

ILO and International instruments that can be used to protect Migrants rights in the context of HIV/AIDS

Marie-Claude Chartier ILO/AIDS

1. Introduction

Migrant workers are highly vulnerable to HIV infection due to their mobile work situation. The fact that they travel regularly, often live away from spouses and partners, work in geographically isolated areas with limited social interaction and health facilities are factors that can cause workers and their partners at home to be more susceptible to HIV infection. Moreover, it is recognised that migrant workers are often subject to xenophobia and double doses of discrimination, resulting from fear of HIV together with the reinforcement of already existing discrimination. A climate of discrimination and lack of respect for human rights leaves migrant workers even more vulnerable to infection and less able to cope with AIDS because it becomes more difficult for them to seek voluntary HIV testing, counselling, treatment or support. In this context, the protection of migrant workers rights is essential not only to protect their dignity but also to prevent the spread of the epidemic.

This paper looks at ILO and other international instruments that can be used to protect the rights of migrants, especially in the context of HIV/AIDS in the following areas: equality of opportunity and treatment; protection of health; access to basic social security; and protection of family unity. The objective is not to do an exhaustive analysis of all standards and guidelines in this area, but to give a brief summary of what exists inside and outside the ILO. The emphasis is first put on ILO conventions and recommendations concerning migration for employment and on the *ILO Code of Practice on HIV/AIDS and the World of Work*. The second part deals with other international instruments. The UN Convention on the Protection of the Rights of All Migrants Workers and Members of their Families is given particular attention since it will soon enter into force and contains provisions particularly relevant in the above-mentioned areas. It should be highlighted that this UN convention and ILO main conventions on migration (No. 97 and No. 143) constitute a complementary body of law and that 68 States have adopted one or more of these instruments¹. Finally attention is paid to other international instruments that, while not being migrants or HIV-specific, can provide protection in this context.

2. ILO instruments

2.1 Protection of migrant workers- a concern of ILO since its foundation

The protection of migrant workers has always had an important place in ILO activities. When the ILO was founded in 1919, the Constitution laid down the obligation for the ILO to improve “protection of the interests of workers when employed in other countries than their own”. In 1944, the Declaration of Philadelphia, concerning the aims and purposes of the organization, also singled out the problems of migrant workers for special attention. Finally, it is to be noted that the Preamble of the ILO Declaration on Fundamental Principles and Rights at work (1998), reaffirms the need to pay special attention to the problem of this category of workers.

¹ As of march 2002, 30 states have ratified or signed the UN Convention on Migrants Rights and 38 other states have ratified one or both conventions Nos. 97 and 143.

2.2 ILO conventions and recommendations

The two major ILO conventions concerning migrant workers are Migration for Employment Convention (revised), 1949 (No. 97) and Migrant workers (Supplementary Provisions) Convention, 1975 (No. 143) and their accompanying recommendations - Recommendation (revised), 1949 (No. 86) and Migrant workers Recommendation, 1975 (No. 151).

Other conventions and recommendations deal specifically with migrants:

Social Policy (Basic Aims Standards) Convention, 1962 (No. 117)
Equality of Treatment (Social Security) Convention, 1962 (No. 118)
Plantation convention, 1958 (No. 110)
Maintenance of Social Security Rights Convention, 1982 (No.157) and Maintenance of Social Security Rights Recommendation, 1983 (No. 167)

Except for the protection of the basic human rights of all migrants, these instruments do not cover certain categories of workers such as: self employed workers; frontier workers; seamen; artists and members of the liberal professions who have entered the country on a short-term basis. The term “migrant workers” in the above-mentioned conventions refers to persons who cross international boundaries for the purpose of employment and do not include workers who move within a country. However, several ILO conventions and recommendations address the working conditions of specific categories of mobile workers like seafarers, fishermen, transport and agricultural workers, such as:

Seafarers’ welfare Convention, 1987 (No. 163)
Labour inspection (Seafarers) Convention, 1996 (No. 178)
Health protection and medical Care (Seafarers) Convention, 1987, (No. 164)
Social security (Seafarers) Convention (Revised), 1987 (No. 165)
Repatriation of seafarers Convention (Revised), 1987 (No. 166)
Prevention of accidents (Seafarers) Convention, 1970 (No.134)
Medical examination (seafarers) Convention, 1946, (No. 73)
Hours of work and rest periods (Road transport) Convention, 1979 (No. 153)
Medical examination (Fishermen) Convention, 1959 (No. 113)
Accommodation of crews (Fishermen) Convention, 1966 (No. 126)
Accommodation of crews (Supplementary provisions) Convention, 1970 (No. 133)
Labour inspection (Agriculture) Convention, 1969 (No. 129)

