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## **Thematic Area 4: Addressing Gaps in Migrant Protection**

**The Future of Human Mobility: Innovative Partnerships for Sustainable Development**

**Technical Paper**

**APRIL 2020**

## 1. Introduction

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Migration is an inherent global occurrence that has grown complex with globalization and modernity. The 2020 World Migration Report by the International Organization for Migration (IOM: 2019), which quantifies African migrants as approximately 19 million out of the 258 million international migrants globally.

Several attempts to govern African migration over the years have not succeeded due to the constant failure to perceive and address host of root causes which stem from incomplete development and the migrants' hope for a better life, succinctly couched by the "Scaling Fences: Voices of Irregular African Migrants to Europe" report (UNPD: 2019); "Migration as a reverberation of uneven development and particularly of a development trajectory that is failing young people, sends a strong signal to policymakers". Notwithstanding the fact that most African migrants arrive safely in their country of destination and integrate into new communities, a significant proportion of them become vulnerable through various stages of the migration process, hence, the need to protect them.

The past decade has seen a decline on the Africa-Europe migration trend; with intra-Africa mobility being on the rise, followed by African migration to the Gulf region. Labour migration in Africa is largely intra-regional (80%) and mainly characterized by the migration of low-skilled workers. Of great importance in the region is the consolidation of significant South-South migration corridors to neighbouring labour markets in the search for a job and better wages. Studies show that due to cultural, religious and historical links the Middle East and Gulf Cooperation Countries is regarded as the second largest destination for African migrant workers, after intra-continental labour mobility, with an estimated 3 million Africans currently living there. The highest number of African migrant workers in that region are recorded to be from Egypt, Ethiopia, Kenya, Sudan, South Africa and Uganda.

According to a study done by UNICEF, one of the key points emerging from the analysis of the scope of movement of children shows that most of them move within the borders of the continent<sup>1</sup>. The study highlighted that children move for various reasons including being forced or to seek opportunities. Acknowledging the different reasons why children move could have important implications on policy choices.

Protection of migrants has moved to the forefront of national, regional and multilateral policy agendas. Countries of origin, transit and destination face a range of human rights, humanitarian and development issues as they manage increased movements of economic migrants, refugees and other migrants through both regular and irregular channels. Studies show that whether migrants enter States with authorization or being undocumented, they will generally find their rights diminished in comparison with the citizens of their country of residence<sup>2</sup>. Migrants are vulnerable to human rights violations by virtue that they are not citizens of receiving states and, due to their status, often live in precarious situations. Women migrants, on the other hand, deal with additional challenges as they face human rights violations based on their migrant status as well as based on their gender<sup>3</sup>. While migration challenges affect all persons on the move, children on the move are more vulnerable and at risk of exploitation, abuse, and suffer the hazards along their migration route and destinations (ACERWC COM Mapping 2018:9 ).

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<sup>1</sup> [https://acerwc.africa/wp-content/uploads/2019/03/ACERWC\\_Study-Mapping-Children-on-the-Move-within-Africa-Nov2018-A4\\_Website-version.pdf](https://acerwc.africa/wp-content/uploads/2019/03/ACERWC_Study-Mapping-Children-on-the-Move-within-Africa-Nov2018-A4_Website-version.pdf)

<sup>2</sup> International Commission of Jurists (2011), p. 29

<sup>3</sup> <https://www.un.org/en/chronicle/article/protection-migrants-rights-and-state-sovereignty>

Millions of children are on the move in the continent. Some are driven from their homes by conflict, poverty or climate change; others leave in the hope of finding a better life. Far too many encounter danger, detention, deprivation and discrimination on their journeys, at destination or upon return. Migrant and displaced children face numerous challenges in transit, at destination and upon return, often because they have few – or no – options to move through safe and regular pathways whether on their own or with their families. These include violence, abuse, exploitation or discrimination. They miss out on education and proper medical care, and don't find it easy to feel at home in the communities they arrive in; trying to learn a new language and integrate into a new culture can make things especially hard. These difficulties have lasting physical and psychological effects and prevent children on the move from reaching their full potential.

The existing international, continental and regional legal framework on migration, comprising international human rights law, international migration law, the refugee regime, international labour standards, trade in services, free movement and transnational criminal law on smuggling of migrants and trafficking in persons provide a framework for governance of migration and guarantee the protection of migrants by setting out obligations for State Parties. This Paper aims at discussing the existing gaps in the migrant protection.

