

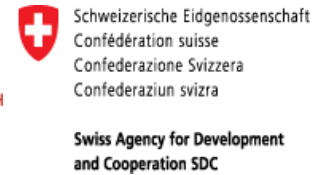


KNOMAD PAPER 39

The Empowerment of Migrant Workers in a Precarious Situation: An overview

Fay Faraday

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THE EMPOWERMENT OF MIGRANT WORKERS IN A PRECARIOUS SITUATION

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The Empowerment of Migrant Workers in a Precarious Situation

Mapping Barriers to Migrant Workers' Rights Enforcement

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EXECUTIVE SUMMARY

The experience of transnational migrants working for low pay under exploitative conditions has been well-documented for many years. Yet, a sizeable catalogue of binding international instruments establishes a rights-based framework through which states commit to deliver substantive labour protections to migrant workers. By focusing on the operation of labour inspectorates in five countries – Canada, Germany, Malaysia, Qatar and South Africa – this paper undertakes a comparative analysis to explore what accounts for the persistent gap between the vision of the rights-based framework and the reality of rights violations that migrant workers experience. These countries were selected for comparison because they are located in five different geographic regions; are countries in which labour is performed by large numbers of migrant workers; and are countries to which migrant workers arrive through a mix of south-to-south and south-to-north migration flows. The research reveals that, across very different countries, economies, legal systems and migration flows, strikingly common patterns of structural inequality, exploitative behaviour and weakness in institutional design deny migrant workers' secure protection of their labour rights and facilitate systemic discrimination, abuse and widespread rights violations. By focusing on the role and design of state-based labour inspection, this report seeks to account for why this is so.

Part II briefly identifies the rights-based framework articulated in UN and ILO instruments which pertain to labour migration. These instruments are used as a reference point to allow for consistent cross-regional comparison. Part III undertakes a comparative analysis of how structural impediments to effective rights enforcement are anchored in the multiple dimensions of migrant workers' precarity (status of employment, form of employment, labour market insecurity, social context and social location). Part IV examines a range of macro-level reforms that States can take to empower migrant workers by addressing (i) precarity that arises from temporary or undocumented status; (ii) precarity in the labour market; and (iii) precarity that arises due to social isolation and lack of effective voice at work, in the community, and in political processes. Part V sets out concluding comments on how the COVID-19 pandemic has exacerbated the precarious situation of migrant workers and placed a premium on their empowerment as societies emerge and rebuild from the pandemic.

I. INTRODUCTION

Today, nearly 1 in every 20 workers globally is a migrant worker. The United Nations estimates that over 164 million individuals, 42% of them women, have migrated internationally for work, making up 4.7% of all the world's workers.¹ The merits and impact of transnational labour migration are highly contested politically. The governance of labour migration is deeply fragmented structurally. And the experience of migrants working for low pay under exploitative conditions has been well-documented for many years.² Yet, a sizeable catalogue of binding international instruments establishes a rights-based framework through which states commit to deliver substantive labour protections to migrant workers. In addition, the UN and International Labour Organization's successive non-binding normative frameworks articulate principles and operational guidelines to assist states to implement and enhance those rights. By focusing on the experiences of migrant workers in low-wage jobs in five countries – Canada, Germany, Malaysia, Qatar and South Africa – this report undertakes a comparative analysis to explore what accounts for the persistent gap between the vision of the rights-based framework and the reality of rights violations that migrant workers experience. Based on the patterns identified, the report outlines some macro-level recommendations to empower migrant workers and identifies directions for future research.

¹ United Nations/Department of Economic and Social Affairs figures cited in International Labour Organization, *ILO Global Estimates on International Migrant Workers – Results and Methodology*. 2nd ed. (Geneva: ILO, 2018) at ix. These are the most current figures at the time of writing.

² François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants – Labour exploitation of migrants*, 3 April 2014, UNHRC 26th Session, Item 3, A/HRC/26/35; François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants – Thematic Report on recruitment practices and the human rights of migrants*, 11 August 2015, UNGA 70th Session, Item 73(b), A/70/310; Felipe Gonzáles Morales, *Report of the Special Rapporteur on the Human Rights of Migrants – The impact of migration on migrant women and girls: a gender perspective*, 15 April 2019, UNHRC 41st Session, Agenda item 3, A/HRC/41/38; ILO, *International labour migration: A rights-based approach* (Geneva: ILO, 2010) at 216.