It has to be noted that while there is no international labour convention or recommendation which specifically addresses the issue of HIV/AIDS in the workplace, there are a large number of instruments that cover both protection against discrimination and prevention against infection that can be - and have been used - in this field. These instruments can provide protection for migrant and mobile workers since they cover all workers, irrespective of their citizenship. Here are some of the conventions and recommendations relevant to HIV/AIDS²:

Discrimination (employment and occupation) Convention, 1958 (No. 111)
Discrimination (employment and occupation) Recommendation, 1958 (No. 111)
Termination of employment Convention, 1982 (No. 158)
Vocational rehabilitation and employment (Disabled persons) Convention, 1983 (No. 159)
Occupational safety and health Convention, 1981(No. 155)
Occupational Health services Convention, 1985 (No. 161)

² For more details, see HODGES-AEBERHARD J. policy and Legal Issues relating to HIV/AIDS and the World of Work, ILO, November 1999.

2.3 Protection provided by ILO migrant specific instruments

a) Equality of opportunity and treatment

The incidence of HIV/AIDS is disproportionately high among some categories of workers, like migrant workers, who already suffer from discrimination and a lack of human rights protection and/or are marginalized by their legal status.

The main objective of Conventions No. 97 and No. 143 is the elimination of the discrimination in employment and living conditions to which migrant workers are exposed. Convention No. 97 prohibits inequalities of treatment -between legal migrant workers and nationals- which may result from legislation or the practices of the administrative authorities in four areas: living and working conditions, social security, employment taxes and access to justice³. This must be followed without discrimination in respect of nationality, race, religion, or sex. Convention No. 143 and recommendation No. 86 require the establishment of an active policy designed to promote, and to guarantee, equality of opportunity and treatment in respect of employment and occupation, social security, trade union and cultural rights and individual and collective freedoms for legal migrant workers and members of their families⁴.

It should be highlighted that all of the above-mentioned provisions apply only to legally accepted migrants. However, Convention No. 143 provides that “each Member for which the Convention is in force undertakes to respect the basic rights of all migrants workers⁵” regardless of their legal status. These “basic rights” refer to fundamental rights contained in the international instruments adopted by the UN in this domain⁶. Freedom from discrimination on the ground of health status, including HIV/AIDS, is one of these fundamental rights⁷. This means that States should not discriminate against persons living with HIV/AIDS or members of groups perceived to be at risk of infection on the basis of their actual or presumed HIV status⁸.

In the 1999 General Survey concerning migrant workers, the ILO Committee of Experts on the Application of Conventions and Recommendations (hereinafter: Committee of Experts) stated that the growing phenomenon of testing incoming migrants for HIV infection was a major point of concern⁹. In this regard, it mentioned that:

Discriminatory practices may take many forms, which are often hidden. For example, workers may be questioned about their HIV status, or be required to submit to AIDS screening, most often without their knowledge. They may also be dismissed solely on the grounds of the HIV status. Each of these constitutes discrimination [...] in the Committee’s opinion, efforts to eliminate all discrimination based on state of health and on HIV/AIDS in particular, should be carried out as part of the national policy to promote equality of opportunity and treatment.¹⁰

³ Article 6.

⁴ Article 10.

⁵ Article 1.

⁶ See General Survey on Migration, International Labour Conference, 1999, Report of the Committee of Experts on the Application of Conventions and Recommendations, paragraphs 296-297.

⁷ The Commission on Human Rights has confirmed that “other status” in the non-discrimination provisions of international human rights instruments is to be interpreted to include health status, including HIV/AIDS; see HIV/AIDS and Human Rights International Guidelines, UNHCHR and UNAIDS, paragraph 86.

⁸ Ibid.

⁹ General Survey on Migration, paragraph 288.

¹⁰ General Survey on Migration, paragraphs 264 to 266.