## **2. Why Act?**

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A holistic and multi-sectoral approach to migration governance including policy development is needed for the continent. Low ratification of key labour standards and regional frameworks, migrants' lack of access to decent working conditions, discrimination and xenophobia, capacity gaps by duty bearers, inadequate timely & disaggregated data are prevalent in Africa and call for action in order to promote and protect all migrants.

### **a.) Mitigating risks to migrants in transit**

Risks associated with transit migration and prevalence of high rates of deaths of migrants in transit, exploitation and violations of human rights while hoping to reach other regions in Africa and abroad such as Europe, the GCC countries and the Middle East, as well as those to the U.S. Canada and Australia are some of the challenges that States encounter in the protection of migrants in transit..

In 2019, the African Union Commission, working with AU Member States and partners, actively participated and led the Joint AU-UN-EU Task Force on Stranded Migrants in Libya. The Joint Task Force successfully worked with the government of Libya and supported 40 000 migrants stranded in transit by returning them to their countries of origin or in case of refugees to third countries including Rwanda and Niger. The African Union Commission has established necessary interventions at operational level to respond to the migrant situation in transit. However, the risks of arbitrary repatriation are further compounded by weak or absent returns policy frameworks in some African countries. 11 member states of the AU do not have any policies to date. For those who have it, reports still indicate that there are cases of arbitrary repatriation involving children (ACERWC p.78).

A study done on Somali migrants have underscored some of the protection risks associated with transit migration towards Europe to include deaths, missing persons, kidnappings, extortion, exploitation, physical and sexual abuse, lack of food, harsh weather conditions and dehydration, vehicle accidents, abduction and kidnapping, trafficking for labour and sexual exploitation, arbitrary detention; and migrants being held at ransom until they are able to secure a release fee from family or friends back in Somalia or abroad. For Horn of Africa migrants, Europe is not the

only destination. For example, many Ethiopian and Somali migrants intend to travel towards Gulf Countries. E.g. Among almost 28,000 migrants arriving in Yemen in Q1 of 2020, 12% were children (3% girls and 9% boys). 94% of migrants are Ethiopian, rest are from Somalia, and for 96% of migrants KSA is an intended country of destination.<sup>4</sup>

## **b) Unfair and Unethical recruitment practices breed exploitation**

Transnational recruitment processes are often the starting point of a cycle of abuse that traps migrant workers in situations of human trafficking, exploitation and forced labour, presently prevalent in the Gulf regions (IHRB:2018) but also in Europe. Migrant workers pay large recruitment fees to agencies and brokers offering potential jobs in countries by connecting employers to prospective migrant workers, negotiating the terms and conditions of their future employment and helping facilitate the issuance of the relevant travel documents and training programmes, skill tests and medical check-ups by origin state authorities.

Complex recruitment practices including illegal charging of exorbitant fees to both migrant workers and employers at destination, common in many labour migration corridors, increases the risk of recruitment-related exploitation in such situations. Unaccompanied children may be exposed to more vulnerabilities such as trafficking for sexual or labour exploitation (ACERWC COM Study, p.23). The governance gaps are significant and resolving this type of systemic exploitation requires wholesale reform of enforcement mechanisms in both sending and receiving countries of migrant labour (IHRB: 2018). Some African countries have bi-lateral agreements with host countries, however, there is the need for a continental framework or agreement to address most of these issues which affect migrants adversely. There is also protection gaps for families of workers staying back home, including protracted family separation and impact on children. Additionally, bilateral agreements should include provisions related to the recruitment process. This is often a gap in existing BLAs, but we are seeing more and more governments understanding the importance of using BLAs to include/promote principles of ethical recruitment. There is also, need to strengthen regulations governing private recruitment agencies and, in particular, enhancing registration, licensing, monitoring, penalties.

## **c) Increasing number of migrants are made vulnerable by the ongoing pandemic**

The past few months have seen governments around the world imposing a series of increasingly stringent regulations on public life to stem the Covid-19 virus's spread, barring people from leaving their houses except for essential travel. This has seen many migrants being stranded in transit or their countries of destination, while some governments managed to evacuate their nationals. As the global pandemic continues, adverse reports have gained negative publicity regarding migrants being particularly vulnerable to the virus especially those without the legal status as they are not tested as well as those living in other poor conditions. Furthermore, it has been reported that numerous African migrants have been forcibly repatriated from the Middle East and GCC countries as a result of the pandemic.