A. Analytical Framework of Migrant Workers' Precarity

Before engaging in a substantive analysis, some key terms and analytical frameworks used in the report are defined here.

First, there is no uniform legal definition of who is a “migrant worker”. This report adopts the UN’s definition from the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. In this Convention “migrant worker” refers to “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”³ This expansive definition encompasses migrants through all stages of their migration journey, from recruitment, through work, unemployment and return to their state of origin.

Second, the report uses the term “work” in a similarly expansive way to encompass all forms of remunerated labour. By contrast, it uses the term “employment” to refer specifically to work that is performed within formal employment relationships.

Third, this report uses the noun “precarity” and adjective “precarious” to refer to the sociological condition created by social, economic and political arrangements that distribute support and risk unequally across populations with the result that some populations face disproportionate economic and social harms.⁴ In analyzing the contours of workers’ precarity, the report’s approach draws on Vosko’s scholarship which

³ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, UNGA Resolution 45/158, 18 December 1990, A/RES/45/158 at Article 2(1) [“*Migrant Workers Convention*”]

⁴ This usage is derived from Judith Butler’s writing which differentiates between “precariousness” and “precarity” as follows: “Lives are by definition precarious: they can be expunged at will or by accident; their persistence is in no sense guaranteed. In some sense, this is a feature of all life, and there is no thinking of life which is not precarious [...] Precarity designates the politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence and death”: *Frames of War: When Is Life Grievable?* (London: Verso Books, 2010).

measures the qualitative nature of precarity across multiple dimensions that intersect in a worker's experience. Vosko defines "precarious employment" as

work for remuneration characterized by uncertainty, low income, and limited social benefits and statutory entitlements. Precarious employment is shaped by the relationship between *employment status* (i.e. self- or paid employment), *form of employment* (e.g. temporary or permanent, part-time or full-time), and *dimensions of labour market insecurity*, as well as *social context* (e.g. occupation, industry, and geography) and *social location* (or the interaction between social relations, such as gender, and legal and political categories, such as citizenship).⁵

Vosko's model maps the variable degrees to which migrant workers experience insecurity along each of these five dimensions to reveal the multiple dynamics that construct migrant workers' precarity.⁶ The model is highly adaptable. It can apply to formal employment relationships, self-employment and informal work relationships. It can also scale to different levels of granularity as desired. For example, "dimensions of labour market insecurity" can be measured as one dimension in combination with the other four main dimensions listed. It can also be examined on its own as a distinct field of precarity encapsulating multiple sub-dimensions such as:

degree of certainty of continuing employment, referring not only to whether a job is permanent or temporary but to job tenure in multiple jobs and work relationships involving multiple parties and/or work outside an employment relationship; *degree of regulatory effectiveness*, concerning not only the existence of formal protections but their design, application, and enforcement ...; *control over the labour process* (i.e. working conditions, wages, and work intensity), encompassing both union membership and/or coverage under a collective agreement and equivalent mechanisms for self-employed workers; and, the *adequacy of the income package*, covering not only workers' income from employment but also government transfers (direct and indirect), and statutory and employer-sponsored benefits.⁷

⁵ Leah Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2009) at 2

⁶ Vosko, *Managing the Margins*, above note 5 at 2.

⁷ Vosko, *Managing the Margins*, above note 5 at 2.

The elements of this matrix of precarious work can be summarized as follows:

Dimensions of Migrant Workers' Precarity

Dimension of Insecurity	Examples of factors considered
Employment Status	<ul style="list-style-type: none"> • self-employment • paid employment
Form of Employment	<ul style="list-style-type: none"> • temporary work • permanent work • part-time work • full-time
Dimensions of Labour Market Insecurity	<ul style="list-style-type: none"> • degree of certainty of continuing employment • degree of regulatory effectiveness • worker control over labour process • adequacy of income package
Social Context	<ul style="list-style-type: none"> • industry • occupation • geographic location
Social Location	<ul style="list-style-type: none"> • social relations marked by discrimination • political or legal status with restricted rights

Just as Vosko's model illuminates the multiple structural drivers of precarity, its holistic approach also helps map the junctures at which multiple, concurrent interventions may be needed to counteract that precarity. As analyzed in Part III, the research across the five countries of focus consistently demonstrates that migrant workers' status in their states of labour is highly precarious across many, if not all, of the five main dimensions of worker precarity.

