# VII. Post-Admission Policies: Rights of Migrant Workers

Post-admission policies are concerned with a number of inter-related elements for regulating the labour market, ensuring protection of workers, and supporting community welfare. Important measures are generally required in five areas:

- labour market regulation, including access, mobility and recognition of qualifications;
- protection of migrant (and national) workers in the employment context, including monitoring of terms and conditions of employment, access to vocational training, language and integration courses, allowing for freedom of association, and protection against discrimination;
- facilitation of social cohesion, particularly through measures to prevent discrimination, promote family reunification, and assist integration;
- improvements in social welfare, including areas of access to health care, education, housing and community organizing;
- provisions on social security.

Most of these measures are related to ensuring adequate protection for migrant workers while in the destination country, and are also found, in the form of minimum standards, in the international rule of law framework of human rights and international labour norms in which OSCE countries participate. As underlined in Chapter I, this framework does not merely concern the citizens of a given country, but are equally applicable to resident non-citizens, such as migrant workers and members of their families, including those without regular status. In addition, specific international instruments have also been adopted under the auspices of the UN and the ILO concerning the protection of migrant workers and their families. This framework of general and specific instruments is buttressed by normative developments in Europe, particularly within the European Union, discussed in Section IV above and Section IX.1.3 below, as well as in the context of the Council of Europe, which encompasses many of the OSCE countries to the east of the enlarged EU space. However, these international and regional standards can only have an impact on the daily lives of migrant workers if they are implemented effectively at the national level. The protection of migrant workers while working in the destination country is best secured by the legislation of that country, whether this is by the labour code, employment legislation, or other rules concerned with the regulation and protection of foreigners, which applies and builds on the minimum norms accepted at the international and regional level. Moreover, even if the countries concerned are not yet prepared to adopt in full these international or regional standards, they can still serve as a model for the development of national legislation.

In some instances, the national legislative measures of countries of origin (see Chapter III) can contribute greatly to the protection of their workers while working abroad, and examples of such measures are also provided in a number of sections below.

## VII.1 Labour Market Regulation

Labour market regulation is concerned with access to employment and occupation in the destination

VII.

country, whether this entails the migrant worker's first employment or a second job if he or she becomes unemployed. The rules relating to recognition of diplomas and qualifications can also greatly affect the skill level of employment migrant workers are permitted to access, thus having a significant impact on the degree of their economic and social contribution to the destination country as well as in terms of their remittances and potential means to enhance development of their countries of origin.

## VII.1.1 Access to employment

### VII.1.1.1 Employment restrictions

National legislation in most countries, with the exception of a few countries where immigrants are permanently admitted on arrival, contains restrictions which may affect free choice of employment. These restrictions may directly limit the access of migrant workers to employment by regulating the circumstances in which they may change jobs or by establishing priorities for employment in favour of national workers (Section VI.2.2). The employment of migrant workers is indirectly affected by other limitations such as statutory provisions requiring employers to obtain authorization to employ foreign workers or fixing the proportion of national workers who must be employed in an undertaking.

In countries such as Belgium, Cyprus, and the Czech Republic, work permits are issued to foreigners at least during the initial period – for a given post in an enterprise or for a given employer. In others such as Bulgaria, work permits are issued for a given geographic region. In Austria and Switzerland, the residence or work permit issued by the authorities is restricted in principle to a given canton; after five years or ten years respectively, however, the migrant worker has the possibility of seeking work throughout the country. In countries such as Albania and Japan, the authorization may be granted for a given occupation or branch of activity without being limited to a single employer, either from the start of the initial period of employment or when certain conditions of residence and employment have been met.

The legislation of Austria requires both an employment authorization and a work permit. Although the employment authorization must be obtained by the employer, it is nonetheless restrictive in its effects on the occupational mobility of the foreign workers, since they may not be hired by employers who have been refused employment authorizations (see also Section VI.4.2 above with regard to the position in the Russian Federation). In the United States, these employment authorizations are granted only if warranted by the employment market situation or if the quota of foreign workers which has been fixed for each undertaking or at the national level is not exceeded, or if it is not going to have negative implications for salaries and working conditions of national workers employed in similar activities (Section VI.3.2.2 above).

Normally, in cases where migrant workers aspire to job changes, since they are entitled to have access to the immigration country's public employment service, they can ask at any time to be placed in a different job, even on the first day after entry. Officials can normally not deny access to their services; but they can hold migrants to jobs in a particular industry or occupation, if that is what the government of the destination country has decided and if they have only recently entered the

country. They can also reserve political functions entirely to nationals (Böhning, 1996: 58). As observed in Section V.4.2, however, restrictions on job mobility within the same employment sector should not continue for too long, particularly in lower-skilled work, because this increases the risk of the migrant worker being exploited.

#### VII.1.1.2 Free access to the labour market

The provision of free access for migrant workers to the labour market is an important step, which can play a vital role in promoting the integration of migrant workers and their families in the destination country. Free access to the labour market is a question determined differently in European countries, although, in many instances, migrant workers, depending on the conditions relating to their first admission, can usually access the labour market freely after a minimum period of between 2-5 years of employment in the country concerned (Cholewinski, 2004: 58). The duration of such geographic, industrial or occupational restrictions on employment varies considerably from one country to another, for example: Australia (two years, but only concerns permanent residents), Austria (from five or eight to ten years), Belgium (from two or three to four years), Croatia (three years), Finland (two years), Luxembourg (between four and five years), Netherlands (three years), Spain (three years), Switzerland (between five and ten years), United Kingdom (four years).

However, in those destination countries where free access to employment is available to foreign workers, the right is frequently limited in accordance with admission rules and it is usually granted to skilled migrant workers earlier than to lower-skilled workers. In some countries operating employment-based immigration (see Section VI.3 above), free access to employment is applicable from the moment of arrival in the country (e.g. Canada). In contrast, in some destination countries, such as those in Asia, free access to employment is not granted at all because labour migration is perceived as strictly temporary.

Admission and immigration rules can also either overtly or covertly discriminate against female migrants because of the gender division of labour in both countries of origin and destination. Persistent occupational gender segregation implies that most jobs available to women migrants are "feminine jobs" related to their traditional roles. The gender-neutral demand for household employees, nurses and entertainers is in fact directed at the recruitment of women. The gender-specific labour supply is based on stereotypes and gender roles with skills training programmes defining certain occupations as more suitable for women. This may be indirectly reflected in admission rules and women may as such be eligible as autonomous migrants only for certain categories of jobs. Although there are middle and high-level women professionals such as nurses, academics, teachers and managers of multinational corporations, the majority of women migrants are in low-skilled jobs in the domestic service, entertainment, labour-intensive factories, care work and sometimes agriculture. In addition, some countries require women migrant workers to undergo pregnancy tests in order to be admitted for employment or make pregnancy a ground for termination of employment, which is contrary to international human rights and labour standards (ILO, 2003c; UN, 2004: para. 153).[1]

The rules in international migration instruments relating to access to the labour market for migrant workers also differ. While everyone has a right to work in accordance with the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Art.6), a right applicable to all persons regardless of their nationality, states can make distinctions between nationals and non-nationals if such distinctions pursue a legitimate State objective and can be justified on the basis of the principle of proportionality. The protection of the national workforce may well constitute such an objective in certain circumstances. ILO Convention No. 143 takes a liberal approach to this question, in effect enabling migrant workers to access the labour market after two years of employment, while considerably more discretion is afforded States parties ratifying the ICRMW (Textbox VII.1).

### VII.1.2 Involuntary job changes

There is a consensus in the specific ILO and UN standards that if a migrant worker loses his or her job, he or she does not necessarily or immediately have to leave the immigration country but should be viewed as part of the normal workforce. In cases in which migrants involuntarily lose their jobs because of illness, or because

TEXTBOX VII.1

## International Law and Access to the Labour Market for Migrant Workers in the Country of Employment

**International Covenant on Economic, Social and Cultural Rights, Article 6(1)**

"The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his/her living by work which s/he freely chooses or accepts, and will take appropriate steps to safeguard this right."

With regard to the application of the right to work to migrant workers and their families, the Committee on Economic, Social and Cultural Rights, in General Comment 18 on the Right to Work adopted on 24 November 2005, underlines that "[t]he principle of non-discrimination as set out in article 2.2 of the Covenant, and in article 7 of the [UN Migrant Workers Convention], should apply in relation to employment opportunities for migrant workers and their families" (2005: para. 18).

**ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Article 14**

In the case of migrant workers' access to employment other than that for which they were recruited, Article 14 of ILO Convention No. 143 stipulates two types of restrictions that can be imposed.

A Member State may:

a) make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant workers have resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract;

b) restrict access to limited categories of employment or functions where this is necessary in the interests of the State. Under this provision, migrant workers can claim the right to seek a job different from the one allocated to them under their first work contract after their first two years in the country or after completion of their first contract if this is shorter in duration.

**UN Migrant Workers Convention (ICRMW), Article 52**

Under this Convention (UN, 1990), a government is not prohibited from restricting a worker recruited abroad to employment in one industry or occupation. But such restrictions cannot be maintained for more than two years. As from the first day of the third year of the foreigner's presence in the country, he or she is entitled to seek another job. Any particular job can still be refused to the migrant if – within the meaning of a vacancy test – a national worker, or someone put on a par with nationals, is willing to take it. As from the first day of the sixth year of the foreigner's stay, however, he or she should have the same right to a job as a national worker.

the employer terminates the employment relationship or goes bankrupt, ILO Convention No. 143, in Article 8, contains the following wording concerning migrant workers lawfully residing in the country:

a) [T]he migrant worker shall not be regarded as in an undocumented or irregular situation by the mere fact of the loss of his/her employment, which shall not in itself imply the withdrawal of his/her authorization of residence or, as the case may be, work permit.

b) Accordingly, he/she shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining. [2]

Slovakia has signed bilateral agreements on the mutual employment of migrants stipulating that when the migrant's employment relationship is terminated for any reason which is beyond his or her control, the recruiting body shall endeavour to find other appropriate employment. However, in Austria, a migrant worker who is unemployed runs the risk of being expelled due to insufficient means of subsistence, regardless of whether he or she possesses a valid permanent residence permit. Switzerland also states that a permanent

residence permit can be revoked in case of poverty, as under Swiss law, poverty is a legal ground for expulsion, although the decision to expel an individual must respect the principle of proportionality, that is to say, expulsion is only ordered where return to the country of origin is possible and can be reasonably enforced.

ILO Convention No. 143 does not, however, grant migrants the right to stay in the country after the two years of presence or when their first contract has expired. Article 8(1) refers exclusively to migrant workers who lose their employment, as opposed to those whose employment comes to an end as foreseen in the employment contract. Thus, the common practice of specifying a period of time and insisting that migrants return to the home country upon completion of this period is not in itself in contradiction to this provision (ILO, 1999a).

### VII.1.3 Brain waste and lack of recognition of diplomas

Many migrant workers, especially women, sacrifice themselves in occupations for which they are overqualified. Some of them possess university degrees or other high level qualifications: university graduates, architects, doctors, accountants, etc. A large number of these women migrant workers, for example, enter domestic work (Section VI.4.3.4) and have a difficult time, especially if they are undocumented, to climb up the occupational ladder. The "one-employer" rule or the restriction to change type of employment also disproportionately affects women; a university graduate working as a household employee cannot take up another occupation that would make more appropriate use of her skills or education, even if there is a job opening (ILO, 2003c: 13).

The same issues discussed on the section on brain drain (Section IV.7) will apply to brain waste: countries of origin spend large portions of their educational funds on workers who then leave their home country to find a job abroad. However, in terms of remittances, because these workers occupy low-skilled jobs, the countries of origin can be considered to be losing out even more through brain waste than through brain drain. Since these migrants frequently enter the labour market without documents and at the lower-skilled level, the wages they receive are much lower than those they would receive if they were able to occupy positions that make use of their qualifications. In turn, their low wages reduce significantly the amount of remittances that they can send home.

One of the reasons causing this high level of brain waste in human resources is that most of these workers reside and work in the country of destination as irregular migrants. There is a large demand in industrialized countries' labour markets for caring services where there is often no recognized demand for foreign workers and where there are not enough legal channels of migration into these occupations. In this regard, best practices have been identified in Greece, Italy and Spain, where a large number of women foreign workers concentrated in the domestic sector have been regularized. In Italy, the 2002 regularization scheme led to a total of 450,000 foreign workers registered as *collaboratori familiari* (of whom 84 per cent were women) and representing 35.2 per cent of the total number of regularized workers (Textbox VIII.5). In early 2006, the Italian Labour Ministry published its quotas for foreign workers which included 45,000 work permits for the domestic sector, out of a total of 170,000. In Spain, the 2005 regularization scheme also benefited a large number of migrant workers in this sector: 191,570 work permits were issued to foreign migrant domestic workers (of whom 89 per cent were women), representing 33.4 per cent of the total number of regularized workers. In Greece, the number of migrant women working as household employees regularized in 1998 was also very high (32.6%).

Apart from the issue of reducing irregular migration by regularizing workers established in the labour market for a number of years, recognition of this labour market demand and opening up of legal channels of migration are necessary.

Another reason for brain waste is the lack of a system of recognition of diplomas and qualifications between major countries of origin and countries of destination. The recognition of qualifications obtained abroad is thus the other main area in which significant changes to national policy and practice are necessary in order to ensure that regular entry migrant workers can access employment on equal terms with national workers (Textbox VII.2).

TEXTBOX VII.2

### Recognition of Qualifications

One important prerequisite to enable migrants to compete with nationals for jobs is recognition of foreign qualifications in the country of employment. Article 14 of ILO Convention No. 143 states that "a Member may ... (b) after appropriate consultation with the representatives organizations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas". The same provision is contained in Paragraph 6 of ILO Recommendation No. 151.

However, recognition of vocational and academic qualifications of migrant workers is an area where States do not appear to have made much progress, either unilaterally or bilaterally and at the regional level (with the exception of pertinent developments in the EU). Only a small number of States seem to be working on the question. Italy's legislation provides that "within the framework of a national integration programme, and on the basis of agreements with local and regional authorities, educational institutions must promote (....) study tracks leading to the compulsory education certificate or the upper secondary school diploma which would take account of education obtained in the country of origin (and) criteria for the recognition of qualifications obtained in the country of origin, in order to facilitate integration into the school system".

In Australia, the Commonwealth Department of Workplace Relations and Small Business provides national recognition in metal and electrical trades for permanent residents and skills assessment in most trades for people applying to migrate to Australia. State governments also provide assistance with skills recognition, such as the Overseas Qualifications Unit in the Victorian Department of State Development, which operates under the coordinating umbrella of the National Office of Overseas Skills Recognition, which is part of the Commonwealth Department of Employment, Education, Training and Youth Affairs.

New Zealand's Qualifications Authority has responsibility for assessing overseas qualifications for their equivalence to those gained in New Zealand. In addition, New Zealand legislation requires the registration of people wishing to practice certain professions, e.g. doctors, and the Government reports that "human rights jurisprudence establishes that qualifying bodies must have procedures in place for assessing overseas qualifications".

A small number of States also recognize qualifications on the basis of bilateral or multilateral agreements, e.g. Slovakia.

Source: ILO, International Migration Programme (MIGRANT), March 2006.



## *VII.2 Protection in the Employment Context*

While States retain sovereign rights over their migration policies, international law has established three fundamental notions which characterize protection for migrant workers and members of their families:

- Equality of treatment between regular migrant workers and nationals in the realm of employment and occupation.
- Core universal human rights apply to all migrants, regardless of status. This was established implicitly and unrestrictedly in ILO Convention No. 143 and later delineated explicitly in the 1990 ICRMW. It is also a fundamental principle of international human rights law. As stated in Section I.3 above, the eight core ILO Conventions apply to all migrant workers.
- A broad array of international labour standards providing for protection in treatment and conditions at work (including occupational safety and health, maximum hours of work, minimum remuneration, non-discrimination, freedom of association, and maternity leave) apply to all workers. This notion was upheld in a recent Advisory Opinion issued by an international court, the Inter-American Court of Human Rights, which states:

> The migrant quality of a person cannot constitute justification to deprive him/her of the enjoyment and exercise of his/her human rights, among them those of labour character. A migrant, by taking up a work relationship, acquires rights by being a worker that must be recognized and guaranteed, independent of his/her regular or irregular situation in the State of employment. These rights are a consequence of the labour relationship (IACHR, 2003).

Preventing exploitation of migrants, criminalizing the abuse of persons by human traffickers and smugglers, and discouraging irregular employment requires enforcement of clear national minimum labour and human rights standards for protection of workers, whether nationals or migrants (see Section VIII.4.3). International labour standards on forced labour and child labour, freedom of association and non-discrimination, occupational safety and health, and the protection of wages provide minimum international norms for national legislation. A necessary complement is *monitoring and inspection*, particularly in such areas as agriculture, construction, domestic work, the sex industry and other sectors of "irregular" employment, to prevent exploitation, detect forced labour, and ensure minimal *decent working* conditions for all.

**TEXTBOX VII.3**

## International Standards Protecting Migrant Workers concerning Terms and Conditions of Employment

According to ILO Convention No. 97 (Art.6 (1)(a)), migrant workers lawfully residing in the country shall not be treated less favourably than nationals in the areas of remuneration, hours of work and overtime, holidays with pay, restrictions on home work, minimum age, apprenticeship and training and employment of women and young persons, in so far as such matters are regulated by law or regulations or under control of the administrative authorities.

According to ILO Convention No. 143 (Art.10), lawfully resident migrant workers shall enjoy "equality of opportunity and treatment in respect of employment and occupation". Article 12 guarantees equality of treatment with regard to working conditions for all regular migrant workers who perform the same activity whatever might be their particular conditions of employment.

ILO Recommendation No. 151 (para.2) indicates that documented migrant workers should be accorded equality of opportunity and treatment in terms of:

a) access to vocational guidance and placement services;
b) access to vocational training and employment of their own choice on the basis of individual suitability for such training or employment, account being taken of qualifications acquired outside the territory of and in the country of employment;
c) advancement in accordance with their individual character, experience, ability and diligence;
d) security of employment, the provision of alternative employment, relief work and retraining;
e) remuneration for work of equal value;
f) conditions of work, including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment.

Article 9(1) of Convention No. 143 provides equality of treatment for *all* migrant workers in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

ICRMW (Art.25(1), stipulates that *all* migrant workers – those who are lawfully present as well as those who are undocumented or in an irregular situation – shall enjoy "treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and other conditions... or terms of employment". Moreover, Article 25(2) adds: "It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment..."

## VII.2.1 Terms and conditions of employment

With regard to minimum terms and conditions of employment (e.g. occupational safety and health, protection of wages and working time), the governing principle, found in general international human rights instruments (UDHR: Art.23; ICESCR: Art.7) and elaborated in ILO standards, is that all foreign workers should be treated on equal terms with nationals. These rights include equal remuneration for work of equal value, which is a fundamental principle in the widely ratified fundamental ILO Conventions Nos. 100 and 111 on equality[3] and in ILO Conventions Nos. 97 and 143, and the prohibition of unlawful deductions from workers' salaries, which is a fundamental principle recognized in the widely ratified ILO Convention on the Protection of Wages, 1949 (No. 95). ILO Convention No. 111 protects *all* migrant workers against discrimination based on, among other grounds, race, colour, ethnicity, sex, or religion in respect of their conditions of work (ILO, 1999b: 369-374, 493-495).[4] In addition, the application of other ILO standards in the areas of occupational safety and health, working time and protection of wages is not necessarily limited to regular migrant workers. The principle of equal treatment is clearly underlined in the specific international instruments pertaining to the protection of migrant workers (Textbox VII.3).

With regard to conditions of work, few legal or administrative provisions at the national level draw distinctions between regular migrant workers and nationals based on nationality. In fact, in most cases, conditions of work are governed by the labour code or other labour legislation which applies to national and foreign workers without distinction, pursuant to the general provisions concerning their scope. However, administrative discrimination against migrant workers is most likely to occur with regard to security of employment and vocational training (see also Section VII.2.2).

Nonetheless, the equality principle also applies to vocational training and protection from dismissal. According to Convention No. 143 (Art.10), employer or state concessions for vocational training should also be available to migrant workers who are lawfully residing in the country. While this might be difficult to implement in practice, particularly if the migrant worker is only in the country on a temporary basis, opportunities for the development of employment skills are vital in terms of labour market integration and prevention of social exclusion (Section VII.3.2) (particularly if the migrant workers were later to settle in the country) and also of their future contribution to the economy of the country of origin in the event of their return. As far as dismissal is concerned, while it is often inevitable that workers lose their jobs during downturns in the economy, distinctions between national and foreign workers in this respect should not be permissible without good reason. In Austria, however, the law provides that foreigners, or at least those who are subject to work permit restrictions, should be the first to be dismissed in the event of staff reductions.

As regards equality of treatment in respect of alternative employment, relief work and retraining, this depends on the situation of the migrant worker, as found in countries such as Australia, Austria, Czech Republic, Germany, New Zealand, and the United Kingdom. If the worker is a permanent resident, he or she will enjoy the same advantages as nationals after a certain period of time has elapsed. However, it would be impossible for a temporary resident to meet the residence requirement and hence they will have little chance of gaining access to such benefits.

A particularly important aspect of employment terms and conditions for migrant workers is the right to equal treatment with regard to rights arising out of past employment. The specific international instruments protecting migrant workers underline that this right should be protected in respect of all migrants, including irregular migrant workers (ILO Convention No.143: Art.9(1); ICRMW, Arts.25(3) and 27). In particular, equal treatment should apply to remuneration (i.e., past wages). This is especially important for irregular migrant workers, since employers often attempt to hide behind the screen of illegal employment to avoid their obligations. Equal treatment with regard to past employment rights also applies to social security benefits arising out of such employment (Section VII.5 below) and includes the possibility of reimbursement of social security contributions or the export of benefits to the migrant's country of origin.[5] However, it does not extend to rights the granting of which is not dependent on a period of employment.[6]

Equal treatment between national workers and regular migrant workers is also protected under bilateral labour migration agreements (Section IX.1.1 below), which often include provisions guaranteeing equal work and employment conditions, as well as under bilateral social security agreements enabling migrant workers *inter alia* to export benefits to their home country. This question is becoming increasingly important for returning migrant workers and their families (especially retired persons).

### VII.2.2 Vocational training, language and integration courses

The principle of equality for regular migrant workers and nationals clearly extends to access to vocational training and retraining.[7] However, there are two areas where administrative discrimination against migrant workers exists: vocational training and language training. Of these, equal access to vocational training is the more problematic. In Norway, access of foreigners to vocational training is subject to a residence requirement; in Canada (Province of Nova Scotia) migrant workers are required to pay fees for education and apprenticeship training, while Canadian residents of the province obtain them either free of charge or at a reduced rate.

With regard to language training, ILO standards indicate that this should take place "as far as possible during paid time" (ILO Recommendation 1975 (No. 151): para.7(1)(b)). Learning the language of the host country is essential for ensuring that migrant workers and members of their families make a smooth transition to the country of employment. Language training is the most obvious and immediate need when migrant workers and their dependants do not have a command of the local language. This can be organized by the national government or be delegated to NGOs, through the provision of government funds for that purpose.

In Germany, the Ministry of Labour and Social Affairs supports German language teaching for migrant workers through the association "German for Foreign Workers". Some of its courses specifically take into account the needs of migrant workers and young women, and combine language training with preparation for vocational training. In particular, the German Government reports that "courses taking account of occupational needs are becoming more and more important". Other examples include San Marino, where "each year, the State promotes and organizes Italian and foreign language courses to assist foreign and local citizens in their everyday work". In Italy, schools and institutions must provide courses and events in the Italian language for the benefit of non-Italian speakers. Belgium's German-speaking community organizes a programme entitled "integration for all through reading and writing" which is directed at socially marginalized groups, including migrants and members of their families – aiming to improve their ability to read and write in German and to ensure basic knowledge of both French and German. In Norway, immigrants are offered 500 hours of tuition in Norwegian which includes basic information about the host country's society.

An interesting example of services to support the development and integration of migrant workers is the programme of the Careers, Education and Training Advisory Board (CETAB) established by the World Federation of Khoja Shia Ithnaasheri Muslim Communities.[8] This organization, based in the UK, promotes the education and career development of young Muslim women and men through information provided on their website and a number of community programmes.

### VII.2.3 Trade Union rights

One of the most effective ways of preventing migrant workers from being exploited is to allow them to exercise their right to join a trade union without hindrance. Trade union rights comprise freedom of association and collective bargaining, and are recognized universally in the core international human rights instruments.[9] The ILO sees the right to freedom of association and collective bargaining as a fundamental concern, which is recognized by the ILO Constitution and should therefore be afforded protection by all ILO Member States, irrespective of whether they have ratified the specific conventions. This position is reiterated in the 1998 Declaration on Fundamental Principles and Rights at Work, which identifies the two specific ILO Conventions (Nos. 87 and 98) addressing trade unions rights as belonging to ILO's eight core fundamental rights instruments (Section I.3). These instru-

ments have been ratified by 145 and 154 countries respectively, but many instances show that their application leaves much to be desired.

Convention No. 87 (Art.2) states that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned to join organizations of their own choosing without previous authorization". This right "implies that anyone residing legally in the territory of a given State benefits from the trade union rights provided by the Convention, without any distinction based on nationality" (ILO, 1994: para. 63).

In general, legislation and national practice recognize the right of foreign workers to join trade unions under the same conditions as nationals. However, States such as the Czech Republic and Slovakia make citizenship a condition for taking office in a trade union, while others, such as Lithuania, require that membership of trade unions is linked to conditions of residence. Following a complaint lodged by a Spanish trade union organization in 2001, the ILO Committee on Freedom of Association, reiterated that Convention No. 87 applies to all workers without distinction. In addition, since this case referred to migrant workers in an irregular situation, it clearly stated that these workers were covered by the Convention and must have the right to join or form trade unions. The Committee also emphasized that "unions must have the right to represent and assist workers covered by the Convention with the aim of furthering and defending their interests" (ILO, 2001b).

In another case, in 2003, the ILO Committee on Freedom of Association acting on a complaint by American and Mexican trade unions contested a US Supreme Court decision in March 2002, which ruled that an undocumented worker, because of his immigration status, was not entitled to back pay for lost wages after he was illegally dismissed for exercising rights protected by the National Labour Relations Act (NLRA). The Supreme Court had overruled a decision by the National Labour Relations Board (NLRB) and a federal appeals court that granted back pay to the worker (*Hoffman Plastic Compounds v. NLRB,* 2002). The ILO Committee considered that the Supreme Court ruling was a violation of freedom of association (ILO, 2002b).

Legislation in Austria and Finland state that only nationals of the country can be elected to official trade union positions. ILO's Committee on Freedom of Association has made comments to Finland on the issue of considering that legislation should allow foreign workers to take up trade union office. The Committee of Experts on the Application of Conventions and Recommendations also stated:

> since provisions on nationality which are too strict could deprive some workers of the right to elect their representatives in full freedom, for example migrant workers in sectors where they account for a significant share of the workforce, the Committee considers that legislation should allow foreign workers to take up trade union office, at least after a reasonable period of residence in the host country (ILO, 1994: para.118).

Organizing migrants is a paramount task for trade unions, and therefore legislation preventing migrants from joining unions should be repealed, as should provisions in trade union statutes and rules which contain obstacles to membership of migrants. In addition to protecting migrant and national workers' rights, in many countries trade unions play a key role for integrating migrants in the host country society: organizing language courses, establishing information centres for migrants and of course enabling them to participate in trade union activities (Textbox VII.4)

Equal treatment and equal opportunity, including the right to freedom of association and to hold office in trade union organizations, are also enshrined in the two ILO specific Conventions Nos. 97 and 143 protecting migrant workers. These instruments are at the centre of the trade union movement activities for migrant workers and promoting their ratification is a key objective of any trade union campaign. There is no reason why any worker, migrant or not, should be deprived of the fundamental right to freedom of association, and there are numerous reasons demonstrating that the ability to exercise this right is good for migrants, for national workers and for the economy.

Migrant workers are often to be found in dangerous occupations shunned by nationals. Indeed, one can only guess that among the 6,000 workers who die every day at work from accident or work-related diseases

TEXTBOX VII.4

## The Role of Trade Unions

How can trade unions, as one of the social partners, make a difference in labour migration concerns? A few concrete examples are provided below:

- Support from the trade unions and consultation with employers and workers' organizations led to the adoption of new rules on immigration in Spain and to the regularization of some 700,000 irregular migrant workers (Textbox VIII.5). Without the support of social partners, no government could risk embarking on such a major operation.
- Trade unions were key promoters of the ICRMW. A similar effort is now being contemplated to promote the ratification of ILO Conventions Nos. 97 and 143.
- Unions can also play a role in addressing the question of brain drain, a key issue for African countries. According to the World Health Organization (WHO), 50 per cent of African doctors are likely to leave their country of origin. Every year, Africa loses some 20,000 of its highly skilled professionals. It has been calculated that this is costing governments, employers and workers as taxpayers US$4 billion a year. Trade unions in industrialized countries are now campaigning for ethical migration in order to avoid depriving Africa of the talents it needs to improve the welfare of its population. In a number of African countries, including Kenya, trade unions are campaigning to negotiate improvements in the health sector by promoting higher health budgets and better working conditions for nurses and doctors.
- Remittances have become a key source of financial flows to the developing countries (Section IV.4). Trade unions, such as the AFL-CIO, have negotiated arrangements with local banks to reduce the cost of transfers for migrants. This encourages both better use of remittances and more transparency in transactions.
- Bilateral and multilateral agreements between trade unions from origin and destination countries are on the increase. Union Network International (UNI), the international trade union for white collar workers, has introduced trade union passports, which allow migrant workers to keep trade union membership and services when they move to another country. Agreement between Moroccan and Spanish trade unions help combat irregular migration and the exploitation that goes with it. Trade unions in Spain and in Mauritania have an agreement to monitor the situation of Mauritanian migrants in Spain and provide them with legal and other assistance.
- In countries of origin (e.g., the Philippines), some trade unions participate in government schemes to train migrants before they depart. This enables trade unions to inform them about their rights and to facilitate contacts with trade unions in destination countries.
- Trade unions also help migrant workers to keep in contact with their native country. In Senegal for instance, expatriates are organized in trade unions.
- Employers and trade unions are now working together to fight the spread of HIV/AIDS, which is a tragedy for Africa. Migrant workers are particularly vulnerable. ILO and others have shown that the workplace is the best starting point for prevention campaigns and that workers are keener to participate if there is union support. Unfortunately, in some countries, migrants are still barred from joining trade unions, which is therefore not only a violation of a fundamental right but also an obstacle to badly-needed campaigns to save people's lives.