In addition to health risks that migrants are facing, they are also particularly vulnerable to increased discrimination and xenophobia. They are also the first to be affected by layoffs and

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<sup>4</sup> [https://reliefweb.int/sites/reliefweb.int/files/resources/en\\_iom\\_yemen\\_migration\\_overview\\_q1\\_2020.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/en_iom_yemen_migration_overview_q1_2020.pdf)

non-payment of wages that come as a result of difficult economic realities due to COVID-19. Incidents of forced returns of migrants have also been registered in different parts of the continent.

### **3. Where to build common ground?**

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#### **a) Ensuring the protection of migrants in labour agreements**

Anchored on the principles of human and labour rights, bilateral labour migration agreements (BLAs) are flexible tools for governing migratory flows, and improving the protection of labour and human rights, recruitment needs and labour shortages in various socio-economic contexts and labour market conditions. Well implemented BLAs represent one of the most important instruments in the protection of migrant workers.

Bilateral Labour Agreements contribute to the labour migration governance objectives and targets embodied in the Global Compact on Safe, Orderly and Regular Migration, the Sustainable Development Goals, the African Union's Agenda 2063, and the African Union Revised Migration Policy Framework for Africa. Bilateral Labour Agreements create legally binding rights and obligations; they describe in detail the specific responsibilities of, and actions to be taken by each of the parties, in order to accomplish the objectives and the goals set out by the agreements. They are also key tools in promoting regional integration, enhancing regular pathways facilitating labour migration; and promoting linkages between migration and development.

Recently there has been an increasing number of African countries negotiating bilateral labour agreements with Middle East counterparts such as Jordan, Qatar and Saudi Arabia, mainly for the provision of domestic workers and other categories of semi-skilled workers in the construction and service industries. There are other Member States such as Ethiopia that wishes to expand the scope of their bilateral labour agreements with the Middle East and the GCC countries to cover other skills levels beyond domestic workers. Endure

The World Migration 2019 has highlighted United States, France, the Russian Federation, the United Arab Emirates and Saudi Arabia as the main global corridors from developing countries, Africa included. America and Europe have received skilled African migrants particularly in the health practitioners and professionals. Studies highlight 42 known agreements on labour mobility of low skilled workers in Africa. Remittances to and within Africa were over US\$85 billion in 2018 and benefiting over 200 million family members of African migrants. Challenges of violation of human rights and labour rights have been noted with countries of origin resorting to putting bans on sending migrant workers to the countries of destination even though there were existence of bilateral labour agreements between the sending and the receiving countries.

#### **b) Protecting migrants in the informal economy**

The inadequacies of the protection of African migrants is one of the core agenda of the African Union Commission, the RECs, the African Union Member States and the development partners such as ILO and IOM. While there may be plethora of legal instruments and policies in protection of the rights of all persons including migrants, in many African States there exist several gaps in labour law coverage on the rights of workers in the informal sector.

According to the most recent estimates, non-agricultural employment in the informal economy represents 66 per cent of total employment in sub-Saharan Africa and 52 per cent in North Africa. Studies have highlighted that workers in the informal sector, including migrant workers in this

sector, are considered to work outside the standard employment relationships and are thus unprotected and unregulated by most labour laws and as such are subjected to among others low incomes and wages, lack of social protection, precarious jobs and workplaces and dreadful working conditions.

Evidence shows that child labour occurs predominantly in the rural and informal economies, beyond the reach of labour inspection, the protection of workers' organizations or the governance benefits of employers' organizations. Researches have highlighted that child labour in the supply chains is prevalent in Africa. Millions of children around the world are trapped in child labour, depriving them of their childhood, their health and education, and condemning them to a life of poverty and want<sup>5</sup>.

In the global supply chains, researches estimated share of total child labour varies across regions: 26 per cent in Eastern and South-Eastern Asia; 22 per cent in Latin America and the Caribbean; 12 per cent in Central and Southern Asia; 12 per cent in Sub-Saharan Africa; and 9 per cent in Northern Africa and Western Asia<sup>6</sup>. The report suggests further that amongst child labourers it is migrant children who receive less pay, work longer hours, less often attend school, and face higher death rates at work in comparison to local children. Despite the numbers of children involved, studies show that the needs and interests of migrant children are largely absent from mainstream debates on child protection, child labour and migration. Most governments have failed to develop effective policy responses to assist and protect migrant children despite being obliged to offer such protection in terms of global, continental and regional legal instruments and policy frameworks; African Union Member States included.

It is worth noting that states are required to eliminate and prohibit the worst forms of child labour such as slavery, debt bondage, serfdom, compulsory labour, use of children for illicit activities and work by whose nature is likely to harm the health, safety or morals of children and is prohibited under Article 1 of the ILO's Worst Forms of Child Labour Convention, 1999 (No.182). Article 32 of the CRC requires states to recognize the right of a child to be protected from economic exploitation and from performing any kind of work that is likely to be hazardous or to be harmful to the child's physical, mental, moral or social development. The ACRWC under Article 15 provides that children should be protected from all forms of economic exploitation and from carrying out 'any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.

### **c) Enabling access to social services for migrants, including portability of social protection benefits**

Major international instruments, such as the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Protection of the Rights of All Migrant Workers and Their Families and various ILO Conventions and Recommendations guarantee social security as a human right such as the Convention on Social Security (Minimum Standards), 1952 (No. 102). Part XII of Convention No. 102 (article 68) which is devoted to equality of treatment of non-national residents. It is also important to mention the Equality of Treatment (Social Security) Convention, 1962 (No.118) and the Maintenance of Social Security Rights

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<sup>5</sup> <https://www.unicef.org>

<sup>6</sup> ILO IOM OECD and UNICEF, 2019. *Ending child labour, forced labour and human trafficking in global supply chains*.

Convention 1982 (No. 157) which calls for the maintenance of rights in the course of acquisition by providing for the totalisation of qualifying periods completed in different countries..

Social protection is also at the heart of the 2030 Agenda, Agenda 2063 and the AU Revised Migration Policy Framework for Africa which recognise the role social protection plays in achieving sustainable development. Evidence shows that adequate social protection promotes inclusive growth and increases productivity and employability. Yet the region is characterized by low levels of social protection and contributory social security coverage. National spending on social protection is usually below 2% of GDP. In recent years, following the adoption of the African Union Social Policy Framework (2008), several African countries have implemented social protection policies and strategies. Many of their peers are in the process of doing the same. Social protection is becoming increasingly prominent in national-long-term development strategies however, social protection coverage is very low on the African continent. According to ILO, 17.8 per cent of the population receive at least one social protection cash benefit, with significant variation across countries. Again, 75 % of the population is excluded from legal health coverage.

In 2015, the African Union held a Specialized Technical Committee (STC) first ordinary session on social development, labour and employment whereupon social protection was the main agenda of this event. At the continental level, the main policy frameworks include the Programme on the Upgrading the Informal Economy, Social Protection, Social Protection Plan for Informal Economy and Rural Workers (SPIREWORK), Production Agenda for Africa, Africa Health Strategy, the Campaign for Accelerated Reduction of Maternal Mortality (CARMMA), Plan of Action on Sexual and Reproductive Health and Rights (Maputo Plan of Action), HIV-AIDs and Malaria, and Drug control. In 2010, the AU Member States also adopted the Yaoundé Tripartite Declaration on the implementation of the social protection floor. The Declaration is a culmination of the movement for Decent Work launched on the Continent for over a decade. Its aim is to commit African member States and social partners to adopt the principles, main elements and practical aspects of the Social Protection Floor, in synergy with the AU Social Policy Framework for Africa.

African Union Commission is currently implementing the AUC/ILO/IOM/ECA Joint Programme on Labour Migration, Development and Regional Integration (JLMP) which is built as a strategic regional intervention to leverage migration for development. The JLMP is also a creative work to achieve the key dimensions of the programme regarding the protection of the rights of migrant workers including portability of social security benefits.

At the national level, many countries have at least some of their non-contributory benefits reserved for their nationals. Additionally, there are some sectors which are excluded from social protection such as seasonal workers and various categories of temporary migrant and undocumented migrants. In some countries, exclusion can be due to either legal obstacles such as the migrant status, length of stay, duration of employment in the light of the eligibility criteria or more practical obstacles such as lack of information or complex administrative procedures.

#### **d) Coherence in admission and integration policies**

Recognizing the importance of the free movement of people, the AU Heads of State and Government adopted the Abuja Treaty in 1991. The treaty established the African Economic Community and urged Member States to adopt policies that allow the free movement of persons within the Community. In 2018 the African Union provided a framework to the Member States for the progressive implementation of the Abuja Treaty by adopting the Protocol to the Treaty

Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and the Right of Establishment.