Finally, mapping the contours of migrant workers' precariousness helps point the way towards its opposite – the empowerment of migrant workers. This report uses the term “empowerment” to mean the degree to which macro-level changes would increase migrant workers experience of economic and social security in the status and forms of their employment, and in their positions within the labour market, their social context, and their social location in the community within which they labour.

B. The Contested Politics of Labour Migration

Implementing a rights-based framework with respect to migration is challenging because the politics of transnational labour migration are highly contested.⁸ At the macroeconomic level, labour migration on today's massive scale depends upon continuing economic asymmetry between states of origin and states of labour. State and private stakeholders, then, have competing and contradictory interests, and varying degrees of leverage to pursue their objectives. As a result, state interests in and efforts to advance migrant workers' empowerment are subject to multiple pressures and do not follow a linear progression towards greater security, agency and protection for workers.

At a national level, control over migration and border security is a fundamental exercise of states' sovereignty. States approach labour migration from a perspective of its utility to advance national economic, social and demographic priorities. In states where migrants perform labour, there is little political will to address or prioritize the rights and empowerment of migrants. Migrant workers do not form a political constituency that is

⁸ A good analysis of the complexity is mapped in International Labour Organization, Report of the Director-General, *Fair migration: Setting an ILO Agenda*, 2014, ILC 103rd Session, Report I(b), ILC/103/DG/IB; International Labour Organization, *Addressing governance challenges in a changing labour migration landscape*, 2017, ILC 106th Session, Report IV, ILC.106/IV

able to influence public policy decisions. This is so even in countries where they constitute large or majority populations. Migrant workers lack the right to vote or engage in political processes at the national level in the states where they labour, and often the precarity of their legal and social condition leads to a fear of speaking up, lest they be deported or blacklisted. The lack of political will to address migrant workers' empowerment is particularly lacking in an economic context, exacerbated by the COVID-19 pandemic, in which national workers face economic insecurity and fear the erosion of pay and working conditions through employers' reliance on migrant labour.⁹ States are even more averse to enhancing migrant rights in an ongoing global political climate of anti-migrant populism which fuels heightened racism and xenophobia and anxiety about border security.¹⁰

At an international level, for nearly two decades the UN and related organizations have promoted state cooperation on labour migration anchored in the normative framework of the UN's and ILO's covenants and conventions as a key aspect of globalization that can facilitate inclusive and sustainable development.¹¹ As was noted in

⁹ Sarah Marsden, Eric Tucker and Leah Vosko, "The trilemma of Canadian migrant worker policy: facilitating employer access while protecting the Canadian labour market and addressing migrant worker exploitation", in *Research handbook on the law and politics of migration*, Catherine Dauvergne, ed. (Cheltenham, UK: Edward Elgar Press, 2021) at 63-81; Chris Hannay, "Government urged to speed up foreign-worker applications by farms and meat plants", *Globe and Mail* (15 October 2021), online: <https://www.theglobeandmail.com/business/article-government-urged-to-speed-up-foreign-worker-applications-by-farms-and/> (accessed 15 October 2021)

¹⁰ ILO, *Fair Migration*, above note 8; Catherine Dauvergne, "Introduction to the *Research Handbook on the Law and Politics of Migration: law, politics and the spaces between*" and Donald Galloway, "Populism and the failure to acknowledge the human rights of migrants", *Research handbook on the law and politics of migration*, above note 9 at 1, 203-204; François Crépeau and Idil Atak, "Global Migration Governance: Avoiding Commitments on Human Rights, Yet Tracing a Course for Cooperation" (2016), 34:2 *Netherlands Quarterly of Human Rights* 113-146 at 115

¹¹ International Labour Organization, *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (Geneva: ILO, 2006); International Labour Organization, *ILO Declaration on Social Justice for a Fair Globalization*, 10 June 2008, ILC 97th Session; United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, UNGA 70th Session, Agenda items 15 and 116, A/RES/70/1; United Nations General Assembly, *New York Declaration for Refugees and Migrants*, 3 October 2016, UNGA 71st Session, Agenda items 13 and 117, A/RES/71/1; United Nations General Assembly, *Global Compact for Safe, Orderly and Regular Migration*, 22 January 2019, UNGA 73rd Session, Agenda items 14 and 119, A/RES/73/195

preparation for the 2013 UN High-Level Dialogue on Migration and Development, grounding labour migration in a rights-based framework is important to ensure migration promotes development, not exploitation:

there is a strong correlation to be made between the rights of migrants and their ability to contribute to development. Large numbers of migrants alone do not necessarily lead to development, what matters is the protection of the individual's rights, well-being and health to enhance the ability of the migrant to access decent work, develop his or her potential, and save money to remit home.¹²

However, the basis for and extent of international cooperation are tenuous. Some states actively discourage or constrain in-migration of labour.¹³ Others facilitate labour migration to meet the demands of employers,¹⁴ while simultaneously benefiting state agendas as taxes deducted from migrants' pay support national infrastructure¹⁵ and the wages migrants spend in-country support the national economy.¹⁶ Others have long-standing labour export policies¹⁷ and rely on their citizens' remittances from overseas work for a significant proportion of their GDP.¹⁸ This creates tension between states of origin advocating for the labour rights of their nationals and trying to satisfy employer expectations in order to retain the state's desired access to foreign labour markets to

¹² Babatunde Osotimehin, William Lacy Wing and Wu Hongbo, *Towards the 2013 High-Level Dialogue on International Migration and Development: Final Report of the High-Level Dialogue Series* (IOM: 2013) at 83; United Nations, Office of the High Commissioner of Human Rights, *Migration and Human Rights: Improving Human Rights-based Governance of International Migration*" (Geneva: OHCHR, 2013) at 8

¹³ Among the five states of focus for this report, Malaysia and South Africa provide examples of this approach.

¹⁴ Among the five states of focus, Canada provides an example of this approach.

¹⁵ A breakdown of migrant agricultural workers' contribution to Canada's social infrastructure and economy through taxes and wages spent is set out in UFCW Canada and the Agricultural Workers' Alliance, *The Great Canadian Rip-Off: An Economic Case for Restoring Full EI Special Benefits Access to SAWP Workers* (UFCW Canada, March 2014)

¹⁶ Fully 85% of the wages that migrant workers earn are spent in the country where they labour. Only 15% of wages are sent to countries of origin by way of remittances: United Nations Department of Economic and Social Affairs, *Remittances matter: 8 facts you don't know about the money migrants send back home* (17 June 2019)

¹⁷ For example, the Philippines has had a formal labour export policy since the 1970s.

¹⁸ The World Bank identifies at least 27 countries in which personal remittances accounted for more than 10% of GDP in 2019. Tonga (37.6%) and Haiti (37.1%) were most reliant on remittances: World Bank, Global Knowledge Partnership on Migration and Development, *COVID crisis through a migration lens*, Migration and Development Brief 32 (Washington, DC: World Bank, April 2020).

continue the flow of remittances.¹⁹ It also creates tension between migrant workers and their home states. Harkins, Lindgren and Suravoranon observe that, while remittances are a significant outcome of labour migration,

the heavy emphasis placed on the macroeconomic importance of remittances within migration and development discourse can come at the expense of a more balanced and migrant-centred understanding of labour migration outcomes.²⁰

Many migrant workers feel betrayed by home governments whose economic policies effectively force them into years of migration because economic opportunities, social stability, or environmental sustainability are lacking domestically. They want their home governments to address the root causes of the economic, political, social and environmental insecurity that drive out-migration. They want local development that ensures migration is no longer a necessity, but a true choice. Others add to this critique by asserting that labour migration does not facilitate sustainable development. Instead, pursuing data-driven research, they argue that, in countries of origin and for individual workers, it creates long-term dependence on migration while disciplining workers to become “better migrants” by investing in the technologies that enable them to maintain family relationships from afar while continuing to migrate.²¹ Correspondingly, in countries of labour, it facilitates and normalizes employers’ “addiction” to cheap and controllable labour.²²

¹⁹ In Canada, the British Columbia Labour Relations Board decision in *Employees of Sidhu & Sons Nursery Ltd. and Sidhu & Sons Nursery Ltd v. United Food and Commercial Workers International Union Local 1518*, (20 March 2014) B.C. LRB B56/2014 reveals how fear of losing access to the Canadian labour market led Mexican officials to blacklist a Mexican migrant agricultural worker who supported a unionization drive by migrant workers in Canada.

²⁰ Benjamin Harkins, Daniel Lindgren, and Tarinee Suravoranon, *Risks and rewards: Outcomes of labour migration in South-East Asia - Key findings in Malaysia* (Bangkok: ILO, 2017) at 1

²¹ Jenna Hennebry, “Who Has Their Eye on the Ball? ‘Jurisdictional Fútbol’ and Canada’s Temporary Foreign Worker Program” (July-August 2010) *Policy Options* 62-67

²² Randall Hansen, “COVID-19 and the global addiction to cheap migrant labour”, *Open Democracy* (6 October 2020), online: <https://www.opendemocracy.net/en/pandemic-border/covid-19-and-global-addiction-cheap-migrant->

This state-focused political complexity is exacerbated when the conflicting interests of non-state actors are added to the mix. Given the scale at which workers and remittances flow across borders, significant sums of money are at stake. Globally, in 2019 remittances from migrant workers and others amounted to approximately \$714 billion USD.²³ Annually, remittances contribute twice as much financial support to developing economies as development aid,²⁴ and contribute significantly more to the economies of low and middle income countries than direct financial investment.²⁵ A multilayered migration industry,²⁶ with varying shades of legality, has emerged to facilitate and profit from this flow of people and money across borders and has a vested interest in seeing levels of migration remain high.²⁷ Meanwhile, employers in the countries of labour benefit from recruiting a just-in-time labour force that meets its specified skill requirements without the need to invest in long-term training. In addition, either through migrant workers' exclusions from legal protections, or through conditions imposed through work permits or

[labour/](#) (accessed 29 June 2021); Amber Hildebrandt, "How Canada became addicted to temporary foreign workers", *CBC News* (1 May 2014), online: <https://www.cbc.ca/news/canada/how-canada-became-addicted-to-temporary-foreign-workers-1.2627572> (accessed 29 June 2021)

²³ Migration Policy Institute, *Global Remittance Guide*, online: <https://www.migrationpolicy.org/programs/data-hub/global-remittances-guide> (accessed 13 June 2021). The figures from 2019 are selected to provide a baseline unaffected by the COVID-19 pandemic.

²⁴ United Nations General Assembly, *Making migration work for all: Report of the Secretary-General*, 12 December 2017, UNGA 72nd Session, Agenda items 14 and 117, A/72/643 at para. 20.

²⁵ World Bank, Global Knowledge Partnership on Migration and Development, *Migration and Remittances: Recent Developments and Outlook*, Migration and Development Brief 31 (Washington, DC: World Bank, April 2019) at 1-3; Federica Cocco, Jonathan Wheatley, Jane Pong, David Blood and Andrew Rininsland, "Remittances: the hidden engine of globalisation", *Financial Times* (28 August 2019) online: <https://ig.ft.com/remittances-capital-flow-emerging-markets/> (accessed 29 June 2021) notes that "Remittances have overtaken FDI, private capital flows and aid as the largest inflow of capital to emerging economies."

²⁶ The "migration industry" has no set definition, but broadly comprises the full range of businesses and services that cater to those seeking to employ migrants and to migrants themselves at all stages of their migration journey including through recruitment, loans, training, migration counselling, language training, travel, and remittances.

²⁷ Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants – Thematic Report on recruitment practices*, above note 2; Kerry Preibisch and Jenna L. Hennebry, "Buy Local, Hire Global: Temporary Migration in Canadian Agriculture", in *Legislated Inequality: Temporary labour migration in Canada*, Patti Tamara Lenard and Christine Straehle, eds. (Montreal: McGill-Queen's University Press, 2012) at 63-72; *The Migration Industry and the Commercialization of International Migration*, Thomas Gammeltoft-Hansen and Ninna Nyberg Sørensen, eds. (New York: Routledge, 2013)

laws restricting labour market mobility, employers in low-wage sectors often exercise considerably more control over migrant workers than local workers.²⁸ From migrant workers' perspective, despite the well-documented history of rights violations, transnational labour migration continues because the economic needs of and benefits to migrant workers and their families are real. Globally, one out of every nine people is supported by remittances from migrant workers, with remittances generally constituting 60% of their household income.²⁹ Moreover, for some migrants, particularly women, labour migration is desirable because it may enable them to experience greater autonomy and broader economic and social opportunities than are available in their states or cultures of origin.³⁰ Through all these and more political tensions and contradictions, there is no singular momentum that steers states towards action that aims to empower migrant workers and uphold their rights.

Complicating this political discord, there is also no single set of binding rights, standards or norms that protect migrant workers. Moreover, governance of labour migration – encompassing policy making, standard setting, accountability frameworks, consultative processes, civil society engagement, and transnational migrant worker networks – is highly fragmented at international, regional and subregional levels and through multilateral and bilateral processes involving a multitude of stakeholders.³¹ Even

²⁸ Different ways this control manifests in the countries of focus are analyzed in more detail in Parts III and IV.

²⁹ UN DESA, *Remittances matter*, above note 16; see also ILO, *Addressing governance challenges in a changing labour migration landscape*, above note 8 at para. 32-35

³⁰ Kerry Preibisch and Evelyn Encalada Grez, "Between hearts and pockets: locating the outcomes of transnational homemaking practices among Mexican women in Canada's temporary migration programmes" (2013), 71:6-7 *Citizenship Studies* 785-802

³¹ Dauvergne, "Law, politics and the spaces between", above note 9; Crépeau and Atak, "Global Migration Governance", above note 10; Branka Likić-Brborić, "Global migration governance, civil society and the paradoxes of sustainability" (2018), 15:6 *Globalizations* 762; Stefan Rother and Elias Steinhilper, "Tokens or Stakeholders in Global Migration Governance? The Role of Affected Communities and Civil Society in the Global Compacts on Migration and

at the international level, no single institution has a comprehensive mandate to oversee all aspects of labour migration, to empower migrant workers, and to promote and protect migrant worker rights. No single institution exists through which states are held accountable for their actions or inactions to protect migrant workers. UN covenants and conventions set out a range of rights relating to migration and labour which are binding, but only on the states which have ratified them. The ILO has also established labour standards which are binding on the states which have ratified them, but it has no mandate with respect to other aspects of migration. The UN High Commissioner for Refugees has a mandate to deal with forced labour and human trafficking but only to the extent that they involve refugees.³² The International Organization for Migration, meanwhile, occupies an ambiguous and controversial space. The IOM is an intergovernmental body that is governed by and provides migration management services to its member states. From 1951 to 2016, it operated outside the UN framework. But a 2016 agreement with the UN gave it status as a “related organization”. While it positions itself as the “UN Migration Agency” and has Memoranda of Understanding with various UN agencies including the ILO and UNHCR, the IOM remains an independent, non-normative intergovernmental organization that is not bound by the UN Charter and is dependent on its donor states for largely project-based funding. While the IOM is involved in the “movement of migrants”, it does not have a mandate to empower or protect migrant workers, and its Constitution makes no reference to the labour or human rights of migrants.³³ Even with this brief

Refugees” (2019), 57:6 *International Migration* 243-257; Sara Rose Taylor, “The role of migrant networks in global migration governance and development” (2016), 5:3 *Migration and Development* 351-360.

³² United Nations High Commissioner for Refugees, *Refugee Protection and Human Trafficking: Selected Legal Reference Materials*, 1st ed. (Geneva: December 2008) at 11-12

³³ International Organization for Migration, *Constitution*, Article 1; United Nations General Assembly, *Agreement concerning the Relationship between the United Nations and the International Organization for Migration*, 8 July 2016, UNGA 70th Session, Agenda item 175, A/70/976; Megan Bradley, “Joining the UN Family? Explaining the

canvas of institutions, it is easy to see how gaps and tensions emerge and how a holistic focus on empowering low-wage migrant workers and protecting their rights is absent.

C. Situating the Present Research

This report is the first in a series of research reports to be produced by KNOMAD's Thematic Working Group on Migrant Rights and Integration in Host Communities which examine whether, how, and to what extent different strategies could operate within a rights-based framework to empower migrant workers labouring in low-wage work. Cumulatively, the research series aims to identify effective state-based and non-state-based strategies to empower migrant workers through labour inspection, rights enforcement and access to justice. It proposes macro-level reforms and practices that can enhance protection for migrant workers or empower migrant workers to combat their precariousness. As the introductory instalment in the series, this report outlines the main global rights-based normative frameworks. It then undertakes a literature review and comparative analysis of migrant workers' experiences in Canada, Germany, Malaysia, Qatar and South Africa to identify the underlying dynamics that create migrant workers' baseline precarity and to identify general strategies to empower migrant workers. To the extent that each country has distinct labour migration regimes for workers performing work that is labelled "high skilled" or "low skilled", the analysis focuses on the circumstances of migrant workers – documented and undocumented – labouring in sectors with work labelled "low skilled" that have low pay.

Evolution of IOM-UN Relations" (2021), 27 *Global Governance* 251-274; Miriam Cullen, "The IOM's New Status and its Role under the Global Compact for Safe, Orderly and Regular Migration: Pause for Thought", *European Journal of International Law* (blog post: 29 March 2019)

These five countries were selected for comparison because they are located in five different geographic regions; are countries in which labour is performed by large numbers of migrant workers; and are countries to which migrant workers arrive through a mix of south-to-south and south-to-north migration flows. Germany is the country of labour for the world's second largest population of migrant workers; Canada ranks eighth; South Africa, fifteenth; and Malaysia, eighteenth.³⁴ Meanwhile, Qatar has the highest percentage of migrant workers relative to local population in the world. In Qatar, 95% of workers are migrant workers with temporary status in the country.³⁵

This overview report maps broad issues of concern that drive migrant workers precarity. As such, it sets the context for the reports to follow which will provide deeper analysis of mechanisms and strategies through which migrant workers could enforce their labour rights and human rights. Part II of this report briefly identifies the rights-based framework articulated in UN and ILO instruments which pertain to labour migration. Part III analyzes how the multiple dimensions of migrant workers' precarity pose structural impediments that disempower migrant workers. Part IV identifies broad strategies that can support migrant workers' empowerment. Part V offers concluding comments, including with respect to the impact of the COVID-19 pandemic. Ultimately, the research reveals that across very different countries, economies and legal systems, strikingly common patterns of structural inequality and exploitative behaviour deny migrant workers' secure protection of their labour rights and facilitate systemic discrimination, abuse and widespread rights violations. This report seeks to account for why this is so.

³⁴ International Organization for Migration, *World Migration Report 2020* (Geneva, IOM 2019) at 26

³⁵ As of March 2019, migrant workers make up over 89% of the total population in Qatar and 95% of all workers: Qatar, Planning and Statistics Authority, *Labor Force Survey: The first quarter (January – March)*, 2019 at 12-13

II. A RIGHTS-BASED AND NORMATIVE FRAMEWORK FOR PROTECTING MIGRANT WORKERS

In the absence of a singular rights-based framework that applies to labour migration, this report focuses on UN and ILO instruments. By virtue of being global in application, these UN and ILO instruments create a common reference point which facilitates comparative analysis across the five widely dispersed geographic regions at issue. This Part briefly outlines the range of binding international instruments,³⁶ as well as some key non-binding frameworks which identify normative principles, guidelines and objectives that encourage state and business actors on an arc towards progressive realization of those rights. More detailed consideration of specific rights is integrated into Parts III and IV.

A. Rights-Based Framework of Binding International Instruments

Migrant workers are protected under the major UN and ILO instruments that apply to all persons and all workers. They are entitled to the full range of rights and freedoms in the *Universal Declaration of Human Rights* which are guaranteed to “all members of the human family”, “without distinction of any kind, such as ... national or social origin”.³⁷ They are similarly protected under the UN’s nine core human rights instruments³⁸ and associated protocols which guarantee civil, political, economic, social and cultural rights;³⁹

³⁶ States are held accountable for compliance with each instrument either through complaints that are adjudicated by dedicated committees or through proactive monitoring via periodic reviews and mandatory reporting to dedicated committees.

³⁷ *Universal Declaration of Human Rights*, 10 December 1948, UNGA, 217 A (III), Preamble, Articles 1 and 2

³⁸ The *Migrant Workers Convention* is addressed below with the other specifically migrant-focused instruments.

³⁹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entry into force 3 January 1976) [ICESCR]; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 5 March 2009, A/RES/63/117; *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Second Optional Protocol to the International*

commit states to eliminate torture,⁴⁰ enforced disappearances,⁴¹ and discrimination based on race and sex;⁴² and commit states to protect the rights of children⁴³ and people with disabilities.⁴⁴

Meanwhile, the ILO's 1919 Constitution has identified "protection of the interests of workers when employed in countries other than their own" as a core part of its mandate since its founding.⁴⁵ Migrant workers are protected under the ILO's eight Core Conventions that set out universal rights in relation to freedom of association and the effective recognition of the right to collective bargaining;⁴⁶ the elimination of forced or compulsory labour;⁴⁷ the abolition of child labour;⁴⁸ and the elimination of discrimination in

Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 15 December 1989, A/RES/44/128 (entered into force 11 July 1991)

⁴⁰ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force) [CAT]; *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199 (entered into force 22 June 2006)

⁴¹ *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006 (entered into force 23 December 2010) [CPED]

⁴² *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) [CERD]; *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [CEDAW]; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 6 October 1999, 2131 UNTS 83 (entered into force 22 December 2000)

⁴³ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [CRC]; *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000 (entered into force 12 February 2002); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263 (entered into force 18 January 2002); *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, adopted by the Human Rights Council, 14 July 2011, A/HRC/RES/17/18 (entered into force 14 July 2011)

⁴⁴ *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/RES/61/106 (entered into force 3 May 2008) [CRPD]; *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex II (entered into force 3 May 2008)

⁴⁵ ILO, *Constitution of the International Labour Organisation (ILO)*, 1 April 1919 at Preamble

⁴⁶ ILO C87, *Freedom of Association and Protection of the Right to Organise Convention*, 9 July 1948 (entered into force 9 July 1948); ILO C98, *Right to Organise and Collective Bargaining Convention*, 1 July 1949 (entered into force 18 July 1951)

⁴⁷ ILO C29, *Forced Labour Convention*, 28 June 1930 (entered into force 1 May 1932); ILO C105, *Abolition of Forced Labour Convention*, 25 June 1957 (entered into force 17 January 1959)

⁴⁸ ILO C138, *Minimum Age Convention*, 26 June 1973 (entered into force 19 June 1976); ILO C182, *Worst Forms of Child Labour Convention*, 17 June 1999 (entered into force 19 November 2000).

respect of employment and occupation.⁴⁹ Under the 1998 ILO *Declaration on the Fundamental Principles and Rights at Work*, even if states have not ratified these conventions, all ILO Member States have “an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith” the principles contained in those core instruments.⁵⁰

Three international Conventions focus specifically on migrant workers and migration for employment: ILO Convention 97 on *Migration for Employment*,⁵¹ ILO Convention 143, the *Migrant Workers (Supplementary Provisions) Convention*,⁵² and the UN *International Convention on the Protection of the Rights of Migrant Workers and Members of their Families*.⁵³ These instruments articulate rights that apply throughout workers’ migration journey from “preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.”⁵⁴ Under these instruments, migrants have rights to mobility, the right to leave their state of origin or state of labour, as well as protection against collective expulsion of migrants;⁵⁵ rights against unauthorized confiscation of their identity documents, documents authorizing residency in the state of labour, and work permits;⁵⁶ and access to consular and diplomatic authorities.⁵⁷ They are entitled to terms and conditions of work – including pay, overtime,

⁴⁹ ILO C100, *Equal Remuneration Convention*, 29 June 1951 (entered into force 23 May 1953); ILO C111, *Discrimination (Employment and Occupation) Convention*, 25 June 1958 (entered into force 15 June 1960)

⁵⁰ ILO *Declaration on the Fundamental Principles and Rights at Work*, 18 June 1998, ILC 86th Session at Article 2.

⁵¹ ILO C97, *Migration for Employment Convention (Revised)*, 1 July 1949 (entered into force 22 January 1952)

⁵² ILO C143, *Migrant Workers (Supplementary Provisions) Convention*, 24 June 1975 (entered into force 9 December 1978)

⁵³ *Migrant Workers Convention*, above note 3

⁵⁴ *Migrant Worker Convention*, Article 1

⁵⁵ *Migrant Worker Convention*, Articles 8 and 22

⁵⁶ *Migrant Worker Convention*, Article 21

⁵⁷ *Migrant Worker Convention*, