 of 8 August 2013, which suspends the migration of Malagasy migrant workers to countries posing high risks, and
2. Decision No. 023/2019 withdrawing authorizations and licences issued previously for the selection and recruitment of Malagasy workers abroad.

The two bans restrict the issuance of exit visas to migrant workers, but do not apply to other types of migration, such as family reunification or student migration.

#### International legal framework and national policy on recruitment of migrant workers

Madagascar has ratified the ICMW as well as ILO Convention No. 97, excluding the provisions of Annex III. June 2019, Madagascar also ratified ILO Convention No. 143, as well as the Domestic Workers Convention No. 189, the Private Employment Agencies Convention No. 181 and The Forced Labour Protocol no. 29 with provisions that are relevant for migrant workers. Madagascar

is a member of COMESA and the SADC. Madagascar does not yet have a labour migration policy or a migration policy, though has expressed interest in developing a labour migration policy, or a section on labour migration in the employment policy.

#### Regulation of employment

The Labour Code (Law No. 2003-044 of 28 July 2004) applies to workers regardless of their sex and nationality (art. 2). The Labour Code prohibits forced labour (art. 4), and with regard to child labour, the Code:

- sets the minimum age for access to employment at 15 years; while also noting that that this minimum age must not be lower than the age at which schooling ceases to be mandatory (art. 100); and
- specifies that decrees issued after consulting the National Labour Council will determine the nature of the work prohibited to children.

The Labour Code prohibits ill-treatment, including sexual harassment (art. 5); and prohibits discrimination on the basis of disability (art. 105) or trade union activity (art. 141). It specifies that membership in workers' or employers' organization is to be free, without discrimination based on age, sex, religion, origin or nationality (art. 144). Any discriminatory treatment based on race, religion, origin, sex, union membership, or political membership/opinions is punishable by a fine of 1 million to 3 million Madagascar ariary or imprisonment for one to three years, or both. The same penalties apply for violating the rules governing women's night work, the protection of pregnant women, the protection of children, and the protection of persons with disabilities. In the event of a repeat offence, the fines and duration of imprisonment are doubled. In addition, perpetrators who violate the Labour Code provision prohibiting sexual harassment (art. 5) will be sanctioned under the provisions of the Penal Code that provide for and punish acts of sexual harassment or any other acts of violence perpetrated against workers (art. 261).

<sup>20</sup> This section is based on the following report prepared for the ILO: by D. Razafindrazaka, "Examen des lois, politiques et pratiques concernant le recrutement des travailleurs migrants à Madagascar" (April 2020), available at: [https://www.ilo.org/global/topics/labour-migration/projects/reframe/WCMS\\_742457/lang--en/index.htm](https://www.ilo.org/global/topics/labour-migration/projects/reframe/WCMS_742457/lang--en/index.htm)

The Labour Code stipulates that foreign nationals may not hold any employment in Madagascar without the prior authorization of the Minister of Employment, after their employment contract has been approved by the Labour Inspector of the place of employment. A Decree adopted after consulting the National Labour Council will determine the terms and conditions for granting employment permits to foreign workers (art. 43). Since the ratification of 5 new Conventions and the Protocol in June 2019, the Labour Code is currently being revised. Thereafter it is expected that new decrees relevant to the employment of migrant workers (emigrants and immigrants) will be issued.

### Regulation of recruitment

At the time of writing, a nationwide ban on the operation of PEAs is in place (as detailed in MEETFP Decree No. 23993/2015)

The Labour Code defines “displaced workers” as those who, for the performance of the agreed work, are expected to settle long-term in a place of work other than their habitual residence or outside their country of origin. At the time of its conclusion, the employment contract of a migrant worker must – after a pre-employment medical examination – be established in writing and subject to the prior approval of the local Labour Inspectorate. A copy of the contract must be sent to the local Employment Department (art. 41). The employment contract of Malagasy workers emigrating outside the territory is subject to prior approval from the Migration Service of the Ministry of Employment, and the contract must provide that these workers are subject to the labour and safety legislation of the place of employment. Any request for a visa based on the employment contract of the migrant worker is the responsibility of the employer. The forms and procedures for drawing up and approving the employment contract as well as the rights of the displaced worker are to be fixed by an order of the Minister of Employment. An order of the Minister of Labour is to specify the model employment contract and the contract visa procedure (art. 42). This procedural manual is currently under development and will aim to clarify the process and the roles of all actors involved. Its finalization and adoption will support the lifting of the September 2019 ban.

The Labour Code established the National Employment Office under the Ministry of Employment, which is responsible for carrying out placement activities (art. 247). Private placement activities are authorized, subject to being carried out by a specialized employment and placement service (that is, a PEA) whose terms and conditions of practice are to be determined by Decree No. 20307/2015/MEETFP of 11 June 2015. The opening of a PEA is subject to the approval of the Minister of Employment (art. 248). PEAs must periodically provide the Minister of Employment information on offers received for labour market monitoring purposes (art. 250).

The regulations governing the operation of PEAs are supplemented by six other texts, namely:

- ▶ Decree No. 2005/396 establishing the conditions and procedures for the operation of private employment agencies and the procedures for granting and withdrawing approval;
- ▶ Order No. 30095/2011 laying down the forms and procedures for establishing the contract of migrant workers;
- ▶ Order No. 30096/2011 laying down the visa procedure for the contract for migrant workers;
- ▶ Decree No. 20307/2015/MEETFP fixing the procedures for granting and withdrawing the approval of private placement offices and their obligations;
- ▶ Decree No. 20308/2015/MEETFP, which revoked all employment agency permits
- ▶ Decree No. 23993/2015/MEETFP, establishing an inter-ministerial committee to monitor the emigration of workers at the Ministry of Employment, Technical Education and Vocational Training (MEETFP), and;
- ▶ Decree No. 2018-558 fixing the attributions of the Ministry of the Public Service for the Reform of Administration, Labour and Social Law (MF-PRATLS) as well as the general organization of this Ministry.

Prior to the issuance of Order No. 20.308 / 2015 / MEETFP revoking all employment agency permits, the recruitment process would start when an employer or a company approached PEA in the country of destination and requested the recruitment a Malagasy worker. A job offer, which had

to be approved by the Ministry of Employment at the central level and regional level was then published by the PEA in the country of destination and further communicated to a PEA in Madagascar. The job offer had to include a description of the tasks required to be performed as well as a list of selection criteria (education, language, sex, and age of the worker). Skills tests and interviews may be conducted by the PEA in Madagascar, following which a list of successful candidates are sent to the PEA in the country of destination who would be responsible for liaising (or finding) employers willing to hire the Malagasy workers.

Alternatively, the company or the employer may also work directly with the Ministry of Employment. After receipt of the job offer, the ministry sends them a list of candidates selected from a list drawn from the Regional Employment Information System. The employers are naturally responsible for securing work permits and other necessary permissions from the country of destination government. These must be forwarded to the Ministry of Employment. The Ministry may also refer candidates to vocational training centres to increase their skills.

In all cases, the following documents must be attested by the Malagasy diplomatic representative abroad: certificate proving existence of the company; authorization to recruit migrant workers; accommodation permit; medical insurance; copy of the employment contract endorsed by the Embassy of Madagascar in the host country and by the Ministry of Labor / Employment in the host country; and the work permit.

The Malagasy worker's employment contract must be authorized by the Ministry of Employment before the worker's departure is authorized. The contract must include the signature of the employer, the worker and the PEA. The latter must also send the ministry a request for specific authorization and a letter guaranteeing its responsibility to the worker until the end of the contract period.

Prior to 2015, PEAs were responsible for providing workers with pre-departure training, in particular

on French language<sup>21</sup>. The current regulation in place<sup>22</sup> requests the PEA to form an official partnership with a training center approved by the Ministry of Employment. The potential migrant worker must provide a certificate attesting that they have followed the required training and passed the skills tests<sup>23</sup>.

To ensure follow up with workers during their employment abroad, PEAs must submit a quarterly and annual reports detailing: status of job offers abroad, an activity report and a follow-up sheet for Malagasy nationals working abroad. In the case of Mauritius, the Madagascar embassy carries out quarterly monitoring of the employment conditions of migrant workers, and provides them assistance when necessary. In countries where Madagascar is not officially represented, or in cases where workers do not know the procedure to be undertaken, in addition to government services, trade unions in Madagascar have been supporting migrant workers by e-mail, Facebook or directly by telephone.

### Recruitment services, fees and related costs

The Labour Code stipulates that no fees or expenses of any kind whatsoever may be charged to workers who present themselves at placement institutions (PEAs).

The Labour Code further stipulates that the contract of a displaced worker must specify that the accommodation and the return costs of the worker and the members of the worker's family are the responsibility of the employer within the limits set by a decree to be issued after consultation of the National Labour Council. The return transport costs must also be covered by the employer in the event of dismissal, whatever the reason of the dismissal (art. 41).

Interviews have revealed that while the legislation in force prohibits PEAs from charging any costs to workers, this practice is almost systematic among irregular and unlicensed PEAs.

21 In accordance with Articles 4 and 5 of Order No. 01.013 / 2010.

22 Order No. 20307/2015 of the MEETFP.

23 The regulatory texts do not specify the exact content of the training, however internal documents of the Ministry mention modules on: the rights and duties of migrant workers; working and living conditions in the countries of destination; conditions of entry and stay; travel documents, airport procedures; health awareness; cultural orientation; services offered by public authorities, non-governmental organizations, diplomatic and consular missions; remittances; and information on return and reintegration.



In formal recruitment processes applicants are normally asked to only take on costs related to their personal expenses (accommodation if necessary, food, internal transport to get to the agency, training, etc.), as well as the various costs related to administrative documents. The remaining costs are the responsibility of employers through the PEA, in particular training cost, visas, and return air travel.

### Unregulated recruitment and migration in abusive conditions

As in almost all sectors of economic activity in Madagascar, the recruitment and placement of workers abroad is characterized by informality. The operation of unlicensed and informal brokers is all the more widespread since the adoption of Order No. 20.308 / 2015 / MEETFP. However, consultations with stakeholders show irregular among PEAs long before this Order came into effect.

The Labour Code punishes by a fine of 1 million to 4 million ariary or imprisonment from one to three years, or both, anyone convicted of the following acts:

any person who, in violation of article 4 [prohibiting forced labour], by threat, violence, deception, fraud or promise, has forced or attempted to force a worker to be hired against the worker's will or who, by the same means, attempted to prevent the worker or prevented the worker from being hired or fulfilling contractual obligations;

any person who, by using a fictitious contract or one containing inaccurate information, has been hired or has voluntarily substituted for another worker;

any employer or attorney or agent who knowingly refers to the employer register or any other document, false certificates relating to the duration and conditions of the work performed by the worker, as well as any worker who has done knowingly use these certificates;

any person who has demanded or accepted from the worker any remuneration of any kind as an intermediary in the payment or payment of salaries, allowances, allowances and expenses of any kind (art. 262).

The Labour Code also stipulates the same penalties to anyone who has been involved in irregular emigration operations of Malagasy workers outside of national territory.. These penalties are also applied

to any person who employs foreign nationals who have not obtained prior authorization from the Minister of Labour and to any foreign national who has agreed to work on the territory of Madagascar without such prior authorization (art. 262).

Looking ahead, several avenues exist for improving the recruitment of Malagasy nationals for work overseas. Relevant legislation is currently being updated to align with the Conventions and Protocol ratified in June 2019, to better protect Malagasy migrants, including migrant domestic workers, and immigrants in Madagascar. The conclusion and implementation of BLAs will remain key. Within government, there will be a need to strengthen interministerial coordination and to further administrative decentralization. A labour migration policy or a labour migration section in the employment policy could be developed to facilitate such coordination and to develop the vision for the future of labour migration in Madagascar. The challenge of combating the proliferation of clandestine PEAs can benefit from raising public awareness and promoting job creation. Such initiatives would need to build on stronger involvement of social partners and civil society organizations in the protection of migrant workers and the implementation of fair recruitment.

### 3.5.1 Seychelles<sup>24</sup>

#### Labour and migration overview

The Seychelles is a net emigration country, but is still home to a very sizeable number of migrants as a proportion of total population, with migrant workers estimated to make up one-third of the country's workforce. According to UNDESA (2019) estimates, in 2019 the Seychelles had a population of 97,000 persons, including about 13,000 migrants (30 per cent women), mainly from India, as well as from Madagascar, the Philippines and Sri Lanka. Migrant workers are primarily concentrated in low- and semi-skilled jobs in the construction, tourism and manufacturing sectors. Some also occupy high-skilled positions in the tourism, financial and public service sectors. Meanwhile, there were about 37,000 Seychellois migrants abroad (55 per cent women), with 46 per cent in Mozambique, 22 per cent in Canada, 13 per cent in the United Kingdom and 9 per cent in Australia.

<sup>24</sup> This section is based on the Seychelles National Labour Migration Policy of 2018.

## International legal framework and national policy on recruitment of migrant workers

The Seychelles has ratified the ICMW. It has not ratified ILO Conventions Nos 97 and 143. The Seychelles is a member of COMESA and of the SADC.

The National Labour Migration Policy (NLMP) of 2018 has four objectives, including to promote fair and effective recruitment practices for all workers, in a way that is in line with labour market needs and does not displace local workers or undermine working conditions. The NLMP commits the Government to developing and enforcing measures to protect workers from fraudulent and abusive recruitment practices and to provide a comprehensive regulatory framework for recruitment. In particular, the Government is to take on a more proactive role in overseas recruitment in collaboration with employers, PEAs and countries of origin of migrant workers, to improve the quality and reliability of recruitment processes. Moreover, the Government is to enhance collaboration between local PES's and PEAs to provide more effective job placement services.

## Regulation of employment

The Seychelles has ratified the eight ILO fundamental Conventions. It has not ratified the Protocol of 2014 to the Forced Labour Convention, 1930.

The Employment Act, 1995, specifies that migrant workers in the Seychelles are protected by the same terms and conditions of employment as Seychellois workers (sect. 67); all labour laws therefore apply equally to migrant workers. The Immigration Decree (Decree No.18 of 1979) and the Immigration Regulations of 1981 (Statutory Instrument No. 32 of 1981) and its amendments, regulate the entry and stay of foreigners in the Seychelles. Starting in 2014, the Government implemented a quota-based work permit system for the private sector, under which companies in main industry sectors, including construction, tourism, fisheries and manufacturing, can apply to the Ministry of Employment, Immigration and Civil Status for a Certificate of Entitlement. The certificate enables employers to recruit workers from overseas within an assigned quota without prior labour market testing, regardless of skill level or profile. Once the certificate is granted, employers then apply to the

Immigration Department for individual temporary work permits known as a Gainful Occupational Permit (GOP), initially valid for a maximum period of two years, which authorize the workers' entry into the country to fill a specific post. Employers wishing to hire foreign workers can be required to submit a localization plan that describes training strategies to transfer skills from a migrant worker to a Seychellois worker within a given time.

In the absence of a systematic labour market information system, entitlement quotas are calculated based on a percentage of the company's size. Quotas for foreign workers tend to be highest in labour-intensive industries, such as agriculture, fishing and construction, reaching 70 to 75 percent of workers for large companies. Quotas are lowest in sectors such as financial services. Some occupations are not eligible within the entitlement quota, including positions such as CEO or human resources director, as well as semi-skilled generalist positions such as sales assistants and low-skilled positions such as cleaners and drivers. The Government has also experimented with establishing lists of jobs reserved for Seychellois workers in some industries, though this was repealed in mid-2017, except for human resources positions, following pressure from employers in the tourism industry. For industry sectors and occupations that are not eligible for Certificates of Entitlement (trade and commerce and domestic workers) or for employers having surpassed their assigned quota, applications are made to the Employment Department for individual post approvals. Before a position can be approved for a foreign worker the employer must engage in labour market testing through three days of locally advertising the post to determine whether local workers are available to occupy the position. However, this three-day requirement is too short a period to determine whether local workers are available prior to opening posts to foreign workers.

In practice, most applications for authorization to hire overseas workers are approved and renewed, and very few have been revoked. From 2014 to 2017, out of about 32,000 applications to open posts for recruitment of non-Seychellois, 74 per cent of new applications and 91 per cent of renewals were approved. Under the current GOP work permit system, incoming migrant workers are sponsored by a single employer to obtain authorization to enter the country. Once inside the Seychelles, they cannot change employers, and termination of the work contract through dismissal or quitting

implies termination of regular migration status in the country. This is problematic as it creates among migrant workers a high level of dependency on their employers, potentially opening the door to abuse and rights violations.

### Regulation of recruitment

The Seychelles has not ratified ILO Conventions Nos 88, 181 and 189.

The Seychelles has implemented a system for licensing and registering PEAs, and for collaboration between PEAs and public employment services. PEAs are prohibited from charging fees to job-seekers for job placement services. Remaining challenges and gaps in regulating PEAs and other recruitment actors include:

- ▶ difficulties in detecting and sanctioning unlicensed PEAs;
- ▶ absence of regulations on employers' direct recruitment of workers abroad without using PEA channels, such as through the use of migrant workers' personal networks to secure other workers from their country of origin;
- ▶ few mechanisms being in place for coordination and data sharing between public and private employment services, leading to overlapping services;
- ▶ lack of regulation of online overseas recruitment activities by Seychellois PEAs or foreign PEAs to attract workers to the Seychelles; and
- ▶ potential financial incentives for PEAs to place foreign workers over local workers in jobs, thus disadvantaging local jobseekers.

Employers and PEAs in the Seychelles face practical difficulties in conducting due diligence to verify the legality and reliability of PEAs abroad and have few independent means to assess candidates' qualifications before their arrival in the country. As a result, employers take on the costs of recruiting a foreign worker with few assurances that the worker will be able to perform the job adequately. Employers also resort to recruitment through informal contacts or unlicensed agents using personal networks to recruit workers, which leaves few means to verify qualifications before arrival in the country.

The Seychelles has several BLAs with countries of origin to recruit workers in high-skill occupations and to recruit workers with vocational skills to fill shortages in the public sector, which are not subject

to quota limits. These countries of origin include China, Cuba, India, Kenya, Mauritius, and Sri Lanka, although not all of the agreements are currently active. These agreements are usually negotiated by the Ministry of Foreign Affairs together the relevant technical ministry (Ministry of Education, Health, etc). While the Government has a successful history of negotiating BLAs with countries to recruit workers for public sector jobs, there have been few formalized arrangements made with countries of origin to cover migrant workers in the private sector. This can lead to inconsistency between the terms and conditions applied to migrant workers in the public sector under BLAs, and those recruited privately under the quota system through direct recruitment by employers, or through PEAs or individual recruiters.

The Employment Department does not monitor the sources from which employers recruit foreign workers. In practice, employers recruit through a variety of channels, including:

- ▶ via local PEAs that contact PEAs in the country of origin;
- ▶ contacting PEAs abroad directly; or
- ▶ using informal networks or agents to recruit directly without passing through a formal intermediary.

The NLMP provides for increasing the capacity of labour inspection, including through training on migrant worker concerns such as abusive recruitment fees and related costs, confiscation of identification and travel documents, access to health and other benefits, and forced labour and human trafficking. The NLMP also provides for increased capacity to conduct joint labour and public health inspections, as well as joint labour and immigration inspections. Whereas the former can help protect the rights of migrant workers, the latter can be problematic, since these inspections may increase the vulnerability of workers in irregular situations. An alternative would be to introduce firewalls between labour inspection and immigration inspection services, consistent with good practice, especially since the Department of Employment and the Department of Immigration are both part of the Ministry of Employment, Immigration and Civil Status.

## Recruitment services, fees and related costs

Costs associated with recruiting migrant workers to work in the Seychelles that are intended to be covered by employers can be pushed on to the workers themselves. This includes making deductions from wages to cover work permit fees or return ticket costs. The Seychelles Federation of Workers Union has intervened on behalf of migrant workers in grievances and disputes. It also facilitates migrant workers' access to free legal advice. Despite evidence of the economic benefits of migration, there is a risk of unsubstantiated public opinions on the negative impacts of migration taking up undue space in policy debate, masking technical realities of migration and eroding national social cohesion. Negative attitudes and perceptions can also be used as a basis to justify actions against the interests of migrant workers, such as discriminatory policies and exploitative employment practices.

## Unregulated recruitment and migration in abusive conditions

In the NLMP, the Government recognized that migrant workers can be exposed to acts of discrimination, exploitation and abuse. Specific categories of migrant workers particularly at risk of rights violations include migrant women, migrants in low-skilled positions, migrants in an irregular situation and migrants in informal employment. Before arriving in the Seychelles, incoming migrant workers can be subjected to a series of abusive and fraudulent practices, including paying exorbitant recruitment fees and other related costs or being recruited based on false information on the conditions of work and type of employment. As a result, migrant workers arrive in the Seychelles with significant debts accrued during the recruitment process. These practices mainly affect workers in low-skill occupations, who have few means of recourse against recruiters in origin countries once they have arrived in the Seychelles. They are often in low-paid jobs making it difficult to pay off recruitment debts.

Employers are responsible for applying for and renewing incoming migrants' GOPs, yet ultimately migrant workers bear the consequences if regulations are not respected. Employers who fail to renew GOPs cause migrant workers to fall into

irregular status, putting them at risk of deportation and classification as "prohibited immigrants", which bans them from re-entry into the Seychelles for several months. No such sanctions exist for employers, who can continue to hire migrant workers even if they fail to respect GOP regulations. Migrant workers can also find themselves expelled from the country without being given adequate time to collect outstanding wages. Once they have returned to their country of origin, they have few means for obtaining these wages. Withholding of migrant workers' passports has become a common practice among employers in some sectors, further increasing the dependency of workers on their employer and limiting their freedom of movement.

The Seychelles passed the Prohibition of Trafficking in Persons Act in 2014. It has set up a National Coordinating Committee on Trafficking in Persons and created a fund for assisting victims. To date, reported cases primarily involve forced labour of migrant workers, particularly in the construction and manufacturing sectors. Indications of forced labour have been found by labour inspectors as well as by NGOs focused on workers' rights in the Seychelles; these include withholding of wages, excessive overtime, confiscation of travel and identity documents, isolation, restrictions of movements, debt bondage, use of threats, and deception. In 2017 the Seychelles prosecuted its first case, involving Bangladeshi victims of forced labour in the construction sector. There have also been cases of suspected trafficking of women transiting through the Seychelles, as the Seychelles is a visa-free transit country. Remaining challenges include:

- ▶ limited capacity to identify cases;
- ▶ limited means to prevent fraud or misinformation prior to departure;
- ▶ lack of emergency shelter; and
- ▶ insufficient training tools for the various stakeholders.

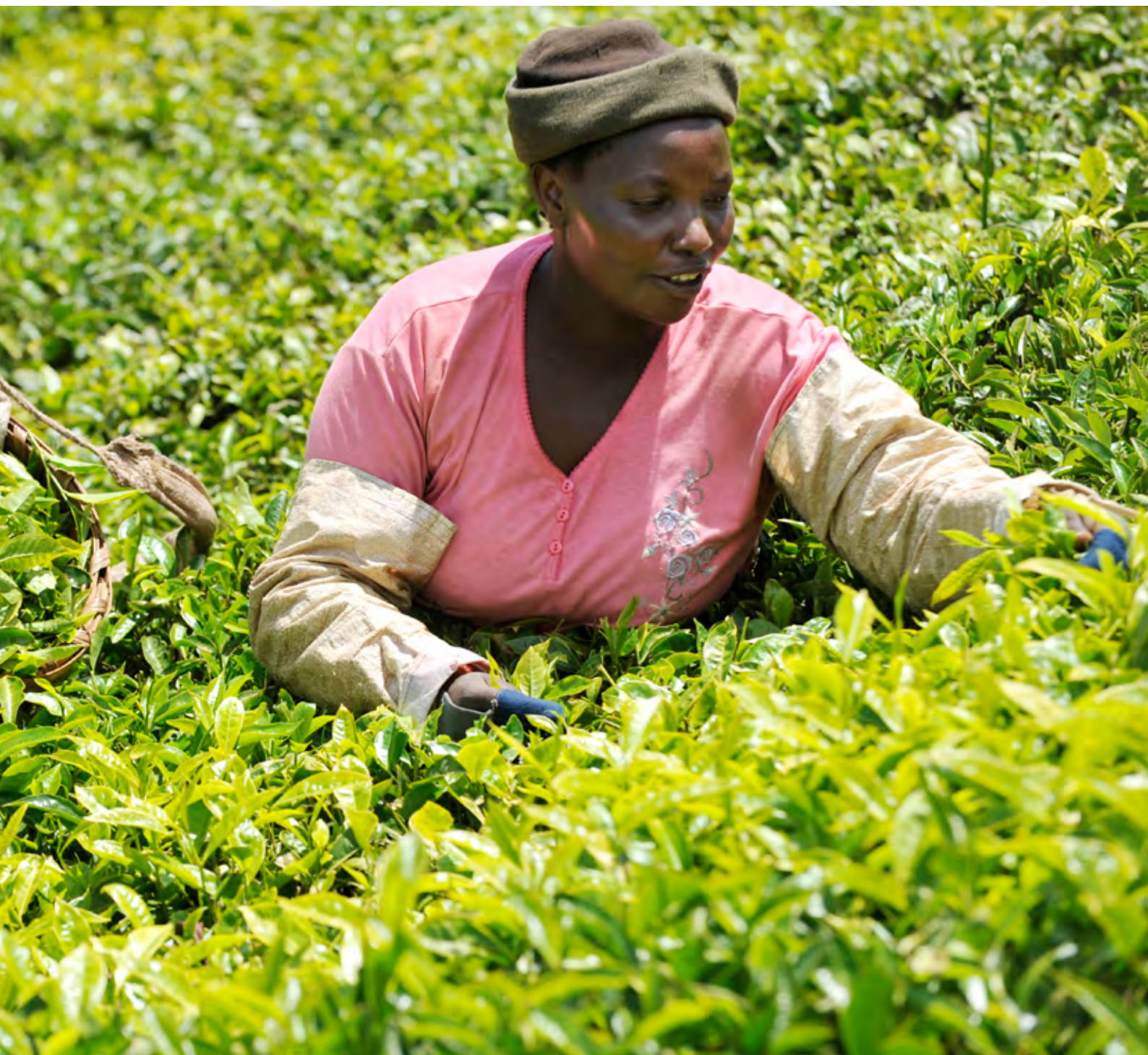
Looking ahead, the following five expected outcomes specified in the NLMP in relation to fair and effective recruitment would represent a significant step forward for migrant workers:

- ▶ Measures are enacted and enforced to protect workers from fraudulent or abusive recruitment practices;
- ▶ A comprehensive regulatory framework for recruitment activities is in place;



- ▶ Greater flexibility is introduced in employer-migrant worker relations to reduce mobility constraints on migrant workers;
- ▶ Improved overseas recruitment processes to facilitate the efficient recruitment of qualified workers; and
- ▶ Collaboration between PES's and PEAs is enhanced to deliver more effective job placement and recruitment services.

In addition to the actions it has identified toward each outcome, the Government should study the possibility of introducing firewalls between immigration inspection and other inspection services, such as labour and public health, to better protect migrant workers in an irregular situation. The NLMP already refers to the envisioned ratification of ILO Conventions Nos 97 and 143; other relevant instruments to ratify include the Protocol of 2014 to the Forced Labour Convention, 1930, and Conventions Nos 88, 181 and 189.







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# 4

**Conclusions  
and observations to  
make the recruitment  
of migrant workers  
in Africa fairer**

Fair recruitment for national and migrant workers is increasingly on the agenda of African governments and the social partners. As per the case studies, many of the obstacles to the fair recruitment of migrant workers are shared with those confronting the fair recruitment of national workers. Yet some challenges are specific to migrant workers.

This section synthesizes the findings from the case studies and elaborates conclusions based on the relevant international normative frameworks, the analyses from the case studies, and the literature.

The findings are written in a way that is generalized to all countries of the region, notably in terms of empirical evidence. Whereas the principles of fair recruitment are international, national contexts and social dialogue should dictate the ways in which they can be implemented through attention to local specificities. Tripartite social dialogue is key for the successful development, implementation and monitoring of the fair recruitment of migrant workers.

## ► 4.1 Mainstreaming fair recruitment into national policies developed through tripartite consultations

### 4.1.1 Developing and implementing labour migration policies

The ILO General Principles and Operational Guidelines for Fair Recruitment refer to adopting, reviewing and strengthening both national laws and regulations and a national fair recruitment policy. Such a policy, however, need not be interpreted as being a stand-alone policy. Indeed, it may often be more strategic to integrate fair recruitment into existing policies to ensure policy coherence and to tackle the issue of “policy fatigue”, with the possibility of deriving fair recruitment action plans from the commitments that have already been made in various policy documents. The experience regarding action plans for gender equality can be a relevant source of guidance.<sup>1</sup> To be effective, national fair recruitment policies require policy coherence (see box 1), as recruitment is intertwined with policies, laws and regulations pertaining to respecting fundamental principles and rights at work, employment, migration, labour migration, human rights, education and training, and other issues. Fair recruitment policies should

cover all workers without discrimination and regardless of migration status. Policies should also be guided by relevant international Conventions, including the ICMW and ILO Conventions Nos 97 and 143.<sup>2</sup>

Governments of the region have used labour migration policies as the privileged vehicle to address issues related to the recruitment of migrant workers. Given the diversity of stakeholders in the migrant worker recruitment process – many of whom are invisible – and given the unequal distribution of power among different players, inclusive and participatory social dialogue is key to ensure that policies are guided by reality and are responsive to needs. Such dialogue can benefit from the existence of intragovernment structures – such as interministerial taskforces – to ensure dialogue within government, as well as tripartite structures that can range in scope from specific issues, such as national committees on human trafficking, to a broad mandate, such as economic and social councils. As detailed in the case studies, ratification of the relevant Conventions, while an important step forward, does not automatically translate into improved policy and practice.

1 See for example Annex I of the ILO Action Plan for Gender Equality 2008–09, which retabulates elements from the ILO Programme and Budget into the logical framework of the Action Plan.

2 The ICMW has been ratified by 24 African countries, and signed by an additional seven. The Migration for Employment Convention (Revised), 1949 (No. 97), has been ratified by 11 African countries. Among these, Burkina Faso and Malawi have ratified the Convention along with all its annexes:

- Annex I applies to migrants for employment who are recruited otherwise than under Government-sponsored arrangements for group transfer.
- Annex II applies to migrants for employment who are recruited under Government-sponsored arrangements for group transfer.
- Annex III regulates the importation of the personal effects, tools, and equipment of migrants for employment.
- Algeria has excluded the provisions of Annex II; Madagascar has excluded the provisions of Annex III; and Cameroon, Kenya, Mauritius, Morocco, Nigeria, the United Republic of Tanzania, and Zambia have excluded the provisions of all three Annexes. Convention No. 143 has been ratified by Benin, Burkina Faso, Cameroon, Guinea, Kenya, Madagascar, Mauritania, Togo and Uganda.



► **Box 1. Checklist for assessing coherence among labour migration, employment and education/training policies**

**A. Policy design process at the national level**

- Are there national labour migration policies in your country?
- Which institution/s is/are usually responsible for their design?
- How is the design process organized?
  - by the responsible institution/line ministry;
  - by the responsible institution but in consultation with other relevant institutions/line ministries;
  - by the responsible institution/line ministry, in consultation with relevant stakeholders, including employers' and workers' organizations.
- Have labour migration, employment and education/training policy interlinkages at the national level (synergies and trade-offs) been taken into account in the national labour migration policy? If yes, how?
- Is labour migration taken into account in other national policies such as employment, education/training, security, trade or specific economic sectors (for example, agriculture), or vice versa?
- Are there any mechanisms/tools/forums that ensure that labour migration policy objectives take on board national employment and education/training priorities, and vice versa?
- Is there any coordinating body that supervises labour migration policy implementation in conjunction with other national policies, and ensures coordination?
- What is/are the other national institution/s responsible for the implementation of labour migration policy and have their roles been clearly specified?
- Are there any monitoring mechanisms/tools/indicators to assess the policy implementation process and which relevant institutions are in charge?
- Are there any mechanisms for ensuring the coherence and harmonization of data from the different sources?

**B. Policy implementation process at the regional level**

- Are there any ongoing processes of regional integration that cover labour migration?
- Is there a regional labour migration policy?
- Who is responsible for the design of regional labour migration policies?
- Are there regional employment and education/training policies, or any other regional policies?
- Are there any coordination mechanisms at regional level to ensure coordination and mutual reinforcement of policy objectives among labour migration, employment and education/training?
- Are there any monitoring and evaluation mechanisms/tools at the regional level for labour migration policy implementation? Are there any similar tools for regional employment and education/training policies, or for other regional policies?
- Are there any joint mechanisms/tools for simultaneously monitoring and evaluating regional labour migration, employment and education/training policies?
- To what extent are employers' and workers' organizations involved in regional policy processes, in particular in the areas of labour migration, employment and education/training?
- Are there any other stakeholders (for example, representatives of civil society) involved in regional labour migration, employment and education/training policies?

Source: Popova and Panzica 2017.

### 4.1.2 Closing the gap between policy-on-paper and policy-in-practice on labour migration

Policy is often understood as a written text that has been officially adopted by the authorities. What is written and officially adopted (policy-on-paper), however, often differs to varying degrees from what actually occurs (policy-in-practice). In relation to the fair recruitment of migrant workers, relevant policies may include employment, migration, equality and labour migration policies, the latter being the favoured instrument by most countries in the cases analysed. A country may have:

- ▶ no explicit policy-on-paper with respect to labour migration;
- ▶ a policy drafted but not adopted, with the document potentially remaining in draft form;
- ▶ a policy but not the related action plan;
- ▶ a policy and action plan but inadequate follow-up.

Even when policies and the related action plans, legislation and institutions are in place, policy-in-practice may still diverge widely from policy-on-paper, as exemplified by the extent of employment in the informal economy across the continent. This gap may reflect various challenges, potentially including: weak state capacity, lack of political will, policy incoherence, inadequate coordination, and insufficient human and financial resources.

To move from policy-on-paper to policy-in-practice, governments, social partners and other relevant stakeholders in the region should focus on the strengthening the institutional and technical capacities of ministries of labour and of public employment services.

### 4.1.3 Strengthening the institutional and technical capacities of ministries of labour

In most countries, the Ministry of Labour (MoL), or its local equivalent, has less political clout and fewer resources than other ministries, such as the Ministry of Finance, the Ministry of Interior, or the Ministry of Foreign Affairs. Even when the MoL is politically considered an “economic” ministry, resource allocation does not always reflect this consideration. In some countries, with the increasing number of ministries, traditional MoL responsibilities have been attributed to other ministries, such as ministries of Employment or Youth Affairs. Inadequate budgets and increasing institutional complexity weaken the capacity of staff to fulfil their roles, including in terms of the formulation and implementation of policies and regulations, social dialogue, and labour inspection. Such challenges are compounded by what are often narrow policy and fiscal spaces. When restructuring is not politically tractable, then furthering coordination and consolidation of institutions can remain important.

Efforts to increase transparency and reduce bureaucratic hurdles and uncertainty can benefit from cooperation between MoL and other related ministries, such as ministries of Foreign Affairs and of Justice. Such cooperation can be concretized, both overseas in diplomatic missions and at home, through structures such as one-stop centres for migrant workers and PEAs.

In addition to the insufficient control over the transparency of recruitment and employment practices within ministries in some countries, frequent staffing changes across ministries in many countries weaken their capacity to address fair recruitment challenges in the long run. Some positions, particularly at the higher level, are considered “political”, in the sense that those filling them are recruited by the incoming minister and are expected to depart when the minister changes.

Finally, since MoLs are inseparable from their context, they are vulnerable to governance deficits that affect many countries in the region, including evidence of corruption in both the public and private sectors.<sup>3</sup> In this context, it is not surprising that corrupt recruitment practices are also found in the public sector – particularly for migrant workers, who are typically less protected than nationals. In the public sector, responsible authorities, such as the MoL and related ministries, should be encouraged to take proactive measures to address such issues as a priority, given their centrality in promoting fair recruitment. Fighting corruption in both the public and private sectors and across global recruitment chains is necessary to enable fair recruitment.

#### 4.1.4 Strengthening the capacity of public employment services

Public employment services (PES's) in the region are often weak and under-resourced. They may be fragmented, as in the case of Nigeria, where multiple entities provide recruitment and placement services, seemingly with little coordination. They may also have been transformed to have a narrower mandate, such as a focus on youth employment, and a narrower consultation basis. A case in point is Côte d'Ivoire, where a youth employment agency has replaced the previous entity while also dropping the representation of workers and workers' organizations from its board. Strengthening PES's to facilitate the movement of migrant workers across borders and to adequately protect migrant workers, particularly during recruitment and placement, can contribute to developing State capacity with respect to labour migration governance.

In some countries, PES's increasingly contribute to information provision for migrant workers, for example through public employment centres in Ghana and migrant resource centres in Nigeria. Physical centres, however, may be difficult to

access, and may lack basic infrastructure; issues that are being addressed as a priority in Nigeria. In countries such as Tunisia, PES's directly contribute to the recruitment of migrant workers, with a focus on the employment of nationals abroad.

In other countries, PES's play a limited role in the recruitment of migrant workers, as in Lesotho, where they rather play a role in labour market testing: the legislation stipulates that the PES must certify that no citizen in the country is qualified and available to fill a vacancy prior to issuing a work permit to a foreign national. A good practice in strengthening the recruitment capacity of PES's for migrant workers has emerged in the Americas, where the ILO has collaborated with the World Association of Public Employment Services and the Central American Integration System on a joint initiative in Central America and the Dominican Republic, building on the model of the European Employment Service (EURES), a network of PES's in countries of origin and destination of migrants.

The ILO has created several capacity-development tools targeting PES's, including four volumes of *Practitioners' Guides on Employment Service Centres*,<sup>4</sup> which address in turn:

- ▶ training of trainers on operations, counselling and employer services;
- ▶ operating employment service centres;
- ▶ providing effective counselling services; and
- ▶ providing effective employer services.

#### 4.1.5 Supporting migrant workers' organizing and participation in social dialogue

It can be said that workers' organizations are increasingly prioritizing migration issues in their promotion of the fundamental principles and rights at work. In countries of destination, the rationale of workers' organizations range from avoiding unfair competition to international working-class solidarity. In countries of origin, the focus is often on malpractices in countries of destination. A challenge

<sup>3</sup> According to Transparency International's *Global Corruption Barometer – Africa 2019*, 55 per cent of respondents in 35 African countries thought that corruption had increased in the previous year, and 59 per cent thought their government was doing a bad job in tackling the issue. More than one in four persons using a public service had to pay a bribe, with Africans paying bribes twice as likely to be among poorest than among the richest.

<sup>4</sup> Developed through the ILO/Regional Skills Programme/Japan Skills Development in Asia and the Pacific project, these guides can be adapted for the African context.

in practice is that the organizational model of workers' organizations has historically been solely within the country itself, and typically in the formal, often public, sector. Workers' organizations across the region have been seeking to move to a new model of organizing beyond national boundaries. Many are now also collaborating with migrant workers' organizations and migrant associations. With the support of regional and international workers' organizations, coordination platforms and digital tools are contributing to a change in the model. The ILO Bureau for Workers' Activities developed in 2008 a model bilateral agreement for trade unions in countries of origin and destination to protect migrant workers; this model agreement has been adopted in multiple countries. Further efforts need to be made to encourage trade unions to develop strategies on how to reach out to and organize migrant workers, to provide more space for worker's organizations to participate in policy dialogue in countries of origin and destination, and to foster collaboration between trade unions in countries of origin and destination. The remainder of this section details some interesting updates in the region.

In a 2018 advocacy paper on the UN Global Compact for Safe, Orderly and Regular Migration, the Mediterranean–Sub-Saharan Migration Trade Union Network (RSMMS), established in 2014, identified a double trend in labour migration governance: oppressive security positions and measures to manage migration flows, along with policy and legal provisions that limit the scope of protection for migrant workers. The RSMMS paper identified corruption, neo-colonialism, armed conflict, climate change and mass unemployment as primary drivers of migration that need to be addressed with a rights-based approach and capacity development of governments', social partners' and migrants' representatives on migration policies that foster employment, decent work, social protection, and sustainable development. The RSMMS's recommendations for promoting fair recruitment and protection of migrant workers throughout the migration cycle included seven points, one being the promotion of international trade union cooperation.

To this end, African trade unions have developed coordination structures to address labour migration. The African Trade Union Migration Network (ATUMNET), a platform launched in 2016 for all national trade union organizations in the 52 African countries affiliated with the African Regional Organization of the International Trade Union Confederation (ITUC-Africa), has upheld the view that migration is not a crisis, but its governance is. In a September 2017 press statement, ATUMNET described migration as a "historic phenomenon that cannot be stopped", identified its push factors, and characterized ill-advised responses to it as "spiking extremism and hate crimes against migrants". ATUMNET noted the inadequate rights protection provisions in BLAs and expressed its concern regarding the externalization of European border control. Focusing on the issue of fair recruitment, it noted the weak regulation and inspection regimes for PEAs, which have had the effect of enabling:

- ▶ human smuggling and trafficking;
- ▶ the perpetuation of inadequate information bases driving migration decisions; and
- ▶ abuses against women migrants, particularly domestic workers, notably in Gulf Cooperation Council countries.

ATUMNET goes on to call for better regulation and inspection regimes and practices as well as for swifter sanctions against PEAs. In formulating its demands in 2018, ATUMNET identified structural crises as the root cause of forced migration, triggering and exacerbating hardship, misery, and despondency (Kandukutu 2018). Among its recommendations were stopping wars, decent job creation, decent wages, genuine partnership in skills development and labour exchange, the expansion and improvement of social protection, and financial support for reintegrating African migrants and refugees.



#### 4.1.6 Facilitating labour migration, with an increased focus on the protection of workers relative to the protection of borders, regardless of their migration status

Labour migration, and migration more generally, have often been addressed from the viewpoint of countries of destination that want to restrict migrants' access to their countries. Even with respect to trafficking in persons, a phenomenon that need not be across borders, the focus has been on the protection of borders. The insufficient attention given to the protection of workers can easily be discerned both in practice and with respect to the differential allocation of resources between border control and labour inspection.

Facilitating labour migration, particularly in terms of access and regular pathways, in addition to the current focus on return and reintegration – especially in light of the COVID-19 pandemic, is critical to addressing irregular migration, a major root cause of which being the inability of workers to access employment abroad through regular channels. States have the sovereign right to determine which non-nationals may enter and remain in their territories, subject to international legal standards, as emphasized by the CEACR. In a context of weak governance, including with respect to labour rights, the protection of migrant workers may not be considered a policy priority in practice. Migrant workers may simply be perceived as a source of additional funding, particularly with respect to work permits, as indicated by interviewees. Labour inspection is drastically under-resourced and its mandate often not strong enough across the regions. With respect to PEAs, the requirements are often too lax, with very limited monitoring or possibility for workers to safely report abuses. PEAs thus have very limited accountability in practice.

Furthermore, there is a need to clearly distinguish between irregular migration, migrant smuggling and trafficking in persons. African countries have made significant efforts in advancing policy, legislation and institutions to combat irregular

migration, migrant smuggling and trafficking in persons. There are indications, however, that the three concepts are often used interchangeably or are inadequately distinguished in practice, even when they may be defined clearly in national legislation. Migration is not a crime, and irregular migration is not a criminal offense; thus it should not be considered a national security or a criminal issue (Crépeau 2013). The smuggling of migrants does not necessarily involve a violation of human rights; although smugglers often exploit the vulnerabilities of smuggled migrants. Yet in national legislation across multiple countries of the region, the penalty for migrant smuggling may be similar to that for trafficking in persons. This can have the unintended effect of incentivizing smugglers to become traffickers, given that they would face similar consequences in case of apprehension.

Workers have a right to labour and social protection irrespective of the regularity of their migration status, although that right is often violated in practice. The Committee on the Elimination of Racial Discrimination, in its General recommendation No. 30 (2004) has recommended that States “[r]ecognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated” (para. 35)<sup>5</sup>. Yet in many countries, migrant workers in an irregular situation may be employed for certain periods, and at the time of payment of salary their employer may report them to the authorities to deport them. In South Africa, for instance, workers who overstay their visa may be banned for up to five years and be declared “undesirable”. From a rights perspective, once migrant workers enter into an employment relationship, they are entitled to their rights as workers, irrespective of their migration status. Across the region there is a need to ensure that migrant workers have access to justice and effective complaints mechanisms, as well as a need to develop or strengthen firewalls between labour rights (complaints mechanisms and labour inspection) and immigration enforcement, to enable migrant workers to enjoy protection without fear of detention or deportation.

<sup>5</sup> The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families has also stressed this point.

## ► 4.2 Protecting workers recruited and placed through private employment agencies, including through effective labour inspection

Several measures can be taken up to regulate the activities of PEAs and to monitor their conduct.

### 4.2.1 Regulating the activities of private employment agencies

The regulation of PEAs can proceed using several methods (see box 2). Countries in the region typically have a system for the registration and licensing of PEAs, with some having different/more stringent requirements when the PEA is engaged in international recruitment and placement. In practice, however, most PEAs in most countries are neither registered nor licensed, partly as a result of the prevalence of the informal economy. Informal recruiters often include migrants and returnees themselves, who recruit members of their extended family or community, as in the Burkina Faso–Côte d'Ivoire corridor. In other cases, members of the community are hired by other actors, typically agents or subagents, to engage in recruitment as part of potentially long and complex recruitment chains. Other service providers contributing to recruitment or labour migration processes may also be informal, such as transportation providers.

### 4.2.2 Monitoring the activities of private recruitment agencies through labour inspection

Other constraining factors for the oversight of PEAs and recruitment more generally include insufficient resources for labour inspection, including in basic terms such as staffing, vehicles (whether in terms of quantity or quality, for instance four-wheel

drive to access areas with inadequate roads), and coverage of transportation costs. Moreover, labour inspectors often have limited power to enforce regulations, including not being able to rely on the support of the police. In such contexts, labour inspectors may find themselves vulnerable to threats from recruiters, employers and their political backers, as well as to corruptive practices. Box 3 identifies a good practice from the UK that demonstrates the role of inspectors in monitoring the compliance of PEAs with licensing requirements.

A further example that can be highlighted from the Africa region are the measures taken by the Labour Ministry in Tunisia to enforce new legislation enabling the systematic inspection of private employment agencies by introducing dissuasive criminal penalties, in view of ensuring fair and ethical recruitment processes for young Tunisians seeking work opportunities abroad. Enforcement is supported by the creation of a new specialised body of inspectors, focused on controlling private recruitment agencies placing Tunisians abroad. The new inspectorate is composed of executives from regional employment offices, with one inspector per governorate and six inspectors from the Tunis office, thus totaling thirty inspectors. The Ministry of Labour developed comprehensive guidance and tools to build the new inspectorate capacity and setting out a unified approach to site visits.<sup>6</sup> A training programme will be delivered in 2021. Together, the training and guidance material aim to harmonise procedures and foster shared values and practice between inspectors.

6 The guidance references the ILO General Principles and Operational Guidelines (2019), ILO Conventions C181 (on Private Recruitment Agencies), C89 (on Forced Labour) and C143 (on Migrant workers) and the Tunisian legislation on the job-placement of Tunisians abroad.

### ► Box 2. Regulating private employment agencies

Policymakers and administrators have to make many important decisions in the regulation and supervision of recruitment:

- Who is allowed to recruit and in what area or region?
- What are their responsibilities toward the recruited workers?
- What practices must they avoid and penalties must they pay if they are found to be violating the rules?
- How should they advertise job vacancies?

**Strategies to regulate and monitor the activities of PEAs include the following:**

**(a)** Compulsory registration – Private labour recruiters and employment agencies are registered in the same way as any other industrial or commercial business and are subject to controls, just like other businesses.

Licensing – Private labour recruiters and employment agencies must request a licence that is granted when certain conditions are met. Such conditions might include:

- Financial capabilities, for example putting up a bond with a competent authority as security or safeguard to ensure that the agency complies with legislative provisions. Loss or damage due to non-compliance can be repaid from the deposit.
- Personal criteria, including applicant's age, attestation of previous lawful behaviour, among others.
- Professional competence – proof of experience or knowledge of legal regulations.
- Management capability – ensuring the applicant is competent to organize and manage a business.
- Marketing capability – ability to identify employment opportunities for jobseekers and to negotiate contracts to benefit the workers.

In adopting licensing regulations, seeking the input of the social partners can give useful references as to the specific need for the operation of PEAs in the labour market.

- A licensing system provides the following advantages:
- It allows the government to identify agents operating in the market.
- It makes it easy to collect information by linking approvals to a provision of data, on a regular basis, on the way private agents carry out their activities.

- It ensures close monitoring of the application of regulations.

- It provides a legal basis for excluding those who commit fraud or unscrupulous practices and for penalizing them.

**(b)** Self-regulation among recruiters is often an effective means. In some countries, associations of private recruitment agencies have codes of conduct that their members must adhere to.

**(c)** Recruiters are made jointly liable with foreign employers regarding the respecting of labour rights.

**(d)** Incentives – Governments can provide incentives to PEAs that meet the criteria for good performance. Standards of good practice in job advertising, labour contract design and fees can be defined.

**(e)** Limiting the number of recruitment agencies – Competition is necessary but too much competition can increase the likelihood of worker abuse; some agencies will break the rules to survive.

**(f)** Sanctions and prohibitions – Sanctions to deter unethical practices should be put in place, including provisions for the prohibition of PEAs engaging in dishonest practices and the suspension or withdrawal of their licences in case of violation. Private labour recruiters and employment agencies are banned from the labour market, and state authorities, usually public employment services, have a monopoly on job matching and placement services.

**Regulating/monitoring PEAs can also focus on:**

- tools and methods for eliminating recruitment fees and related costs being charged to prospective migrant workers;
- preventing fraud;
- minimizing mistakes in matching workers to jobs;
- checking the veracity of job offers appearing in the press;
- recognizing the acquired rights of workers recruited by agencies in the event of such agencies defaulting; and
- controlling enquiries made by agents into the candidates.

### 4.2.3 Regulating informal recruiters or subagents

Discussions with PEAs have revealed that even when formal, PEAs often rely on informal recruiters. The reality is that at the local level in remote areas, the scene is fluid and informal agents often work with whichever request they receive, typically with more than one PEA or with other informal agents. Hence, licensed PEAs typically lack a formalized network of registered agents at the village level, with exceptions including the Employment Bureau for Africa (TEBA).

Formal PEAs rely on informal agents for several reasons, including cost considerations or the insufficient size and capacity of the PEA. In Ghana, for instance, PEAs often receive requests from their counterparts in the Arab States for recruiting large numbers of workers within a limited time. The local PEAs often agree to these requests – despite their inability to respond to the demand – in order to avoid losing business to competitors. Even so, given their limited capacity, these PEAs often co-operate with their competitors as well as informal recruiters and subagents in order to deliver on the terms of their agreements with their counterparts abroad. An important question is how and to what extent informal agents should be formalized through licensing (see box 3 above for an example of good practice).

### 4.2.4 Due diligence between employment agencies in countries of origin and destination

With respect to due diligence, PEAs and official authorities often place the onus of responsibility on each other, whereas in practice both sides are responsible though neither side may have the required capacity. Even within the same migration corridor, different PEAs may have different capacities. In the Lesotho–South Africa corridor, for example, TEBA, which has offices in Botswana, Lesotho, Mozambique, South Africa and Swaziland, has credibility and clout with public authorities, which facilitates its recruitment processes. In comparison, recruiters to farms have more limited capacity. Yet abuses may happen in either case, including situations whereby workers are recruited

#### ► Box 3. Improving recruitment in agriculture through labour inspection of recruitment agencies: An example of good practice from the United Kingdom

The Gangmasters Act 2004 is an Act of the Parliament of the United Kingdom that aims to safeguard the welfare and interests of workers in agriculture, horticulture, shellfish gathering, and any associated processing and packaging. The Act came about after the death of 21 migrant cockle pickers in northwest England in 2004, an incident that raised public awareness of the exploitation of migrant workers in the UK agricultural and food processing sector.

The Act establishes regulations and licensing procedures for anyone employing, placing or supervising a worker employed in the above-mentioned industries, as well as for PEAs. It makes it a criminal offence, punishable by imprisonment and/or a fine, for labour providers to operate without a license, employers to knowingly use the services of an unlicensed labour provider, and to obstruct the work of enforcement officers.

The Act also established the Gangmasters Licensing Authority, a non-departmental public body that issues licences and ensures compliance through inspections. All new applicants are inspected to ensure they meet licensing standards, and license holders may have a compliance inspection. Unannounced inspections are conducted as needed, and the premises of labour users may also be inspected, and interviews conducted with workers. Following inspection, a decision is made whether further inspections or investigations are needed. Failure with respect to a critical standard during a compliance inspection may lead to revoking of the licence. The Authority provides informational material for workers in 18 different languages, and maintains a public list of PEAs who are licensed or who have applied for a license.

Source: ILO n.d.-a.



to work in South Africa but are then taken to work in another country. Some PEA associations have developed self-regulation measures such as codes of conduct, although their use/implementation often varies. Examples include those of Human Capital Providers in Nigeria (HuCaPAN) and the Federation of African Professional Staffing Organisations (APSO) in South Africa. Whereas the APSO code of professional practice is easily accessible online along with a complaint mechanism; access to the HuCaPAN code of conduct is password-protected on its website, and this restricted accessibility limits the code's effectiveness as a voluntary regulation tool since key stakeholders cannot refer to it. A good practice is to establish a tripartite monitoring mechanisms that reviews PEAs adherence to the Code of Conduct, as is done for monitoring of the CoC of the Viet Nam Association of Manpower Supply.<sup>7</sup>

#### 4.2.5 Eliminating recruitments fees and related costs borne by workers, and reducing the costs of labour migration

A priority in the regulation of recruitment space is abolishing recruitment fees and costs charged to workers, whether nationals or migrants. Abolishing recruitment fees and related costs charged to workers and reducing recruitment costs borne by workers more generally requires cooperation between countries of origin and countries of destination, including through bilateral or multilateral agreements, which should explicitly indicate that workers are not to be charged recruitment fees and related costs. This position should also be carefully reflected in legislation and policy related to labour migration. Box 4 below provides an overview of an ILO global database that has collected laws, regulations and policies from over 90 countries that define recruitment fees and related costs. This database can serve as a resource for reviewing policy and legal instruments from countries that have had success in effectively having recruitment fees and costs being borne by employers.

The elimination of worker-paid recruitment fees and related costs also requires a shift in the

#### ► Box 4. ILO Global database: Definition of fees and related costs in national laws and policies

The ILO in 2020 launched a global database of national laws, policies and regulations that have defined recruitment fees and related costs.

The data collection was undertaken in 2018 in preparation for a global study to support the Tripartite Meeting of Experts to Define Recruitment Fees and Costs. This meeting led to the adoption of the ILO definition of recruitment fees and related costs, to be read in conjunction with the ILO General Principles and Operational Guidelines for Fair Recruitment.

The global study scoped the national laws and policies applied to public and private employment agencies and focused on formal channels of recruitment. Overall, the database contains policies of 90 countries that took a position or definition on the regulation or prohibition of recruitment fees and related costs. The database can be accessed at <http://ilo.org/gimi/FRI.action>.

The database uses a colour-coded world map, in which the two colours indicate whether the country in question's policy regulates or prohibits the charging of recruitment fees and/or related costs to the worker. Clicking on a country will display information about whether the policy applies to national recruitment, international recruitment or both, and provide links to the policy.

Source: ILO n.d.-b.

business model of PEAs and increased responsibility by employers to assume the costs. PEAs in countries of origin have expressed concern that not charging fees to migrant workers is not economically viable when the PEAs are charged fees

<sup>7</sup> For further information, please see: Labour Migration Good Practice Database, Monitoring the application of the Vietnam Association of Manpower Supply (VAMAS) Code of Conduct (COC-VN), available at: [https://www.ilo.org/dyn/migpractice/migmain.showPractice?p\\_lang=en&p\\_practice\\_id=116](https://www.ilo.org/dyn/migpractice/migmain.showPractice?p_lang=en&p_practice_id=116)

by their counterparts in countries of destination, particularly in the Arab States. Nevertheless, there are new PEA models emerging that operate on the basis of not charging workers any fees, including in the Philippines, Hong-Kong, Nepal and Mexico. Box 5 articulates the experience of establishing a fair recruitment corridor between Nepal and Jordan.

A reduction/elimination of the recruitment fees and related costs borne by workers should be complemented by a reduction of the costs of labour migration. To reduce the costs of labour migration, care should be given to ensure that the PEAs do not charge employers less by charging workers more. Experiences in South-East Asia bear

► **Box 5. Fair recruitment corridor piloted between Nepal and Jordan (in the garment sector)**

The pilot intervention was designed to eliminate deceptive and coercive recruitment practices in the garment industry in Jordan, reduce the vulnerability of migrant workers to labour exploitation and provide workers with decent work opportunity in this growing industry. The broad objective of the fair recruitment corridor pilot is to demonstrate that Nepali workers can be recruited along this corridor in full compliance with international human rights and labour standards and the endorsed ILO Principles and Operational Guidelines for Fair Recruitment.

The pilot intervention was designed in collaboration with the Better Work Jordan and social partners. Through the Integrated Programme on Fair Recruitment (FAIR), the ILO linked up with a private employment agency which had demonstrated a proven model of fair recruitment to initiate fair recruitment of Nepali workers in the garment sector in Jordan, including no charging of recruitment fees and costs to workers. The pilot was undertaken with 4 factories in Jordan who had expressed interest to participate.

The project also partnered with Safer Migration Initiative (SaMi) in Nepal to provide a month long skills training for work in the garment sector in Jordan. The skills training providers were also trained to give a Jordan specific pre-departure awareness training developed under the pilot which was aimed at providing the workers with accurate information about their employment and labour rights in Jordan. Further, the project also worked with General Federation of Nepalese Trade Unions (GEFONT) as well as

The General Trade Union of Workers in Textile, Garment & Clothing Industries in Jordan (JTGCU) to facilitate Nepali migrant workers' access to justice in case of irregularities in the recruitment and employment process, whilst also informing about their rights, especially for collective bargaining.

As a result, 160 (154 women, 6 men) Nepali workers were fairly recruited under the pilot. An impact evaluation was conducted by Tufts University between April 2017 and November 2018 to assess the feasibility of fair recruitment, theories of fair recruitment, the role of screening and fair recruitment in mitigating contract deception and debt bondage, the role of screening in improving a match between migrants and their jobs and the impact of fair recruitment on migrants and factories. The assessment has recorded the following as the positive impact of fair recruitment against the conventional recruitment model:

- Fair Recruitment increases worker voice and well-being (through better understanding of the terms of their contracts and more control over working conditions)
- Zero recruitment fees benefits workers and employers
- Fair Recruitment fosters an improved working environment
- Fair Recruitment positively impacts performance at work

The proof of impact can be found in the following document: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipecc/documents/publication/wcms\\_750465.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipecc/documents/publication/wcms_750465.pdf)

out that when recruitment fees and related costs to employers are lowered by PEAs as a result of competition, the PEAs instead charge them to the migrant workers through non-transparent cost structures and conditions. To address this issue, it is necessary to carefully review experiences and good practices that have successfully managed to effectively charge fees and costs to employers, and not to migrant workers, and this includes reviewing which factors have enabled the success of these approaches.

#### 4.2.6 Combating misleading propaganda regarding migration and migrants

An important consideration in protecting migrant workers is combating misleading propaganda,

including propaganda that promotes sexism, racism and xenophobia. In many countries of the region, as well as in countries of destination, there have been worrying trends with respect to various forms of violence against migrant workers, particularly against migrant workers that are among the most vulnerable. Such trends have been fomented by political discourses, including those aiming to mobilize political bases during elections or political confrontations. Misleading propaganda often portrays as facts assumptions that run counter to empirical reality. Rigorous research developed with – and disseminated to – relevant stakeholders can contribute to fact-based thinking (see box 6). Governments need to adopt measures to prevent and combat prejudices regarding migration and to prevent and combat the stigmatization and stereotyping of migrant workers, including both immigrants and returnees.

#### ► Box 6. How immigrants contribute to the economy of developing countries

Fact-based analyses are necessary to counter misleading propaganda with respect to migrant workers. Research carried out by the OECD Development Centre and the ILO and co-financed by the European Union between 2014 and 2018 has analysed the evidence regarding the impact of labour immigration on the development of ten host countries: Argentina, Côte d'Ivoire, Costa Rica, the Dominican Republic, Ghana, Kyrgyzstan, Nepal, Rwanda, South Africa and Thailand.

**Employment:** Immigrants in most countries had higher labour force participation and employment rates than nativeborn workers. However, the quality of immigrants' jobs was a concern because they often lacked decent work. The overall impact of immigration on the employment outcomes of native-born workers was negligible. The results, however, were diverse and highly contextual. This is in line with most research on OECD countries, which finds only a small effect.

**Economic growth:** The estimated contribution of immigrants to gross domestic product (GDP) ranged from about 1 per cent

in Ghana to 19 per cent in Côte d'Ivoire, with an average of 7 per cent. The immigrants' contribution to value added exceeded their population share in employment in half of the countries. In countries where this was not the case, the differences were small. Overall, immigration was unlikely to depress GDP per capita. The results regarding how immigration affected productivity were less clear. Various research methods were employed across the countries depending on data availability.

**Public finance:** Immigrants helped increase overall public revenues, but the increase was not always sufficient to offset the public expenditures they generated. This was the case for two countries, Kyrgyzstan and Nepal, where the deficit was less than 1 per cent of GDP. In the other seven countries for which data were available, the net direct fiscal impact of immigrants was positive but below 1 per cent of GDP. Overall, the net fiscal contribution of immigrants was therefore generally positive but limited. This is in line with the available evidence for OECD countries.

Source: OECD and ILO 2018. For more information, see: <https://www.ilo.org/eclm>.

Private actors may also engage in misleading propaganda, including for purposes of fake recruitment and misleading recruitment. A recommendation emerging from PEAs themselves is that PEA job advertisements should be subject to the approval of the MoL, or the equivalent ministry. A related concern is that job announcements should be free of any discriminatory language, including with respect to gender, age, nationality and physical appearance. Such concerns can be addressed by the print and online media outlets that publish job

vacancies and advertisements for PEAs, as these outlets can serve as gatekeepers of the language used in such advertisements. Combatting inaccurate media coverage on the realities of recruitment and labour migration conditions in the country could lead to better investigative reporting, thereby contributing to help change the climate of public opinion – and even policy – to improve the recruitment employment conditions of migrant workers (box 7).

► **Box 7. Reporting on forced labour and fair recruitment – An ILO toolkit for journalists**

Journalists have a voice that many workers do not. They can shine a light on abusive practices and on the denial of fundamental human and labour rights. They can alert their readers or viewers to these abuses. They may help to change public opinion, and even policies, so that life becomes better for workers.

The ILO and its partners have been engaging with the media to support the production of quality reporting on forced labour and fair recruitment issues. In 2020, the ILO launched a toolkit to support journalists to report accurately and fairly on forced labour and fair recruitment issues. The toolkit aims to support the production of quality reporting on forced labour and fair recruitment issues, creating or strengthening networks of specialized journalists, as well as building partnerships with those institutions who have the capacity and mandate to take forward media training and outreach.

The toolkit includes a media-friendly glossary on migration, as well as concrete tips for improving media productions and story ideas. To access the toolkit, visit [bit.ly/ILOtoolkitforjournalists](https://bit.ly/ILOtoolkitforjournalists).

Source: n.d.-c. "Reporting on Forced Labour and Fair Recruitment: An ILO Toolkit for Journalists", available at: [bit.ly/ILOtoolkitforjournalists](https://bit.ly/ILOtoolkitforjournalists).



## ► 4.3 Promoting full, productive, freely chosen employment and decent work for all workers

Improving the recruitment process alone is insufficient to ensure workers are protected from the risks of forced labour. Field work findings suggest that most recruiters do not consider the fundamental principles and rights at work of migrant workers a priority in their activities. When they discuss promotion of workers' rights, their emphasis is typically on the right to work, which they enable through provision of recruitment services. Whereas some recruiters seek to give more importance to basic workers' rights, a major obstacle is that unscrupulous actors do not, thereby undercutting the market from those who want to do the right thing.

An ILO impact study has shown that fair recruitment has a positive impact on workers in terms of understanding their contract, resolving conflict and meeting production targets. The assessment showed that fair recruitment can increase worker voice and well-being; that zero recruitment fees are beneficial for workers and employers; that it fosters an improved working environment, and that it fosters performance at work. However, the impact study also showed that "Fair recruitment interventions need to employ a comprehensive view of the recruitment journey focusing on both the recruitment process and the working and living conditions in the countries of destination" (ILO, 2019f).

While a full review of employment creation, transition to the formal economy, and improvements of working and living conditions are beyond the scope of this study, there are some important observations to be made.

Migration for employment, whether through the recruitment-first or the migration-first pathway, is intrinsically related to the extent to which countries promote full, productive, freely chosen employment and decent work, which is pivotal in creating conditions enabling labour migration to be a choice rather than a necessity. The lack of employment opportunities is a challenge to fair recruitment, as job scarcity creates perverse incentives in recruitment processes. In terms of ILO guidance, the Employment Policy Recommendation, 1964 (No. 122), calls for facilitating "[i]nternational migration of workers for

employment which is consistent with the economic needs of the countries of emigration and immigration, including migration from developing countries to industrialised countries" (Para. 33).

The Employment Policy Convention, 1964 (No. 122), has been ratified by 24 African countries. Migration issues seem to be insufficiently addressed in reporting on its application. An important exception is Libya, where the Government has reported that migrants in an irregular situation were reluctant to regularize their situation through registration, due to their fear of being repatriated and their desire to migrate to Europe, with Libya serving as one of the transit States south of the Mediterranean (Libya – CEACR, Convention No. 122, observation, 2019).

The Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169), provides guidance relevant to the recruitment of migrant workers. Recommendation No. 169 connects labour migration and employment to broader development issues, with specific responsibilities for countries of employment and countries of origin, which may differ depending on their level of development (see box 8).

When recruitment is into an informal job, meaning a job that is not covered or insufficiently covered by formal arrangements, it is harder to ensure the fairness of the recruitment process. Because "legislation and regulations on recruitment should not apply only to the formal economy" (ILO 2019a, 15), a major challenge for fair recruitment in Africa is the prevalence of job opportunities in the informal economy, largely in precarious jobs. In 2016, an estimated 86 per cent of employment in Africa was informal (83 per cent of men's employment, 90 per cent of women's employment) (ILO 2018d).

Crisis situations arising from conflicts and disaster, which, together with environmental and political factors, generate forced migration and displacement, are a major challenge for fair recruitment. Forcibly displaced persons find themselves in precarious situations in contexts in which their right to work and rights at work may not be properly inscribed in law and policy. They are thus vulnerable to and susceptible to abuse and exploitation, both

► **Box 8. Specific roles of countries of employment and countries of origin according to the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169)**

**Countries of employment**

Members which habitually or repeatedly admit significant numbers of foreign workers with a view to employment should, when such workers come from developing countries, endeavour to co-operate more fully in the development of such countries, by appropriate intensified capital movements, the expansion of trade, the transfer of technical knowledge and assistance in the vocational training of local workers, in order to establish an effective alternative to migration for employment and to assist the countries in question in improving their economic and employment situation (Para. 40).

**Countries of origin**

Members which habitually or repeatedly experience significant outflows of their nationals for the purpose of employment abroad should, provided that such measures

are not inconsistent with the right of everyone to leave any country including his own, take measures by means of legislation, agreements with employers' and workers' organizations, or in any other manner consistent with national conditions and practice, to prevent malpractices at the stage of recruitment or departure liable to result in illegal entry to, or stay or employment in, another country (Para. 41).

**Developing countries of origin**

Developing emigration countries, in order to facilitate the voluntary return of their nationals who possess scarce skills, should-

- (a) provide the necessary incentives; and
- (b) enlist the co-operation of the countries employing their nationals as well as of the International Labour Office and other international or regional bodies concerned with the matter (Para. 42).

in recruitment and during employment. Moreover, in contexts where the rule of law has been weakened by crisis situations, it becomes all the more difficult for laws and policies to be implemented in practice, even when they explicitly safeguard the rights of forcibly displaced worker. By the end of 2018 the African population affected by crisis situations, according to the UNHCR (2019), amounted to 27.5 million persons, or 37 per cent of the global total, including 7.4 million refugees and 17.8 million internally displaced persons.<sup>8</sup>

Low levels of literacy and inadequate education and training are significant obstacles to fair recruitment. They restrict the number and quality of jobs that these workers can be recruited to. They

are also associated with higher risks of abuse and exploitation during the labour migration and recruitment processes. The ILO General Principles and Operational Guidelines for Fair Recruitment emphasize that the terms and conditions of employment should be "specified in an appropriate, verifiable and easily understandable manner, and preferably through written contracts" (ILO 2019a, 13). Developing the capacity of workers to read written job advertisements and employment contracts, and to understand the legal and economic implications of relevant policies, practices, rules and regulations is key to enabling them to make more informed decisions. Workers who are considered by recruiters and employers to have inadequate competencies – including illiteracy – are

8 Major countries of origin included the Democratic Republic of the Congo (5.4 million persons), South Sudan (4.3 million persons), Somalia (3.7 million persons), Ethiopia (2.9 million persons), Nigeria (2.7 million persons) and Sudan (2.7 million persons). Major African countries of asylum included the Democratic Republic of Congo (5.1 million persons), Ethiopia (3.5 million persons), Sudan (3 million persons), Somalia (2.8 million persons), Nigeria (2.4 million persons), South Sudan (2.3 million persons), Uganda (1.4 million persons) and Cameroon (1.1 million persons).

more vulnerable to abuse. Improved digital literacy can also help workers access information, including regarding recruitment, migration, PEAs, countries of destination and migration channels, as well as the risks and costs associated with various choices. Digital literacy can also enable workers to communicate with relevant individuals and institutions, including supervisory authorities. Online tools such as the ITUC Migrant Recruitment Advisor website for reviewing PEAs require such digital literacy.

Finally, various categories of workers may require specific attention, particularly among migrants and workers in the informal economy. These include, based on the case studies:

- ▶ agricultural and fishery workers, including plantation workers;
- ▶ domestic workers;
- ▶ sex workers;
- ▶ mineworkers;
- ▶ construction workers;
- ▶ street vendors;
- ▶ personal services workers, including workers in hotels and restaurants;
- ▶ drivers;
- ▶ protective service workers;
- ▶ garment workers; and
- ▶ nursing personnel.

Sociodemographic segmentation criteria should also be attended to, including with respect to age, gender, ethnicity, level of education and other considerations. The ILO's General Survey 2021 will address "decent work for care economy workers in a changing economy", which is typically feminized. As such, this section will focus on domestic workers and nursing personnel. The feminization of migration has been highlighted in the African Union revised migration policy framework for Africa.

Domestic workers have been identified in interviews and focus group discussions as a major category of vulnerable migrant workers across the region. They are predominantly women and girls with low levels of education, migrating within the continent as well to other destinations, particularly the Arab States, where abuses have been well documented (Esim and Smith 2004; Fernandez and de Regt 2014). In the Burkina Faso–Côte d'Ivoire corridor, experiences were shared of girls leaving their villages in quest of better prospects than forced marriage. Sometimes moving in small groups, they engage in odd jobs to survive and save enough to move to their next destination, with what started as rural–urban migration eventually becoming international migration. Many women heads of household indicated their preference for employing girl child domestic workers, particularly those with limited education and experience. In such cases, the workers have lower bargaining power and are less familiar with their rights; they are presumed to be more obedient and pliable, and are thus more likely to develop their skills, and even personality, according to the desires of their employers. The exploitation of domestic workers often came veiled in employers' rhetoric of domestic workers being treated as a part of the family: girls and women being "educated", fed and accommodated at the employer's expense. In practice, examples were shared of workers being "disciplined" by their employers, eating leftovers of the meals they cooked, being locked on balconies even on rainy days, and others of girls sharing a bedroom with an adult man. Gender-based violence and harassment are widespread.

While the challenges are vast, taking a holistic approach to ensuring fair recruitment beyond a simple focus on the recruitment process itself will ensure that the benefits are sustained and have a major impact on workers and their families as well as employers. It will also ensure that the development benefits of migration are truly realised.









# Summary

5

The current report has provided an analytical framework on the recruitment of migrant workers in Africa, drawing on the normative work of the ILO, global and regional policy frameworks, as well as findings from the 13 case studies. The analytical framework provides decisionmakers and analysts with the tools to examine and improve the recruitment of migrant workers. It introduces the notions of recruitment-first and migration-first pathways to address shortcomings in some assumptions – some of which underly earlier international labour standards – that labour migration typically follows the recruitment-first model.

In fact, evidence from the African context suggests the prevalence of the migration-first model, with its importance increasing as a result of increased freedom of movement as well as through growing irregular migration or regular migration followed by a transition to irregular status. The analytical framework has summarized the thinking around recruitment fees and related costs, and has studied how the costs of migration and the cost burden borne by various actors varies in different settings. The framework is original in systematically addressing the migration, employment and recruitment aspects of an expanded view of recruitment, as well as the roles of employers, recruiters and other service providers. It has also offered a preliminary typology of the various

practices that can constitute – separately or in combination – unfair recruitment.

In line with the analytical framework, the results of the case studies are presented using the same format for readability purposes, together offering ways forward for the stakeholder in the different countries, as well as analytical tools that can be adapted by decision-makers and analysts engaged in other contexts. Generalizing from the findings of the case studies, the report offers priority areas to address on the way to making the recruitment of migrant workers in Africa fairer. The report proposes an approach for mainstreaming fair recruitment into national policies, developed through tripartite social dialogue and engagement with other relevant stakeholders. Such mainstreaming addresses the ILO's General Principles and Operational Guidelines on Fair Recruitment, taking into account the challenges that often emerge in practice in the African context. Beyond the General Principles, the report also offers a first depiction of what can be termed the “enabling environment” for fair recruitment, tackling issues such as full employment and decent work; transition from the informal to the formal economy; crisis prevention and response; investment in infrastructure, particularly in the rural economy and in the care economy; capacity development for workers; and addressing the needs of specific categories of workers.





# Appendices

## ► Appendix I. Data collection tools

### Interview guide

#### A. The recruitment of migrant workers: overview

1. How are migrant workers typically recruited in/to [country]?
2. Are there differences among groups of workers?  
*Probing:* with respect to: Gender? Nationality? Occupation? Industry? Region?
3. What are the main players involved in recruiting and placing migrant workers?  
*Probing:*
  - a) Public employment service
  - b) Accredited employers' direct recruitment
  - c) Registered private employment agencies
  - d) Unregistered private employment agencies
  - e) Fee-charging informal recruiters and intermediaries that lack authorization to operate in the recruitment business in the country of destination or in the country of origin (contractor, subcontractors, brokers, travel agencies, training centres, medical centres, other.)
  - f) Personal networks (not charging fees)

#### B. The regulation of recruitment: law and policy

4. How is the recruitment of workers, especially migrant workers, regulated in law and policy?  
*Probing:*  
What are the relevant provisions of national laws and regulations? Which categories of workers/sectors do they cover? Which categories of workers/sectors do they not cover? Is the recruitment of migrant workers part of a specific national policy? Does that policy integrate elements to ensure equality of opportunity and treatment? Does it integrate elements to improve attitudes toward migrant workers and labour migration?

5. What are the relevant international, regional, and bilateral frameworks informing national law and policy?

##### *Probing:*

What relevant conventions are currently under consideration for ratification in the foreseeable future? Are there bilateral agreements? *If yes:* Do they contain specific provisions related to recruitment? Could you kindly share a copy with me? Is there a regular exchange of experiences and practices with other countries labour migration and recruitment?

6. How are workers' organizations, employers' organizations, and non-governmental organizations involved in the regulation/monitoring of the recruitment of migrant workers?

##### *Probing:*

Are there social dialogue structures between Government representatives, employer and workers' representatives related to labour migration and recruitment, placement and employment policies and practices? Which other actors are involved? How can social dialogue be facilitated in this area? Are there any examples of transnational initiatives between trade unions and employers' organisation between the country of destination and the country of origin?

#### C. The regulation of recruitment: supervision

7. How are private employment agencies registered, supervised, and monitored?

##### *Probing:*

How do private employment agencies organize themselves? *If have one or more associations:* What are the association's mission, objectives, priorities, and achievements? Is it a member of the World Employment Confederation? What initiatives have private recruitment agencies undertaken to regulate themselves? Is there a registry of private employment agencies, intermediaries and recruiters? Is there a licencing and registration system in place? How is it monitored? How are PEAs inspected? What are the existing complaints processes? What are the sanctions in place in case of violation?



Does the present registry include information on the supply and demand for migrant workers and about their employers? Does it register migrant workers' employment contracts and working conditions?

8. What documents are provided to migrant workers?

*Probing:*

Do model contracts exist? Are they in a language that the workers understand? Do workers receive a copy of the contract of employment? Do they receive information regarding remuneration? Hours of work? Weekly rest periods and annual leave? Trade union rights? Accommodation? Social protection? Employment taxes? Working and living conditions? Mechanisms for complaints and dispute resolution? Access to justice?

9. What services are provided to migrant workers, and who provides them?

*Probing:*

Prior to departure: Migration information and assistance service? Measures to combat misleading propaganda? Training? Translation and interpretation? Special services for women migrant workers? Medical testing?

During the journey: Health care? Internal travel? Lodging? Costs of the journey?

Upon arrival: Medical services and hygienic conditions upon arrival? Information provision on arrival? Accommodation, clothing and food? Contact with the local embassy/trade unions/civil society? Other?

Upon return: Reintegration support for returning migrants (medical, psychosocial, financial, education)? Investment promotion among returning migrants?

10. What are the regulations in place with respect to recruitment fees and related costs?

*Probing:*

What kinds of recruitment fees and related costs do migrant workers pay in practice?

Examples: medical costs, insurance costs, costs for skills and qualification tests, costs for training and orientation, equipment costs, travel and lodging costs, and administrative costs.

## D. Vulnerable situations related to labour migration

11. Who are the most vulnerable groups with respect to labour migration and recruitment?

12. What information is available in monitoring systems regarding violations and abuses?

*Probing:*

Occupation, economic sector/industry, working conditions and wages, labour skills or competencies, type of violation and resolution of violations, redress mechanisms, access to justice, how long does resolution take?

13. What types of abuses are most common and under what circumstances do they typically arise?

*Probing:*

Deception about the nature and conditions of work (e.g. receiving lower wages than those previously promised)? Contract substitution, non-issuance of a contract or contract issued not respecting existing labour standards? Illegal recruitment fees? Debt bondage linked to repayment of recruitment fees? Retention of passports? Illegal wage deductions? Threats if workers want to leave their employers? Threats of expulsion? Physical violence?

14. How prevalent is irregular migration with respect to migrant workers?

*Probing:*

Are there some patterns or trends you can share with respect to groups of workers more likely to engage in it? High-profile examples? How do migrant smugglers typically proceed? How is irregular migration perceived by the general public?

15. How has the issue of human trafficking been addressed?

*Probing:*

Are there specific examples you can share?

## E. Recommendations

16. What three recommendations would you give, and to whom, regarding how to improve the recruitment of migrant workers?

## Focus group discussion guide

### A. Introduction

Thank you for agreeing to participate. We are very interested to hear your valuable opinion on how migrant workers are typically recruited [from or to] your country. We are also interested in understanding how workers seeking a job in another country typically proceed. The purpose of this study is to learn about the actual experiences of migrant workers and their families, the challenges they face, and how they can be improved. You are here because you have personal experience on labour recruitment and labour migration. You have valuable knowledge that is special and unique that policymakers and policy advisors can learn from to improve law and policy. We will share the findings of this study with policymakers and key actors involved in the regulation of labour recruitment and labour migration. We are not looking for achieving consensus. We are here to listen to you all, and we would like to collect information from diverse experiences and viewpoints.

### B. Confidentiality, consent, logistics, and ground rules

The information you give us is completely confidential, and we will not associate your name with anything you say in the focus group. We would like to record the focus groups so that we can make sure to capture the thoughts, opinions, and ideas we hear from the group. No names will be attached to the focus groups and the recordings will be destroyed as soon as they are transcribed. You may refuse to answer any question or withdraw from the study at any time. We understand how important it is that this information is kept private and confidential. We will ask participants to respect each other's confidentiality. If you have any questions now or after you have completed the discussion, you can always contact a study team member like me. The discussion should last about two hours. Feel free to move around and to help yourself to the refreshments.

Let us set some ground rules to the discussion. What do you suggest as ground rules?

Let us go around the table so you can each introduce yourself briefly.

### C. Experiences with international labour recruitment and labour migration

1. From your own experience or the experience of people you know personally, what do workers [seeking to work OR coming to work from] abroad need to do to achieve that objective?

*Probing:*

Where do the workers [seek to go OR come from]?

What are the steps they typically must undertake?

What journeys do they typically go through?

2. What are the main players involved in the process?

*Probing:*

- a) Public employment service
- b) Accredited employers' direct recruitment
- c) Registered private employment agencies
- d) Unregistered private employment agencies
- e) Fee-charging informal recruiters, intermediaries, and other service providers
- f) Personal networks (not charging fees)

3. What information do workers have prior to migration for employment?

*Probing:*

Do model contracts exist? Are they in a language that the workers understand? Do workers receive a copy of the contract of employment? Do they receive information regarding remuneration? Hours of work? Weekly rest periods and annual leave? Trade union rights? Accommodation? Social protection? Employment taxes? Working and living conditions? Mechanisms for complaints and dispute resolution? Access to justice?

4. What types of abuses are most common against migrant workers and under what circumstances do they typically arise?

*Probing:*

Deception about the nature and conditions of work (e.g. receiving lower wages than those previously promised)? Contract substitution, non-issuance of a contract or contract issued not respecting existing labour standards? Illegal recruitment fees? Debt bondage linked to repayment of recruitment fees? Retention of passports? Illegal wage deductions? Threats if workers want to leave their employers? Threats of expulsion? Physical violence?

5. What services are provided to migrant workers, and who provides them?

*Probing:*

Prior to departure: Migration information and assistance service? Measures to combat misleading propaganda? Training? Translation and interpretation? Special services for women migrant workers? Medical testing?

During the journey: Health care? Costs of the journey?

Upon arrival: Medical services and hygienic conditions upon arrival? Information provision on arrival? Accommodation, clothing and food? Other?

Upon return: Reintegration support for returning migrants (medical, psychosocial, financial, education)? Investment promotion among returning migrants?

6. Are there differences among groups of workers?

*Probing:* with respect to: Gender? Nationality? Occupation? Industry? Region?

7. What are the reasons to explain the problems that persons [seeking to work OR coming to work from] abroad face?

8. How can labour recruitment and labour migration processes be improved?

*Probing:*

What is the role of Governments in the process? What is the role of workers' organizations, employers' organizations, and non-governmental organizations? What is the role of labour recruiters (public employment services, private employment agencies, other intermediaries or subagents)? What is the role of community leaders and members?

That concludes our focus group. Thank you so much for coming and sharing your thoughts and opinions with us. We have a short evaluation form that we would like you to fill out if you time. If you have additional information that you did not get to say in the focus group, please feel free to write it on this evaluation form.

## ► Appendix II. Sample laws and policies with specific references to recruitment fees and related costs in African countries

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>Algeria</b> (Ratified C181)	<p>Law No. 04-19 of 25 December 2004 relating to the placement of workers and the control of employment</p> <p>Executive Decree No. 07-123 of 24 April 2007 determining the conditions and modalities for granting and withdrawing approval to private organizations for the placement of workers and fixing the standard specifications relating to the exercise of the public employment service of workers (as amended by Executive Decree No. 18-193 of 22 July 2018)</p>	<p>Deals with private and public employment agencies.</p> <p>The law does not cover recruitment in the public sector (Law No. 04-19, art. 4).</p> <p>Algeria has a national public employment agency (ANEM), established by Law No. 04-19 (art. 7), which manages public employment services. In locations, where ANEM has no offices, the agency can conclude agreements with either the local authorities or private entities and authorize them to offer employment services (Law No. 04-19, arts 8–10).</p> <p>PEAs also need an additional approval from the labour ministry (Law No. 04-19, art. 9; Executive Decree No. 07-123, arts 7 and 14).</p> <p>PEAs are not allowed to offer employment services for the recruitment of migrants in Algeria, or for the recruitment of Algerians abroad. (Executive Decree No. 07-123, art. 2).</p>	Both	<p>Prohibited.</p> <p>The charging of any costs and fees for private and public employment agencies is prohibited. The agencies are solely paid by the employers.</p> <p>Law No. 04-19, art. 6: "The placement of job seekers is free. No fees or other costs should be charged to the job seeker."</p> <p>Executive Decree No. 07-123, art. 10: "The organizations undertake not to charge any fees or expenses from the job seeker in accordance with the provisions of article 6 of law No. 04-19 of 13 Dhou El Kaada 1425 corresponding to December 25, 2004, above cited."</p> <p>Executive Decree No. 07-123, art. 3: "The organizations are remunerated by the employers to whom they deliver their services according to a reference scale established, jointly by the ministers responsible respectively for employment, labor and trade"</p>	<p>ANEM, as well as the labour inspection services, are responsible for supervising the activities of PEAs and the local authorities that have concluded agreements with the ANEM (Law No. 04-19, arts 16, 22 and 23; Executive Decree No. 07-123, art. 29).</p> <p>The authorities may revoke their authorization, in case of a serious failure to meet the obligations set out in Algeria's laws or in their agreement concluded with ANEM (Law No. 04-19, art. 13; Executive Decree No. 07-123, arts 15–17 and 32). Otherwise a PEA can be prohibited to offer its employment services for up to 3 months (Executive Decree No. 07-123, art. 32).</p>



Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>Ethiopia</b> (Ratified C181)	Overseas Employment Proclamation No. 923/2016	<p>Ethiopia's Overseas Employment Proclamation No. 923/2016 applies to the overseas employment relation of Ethiopians' conducted by public employment organs, through Agency or on direct employment, as well as to Ethiopians travelling abroad to engage in overseas contracts as non-profit domestic workers. For employment positions not related to domestic work, the Ministry needs to provide approval.</p> <p>Article 2(1): "Private Employment Agency" or "Agency" means any person other than a Government body, which makes a worker available to an overseas employer by concluding a contract of employment with such a worker."</p>	International recruitment	<p>Article 9(3): "Whenever a worker is required to undergo a medical examination more than once, such expense shall be covered by the Agency."</p> <p>Article 10(1): An employer shall, through the PEA, be responsible for the payment of visa fee of the country of destination; round trip ticket; residence and work permit fees; embarkation fee; employment contract approval fees and insurance coverage.</p> <p>No. 923/2016, Article 10(2): The worker shall be responsible to cover the costs of: issuance of passport; authentication of documents (contract of employment and certificate of clearance of crime) within the country; medical examination; vaccination; birth certificate issuance; and certificate of occupational competence.</p> <p>Article 10(3-4): Allows for either party to be reimbursed costs due to the failure of the opposing party to provide the services or labour it agreed to:</p> <p>The Agency or employer shall refund the worker's expenses referred to in sub-article (2) of this Article, if the worker fails to be deployed for work for reasons not attributable to him after incurring the expense. ... Whenever the worker, without justified cause, fails to be deployed for work after all requirements for departure are fulfilled, the employer may require the worker to refund expenses incurred regarding the employment pursuant to sub-article (1) of this Article.</p> <p>Article 11: "The Ministry shall charge the employer a service fee associated with the approval of contract of employment in accordance with Regulations issued by the Council of Ministers."</p>	<p>Article 42(1): Licence may be suspended or revoked, and penalties may be imposed: "The contravention of sub-article (2) or (3) of this Article shall entail suspension or revocation measure against the license of an Agency."</p> <p>Grounds for suspension include "withholding of the worker's wage or his remittances" (art. 42(2)(l)), and "failure to refund expenses of worker who was not deployed for reason not imputable to him" (art. 42(2)(m)). Grounds for revocation include "receiving fee, in cash or in kind, from a worker in return for overseas employment exchange service" (art. 42(3)(i)).</p> <p>Articles 53(8), 56(2) and 56(3): Any representative of a PEA who contravenes any of the provisions of the Proclamation can be suspended and required to pay a fine.</p>

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>Ethiopia</b> (cont'd) (Ratified C181)	Employment Exchange Services Proclamation No. 632/2009, Labour Relations Proclamation No. 377/2003, as amended by the Employment Exchange Services Proclamation No. 632/2009	<p>According to arts 170(2), 172 and 173 of the Labour Relations Proclamation 377/2003, the Labour Ministry is responsible for coordinating and organizing employment services in Ethiopia.</p> <p>Proclamation No.632/2009 is still governing local employment exchange service in the country until a new law pertaining to it is issued (art. 78(4)).</p> <p>Proclamation No. 632/2009, art. 2(7): “‘public employment service’ means the service of issuance of license to private employment agencies, monitoring and supervision of such agencies and the issuance of work permit by the Ministry to citizens to work abroad, and includes other services provided in this Proclamation.”</p>	National recruitment	<p>Regulated</p> <p>Proclamation No. 632/2009, arts 15(2) and 15(3): The worker shall be responsible to cover the costs of: issuance of passport; authentication of documents; first medical examination (further examinations must be paid by the agency); vaccination; birth certificate issuance; skill testing; and certificate of clearance from any crime.</p> <p>Proclamation No. 632/2009, arts 15(4) and 15(5): If the recruitment fails for reasons for which the worker is not responsible, the PEA must refund the workers his expenses. If the recruitment fails for reasons for which the worker is responsible, even though the worker fulfils all of the conditions of the advertised position, the worker must compensate the PEA for its expenses.</p> <p>Proclamation No. 632/2009, art. 15(1): An employer shall, through the private employment agency, be responsible for the payment of visa fee of the country of destination; round trip ticket; residence and work permit fees; embarkation fee and insurance coverage.</p>	<p>Proclamation No. 632/2009, art. 35(1): PEAs are overseen by the labour inspection services.</p> <p>Proclamation No. 632/2009, arts 25(1)(b) and 28(1)(a): A private employment agency's license can be withdrawn if it charges a worker more fees than the ones prescribed in the Proclamation 632/2009.</p> <p>Proclamation No. 632/2009, arts 27(1)(f) and 28(1)(d): An agency's licence can be suspended if it is found to violate of any of the provisions in Proclamation No. 632/2009. The licence can be withdrawn, if the agency does not rectify its shortcomings within 30 days after the suspension.</p> <p>Proclamation No. 632/2009, art. 40(3): Any individual, who violates provisions of Proclamation No. 632/2009 is punishable with imprisonment or a fine.</p>

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
Ghana	<p>The Labour Act, 2003 (Act 651)</p> <p>Labour Regulations, 2007, (L.I. 1833)</p> <p>Code of Conduct of the “Ghana Association of Private Employment Agencies” (GHAPEA)</p>	<p>The Labour Act, 2003, applies to all workers and to all employers except the Armed Forces, the Police Service, the Prison Service and the Security and Intelligence Agencies specified under the Security and Intelligence Agencies Act 1996 (Act 526) (sect. 1). The Labour Act, 2003, concerns both private and public employment agencies. (arts 2 and 5)</p> <p>Labour Regulations, 2007, sect. 41: “private employment agency means any corporate body which acts as an intermediary for the purpose of procuring employment for a worker or recruiting a worker for an employer.”</p> <p>GHAPEA is a private association of 22 major Ghanaian PEAs. Its code of conduct is not legally binding, however its members have committed themselves to comply with it.</p>	Both	<p>Regulated.</p> <p>The Labour Act, 2003, makes provision for PEAs to charge fees for the recruitment and placement of workers, but does not stipulate details on the amount or the costs PEAs can charge (sect. 7(7)).</p> <p>The Labour Act, 2003, art. 174(h) states that the Minister may make regulations prescribing the scale of fees chargeable by PEAs. Such a regulation has, however, not been issued so far – see Labour Regulations, 2007, sects 1–3</p> <p>Labour Regulations, 2007, sect. 34: <b>Expense of journey</b></p> <ol style="list-style-type: none"> <li>(1) the expenses of the journey of an employee engaged under a foreign contract and of the members of the employee’s family authorized to accompany the employee to the place of employment, including incurred for protection during the journey, shall be paid by the employer.</li> <li>(2) the expenses of the journey shall include the necessities for the journey</li> <li>(3) the employer shall provide transport to the place of employment for the employee and the accompanying members of the employee’s family</li> <li>(4) the provision of transport shall include transportation for repatriation.</li> </ol> <p>Labour Regulations, 2007, sect. 35: <b>Termination of contracts</b></p> <p>Where an employer is unable to fulfil the contract or if, owing to sickness or accident, the worker is unable to fulfil the contract, the contract may be terminated by either party and the worker is entitled to remuneration earned, deferred pay and compensation due to the worker in respect of sickness or accident as well as repatriation of a member of the worker’s family who has accompanied the worker to the place of employment. A worker is entitled to repatriation expenses unless the agreement for the termination of the contract otherwise provides.</p>	<p>Labour Act, 2003, sect. 7(7): “An Agency shall refund 50% of the fees paid by a client to the Agency, if the Agency is unable to secure a job placement for the client after the expiration of three months.”</p> <p>Labour Regulations, 2007: Private employment agencies are overseen by the labour inspection services (sect. 3(5)). In case they contravene the Labour Code or the Labour Regulations, their license can be revoked (sect. 3(7)).</p> <p>Labour Regulations, 2007, sect. 38(1): “a person who contravenes of these regulation commits an offence and is liable on summary conviction to a fine of twenty-five penalty units.”</p>

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
Ghana (cont'd)				<p>Labour Regulations, 2007, sect. 36: <b>Repatriation</b></p> <p>(1) subject to sub-regulation (3) of regulation 31, an employee engaged under a foreign contract and the member of the employee's family authorized to accompany the worker to the place of employment shall be repatriated at the expense of the employer in the following circumstances:</p> <ul style="list-style-type: none"> <li>(a) on the incapacity of the worker through sickness or accident during the journey to the place of employment</li> <li>(b) on the worker being found on medical examination to be unfit for employment</li> <li>(c) on the expiration of the period of employment</li> <li>(d) on the termination of the employment because of the inability of the employer to fulfil the undertakings in the contract</li> <li>(e) on the termination of the employment because of the inability of the worker to fulfil the undertakings of the contract owing to sickness or accident</li> <li>(f) on the termination of the employment by mutual agreement between the employer and the worker unless the agreement otherwise provides</li> <li>(g) on the termination of the employment by the employer or employee where the Chief Labour Officer or Labour Officer directs in writing, or</li> <li>(h) any other cause occurring in the course of the worker's employment</li> </ul> <p>According to principle 3 of the GHAPEA Code of Conduct, PEAs may charge fees for their services, however these fees must be "appropriate" in relation to costs of the agency.</p>	



Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
Kenya	Labour Institutions Act of 2007 (No. 12 of 2007) [revised 2012]	Regulates PEAs for domestic and international recruitment and placement. The act does not apply to armed forces or the National Youth Service.	International recruitment	<p>Regulated.</p> <p>In the case of recruitment for foreign employment, the costs of recruitment should be met by the recruitment agent or the employer, including visa fees, airfare and a surety bond. However, a service fee could be charged to the worker to cover administrative fees or costs rendered during the recruitment, such as medical or occupational tests, provided that they did not exceed one-quarter of the worker's first monthly salary.</p> <p>Section 57(2):</p> <p>No person shall charge or receive in respect of anything done or to be done at an employment agency—</p> <p>(a) any fee or other payment or reward at a rate higher than that which may, from time to time, be prescribed for any particular area and class of business; or</p> <p>(b) any fee or other payment or reward, unless provision has been made for the charging of such fee, payment or reward in regulations made under this Act</p> <p>Section 60(2): "Regulation made under subsection (1) may provide for ... (c) the fees which may be charged in respect of the business of an employment agency."</p>	<p>Section 61:</p> <p>A person who contravenes any provision of this Act for which no penalty is specifically provided shall be liable to a fine not exceeding fifty thousand shillings or, to imprisonment for a term not exceeding three months, or to both.</p>

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>Mali</b> (Ratified C181)	<a href="#">Law No. 92-020 of 23 September 1992 on the Labour Code of the Republic of Mali</a> , as amended by Law No. 2017021 of 12 June 2017	Article 303: Any natural or legal person may be authorized to carry out paid placement operations in offices open for this purpose.  The conditions for opening feecharging PEAs are determined by decree.	Both	Prohibited.  Article 304 states that all fees are to be borne by the employer only: "Placement fees collected by fee-charging employment agencies shall be borne entirely by the employers without any payment being received from the workers."  Article 305: Paid employment agency managers and their agents are prohibited from collecting or accepting from time to time any transactions made by them, deposits of surety of any kind whatsoever.	Article 305(2-3): Paid placement agencies operate under the supervision of the National Directorate of Labor, Employment and Social Security. Fee-charging employment agencies are required to submit to the National Office of Labor and Employment information on the placements made, as well as a copy of the declaration of opening of an establishment or site.  Article 332: Every person who infringes the provisions of Art. 304 is punished with a fine of 20,000–50,000 CFA francs, increased to 50,000–250,000 CFA francs in cases of recidivism.

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>Morocco</b> (Ratified C181)	Book IV of the Labour Code, No. 5210, 2004, as amended up to 2017	The law regulates both the public employment service as well as PEAs.	Both	<p>Prohibited.</p> <p>Public employment services are free of charge for workers. PEAs are also not allowed to charge workers any fees for their services. In case of a recruitment of a Moroccan worker abroad, the agency also has to pay the worker's repatriation costs.</p> <p>Article 476: Intermediation in employment is provided by services created for this purpose by the government labor authority. The services provided by these services to job seekers and employers are free.</p> <p>Article 480: Private recruitment agencies are prohibited from directly or indirectly collecting emoluments or fees from job seekers, in part or in full.</p> <p>Article 490: The private recruitment agency, through which an employment contract abroad has been concluded, bears the costs of the employee's return to his country as well as all the costs incurred by him in the event of non-performance. of the contract for reasons beyond its control.</p>	<p>Violations of articles 476, 480 or 490 are punishable by a fine between 10,000 and 20,000 dirhams and double this amount in cases of recidivism.</p> <p>Article 494: Any violation of the other provisions of this chapter [Chapter 1: Intermediation in recruitment matters] is punishable by a fine of 10,000 to 20,000 dirhams. In the event of a repeat offense, the fine is doubled.</p>
<b>Niger</b> (Ratified C181)	Law No. 2012-45 of 25 September 2012 on the Labour Code Decree No. 2017-682 of 10 August 2017 on the Regulations of the Labour Code	Article 262 of the Labour Code deals with employment services. It states that placement of workers is a joint exercise concerning the public and private employment services sectors.	Both	<p>Prohibited.</p> <p>Article 264(1) of the Labour Code states that public employment services are offered without charge.</p> <p>Regarding PEAs, article 22 of the Regulations of the Labour Code states that the fees charged by private employment offices or offices are borne entirely by the employers. However, the costs of registration and making up the file for employment remain the responsibility of the worker. The rates charged must be prominently displayed on the premises of the office or private employment office.</p>	<p>For the public employment service:</p> <p>Articles 264(2) and 352(h) of the Labour Code) state that a representative of the public employment service, who charges a worker in any way for using the public employment service, is punishable with disciplinary and penal sanctions.</p>

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>Nigeria</b>	The Labour Act Chapter 198, Laws of the Federation of Nigeria 1990  Nigeria Code of Conduct for Private Employment Agencies (NCCPEA)	According to section 71(3) of the Labour Act, a “fee-charging employment agency” is defined as:  ... an agency conducted by any person who acts as an intermediary for the purpose of procuring employment for a worker or supplying a worker to an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either employer or worker  The Nigeria Code of Conduct for Private Employment Agencies (NCCPEA) is a non-binding guidance tool, developed by the Nigerian Government and the Nigeria Employers' Consultative Association, which sets out principles that guide practitioners in Private Employment Industry.	Both	Regulated.  According to section 71(2) of the Labour Act, the Labour Ministry can issue regulations providing for the scale of fees that can be charged by PEAs. However, to date, no such regulation has been issued.  The Labour Act does, however, contain regulations on the travel expenses of workers:  Section 30 states:  (1) the expenses of the journey of recruited workers to the place of employment, including all expenses incurred for their welfare during the journey, shall be borne by the recruiter or the employer.  (2) The recruiter shall furnish recruited workers with everything necessary for their welfare during the journey to the place of employment, including particularly, as local circumstances may require, adequate and suitable supplies of food, drinking water, fuel, cooking utensils, clothing and blankets.  Section 38(2):  Within thirty days after the expiration of a foreign contract, the employer to whom the employer's permit was granted under section 24 of this Act (or the agent of that employer) shall offer to provide the worker with a return passage for himself and his family, if any, to the place of recruitment, together with proper accommodation and maintenance on the journey.  Guiding principle 4 of the NCCPEA states that PEAs shall not charge directly or indirectly, in whole or part, any fees or costs to prospective employees.	n.a.



Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>Namibia</b>	Employment Service Act, 2011, No.8 of 2011 (as amended by Labour Amendment Act 2 of 2012)	Regulates public employment services. Designated employers must provide the bureau with “the number of employees who are Namibian citizens or permanent residents by sex, age, occupation, identity number or birth certificate number; the number of employees who are not Namibian citizens by sex, age, occupation, passport number or birth certificate number” (arts 17(b) and (c)).	Both	<p>Prohibited.</p> <p>PEAs are not allowed to charge fees, whether directly or indirectly to any individual using their services for employment placements. No deduction from the remuneration of individual placed by private employment agencies is allowed.</p> <p>Section 24(1): “A private employment agency may not charge a fee to any jobseeker using its services for matching offers of and applications for employment.”</p> <p>Section 24(1)(a):</p> <p>A user enterprise may not deduct or withhold from the remuneration of an individual placed with it by a private employment agency an amount equivalent to the fee paid by the user enterprise to the private employment agency for the placement of the employee or any portion thereof.</p>	<p>Section 24(2): “Contravention of this section may lead to a fine of N\$20,000 fine or two years imprisonment or both.”</p> <p>Section 22(1–2): In case a private employment agency does not comply with any provision of the Employment Service Act, its license may be withdrawn with a 30-day notice period.</p>
<b>South Africa</b>				<p>Prohibited for public employment services (sect. 5):</p> <p>“The Department must provide the following public employment services free of charge to members of the public in a manner that is open and accessible:</p> <ul style="list-style-type: none"> <li>(a) Matching work seekers with available work opportunities;</li> <li>(b) registering work seekers;</li> <li>(c) registering job vacancies and other work opportunities;</li> <li>(d) facilitating the placing of work seekers with employers or in other work opportunities;</li> <li>(e) advising work seekers on access to education and training;</li> <li>(f) advising workers on access to social security benefits;</li> <li>(g) providing specialised services to assist vulnerable work seekers;</li> </ul>	

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>South Africa</b> (cont'd)	Employment Services Act, 2014, No. 4 of 2014	Covers public employment services and PEAs  The purpose of this Act includes the facilitation of employment of foreign nationals in the South African economy where their contribution is needed. (sect. 8(2)).	Both	<p>(h) facilitating the exchange of information among labour market participants, including employers, workers and work seekers, private employment agencies, Sector Education and Training Authorities and training providers;</p> <p>(i) facilitating the employment of foreign nationals in a manner that is consistent with the object of this Act and the Immigration Act; and</p> <p>(j) generally, performing any other function in terms of employment law or prescribed in terms of this Act."</p> <p>Prohibited for private employment agencies (sect. 15):</p> <p>(1) No person may charge a fee to any work seeker for providing employment services to that work seeker.</p> <p>(2) Despite subsection (1), the Minister may, after consulting the Board, by notice in the Gazette permit private employment agencies to charge fees in terms of a specified fee to specified categories of employees or for the provision of specialized services.</p> <p>(3) A notice in terms of subsection (2) may specify categories of employees by reference to the work performed or to the earnings of such employees.</p> <p>(4) A private employment agency must not deduct any amount from the remuneration of an employee or require or permit an employee to pay any amount in respect of the placing of that employee with an employer.</p> <p>(5) Any agreement between a private employment agency and a client in terms of which employees perform work for the client, must specify separately the remuneration that employees will receive and the fee that the client is paying to the private employment agency.</p> <p>To date no exception under section 15(2) has been allowed by the Minister.</p>	Section 18(1): "The registrar may cancel the registration of a private employment agency for failure to comply with the requirements of this Act or any regulations made in terms of this Act or any prescribed procedures."

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
Togo	<a href="#">Law No 2006-010 of 13 December 2006 on the Labour Code</a>	<p>Covers public and private employment services</p> <p>Article 196: The public placement service is provided by the National Agency for Employment (ANPE). Placement transactions can also be carried out by paid employment offices or offices.</p> <p>A paid placement activity is considered to be the act of any natural or legal person acting as an intermediary to find employment for an applicant by deriving direct or indirect material and / or financial profit from this operation.</p> <p>Before any placement, fee-paying employment offices or offices must ensure that the job seeker is registered with the public employment service.</p> <p>The conditions for opening paid employment offices or offices and the rules to which they are bound are set by decree in the Council of Ministers.</p>	Both	<p>Prohibited (but employer can be charged)</p> <p>The Labour Code specifically prohibits the charging of fees or costs for workers by public and private employment agencies.</p> <p>Article 197: The placement costs collected by fee-paying employment agencies are fully borne by the employers without any remuneration being collected from the workers.</p> <p>Article 198: It is forbidden for the managers of fee-paying employment agencies and their employees to collect or accept, during transactions made by them, deposits of any kind whatsoever.</p> <p>The travel expenses of a worker recruited to work outside of Togo are to be borne by the employer, per article 161:</p> <p>Subject to the provisions provided for in article 164 of this code, the employer will pay the travel expenses of the worker recruited outside Togo, his spouse and his minor children usually living with him, as well as transport costs of their luggage from the place of usual residence to the place of employment and from the place of employment to the place of usual residence:</p> <ol style="list-style-type: none"> <li>1) in the event of expiry of the fixed-term contract;</li> <li>2) in the event of termination of the contract when the worker has acquired the right to leave under the conditions provided for in Article 159 above;</li> <li>3) in the event of termination of the contract or of the probationary engagement by the employer or following gross negligence on the part of the latter;</li> <li>4) in the event of termination of the contract due to force majeure.</li> </ol> <p>The worker is also entitled to travel from the place of employment to the place of usual residence and return in the event of normal leave. The return to the place of employment is only due if the contract has not expired before the date of the end of the leave and if on that date the worker is able to resume his service.</p> <p>However, the employment contract or the collective agreement may provide for a minimum period of stay below which the transport of families will not be the responsibility of the employer. This period cannot exceed twelve (12) months.</p>	Article 291(3): Every person, who violates article 197 or 198 is punishable with a fee of 25,000–50,000 CFA francs; the amount is raised to 50,000–100,000 CFA francs in cases of recidivism.

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>Tunisia</b>	Decree No. 2010/2948 laying down the conditions, modalities and procedures for granting the authorization to exercise by private establishments with placement activities abroad, as amended by Decree No. 2011/456	Applicable to all categories of workers placed abroad. The Decree specifically addresses private establishments that provide placements abroad.	International recruitment	<p>Prohibited.</p> <p>Article 4 prohibits the collection of any fees for services rendered by employment agencies, as below:</p> <p>Article 4: The private prospecting establishment for placement opportunities abroad is prohibited from directly or indirectly receiving, in whole or in part, a financial contribution or any other costs from the candidate for a placement in the foreign country.</p>	<p>If a PEA violates any provision of the Decree, its license can be suspended or withdrawn:</p> <p>Article 20: In the event of non-compliance with the provisions of this decree, the minister responsible for employment may, after consulting the commission mentioned in article 7 and after having heard the legal representative of the establishment concerned, pronounce one the following sanctions:</p> <ul style="list-style-type: none"> <li>– a warning against the legal representative of the establishment, if the shortcomings are simple, with the granting of a maximum period of one month to remedy them,</li> <li>– the provisional withdrawal of the authorization for a period not exceeding six months,</li> <li>– the final withdrawal of the authorization.</li> </ul> <p>Sanctions are notified by registered letter with acknowledgment of receipt. The sanctions cited in the second and third indents above are published in two daily newspapers within three days of the date of notification of the sanction.</p>



Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
Uganda	Rules and Regulations Governing the Recruitment and Employment of Ugandan Migrant Workers Abroad, 2006	<p>The Rules and Regulations define recruitment and placement as:</p> <p>“Any act of canvassing, contracting, transporting, utilising, hiring, or procuring workers, and referrals, contract services, promising or advertising for migrants’ employment, whether for profit or not; provided that any persons shall be deemed to be engaged in recruitment and placement.” (rule I, sect. 23)</p> <p>The following definitions are important for interpreting the Rules and Regulations:</p> <p>Principal – refers to a foreign person, partnership or company engaging and employing Ugandan migrant workers through a licensed recruitment agency (rule I, sect. 20).</p> <p>Uganda Migrant Worker – Refers to a Ugandan citizen who is to be engaged, or has been engaged in remunerated activity in a state of employment (rule I, sect. 29).</p>	International recruitment	<p>Regulated.</p> <p>Rule IV deals with “Placement fees and contributions”. It states that agencies may charge their principals a “fee to cover services rendered in the recruitment and deployment of Ugandan migrant workers. However, recruitment agencies shall charge a nominal fee from the Ugandan migrant workers for their recruitment and deployment services as administration costs.”</p> <p>Rule VI elaborates on the issue as follows:</p> <p><b>Placement fees and documentation costs</b></p> <p>Section 1. <i>Fees chargeable Against Principals:</i> Agencies shall charge from their principals a service or recruitment fee to cover services rendered in documentation and placement of workers.</p> <p>Section 2. <i>Fees/Costs Chargeable from Workers:</i></p> <p>(a) Private employment agencies may charge placement fees as may be authorised by the Permanent Secretary from a hired worker to cover costs of placement and services such as trade or skill testing, medical examination, passport, visa, clearances, inoculation, airport terminal fees, notaries, among others.</p> <p>The above charge shall be collected from a hired worker only after he/she has signed the employment contract and shall be covered by receipts clearly showing it.</p> <p>(b) Recruitment agencies shall charge a minimal fee not exceeding Uganda Shillings Fifty thousand (US\$ 50,000/=) from Ugandan migrant workers for its recruitment and placement services.</p> <p>Section 3. <i>No other charges shall be imposed on the worker.</i></p>	<p><b>Rule II. Issuance of license</b></p> <p>Section 15. <i>Monitoring Compliance with Conditions of License:</i> The Administration shall monitor the compliance of agencies with their undertakings in connection with the issuance or renewal of the licence. Appropriate sanctions shall be imposed for non-compliance with any of their undertaking.</p> <p><b>Rule III. Inspection of recruitment agencies</b></p> <p>Section 7. <i>Violations Found in the Course of Inspection:</i> Violations found in the course of inspection such as non-compliance with existing rules and regulations shall be grounds for the imposition of appropriate sanctions or for the denial of application for the issuance or renewal of license. A copy of the inspection report shall be endorsed to the appropriate unit for the conduct of necessary proceedings.</p>

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>Zambia</b> (Ratified C181)	Employment Act, 2017 Employment Regulations, as amended by Act 13 of 1994	Regulates PEAs	Both	<p>Prohibited.</p> <p>Includes requirements on licensing, record keeping and the strict prohibition of collecting any fees from workers for services rendered. Employer must pay repatriation fees; transport fees; all wages, even those in lieu of holidays or contract termination; contract creation fees; redundancy fees.</p> <p>Employment Act, section 59:</p> <p>(1) An employment agency shall charge a prospective employer such fees as may be agreed between them.</p> <p>(2) The employment agency shall not charge the prospective employee for any services rendered.</p> <p>(3) Any person who contravenes the provisions of subsection (2) shall be guilty of an offence.</p> <p>Employment Act, section 13(1):</p> <p>Whenever an employee has been brought from a place within Zambia to a place of employment by the employer, or by an employment agency acting on behalf of the employer, the employer shall pay the expenses of repatriating the employee to the place from which he was brought, in the following circumstances:</p> <p>(a) on the expiry of such period of service as may be specified in the contract of service;</p> <p>(b) on the termination of the contract of service by reason of the inability, refusal or neglect of the employer to comply with all or any of the provisions of such contract;</p> <p>(c) on the termination of the contract of service by agreement between the parties unless the contract otherwise provides;</p> <p>(d) on the termination of the contract of service by reason of the inability of the employee to comply with the provisions thereof by reason of illness or accident not occasioned through his own fault.</p> <p>Further details on exceptions, as well as what the expenses of repatriation include can be found in section 13(2-4).</p>	<p>Employment Act, section 13(5-6):</p> <p>If an employer fails to comply with any of the provisions of this section, the duty laid on him thereby shall be discharged by or under the directions of a proper officer and any reasonable expenses thereby incurred shall be a debt due by the employer to the Government and in any suit to recover such a debt, a certificate signed by a proper officer shall be conclusive evidence of the amount of the expenses incurred. (6)</p> <p>Notwithstanding the provisions of subsection (5), an employer who fails to comply with the provisions of this section, or with any lawful order or direction of a proper officer, shall be guilty of an offence.</p> <p>Employment Act, section 59(2) prohibits PEAs from charging prospective employees for any services rendered. Per section 59(3): "Any person who contravenes the provisions of [section 59] subsection (2) shall be guilty of an offence."</p>

Country	Policies/programmes related to recruitment	Details	Applies to national or international recruitment?	Provisions on charging fees to workers	Sanctions for violations
<b>Zambia</b> (cont'd)				<p>Employment Regulations, regulation 15:</p> <p>An employment agency shall not charge or receive fees in excess of the following scales:</p> <p>(a) where employers notify a vacancy: eight fee units in respect of each vacancy filled by an employee introduced by the agency;</p> <p>(b) (b) in the case of applicants: two fee units initial registration fee and up to five per centum of the applicant's first month's earnings in the event of being placed in employment by the agency.</p>	<p>Employment Act, Article 61:</p> <p>Any employment agency-</p> <p>(a) knowingly deceiving any person by giving false information; or</p> <p>(b) making or causing to be made or knowingly allowing to be made any register, record or return which is false in any material particular;</p> <p>shall be guilty of an offence.</p> <p>Employment Regulations, regulation 17b:</p> <p>An employment agency which charges or receives fees in excess of those prescribed by regulation 15; shall be guilty of an offence and shall be liable to a fine not exceeding eight penalty units.</p>
Zimbabwe	The Labour Act [Chapter 18:01]; 16/1985, 12/1992, 20/1994 (s. 19), 22/2001 (s. 4), 17/2002, 7/2005 , May-15	<p>Regulates employment in general.</p> <p>Section 3(1): "This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution."</p> <p>An "employment agency" is defined as "any business carried on for gain or reward in which employment of any nature whatsoever is either procured for persons seeking work or is offered to such persons on behalf of third parties, or in which advice in regard to such procurement or offering of employment is given to such persons or third parties" (sect. 2).</p>	Both	<p>Prohibited.</p> <p>Section 116(2):</p> <p>No person shall charge or receive in respect of anything done or to be done at an employment agency—</p> <p>(a) any fee or other payment or reward at a rate higher than that which may, from time to time, be prescribed for any particular area and class of business; or</p> <p>(b) any fee or other payment or reward, unless provision has been made for the charging of such fee, payment or reward.</p>	<p>Section 118(2):</p> <p>Any person who contravenes ... subsection (1) or (2) of section <i>one hundred and sixteen</i> ... shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.</p>

C181 = Private Employment Agencies Convention, 1997 (No. 181); n.a. = not applicable.

**Source:** Compiled by authors.





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This report provides an analytical framework on the recruitment of migrant workers within and from Africa, drawing on the normative work of the ILO, global and regional policy frameworks, as well as findings from the 13 case studies. The report is grounded in a rights-based approach drawing on international labour and other human rights standards. Generalizing from the findings of the case studies, the report offers priority areas to address on the way to making the recruitment of migrant workers in Africa fairer.

This report contributes to the knowledge development pillar of the ILO's Fair Recruitment Initiative.

Certain sections of the report benefited from funding from ILO multi-stakeholder projects involving the following partners:



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