*Today's challenge is to strengthen social dialogue on migration at the national level. Tomorrow's challenge will be to initiate genuine tripartite migration policy development at regional and international levels.* There is certainly a will in the trade union movement to move in this direction.

**Trade unions in countries of origin can:**

- assist in offering pre-departure orientation and training;
- negotiate for standard employment contracts in accordance with international standards;
- lobby for abolition of recruitment fees;
- provide migrants with trade union contact names and addresses;
- provide referral services for migrants suffering from abuse;
- ensure migrant women's protection from discrimination and from falling victims to trafficking.

**Trade unions in destination countries can:**

- lobby for legislation on equal treatment and non-discrimination in respect of employment conditions, social security, etc.;
- organize training on the rights of migrant workers;
- call for the repeal of provisions discouraging migrants from joining trade unions;
- include migrants in collective bargaining agreements;
- cooperate in identifying abusive employment agencies;
- help identify those involved in trafficking;
- establish migrant workers rights' committees;
- lobby for the inclusion of a social clause in bilateral/international treaties.

Source: ILO Bureau of Workers' Activities (ACTRAV), March 2006.

worldwide, many are migrant workers. 170,000 die each year in agriculture, and construction counts for 55,000 deaths every year. Here also trade unions and social dialogue can make a difference. Studies published[10] by the ILO show that when there are social dialogue mechanisms at the workplace and when the workforce is organized in trade unions, accidents can be reduced by half.

The European Trade Union Confederation (ETUC) has recently decided to adopt a more pro-active policy on labour migration and has submitted a position paper as a contribution to the consultation process on legal migration initiated by the EU. The complementarities of views became evident: while the EU addresses migration issues in terms of the need for high-skilled migration and the fight against irregular migration, the European trade unions have come forward with a position that places migrant workers' rights at the top of the agenda, together with the need to expand legal avenues for labour migrants, including unskilled workers.

Migration is a labour issue and labour is not a commodity. As one well-known Swiss intellectual commented, referring to immigration in his country, "we called for workers, and there came human beings". [11] Dealing with labour migration should require policies that take account of the social dimensions of the phenomenon. Enabling and respecting migrants' right to freedom of association is part of that social dimension.

## *VII.3 Facilitating Social Cohesion*

Social cohesion in destination countries will be facilitated considerably if discrimination against migrant workers and their families can be addressed and eliminated. Moreover, appropriate measures assisting the integration of migrants in society (see also Section VII.2.2 above) and providing possibilities for family reunification also play an important role in preventing the marginalization of migrants and promoting social cohesion.

### VII.3.1 Addressing discrimination

Discrimination produces differential treatment in labour markets, preventing equal opportunity, provoking conflict within the working population and undermining social cohesion. Discrimination reinforces attitudes that constrain certain identifiable groups to marginalized roles and poor conditions in the work force. The results of consistent denial of employment opportunities, relegation to ghettoes, lack of education or training opportunities, absence of police protection, and multiple discriminations in community life are exclusion and ultimately, breakdown of social cohesion. Migrant workers face various forms of discrimination in employment and occupation, and discrimination suffered by migrants often begins at the recruitment stage. Difficulties in finding suitable employment often result in highly qualified men and women doing relatively menial jobs.

Discrimination prevents integration. The consequences of past policies that neither anticipated nor prevented discrimination can be seen in ethnic ghettos, high unemployment, low school attainment, higher violence and crime rates in numerous countries. It is evident that the longer migrants and their offspring live and work in a host society under discriminatory provisions, the more likely it is that this prejudice and discrimination will prevent them from reaching similar economic and educational attainments as the majority population (Taran et al., 2006). In some countries, the accumulated effects of discriminatory acts in the past have led to a contemporary environment that is itself discriminatory.

ILO research in Western Europe and North America has shown significant, consistent and disturbing levels of discrimination in access to employment in all countries surveyed (e.g. Bovenkerk et al., 1995; Goldberg et al., 1996; Colectivo IOE, 1996; Bendick, 1996; Smeesters and Nayer, 1999; Allasino et al., 2004). When all else is equal (qualifications, educational attainment, skills, language ability), persons of immigrant origin still face high net discrimination rates—solely on the basis of name or appearance. Without special attention, immigrants and their children will end up over-represented in the ranks of the long-term unemployed and at high risk of social exclusion.

Discrimination has a double impact on women. As noted in Section 3.4 of the Introduction, most job opportunities for women migrants are in unregulated sectors (agriculture, domestic services, sex industry). The demand for women migrant workers means that today, fully 50 per cent of all migrant workers are women. As noted above in Sections VII.1.1.2 and VII.1.3, the existence of occupational segregation by gender in labour markets contributes to the increase of multiple discrimination in countries of destination, resulting in high levels of abuse and exploitation of women migrant workers.

Addressing discrimination applies universally across the labour market. While integration policies may focus on "long-stayers" and permanent immigrants, no one should be subject to discriminatory behaviour, if social cohesion and labour market stability are to be maintained.

**TEXTBOX VII.5**

## The Principle of Non-Discrimination at the International, Regional and National Levels

The principle of non-discrimination (on such grounds as race, ethnic origin, sex, religion, etc.) is universally applicable and recognized in the International Bill of Rights (Universal Declaration of Human Rights, ICCPR and ICESCR), international human rights treaties addressing specific themes (ICERD, CAT, ILO Convention No. 111) or groups of persons (CEDAW, CRC and ICRMW) as well as regional human rights treaties, such as the ECHR (Art. 14; Protocol No. 12), which has been ratified by most OSCE European States. It is also generally accepted that the prohibited grounds of discrimination listed in these instruments are not exhaustive and may include other grounds of discrimination, such as nationality. Moreover, not all distinctions between groups of person on such grounds are prohibited, provided that they are prescribed by law, conform to a legitimate State objective and are justified on the basis of objective and proportionate criteria.

The European Court of Human Rights has ruled that very good reasons must be given to justify distinctions on the basis of nationality (*Gaygusuz v. Austria*, 1996; *Piorrez v. France*, 2003).

While human rights and labour rights are applicable to all without distinction based on nationality, the international instruments recognize, either explicitly or implicitly, that certain rights are applicable in large part to citizens only. For example, political rights, such as the right to vote and stand for political office, are limited to citizens (ICCPR, Art.25), although a number of European countries (particularly the Nordic States) grant foreign residents these rights at the local level after a certain period of lawful residence in the country. EU Member States are also obliged to afford these rights to nationals of other Member States resident in their territory. Moreover, access to employment or to the labour market is considered a sovereign prerogative of States and can be limited although, in many OSCE European countries, restrictions are generally lifted after two to five years of employment. As noted above in Section VII.1.2.2 on access to employment, the specific international instruments pertaining to the protection of migrant workers address this question (ILO Convention No. 143; ICRMW).

In many OSCE countries, national labour legislation is usually applicable to all workers and makes no distinctions on the basis of nationality, but application of this legislation is problematic because it often affords no explicit protection to non-nationals and access is also difficult in practice. Applicability of anti-discrimination laws to distinctions on the grounds of nationality is also incomplete. Some laws only prohibit discrimination on certain grounds, such as race or sex, while laws relating to distinctions on the basis of nationality are often limited. In the UK, for example, under the amended Race Relations Act 1976, protection against discrimination on the grounds of race and ethnic origin is now stronger than protection against discrimination on the grounds of nationality.

Based on proven experience worldwide, a comprehensive and effective agenda to prevent discrimination and ensure social cohesion must include the following policy elements:

- an explicit legal foundation based on relevant international standards;
- outlawing racist and xenophobic discrimination, behaviour and action;
- outlawing sex discrimination and gender inequalities in the labour market;
- administrative measures to ensure full implementation of legislation, and accountability for all government officials;
- an independent national human rights/anti-discrimination institution with powers to address discrimination against non-citizens;
- respect for diversity and multicultural interaction;
- emphasis on positive images of diversity and of migration in news and communications media;
- inclusion of multi-cultural and diversity training in educational curricula;
- cooperation with civil society and community groups.

The UN Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), and ILO Convention on Discrimination (Employment and Occupation), 1958 (No.111) provide most of the necessary standards for national legislation (Textbox VII.5); most OSCE participating States have ratified these instruments. The three specific instruments addressing migrants, discussed in Section I.2 above, provide the additional norms concerning foreign workers.

As also noted in Chapter I, the relevant sections of the Durban Declaration and Programme of Action of the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (the Durban Declaration and Plan of Action (UN, 2001)) provide a more detailed policy framework of structures, measures and actions to be put in place in order to act effectively against discrimination against migrant workers and other foreigners.

An excellent national model of implementation is the recently adopted Ireland National Action Plan against Racism, titled appropriately *Planning for Diversity*. This official commitment was drawn up by the Department of Justice, Equality and Law Reform on the basis of the Durban Declaration and Programme of Action, following extensive consultation with employers' organizations, trade unions, civil society groups and migrant organizations (Ireland, 2005b).

## VII.3.2 Integration

The concept of integration of migrants in the host country is evolving and is interpreted differently in different contexts. It is all too often confused with assimilation. The European Commission has defined integration as follows:

> [I]ntegration should be understood as a two-way process based on mutual rights and corresponding obligations of legally resident third country nationals [foreigners] and the host society which provides for full participation of the immigrant. This implies on the one hand that it is the responsibility of the host society to ensure that the formal rights of immigrants are in place in such a way that the individual has the possibility of participating in economic, social, cultural and civil life and on the other, that immigrants respect the fundamental norms and values of the host society and participate actively in the integration process, without having to relinquish their own identity (EU, 2003b: 17-18).

In November 2004, the EU Council of Ministers adopted Conclusions on the common basic principles of integration policy, which are supposed to guide EU Member States in the development of their policies in this field (Textbox VII.6). It is important to note both documents emphasize that integration is a "two-way" process, with responsibilities and obligations for both the host society and the migrant.

Whether labour migration is temporary or permanent in nature, integration is necessary for the following reasons:

- it guarantees health and safety in the workplace: sufficient knowledge of the language for the work in question is necessary and is particularly important in respect of dangerous work where migrants must be able to read warning signs on machinery, etc.;

TEXTBOX VII.6

## Common Basic Principles for Immigrant Integration Policy in the European Union

1. Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States.
2. Integration implies respect for the basic values of the European Union.
3. Employment is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society, and to making such contributions visible.
4. Basic knowledge of the host society's language, history, and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration.
5. Efforts in education are critical in preparing immigrants, and particularly their descendants, to become more successful and more active participants in society.
6. Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration.
7. Frequent interaction between immigrants and Member State citizens is a fundamental mechanism for integration. Shared forums, inter-cultural dialogue, education about immigrants and immigrant cultures, and stimulating living conditions in urban environments enhance the interactions between immigrants and Member State citizens.
8. The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.
9. The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.
10. Mainstreaming integration policies and measures in all relevant policy portfolios and levels of government and public services is an important consideration in public policy formation and implementation.
11. Developing clear goals, indicators and evaluation mechanisms are necessary to adjust policy, evaluate progress on integration and to make the exchange of information more effective.

Source: EU (2004h: 15-25).

- it facilitates the exercise of migrants' rights in the workplace (employment and trade union rights) and in the host community (social and cultural rights);
- it prepares for the eventual return of the migrant to the country of origin: e.g., knowledge of the language, culture and other values learnt in the host country will assist the migrant in his or her endeavours on returning home.

Knowledge of the language and the acquisition of additional skills (e.g., through vocational training) ensure that migrants are active in the labour market of the destination country. This in turn, together with the development of improved employment prospects, knowledge of the language, culture and society of the destination country, and the right to have their family members join them (Section VII.3.3), clearly assists migrant workers in their possible settlement in the host society. If migrant workers are more active in the labour market, the host country will benefit from reduced unemployment rates among the foreign labour force and, consequently, lower costs for the administration.

In the same way that the establishment of information and resource centres for migrants in countries of origin (Section III.3.3.1 above and Textbox III.2) can play an important role in assisting them to prepare for employment and life abroad, such centres in destination countries can assist greatly in their integration in the host society. The Information and Resource Centre for migrants in Portugal is a good example of such a body, which undertakes this task as well as other important activities (Textbox VII.7).

TEXTBOX VII.7

## Information and Resource Centre for Migrants in Portugal

Officially opened on 5 January 2001, the project, *In Each Face... Equality in Portugal*, is financed by the European Social Fund (ESF) – European Regional Development Fund (ERDF). The project is a result of the close cooperation between IOM and the High Commissioner for Immigration and Ethnic Minorities (ACIME), based on a Cooperation Agreement between the Portuguese Government and IOM signed on 15 December 1997.

The project has five activities:
- seminars and workshops;
- interactive website;
- CD-ROM;
- television spot;
- Information and Resource Centre

The Information and Resource Centre is a result of the cooperation among the Junta de Freguesia de Benfica, the IOM Mission in Portugal, and the High Commissioner for Immigration and Ethnic Minorities (ACIME). In this protocol, the Junta de Freguesia de Benfica granted IOM the Portas de Benfica building, while IOM took care of the building's recovery works.

The Centre plays an important role in providing sustained and effective integration policies for immigrant communities and ethnic minorities. Its mission is to collect and make available information about the immigrant communities and ethnic minorities in Portugal. In particular, the Centre:
- collects, makes available and gives useful information that is relevant to the promotion of and harmonious integration of the immigrant communities and the ethnic minorities and to fighting exclusion and all forms of discrimination which they may suffer;
- cooperates with other national institutions (governmental and non-government) and facilitates the inter-institutional cooperation to achieve the goals of promotion of integration and of fighting against exclusion and all forms of discrimination against these communities;
- becomes part of trans-national networks promoting an added value in European terms to achieve these goals.

To better disseminate the information, the Information Centre created an infrastructure that would allow a network with all the information deemed useful for immigrants and ethnic minorities. Produced by IOM, ACIME and by other public and private entities responsible for training and integration sessions, this information covers the following areas:
- legislative and other measures to fight discrimination against communities and ethnic minorities;
- legal status of the immigrant in Portugal;
- placement in the labour market, including access to training;
- access to social security, health care, the educational system and other social rights.

The Centre is also a depository of international studies about the migratory process and its management.

IOM is responsible for the management and operation of the Centre through a Commission constituted by representatives of three institutions (i.e. Junta de Freguesia de Benfica, IOM and ACIME) to handle management and operational issues.

The Centre continues to collaborate with the *Servico de Estrangeiros e Fronteiras* (SEF-Immigration) and the *Inspeccao Geral do Trabalho* (IDICT-Labour Inspection), two of the most important offices involved in the granting of the *Autorizacao de Permanencia.**

On 20 March 2001, a Service Office (with two officials and an inspector to ensure its operation) was created in the Centre to handle requests for *Autorizacao de Residencia and Reagrupamento Familiar* (family reunion). As of November 2003, the SEF Service Office had received 2,373 requests for *Autorizacao de Residencia* and 897 requests for *Reagrupamento Familiar,* amounting to a total of 3,328 requests. By the end of February 2004, the Information Centre had also answered 11,566 walk-in information requests and 13,264 phone inquiries.

Source: IOM (January 2005).

* *Autorizacao de Permanencia* is granted to foreign citizens so long as they have a valid work contract in Portugal under the *Decreto-Lei* (Decree-Law) No. 4/2001 regulating the conditions for entry, residence, exit and removal of foreigners from the national territory. This law, which replaced *Decreto-Lei* No. 244/98, took effect on 22 January 2001; thus, the need to inform migrants in an irregular situation of the required documents to avail of the *Autorizacao de Permanencia* and other details relating to the process.

## VII.3.3 Family reunification

Although there is no unequivocal right to family reunification in international human rights law, despite repeated references to the family as a basic unit of society[12], the specific ILO instruments protecting migrant workers and ICRMW stipulate that family reunion should be facilitated.[13] Clearly, this means that States should not deliberately create obstacles to make family reunification impossible or more difficult. Moreover, in practice, policy-makers find it more difficult to justify, for humanitarian reasons, the denial of family reunion to migrants who have been lawfully resident in the destination country for more than one year.

In Europe, family unity is also safeguarded by a number of Council of Europe instruments. With reference to ECHR (Art. 8), which protects the right to respect for family life, the European Court of Human Rights has found violations in cases where disproportionate restrictions have been placed on this right in the context of the expulsion of foreigners or their admission into a State party (e.g., *Boultif v. Switzerland*, 2001; *Sen v. Netherlands*, 2001). The (Revised) European Social Charter (Art.19(6)) and the European Convention on the Legal Status of Migrant Workers (ECMW) (Art.12) also contain specific provisions on family reunification, although they are based on reciprocity and thus only apply to lawfully resident migrant workers from other contracting parties. By far the strongest right to family reunion is found in European Union law, where the spouse, registered partner, dependent children up to the age of 21 and dependant relatives in the ascending line, irrespective of their nationality, have a clear right to join the EU national employed or resident in another Member State (EU, 2004b: Arts.2(2) and 3(1)). Spouses and children of third-country nationals lawfully resident in most EU Member states also have a qualified right to family reunification under Directive 2003/86/EC (EU, 2003d) (Textbox VII.8), which should have been transposed in all participating EU Member States by 3 October 2005.

As a general rule, family reunification does not appear to have given rise to significant problems for the majority of States admitting migrants for permanent settlement. For example, in New Zealand, there is provision for reunification of "close family members of migrants who have obtained New Zealand residence". Similarly, Australia reports that its immigration policy "includes a family reunion component". The relatively liberal position in Canada is discussed in Section VI.3.1.3 above.

TEXTBOX VII.8

### Council Directive 2003/86/EC on the right to family reunification (EU, 2003d)

The key features of this Directive are as follows:

- It is only applicable to third-country nationals holding a residence permit of one year or more and with "reasonable prospects of permanent residence".
- Only the spouse and minor children have a *right* to join the sponsor (EU Member States retain the discretion whether to admit other family members).
- The right to family reunification, however, can be qualified by a number of optional conditions relating to the possession of accommodation, sickness insurance, and stable and regular resources.
- Member States may also impose a waiting period for up to 2 years and restrict the admission of family members on the grounds of public order, public security or public health.
- The Directive is not applicable in Denmark, Ireland and the United Kingdom.

The Directive also contains a number of controversial optional integration conditions, which may qualify the right to family reunification still further, and the European Parliament has challenged these provisions before the European Court of Justice as contrary to the right to family life in Article 8 of the European Convention on Human Rights (ECJ, 2003b: Case 540/03).

Countries which do not admit migrants for permanent settlement from the outset but which issue medium or long-term residence permits, do not appear to have confronted major difficulties in facilitating family reunification. For example, the UK's legislation "allows for the spouse and minor children of a person who holds a work permit for a period of more than 12 months to accompany that person". Similarly, France has enacted special measures to facilitate the arrival of family members of "permanent" migrant workers. These measures include a pre-arrival and a post-arrival visit to the family to inform them of social policy, as well as their rights and duties in France.

The notion of family reunification has caused a certain amount of friction between origin and destination countries, in particular in relation to temporary or time-bound labour migration. In this regard, ILO Members are encouraged to facilitate the family reunification of temporary and even seasonal migrants who are legally resident in the country. In adopting the Guidelines on Special Protective Measures for Migrant Workers in Time-Bound Activities, the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration stated that "even in the case of seasonal and special purpose workers countries should favourably consider allowing family migration or reunification" (ILO, 1997: Annex I, para.6.1).

Swiss law, however, does not authorize family reunification for temporary residents, whether they are seasonal workers, trainees or other foreigners residing in Switzerland for a short period. In France, only migrants who have lived legally in the country for a period of at least two years, holding as a minimum an annual residence permit, can apply for family reunification. In Spain, a one-year waiting period for family reunification is imposed in respect of non-EU nationals, which excludes most temporary migrant workers.

While Canada's legislation provides that "dependants of temporary foreign workers who accompany the worker to Canada are allowed to work and study in Canada, ... spouses and children of workers are required to obtain employment or student authorizations, as the case may be, prior to commencing work or study". No family reunification, however, is permitted for migrant workers entering Canada under the Seasonal Agricultural Workers Programme. Similarly, family reunification is not permitted under the UK's low-skilled temporary labour migration schemes, namely the Seasonal Agricultural Workers Scheme and the Sectors Based Scheme.

As regards which family members should be entitled to family reunification, ILO Convention No. 143 states that these should include "the spouse and dependent children, father and mother" (Art.13(2)). The ICRMW definition is broader in the sense that it applies to unmarried partners "who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage", but also narrower in the sense that it encompasses only "minor dependent unmarried children" (Art.44(2)). In this respect, the definition of family for the purpose of family reunification in the Revised European Social Charter is similar.[14] Several countries have difficulties with introducing a broader definition. Austria considers that "family immigration applies only to the spouse and minor children (with the exception of) nationals of (certain) third States granted favourable conditions under EU law. Similarly, in France, only the spouse and minor children born to the couple are permitted to be reunified with the migrant worker, as is the case in the United Kingdom, unless "exceptional circumstances" pertain.

Finally, eligibility for family reunification may be different for men and women migrants. While both men and women may be excluded by law from joining their family members, women may find their eligibility for family reunification affected by rules and regulations that appear neutral but are not so in their impact. For example, government policies imposing financial restrictions on persons seeking to sponsor family members, while seemingly gender-neutral, can have a disproportionately negative impact on women migrants. Due to occupational segregation in lower paid jobs, women migrants' earnings are often lower than men's and below the financial income requirements that makes them eligible to sponsor relatives.[15]

# *VII.4 Enhancing Social Welfare*

The social welfare of migrant workers and their families in destination countries is enhanced by proper access to health care, housing and education on equal terms to those afforded nationals. These areas are also manifested strongly in important social rights protected in international human rights and labour law and to which nearly all OSCE participating States are committed.

## VII.4.1 Health care

General international human rights law provides for the right to health care without any distinction based on nationality or legal status.[16] In this regard, Article 12(1) of the ICESCR reads: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".[17] In General Comment No. 14 on the right to the highest attainable standard of health, under the heading "specific legal obligations", the UN Committee on Economic, Social and Cultural Rights emphasizes that

> [i]n particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy..." (UN ECOSOC, 2000a: para.34) (*Original emphasis*).

The reference to "preventive care" here is important because it underlines that the right to health is a holistic concept, which goes beyond the provision of mere medical treatment.

With regard to those international instruments specifically relating to migrant workers[18], particular attention should be given to ICRMW, which stipulates explicitly that emergency medical treatment must be available to all migrant workers and their families on equal terms with nationals and cannot be denied to those in an irregular situation.[19] While this provision is clearly an important addition to international human rights standards in this area, because of the explicit recognition that irregular migrants should not be denied health care, its emphasis on emergency medical treatment falls short of the holistic approach defined above which guarantees access to preventive care. More extensive rights, however, appear to be afforded migrant workers in a regular situation. ICRMW's Articles 43(1)(e) and 45(1)(c) add that regularly present migrant workers and family members, respectively, should be granted equal treatment with nationals as regards "access to ...health services".

In countries such as Croatia and the Netherlands, migrants have equal access to health care services with nationals. In other countries such as Israel and Japan, it is the employer's responsibility to ensure adequate health care for migrant workers, although no reference is made to members of their families. In Australia, health care provisions may also be regulated by bilateral or multilateral agreements. In Canada's Province of Ontario, health coverage is only extended to migrant workers who have an authorization to work with a specific employer and in a specific occupation, which has been issued for at least six months.

## VII.4.2 Housing

In practice, the availability of adequate housing or accommodation for migrant workers can be a particular problem in a number of countries and regions, where accommodation is generally scarce and especially in large cities, where there is a shortage of public housing or where private accommodation is unaffordable for many migrant workers, including those with their families. The right to an adequate standard of living stipulated in international human rights law includes the right to housing and, in principle, is applicable to all persons regardless of nationality or legal status.[20] In its General Comment on the right to adequate housing, the Committee on Economic, Social and Cultural Rights underlines that

> [t]he right to adequate housing applies to everyone... [I]ndividuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular,

enjoyment of this right must, in accordance with article 2(2) of the Covenant, not be subject to any form of discrimination (UN ECOSOC, 1992).

The Committee has adopted a broad understanding of the right to housing stating that it "should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity", but that "it should be seen as the right to live somewhere in security, peace and dignity" (UN ECOSOC, 1992: para.7). Moreover, the Committee has identified a number of aspects in the concept of adequacy, including accessibility, and in this regard has emphasized that "disadvantaged groups must be accorded full and sustainable access to adequate housing resource", that such groups "should be ensured some degree of priority consideration in the housing sphere", and that "both housing law and policy should take fully into account the special housing needs of these groups" (UN ECOSOC, 1992: para.8(e)). In revised guidelines on state reporting under ICESCR, the Committee also urges Contracting Parties to take steps "to ascertain the full extent of homelessness and inadequate housing within its jurisdiction" and that detailed information should be provided in state reports about "those groups within society that are vulnerable and disadvantaged with regard to housing" (UN ECOSOC, 1992: para.13).[21] In these guidelines, the Committee's list of disadvantaged and vulnerable groups includes, inter alia, migrant workers and "other especially affected groups" (UN ECOSOC, 1992: 100).

Since the adoption of the ESC Committee's General Comment, the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living has welcomed the attention given to housing and discrimination issues in the Durban Declaration and the Programme of Action of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (UN, 2002: para.40). The Programme of Action "recommends that host countries consider the provision to migrants of adequate social services, in particular in the areas of health, education and adequate housing, as a matter of priority" and urges all states to prohibit discriminatory treatment against foreigners and migrant workers, including in the field of housing (UN, 2002: paras.33 and 81).

Equality of treatment in respect of accommodation is specifically provided for in ILO Convention No. 97 (Art.6(1)(a)(iii)) and covers the occupation of a dwelling to which migrant workers must have access in the same conditions as nationals. On the other hand, this provision cannot be taken to refer to access to home ownership or consequently to the various forms of public assistance which may be granted with a view to facilitating property ownership. Under these circumstances, the provisions of national legislation reserving for nationals the benefit of various subsidies and other forms of public assistance for the purpose of acquiring the ownership of their own homes, as well as national regulations limiting or restricting the right to foreigners to acquire immovable property, do not come within the scope of this article.[22]

ICRMW also includes an equality provision for lawfully resident migrant workers aiming at "access to housing, including social housing schemes, and protection against exploitation in respect of rents" (UN, 1990: Art.43(1)(d)). However, governments are not required to give project-tied or specified-employment workers access to social housing on an equal footing with nationals (Arts.61(1) and 62(1)).

In the EU, equality of treatment between nationals and citizens of EU Member states with regard to housing applies both to the occupation of housing and access to home ownership (EU, 1968: Art.9(1)).

In some countries such as Canada (Province of Ontario) and Switzerland, migrant workers must meet residence requirements in order to obtain public housing. Under its bilateral and multilateral agreements (Canada-Caribbean and Mexican Seasonal Agricultural Workers Programme, NAFTA, the Canada-Chile Free Trade Agreement, and the General Agreement on Trade in Services (GATS)), Canada makes provisions for accommodation. In Asia, Singapore has introduced guidelines to encourage employers to improve the standards of accommodation for migrant workers, including schemes to promote dormitory housing and subsidized public housing. Italy provides accommoda-

tion services to its non-EU documented migrant workers urgently requiring accommodation, whereas in some countries like Cyprus, employers are bound to provide minimum standards of accommodation, which are subject to inspection. In the UK, agricultural employers are responsible for the provision of clean and sanitary accommodation to migrant workers under the SAWS (Textbox VI.12).

### VII.4.3. Education

Universal human rights standards proclaim that everyone has the right to education and that, at a minimum, access to primary or elementary education should be free to all children without any distinction whatsoever (UN, 1948: Art.26; UN, 1966a: Art.13; CRC, 1989: Arts.2 and 28(1)(a); UNESCO, 1960: Art.4(a); ICRMW, 1990: Art.30). In practice, however, most OSCE participating States also apply this latter obligation in respect of secondary school children because of legal compulsory schooling requirements. The Committee on Economic, Social and Cultural Rights emphasizes the role of education as a human right and its integral connection with the enjoyment of other human rights:

> Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities (UN ECOSOC, 1999: para.1).

ICESCR stipulates that the right to education is to be enjoyed by "everyone". There are no qualifications precluding non-nationals from benefiting from this right (UN, 1966a: Art.13).[23] In its General Comment on the right to education, the Committee on Economic, Social and Cultural Rights confirms that "the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, *including non-nationals, and irrespective of legal status*" (1999: para.34) (emphasis added). Although mainly concerned with civil and political rights, ECHR also provides for a right to education. The first sentence of Article 2 of the First Protocol to ECHR stipulates unequivocally that "[n]o person shall be denied the right to education". When read in conjunction with Article 14 (the non-discrimination clause), this provision clearly applies on a non-discriminatory basis to both nationals and non-nationals who are within the territory of a Contracting Party unless there is an objective and reasonable justification for the differential treatment (Textbox VII.5).

Despite the existence of these clear international and regional human rights provisions guaranteeing education to all persons irrespective of nationality and legal status, the children of irregular migrants in particular face legal, administrative and practical obstacles in accessing education in their country of residence. These obstacles include the refusal of school principals to enrol the children of irregular migrants in primary and secondary schools; the existence of obligations on official institutions, which are also applicable to teachers, to denounce or report irregular migrants; difficulties encountered with the recognition of the education of such children, both in the destination country and on their return to the country of origin under readmission agreements or otherwise; and the greater mobility of irregular migrants and the poorer conditions in which they frequently live, which may adversely impact on their children's educational development (Cholewinski, 2005:36-38). Needless to say, some of these obstacles, particularly those relating to problems with recognition of prior education and poorer living conditions, are also applicable to the children of lawfully resident migrant workers.

## *VII.5 Social Security*

The world community, through widely accepted international human rights standards, recognizes the right to social security for everyone, including social insurance (UN, 1948: Art.22; UN, 1966a: Art.9).[24] Social Security[25] was also confirmed as a basic human right during the General Discussion on Social Security at the International Labour Conference in 2001 (ILO, 2001a: para.2).

Migrant workers are confronted with particular difficulties in the field of social security, as social se-

curity rights are usually related to periods of employment or contributions or residency. They risk the loss of entitlements to social security benefits in their country of origin due to their absence, and may at the same time encounter restrictive conditions in the host country with regard to their coverage by the national social security system. Migrant workers have specific interests in:

- obtaining equal access to coverage and entitlement to benefits as national workers;
- maintaining acquired rights when leaving the country (including the export of benefits);
- benefiting from the accumulation of rights acquired in different countries.[26]

## VII.5.1 Restrictions to migrant workers' social security rights

Migrant workers often face difficulties with regard to social security coverage and entitlement to benefits, which national workers do not face. These difficulties are due to a number of factors, such as the principle of *territoriality*, which limits the scope of application of social security legislation to the territory of a country, with the consequence that its nationals working abroad are not covered by such legislation and therefore not entitled to benefits. Migrant workers' rights can also be affected by the principle of *nationality*, the application of which may result in the exclusion of foreigners from coverage or entitlement to benefit. While such discriminatory rules can be found in some countries, few go so far as to deny any social security coverage to foreigners. Discrimination can also be attributable to the *lack of bilateral or multilateral social security agreements*, through which social security rights, acquired in the country of employment, are maintained and which provide for the export of benefits from the country of employment to the country of origin.

## VII.5.2 ILO standards for the protection of migrant workers' social security rights

ILO Conventions Nos. 97 and 143 provide for equality of treatment between regular migrant workers and nationals in the area of social security, subject though to certain limitations. Further guidance

TEXTBOX VII.9

### Specific ILO Standards Protecting the Rights of Migrant Workers to Social Security

- *The Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)* specifically establishes the right to equality of treatment for foreign workers of any other State which has ratified the Convention, in respect of workmen's compensation for industrial accidents and provides for the export of benefits of foreign workers covered by the Convention, but only insofar as the ratifying State provides for such export of benefits for its own nationals.

- *The Equality of Treatment (Social Security) Convention, 1962 (No. 118)* provides for the right to equality of treatment with regard to all nine branches of social security. For each of the nine branches that it accepts, a State party to the Convention undertakes to grant within its territory to nationals of any other State that has ratified the Convention equality of treatment with its own nationals. It also provides for some flexibility by permitting the exclusion of non-nationals in cases where benefits or parts of benefits are payable wholly out of public funds. The Convention further provides for the maintenance of acquired rights and the export of benefits. In essence, a State party to Convention No. 118 has to ensure the provision of benefits abroad in a specific branch for its own nationals and for the nationals of any other State that has accepted the obligations of the Convention for the same branch, irrespective of the place of residence of the beneficiary.

- *The Maintenance of Social Security Rights Convention, 1982 (No. 157)*, and Recommendation (No. 167) institute an international system for the maintenance of acquired rights and rights in the course of acquisition for workers who transfer their residence from one country to another, and ensure the effective provision of the benefits abroad when they return to their country of origin. Under this Convention, the maintenance of acquired rights has to be ensured for the nationals of other States parties to the Convention in any branch of social security in which the States concerned have legislation in force. Within this context, the Convention provides for the conclusion of bilateral or multilateral social security agreements. In addition, the Recommendation contains model provisions for the conclusion of such agreements.

Source: ILO, Social Security Department (SECSOC), March 2006.

in this regard is provided by ILO social security standards. All current ILO social security standards[27] define personal scope of coverage irrespective of nationality and almost all contain similar clauses on equality of treatment between nationals and foreign workers in the host country,[28] and most of them contain special non-discrimination clauses, such as, for example, the Social Security (Minimum Standards) Convention, 1952 (No. 102).[29] In addition to these instruments, the ILO has adopted several standards, which deal specifically with the protection of migrant workers' social security rights (Textbox VII.9).

Without touching the essential content of national laws, the principal objective of ILO Conventions in this field is coordination as regards the elimination of any obstacle in the way of the application of national laws. The effect of national rules is modified only insofar as it is necessary to guarantee to

TEXTBOX VII.10

## The Situation and Some Best Practices Regarding Social Security Rights of Irregular Migrant Workers

The bottom line with regard to access to social benefits for irregular migrant workers seems to be *emergency health care* (e.g. Belgium, Czech Republic, Finland, France, Mexico, Norway and Spain). Irregular migrant workers have the same right to urgent medical care as regular residents (or workers) in the country. However, the way in which the access to emergency health care is guaranteed can differ from country to country; the same can be said for what is understood as emergency care.

In some countries (e.g. Sweden and Turkey), an irregular migrant worker in need of urgent care can be treated by a medical doctor. However, the patient in this situation is obliged to refund the costs for the delivered health care. It should be mentioned that Turkey is currently revising its Fundamental Law for Social Services and Welfare, whereby it is planned to provide some basic social and medical support for unlawful migrant workers. Mexico will provide emergency health care to any person whose condition poses a grave threat to physical integrity or life. No limitations are imposed for reason of nationality or migratory status. In Albania, the Hospital Care Law obliges both public and non-public hospitals to give free treatment to Albanians and foreign citizens (even when the latter are illegally in Albania) if they are in need of emergency care. In the Czech Republic and Switzerland, irregular migrant workers are also granted access to emergency care, mainly through social assistance. However, in both countries irregular migrant workers are supposed to be socially insured for health care. Social security in these countries is disconnected from the question of whether a person is regular or irregular as regards working or staying in the country. As soon as a person is staying on the territory, (whatever the legal nature of the professional activity or stay), the person is supposed to take out a public health insurance through one of the sickness funds operating in the country. In reality, a tiny minority of irregular migrant workers is socially insured for health care in those countries as either the worker refrains from self-disclosure and/or does not have the financial means to pay for health insurance. In the event of an emergency, irregular migrant workers are guaranteed health care treatment irrespective of whether they are insured or not. The costs for such treatment are borne by the local authorities through social assistance or social welfare.

In Belgium, the legislation governing employment injury compensation is a matter of public policy and hence mandatory: the nullity of a contract concluded with a worker in an irregular situation cannot be invoked in order to evade payment of compensation. If the employer is not insured, it is the Employment Injury Compensation Fund that pays and subsequently claims from the employer. If a worker who is to be paid compensation has not been affiliated to the scheme, the employer is liable to pay contributions in arrears.

Sources: ILO, Social Security Department (SECSOC), March 2006; Schoukens and Pieters (2004).

migrant workers complete and continuous protection on the basis of effective equality.

### VII.5.3 Social security standards and irregular migrant workers

Relevant ILO social security instruments are silent regarding the protection of irregular migrant workers. One exception, however, can be found in ILO Convention No. 143, which stipulates that irregular migrant workers shall have the same rights as regular migrant workers concerning social security benefits arising out of past employment (Art.9(1)). This provision particularly must be understood for the purpose of acquiring rights to long-term benefits. Within this context, it appears that the wording "past employment" refers to past periods of legal as well as illegal employment.[30] In practice, some social security rights and particularly access to medical treatment are afforded irregular migrant workers in a number of countries (Textbox VII.10).

### VII.5.4 Social security protection through social security agreements

The best way to ensure migrant workers' social security protection is through the conclusion of multilateral or bilateral social security agreements. Multilateral agreements, in comparison to bilateral agreements, have the advantage of generating common standards and regulations and so avoiding discrimination among migrants from various countries of origin who otherwise might be granted differing rights and entitlements through different bilateral agreements. In addition, a multilateral approach also eases the bureaucratic procedures by setting common standards for administrative rules implementing the agreement (Holzmann et al., 2005: 25). A number of best practices can be identified.

EU Regulations related to the portability of social security benefits are probably the most comprehensive example, at least insofar as it concerns the rights of EU citizens. Regulation 1408/71/EEC (EU, 1971)[31] ensures far-reaching portability of social security entitlements within the EU, to the extent that EU citizens do not suffer any disadvantages in terms of social security entitlements by moving from one Member state to another. Regulation 859/2003/EC (EU, 2003a) extends the provisions of Regulation 1408/71/EEC to third-country nationals so that they enjoy now the same rights as EU nationals with regard to the portability of social security coverage and benefit entitlements when moving within the EU.

Best practice examples are also the European-Mediterranean agreements from the 1990s between the EU, its Member States, and the Maghreb countries of Algeria, Morocco and Tunisia (Section IX.1.3.3 below), which contain far-reaching provisions on the portability of social security benefits for migrant workers from the Maghreb countries who live and work in the EU. The EU also fosters cooperation in the area of social security with other neighbouring countries. The Barcelona Declaration in 1995 founded the European Mediterranean Partnership (EMP), making ten Mediterranean countries official partners of the EU.[31] Since then, the EU has negotiated multilateral Association Agreements with all Euro-Mediterranean partners. As the sections on the coordination of social security use more or less the same wording in the agreements, they can serve as a blueprint for further association agreements with other countries and the EU (Holzmann et al., 2005: 11-12).

Another comprehensive multilateral agreement is the Caribbean Community and Common Market (CARICOM) Agreement on Social Security (1997: 39), which was signed with a view to harmonizing the social security legislation of its Member States. It explicitly refers to ILO Conventions in its Preamble and is based on the three fundamental principles stated therein: equality of treatment for residents of the Contracting parties under their social security legislation; maintenance of rights acquired or in course of acquisition; and protection of and maintenance of such rights notwithstanding the changes of residence among their respective territories. The provisions of the Agreement are largely based on the model provisions for the conclusion of bilateral or multilateral social security instruments set out in ILO Maintenance of Social Security Rights Recommendation, 1983 (No. 167), and the Agreement entered into force in 1997. Thirteen Member States have so far signed and ratified the Agreement, while twelve of these Member States have enacted domestic legislation to give legal effect to it.

## VII.5.5 Unilateral measures for the protection of migrant workers' social security rights

Social security protection of migrant workers and their families can best be achieved through ratification of the above social security conventions and their implementation through the conclusion of social security agreements. In the absence of ratification of the relevant conventions and conclusion of social security agreements, some countries have developed unilateral measures for the protection of migrant workers' social security rights, which comprise provision of:

- equality of treatment for national and migrant workers as regards coverage of and entitlement to social security benefits;
- a requirement (liability) on recruitment agencies to pay social security contributions to the national social security system for each worker recruited for employment abroad (e.g. the Philippines, Indonesia);
- voluntary coverage for nationals working abroad (e.g. France, Jordan, Philippines);
- the possibility of payment of retroactive contributions for returning migrant workers for periods abroad;
- waiving long qualifying periods in favour of migrant workers;
- crediting periods of insurance completed in another country for the purpose of giving migrant workers immediate access to benefits;
- medical coverage for family members of migrant workers who are left behind.

### VII.5.5.1 Unilateral measures of destination countries: health care benefits for retired returning migrant workers

Migrant workers who, upon retirement, return to their country of origin and do not qualify for a pension in the country of origin are not covered by the statutory health care scheme there. In order to overcome this gap in protection, some destination countries in Europe reimburse retired migrant workers for their medical care expenses in their home countries, in a similar way to the reimbursement of their own nationals who temporarily travel or reside abroad. The Austrian health system (Holzmann et al., 2005: 29), for example, reimburses up to 80 per cent of the medical costs which Austrian hospitals (or medical doctors) charge the Austrian public health insurance. However, since the Austrian health system is heavily subsidized, the costs that hospitals charge to the public health insurance are only notional and do not reflect the actual, much higher, costs.

### VII.5.5.2 Unilateral measures of countries of origin to extend social security coverage to their nationals working abroad

In the absence of social security agreements, migrant workers are often excluded from the social security coverage of the country of employment and even if they are covered by the statutory social security scheme of that country, they are often unable to receive their benefits when returning to their country of origin. Therefore, several countries have extended statutory social security coverage to their nationals working abroad, either through compulsory insurance or through voluntary insurance (Textbox VII.11).

TEXTBOX VII.11

## Unilateral Measures by Countries of Origin Protecting the Social Security Rights of their Nationals Working Abroad

Some countries have used recruitment agencies as a lever to ensure that their migrant workers continue to be given at least some social security protection. A very good example is provided by the Philippines where agencies, which recruit and provide Philippine seamen for the manning of foreign ships, are held responsible under a Memorandum of Agreement of 1988 for paying quarterly contributions to the social security system. These contributions provide comprehensive coverage under Philippine laws on social security, medical care and employee's compensation. Imposing on recruitment agencies a liability to pay social security contributions was facilitated by the fact that, under the Philippine law, contracts for overseas employment have to be approved by the Department of Labour and Employment, with the result that it was possible to impose the registration of seamen with the Philippine social security system as one of the contract conditions.

Another example is provided by Pakistan, where migrants are protected by a group insurance concluded between the Bureau of Emigration and Overseas Employment and the State Life Insurance Corporation. This group insurance is financed by a premium paid by applicants on registration with the Bureau. It provides coverage in the event of two contingencies – disability and death – for a period of two years. The benefit is a lump sum, payable to the disabled worker or to the surviving designated beneficiary, as the case may be. Pakistan is now carrying out a feasibility study on the introduction of a pension scheme for migrant workers abroad. One possibility may be the setting up of a social security scheme for migrant workers based on voluntary contributions to individual accounts both for long-term and short-term benefits such as health care for members of the migrant workers' families who stay in the home country.

Another possible way of extending national social security coverage is to offer migrant workers the possibility of voluntary insurance in their home country. Jordan should be mentioned as an example for providing voluntary social insurance to its nationals working abroad. Voluntary insurance can be offered in different ways, either in the form of continuous optional insurance after a period of previous mandatory coverage or by allowing returning migrant workers to cover retroactively the periods during which they were employed abroad. The latter option may be particularly attractive where migrant workers have received a lump-sum payment of the social security rights, which they have acquired in the country of employment.

Source: ILO, Social Security Department (SECSOC), March 2006.

**ENDNOTES**

1 Pregnancy tests are, for example, required in Singapore and Malaysia.

2 ICRMW states: "Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in Articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of: (a) protection against dismissal; (b) unemployment benefits; (c) access to public work schemes intended to combat unemployment; (d) access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to Article 52 of the present Convention" (UN, 1990: Art. 54). On the regional level of the Council of Europe, ECMW stipulates: "If a migrant worker is no longer in employment, either because s/he is temporarily incapable of work as a result of illness or accident or because s/he is involuntarily unemployed, this being duly confirmed by the competent authorities, s/he shall be allowed for the purpose of the application of Article 25 of this Convention [re-employment] to remain on the territory of the receiving State for a period which should not be less than five months. Nevertheless, no Contracting Party shall be bound, in the case provided for in the above sub-paragraph, to allow a migrant worker to remain for a period exceeding the period of payment of the unemployment allowance" (Council of Europe, 1977: Art.9(4)).

3 With 162 and 164 ratifications respectively.

4 The 2000 Observations of the CEACR on the application of Conventions Nos. 97 and 111 by Spain address the working conditions of migrant workers, including those with an irregular status.

5 European Union law provides for a system of harmonizing and aggregating social security benefits in Member States and EU rules now apply to third country nationals moving within EU territory (EU, 2003a; 1972a; 1971), as well as to other third country nationals by virtue of Association Agreements that the EU has adopted with certain third countries (e.g. Bulgaria, Romania, Turkey and the Maghreb countries of Algeria, Morocco and Tunisia).

6 For more details, see ILO (1999a: paras. 306-309); moreover, Convention No. 97 (Art. 9(1)) only applies to rights which the worker has acquired by virtue of his or her employment and by fulfilling the other qualifying conditions required in the case of regular migrant workers.

7 ILO Recommendation No. 151 indicates, in para. 2, that documented migrant workers should be accorded equality of opportunity and treatment in terms of (a) access to vocational training and employment of their own choice on the basis of individual suitability for such training or employment, account being taken of qualifications acquired outside the territory of and in the country of employment; and (b) retraining. It has been recognized by ILO that, when temporary exceptions, allowed and authorized under Convention No. 143 (Art.14(a)), are taken into account with regard to access to employment, it may in practice be more difficult to provide equality of treatment in respect of vocational training to certain categories of migrant workers, for example, seasonal workers (see ILO, 1999a: para. 378).

8 See http://www.word-federation.org/CETAB

9 E.g., ICCPR (UN, 1966b: Art.22(1)); ICESCR (UN, 1966a: Art.8); ICRMW (UN, 1990: Art.26 and 40).

10 See articles in ILO (2002c).

11 Max Frisch commenting on the European "guestworker programmes" in the 1960s.

12 See e.g. ICCPR: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State" (UN, 1996b: Art.23(1)).

13 ILO Convention No. 143 (Art.13(1)) calls on every Contracting Party "to take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing on its territory". ILO Recommendation No. 151 (para.14) provides that "representatives of all concerned, and in particular of employers and workers, should be consulted on the measures to be adopted to facilitate the reunification of families and their cooperation sought in giving effect thereto". ICRMW (Art.44(2)) stipulates that "States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children".

14 See the Appendix to the Revised European Social Charter (Council of Europe, 1996) regarding interpretation of Article 19(6) relating to family reunification.

15 For more details on gender differences with regard to family reunification in the context of migration, see UN (2004: paras. 92-107).

16 Health care is also recognized as one of the traditional branches of social security, which is discussed in Section VII.5 on social security below (see also Textbox VII.9 which includes information on the access of irregular migrant workers to emergency health care provision).

17 See also UDHR (UN, 1948: Art.25(1)): "Everyone has the right to a standard of living adequate for the health of himself/herself and of his/her family, including food, clothing, housing and medical care and necessary social services."

18 The provision of adequate health care to migrant workers and members of their families outside employment is an area which is not addressed by either ILO Convention No. 97 or Convention No. 143. ILO Recommendation No. 86, para.12, stipulates that "in the case of migrants under government-sponsored arrangements for group transfer, medical assistance should be extended to such migrants in the same manner as provided for nationals", but no provision extends this access to other categories of migrants. ILO Recommendation No. 151, para.2(i), refers to equality of opportunity and treatment in respect of conditions of life, including "health facilities".

19 See ICRMW: "Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment" (UN, 1990: Art. 28).

20 See UDHR (UN, 1948: Art.25(1)) and ICESCR (UN, 1966a: Art.11(1)). The latter provision reads: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself/herself and his/her family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent".

21 The General Comment cites UN ECOSOC, 1991: 88.

22 ILO Recommendation No. 86 stipulates in paragraph 10(a) that "migration should be facilitated by such measures as may be appropriate to ensure that migrants for employment are provided in case of necessity with adequate accommodation", whereas paragraph 16 of ILO Recommendation No. 151 also provides that: "with a view to facilitating the reunification of families as quickly as possible ... each Member should take full account of the needs of migrant workers and their families in particular in its policy regarding the construction of family housing, assistance in obtaining this housing and the development of appropriate reception services".

23 In this regard, see also UNESCO (1960: Art.3(e)), which explicitly requires State parties "[t]o give foreign nationals resident within their territory the same access to education as that given to their own nationals".

24 For relevant Council of Europe instruments, see Council of Europe (1964, 1972, 1990).

25 Social security can be understood as "the protection which society provides for its members, through a series of measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for children". ILO, 1989: 3).

26 Social security benefits are traditionally divided into nine different branches: medical care, sickness cash benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivors' benefit. For a detailed overview of the ILO instruments on social security, see Humblet and Silva (2002: 41-45).

27 Social Security (Minimum Standards) Convention, 1952 (No. 102); Employment Injury Benefits Convention, 1964 (No. 121); Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128); Medical and Sickness Benefits Convention, 1969 (No. 130); Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168); and Maternity Protection Convention, 2000 (No. 183),

28 Their applicability to migrant workers is demonstrated, inter alia, by the fact that the ILO supervisory bodies have made specific reference to migrant workers in the context of the regular supervision of, for example, the Employment Injury Benefits Convention, 1964 (No. 121), and the Medical Care and Sickness Benefits Convention, 1969 (No. 130).

29 Article 68 of this Convention, applicable to all branches of social security, states that nationals and non-nationals should have the same rights to social security. It also provides for some flexibility by permitting the exclusion of non-nationals in cases where benefits or parts of benefits are payable wholly out of public funds.

30 Recommendation No. 151, which accompanies Convention No. 143, recommends that migrant workers, irrespective of their status, who leave the country of employment, should be entitled to employment injury benefits (para. 34(1)(b)).

31 Regulation 883/2004/EC was adopted in 2004 as a follow-up to Regulation 1408/71/EEC. However, both a new implementing regulation and supplements and appendices to the new regulation have not yet been completed.

32 Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia, Turkey and the Palestinian Authority. Cyprus and Malta were also part of the original EMP, but joined the EU as full members in 2004. Libya has observer status.