The Committee also drew attention to the report of the United Nations Secretary General to the Second International Consultation on HIV/AIDS and Human Rights¹¹, which states:

The Human Rights Committee has confirmed that the right to equal protection of the law prohibits discrimination in law or in practice in any fields regulated and protected by public authorities. These would include travel regulations, entry requirements, immigration and asylum procedures. Therefore, although there is no right of aliens to enter a foreign country or to be granted asylum in any particular country, discrimination on the grounds of HIV status in the context of travel regulations, entry requirements, immigration and asylum procedures would violate the right to equality of treatment.

Finally, although not migrant specific, the fundamental and highly ratified convention No. 111 on Discrimination (employment and occupation) protects all persons against discrimination in employment or occupation on the basis of race, colour, sex, religion, political opinion, national extraction and social origin, with the possibility of extending its protection to discrimination on the basis of other criteria. In addition to the protection provided by the Convention, Recommendation No. 111 contains provisions that also refer to the particular situation of migrant workers. It provides that with respect to immigrant workers of foreign nationality and the members of their families, regard should be had to the provisions of convention No. 97 relating to equality of treatment and to those of its accompanying recommendations relating to the lifting of restrictions on access to employment¹².

b) Protection of health

ILO instruments provide for the maintenance of appropriate medical services responsible for ascertaining, where necessary, both at time of departure and on arrival, that legal migrants and members of their family are in reasonable health¹³. This examination should not include HIV screening. The Committee of Experts, recalling the Joint Statement ILO/WHO on AIDS and the workplace¹⁴, noted:

“ refusal of entry or repatriation on the grounds that the worker concerned is suffering from an infection or illness of any kind which has no effect on the task for which the worker has been recruited, constitutes an unacceptable form of discrimination. [...] HIV infection by itself is not associated with any limitation in fitness to work. If fitness to work is impaired by HIV-related illness, reasonable alternative working arrangements should be made”¹⁵.

Convention No. 97 also stipulates that adequate medical attention and good hygienic conditions be given to migrants and their families at the time of departure, during the journey and on arrival in the territory of destination¹⁶. In respect of special health risks to which the migrant population may be vulnerable, the Committee of Experts stated that:

¹¹ E/CN.4/1997/37.

¹² Article 8.

¹³ Convention No. 97 (article 5); Recommendation No. 86 and Convention No.110 concerning plantation (article 11).

¹⁴ Geneva, 27-29 June 1998

¹⁵ General Survey on Migration, paragraphs 264 to 266.

¹⁶ Article 5. Convention No. 110 concerning Plantation addresses specifically the needs of this category of worker and of the members of their family in terms of medical services, good hygienic assistance and welfare of workers during their journey and in the place of employment. This includes the eradication or control of the prevalent endemic diseases (Article 91). See also recommendation 151 (article 20).

“In terms of preventive measures, migrant workers and members of their families, as well as national workers, ought to have access to informational and educational programmes on HIV/AIDS, as well as appropriate advisory and information services.¹⁷”

Recommendation No. 151 provides also for training and instruction of migrant workers in occupational safety and occupational hygiene¹⁸. Although the majority of workers are not at risk of being infected by HIV in the course of their work, since HIV is not casually transmitted, these provisions could be particularly useful for the protection of workers in contact with human blood and other body fluids.

Finally, convention No. 97 prohibits the expulsion of legal migrants or members of their family in the event of incapacity to work due to an illness contracted or injury sustained subsequent to entry¹⁹.

c) Social security

Social security has an important role to play in the context of HIV/AIDS. While HIV/AIDS thrives in conditions of poverty, the illness of a family member leads to the loss of that person's income, increasing medical expenses and the diversion of other family members from work or school to care for the patient. Death results in a permanent loss of income, and often the removal of children from school to reduce expenditures and increase family labour and earnings.

Conventions Nos. 97, 143 and 118 provide for equal treatment, subject to restricted limitations, between legal migrant workers and nationals in respect of benefits covering employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities and any other contingency which is covered by a national social security scheme²⁰. Special needs of migrant workers and their families should be taken into account and they should be provided with help to make full use of services provided in such fields as education, health services and social security²¹.

Recommendation 86 mentions that migrants and members of their families returning to their country of origin should benefit from any measures in force there for the granting of poor relief and unemployment relief and for promoting reemployment of the unemployed²². Finally, convention 157 provides for the establishment of an international system that enables the maintenance of migrant workers' rights in social security.

d) Protection of family units

In 1997, the ILO adopted guidelines at the Tripartite Meeting of Experts on Future ILO Activities which state that family reunification should be facilitated for the following reasons²³:

¹⁷ General Survey on Migration, paragraph 504.

¹⁸ Article 20.

¹⁹ Convention 97 (article 8)

²⁰ Convention 97 (Article 6.1), convention 143 (article 10), convention 118 (article 1).

²¹ Convention 143 (article 12 e) and Recommendation 151 (article 24).

²² Article 20.

²³ General survey on Migration, paragraph 470.

Prolonged separation and isolation of family members lead to hardships and stress affecting both migrants and the dependants left behind, which may give rise to social, psychological and health problems, and even workers' productivity.

Prolonged separation from family also increases the likelihood of sexual activities with other partners. The extra sexual activity associated with the circumstances in which workers find themselves increases the risk of exposure to HIV, not only for the workers themselves but for the communities in which they work and those from which they come.

Protection of the family unit is promoted through several ILO conventions. While Recommendation No. 86 applies only to "migrants for employment introduced on a permanent basis" other provisions apply also to temporary and seasonal workers. For example, convention No. 143 and its recommendation mentions that countries may take all necessary measures and collaborate to facilitate the reunification of the families of all migrant workers legally residing in their territories²⁴. In this view they should take full account of the needs of migrant workers and their families regarding the construction of family housing, assistance in obtaining this housing and the development of appropriate reception services²⁵.

2.3 ILO Code of practice on HIV/AIDS and the world of work

The *ILO Code of Practice on HIV/AIDS and the World of Work* gives practical guidance to governments, employers' and workers' organizations in order to prevent HIV/AIDS; manage and mitigates its impact; provide care and support for workers infected and affected by HIV/AIDS; and eliminate the stigma and discrimination on the basis of real or perceived HIV status. It applies to the formal and informal sectors and to all workers, including migrants.

The Code is based on the protection of human rights and establishes principles that include non-discrimination in employment on the basis of HIV status, continuation of employment relationship; confidentiality, gender equality, strict limit on testing, and the need for social dialogue, prevention programmes and care and support, as the basis for addressing the epidemic in the workplace.

Special attention is paid to vulnerable groups like migrants. Provisions dealing with vulnerability incite governments and social partners to identify groups of workers who are vulnerable to infection and adopt strategies to overcome the factors that make them more vulnerable²⁶. They also suggest establishing appropriate education and information programmes for these workers²⁷.

3. The UN convention on Migrants Rights and other international instruments

ILO instruments stand alongside other international instruments that are aimed at protecting, explicitly or not, the rights of migrants or the human rights of all persons in the context of HIV/AIDS. A brief review of some of these instruments is given below but further attention should be given in future to this variety of standards and tools.

²⁴ Article 13. The members of the family covered by this article are: the spouse and dependent children, father and mother. See also articles 3 and 6 of Convention 117.

²⁵ Recommendation 151 (article 16).

²⁶ Articles 5.1 q) and 5.3 l)

²⁷ Articles 5.1 q), 7 and 7.2.

3.1 UN Convention on Migrants Rights

More than 10 years after its adoption, the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families is expected to come into force soon. The convention recognises and builds upon the provisions contained in existing ILO conventions and in many ways goes beyond them. The convention ensures the explicit extension of human rights enclosed in the International Bill of Human Rights²⁸ to all migrants and members of their family²⁹ and provides for a scope of protection outside as well as within the workplace. Contrary to ILO conventions, it covers unauthorized migrants, self-employed workers and migrants working in the informal sector³⁰.

a) Equality of opportunity and treatment

Ratifying States must, in accordance with the international instruments concerning human rights, respect and ensure that all migrants and their families be given the rights provided for in the convention without distinction of any kind. This includes distinctions based on nationality and also on HIV status, real or perceived³¹.

The convention also provides that their right to privacy shall be protected in the law³². This provision is particularly relevant in the context of HIV/AIDS because the lack of confidentiality regarding a person's HIV-related information often opens the door to discrimination.

b) Protection of health

All migrant workers and members of their family shall have the right to receive any medical care that is urgently required for the preservation of their lives or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals. Such emergency medical care shall not be refused to them by reason of any irregularity with regard to stay or employment³³. The convention also provides for equality of treatment with national in relation to access to health services for regular migrants and members of their families³⁴. Finally, States shall take measures not less favourable than those applied to nationals to ensure their working and living conditions are in keeping with the standards of fitness, safety, health and principles of human dignity³⁵.