Studies have shown that majority of immigration policies in Africa are restrictive around settlement and legal employment of foreign nationals and difficult or even impossible access to citizenship rights. Scholars argue that naturalization can be even more politically delicate with large flows of migrants, including refugees. Transit and destination states should ensure that unaccompanied children are provided with foster care or supervised independent living and integration into the community. Most importantly, states should ensure that children are not separated from parents and where separation has taken place, children should be reunited with their families or relatives.

#### **e) Access to justice**

States have notably committed to provide migrants with targeted, gender-responsive, child-sensitive, accessible and comprehensive information and legal guidance on their rights and obligations, including on access to justice to file complaints about rights violations. However, studies have shown that in many countries, access to the courts are impeded by language barriers, documentation / registration barriers, barriers from within immigrant communities that impede investigations, discrimination, cultural barriers, fear of government institutions, inadequate funding of services, delays in service provision, ineffective screening of individuals seeking services, poor documentation of crimes and injuries, inadequate record-keeping, inadequate coordination of services across agencies and limited access to culturally specific programming and lack of legal aid provisions to migrants.

With respect to children on the move, the right to access to justice is indeed one of the most neglected rights considering the significant barriers to its realisation. Particularly those in irregular circumstances, realisation of access to justice remains an illusory goal. There are many migrant, asylum-seeking, refugee and internally displaced children and victims of child trafficking being unfairly detained and are subjected to discriminatory and dysfunctional judicial systems. Across Africa, there are about 28,000 children in detention or deprived of their liberty and in some cases are subjected to inhumane punishments. The situation is dire in states where there is far-reaching criminalization of irregular migrants, including children. Criminalization of foreigners, such as migrants and refugees, leads to use of inappropriate terminology such as referring them as 'illegal migrants' or 'illegal aliens'. This makes it complex for children termed as 'illegal migrants' or 'illegal aliens' to access justice systems because of discrimination and other structural challenges that they might face.

It is worth noting that migrants face a challenge of access to services including access to education, health, child protection and lack of access to regular status / regular migration pathways / regularization. Additionally, birth registration of children of migrant workers (especially single/female workers) and difficulties of women conferring nationality to their children is still a challenge in some countries and these can lead to statelessness of children born to migrant workers.

#### **4.Existing practices, existing partnerships, practical value across borders**

AUC has started the process of establishing a multilateral agreement between main countries of origin of African migrants and the Middle East and the GCC countries. This process is still in its infancy, but it has the possibility of creating an efficient channel for joint negotiations for improved protection, ethical recruitment and dignified employment and returns when needed. In addition, in January 2020, IGAD Member States, led by the Government of Kenya, agreed on strategies

towards harmonizing labour policies in East and Horn of Africa. Furthermore, in 2019, the AUC and some RECs participated in the Abu Dhabi Dialogue Ministerial meeting.

Also, SADC Ministers and Social Partners have adopted the Guidelines on Portability of Social Security Benefits in SADC. The Guidelines were informed by the policy and programmatic options recommended by the research studies as well as relevant International Labour Standards and good practices in other RECs and regions seeking to extend social protection to migrant workers. SADC has also endorsed the Employment and Labour Sector decision to prioritize safe and fair recruitment in all SADC Member States. This is in line with the decision of Ministers of Labour and Employment and Social Partners to include ethical recruitment in the new SADC Labour Migration Action Plan (2020-2025) that has fostering partnerships across governments, private sector, workers and recruitment actors in the region. However, not all regional economic communities (RECs) are advanced with respect to regional protection mechanisms. Yet, this is necessary due to movement within regions.

## 5. Conclusion

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The existing international, continental and regional legal framework on migration, comprising international human rights law, international migration law, the refugee regime, international labour standards, trade in services, free movement and transnational criminal law on smuggling of migrants and trafficking in persons, provides a framework for governance of migration and guarantee the protection of migrants by setting out obligations for State Parties. However, adequate protection of the rights of all migrants inclusive of migrant children at the national level is key and at the heart of migration governance. There is need for regional cooperation and harmonisation of policies and systems in other for amongst others foster regular migration including labour migration in order to meet the supply and demand of domestic and foreign labour markets, promote the enforcements of international standards and reduce the recourse to irregular migration. At the national level, there is an acute lack of implementation of international, continental and regional legal instruments on human rights and migration, thus creating a major gap in the protection of migrants. Additionally, in practice, in some countries, migrants are still subjected to discrimination as they are no permitted to enjoy the same rights as citizens of the destination countries. Finally, xenophobia is also portraying the challenges that migrants are facing.

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