²⁸ Refers to the Universal Declaration on Human Rights International; the Covenant on Political and Civil Rights and the International Covenant on Economic, Social and cultural Rights.

²⁹ The term "members of the family" refers to persons married to a migrant workers but also to persons who have with them a relationship that, according to applicable law, produces effect equivalent to the marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned (article 4).

³⁰ Article 2.

³¹ As mentioned earlier, the Commission on Human Rights has confirmed that "other status" in the non-discrimination provisions of international human rights instruments is to be interpreted to include health status, including HIV/AIDS; see note 6.

³² Article 14.

³³ Article 28.

³⁴ Articles 43 and 45.

³⁵ Article 70.

c) Social security

With respect to social security all migrant workers and their family members shall enjoy the same treatment granted to nationals³⁶. Special attention is given to the educational needs of migrant workers' children and they shall have the basic right to access to education, regardless of their irregular situation³⁷. Extended protection is provided for authorized migrants and their family members who shall enjoy equality of treatment with the nationals in relation to access to vocational training guidance and placement services; access to housing, including social schemes; access to social and health services; unemployment benefits and access to public work schemes intended to combat unemployment³⁸.

d) Protection of family units

The convention recognizes the importance of protecting the family unit in its preamble. It also provides for the extended protection of authorized migrants. Article 44 stipulates:

States parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.

Measures should be taken to facilitate the reuniting of migrant workers and 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 children³⁹. Favourable consideration should also be given to reuniting other family members of migrant workers⁴⁰. In the event of the death of a migrant worker, or dissolution of marriage, States where the migrant worker was employed shall favourably consider granting his family members residing in the State an authorization to stay on the basis of family reunion⁴¹.

3.2 Other international instrument

The other fundamental human rights instruments⁴² that apply to every person including migrant workers, can also be used to protect several rights like the right to non discrimination; health; social protection; work; and education. Such rights are all essential to prevent the spread of the epidemic. Even if they are not migrant or HIV-specific these instruments have the advantage of being highly ratified. Moreover, the Convention for the Elimination of Racism and Racial Discrimination (CERD); the Convention for the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are particularly good complementary tools since they ensure the explicit extension of human rights to vulnerable groups that are also part of migrant population.

The HIV/AIDS and Human Rights Guidelines offer states concrete measures for action that can be taken to protect human rights and health where HIV/AIDS is concerned. These

³⁶ Article 27.

³⁷ Article 30. However the obligation to act in this area is strongest for the children of regular migrant workers (article 45).

³⁸ Articles 43 and 54.

³⁹ Article 44. 1.

⁴⁰ Article 44.2.

⁴¹ Article 50.1.

⁴² These instruments include the Bill of rights and the below-mentioned conventions.

guidelines mention that States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, and promote and support a supportive and enabling environment for them by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups⁴³. Other codes of conduct and guidelines addressing migration or HIV/AIDS issues can surely be useful in preventing the spread of the epidemic. More research needs to be done, especially to highlight the existence of regional or national tools.

4. Conclusion

ILO and international instruments constitute complementary tools that can serve as basis for the protection of migrant workers in the specific context of HIV/AIDS. Some provisions of ILO conventions and recommendations can be used to that effect. However, the conventions concerning specifically migrant workers are not highly ratified. Although, they seem to have fulfilled their role in orienting national laws and regulations in certain areas, countries tend to the provisions made by the instruments in broad terms, but less so when it comes to provisions calling for more specific commitments, in particular with regard to the protection of migrant workers⁴⁴. It is important to remember that several categories of migrant workers, like self-employed, unauthorized workers and workers in the informal sectors are excluded from their scope. In this regard, the integration of the UN Convention on Migrants Rights in ILO activities might be a way to promote the protection of rights of the categories of workers excluded from the application of ILO conventions. The *ILO Code of Practice on HIV/AIDS and the World of Work*, in addition to giving clear guidance on the protection of human rights in the context of HIV/AIDS, also constitutes a new tool to mobilize ILO tripartite constituents in making an effective response in this field. Finally, other international instruments can be useful for this purpose and further attention should be given to these in the future.

⁴³ Guidelines 5 and 8.

⁴⁴ This refers to the conclusions reached by the *ILO Working Party regarding the Revision of Standards*, 1996.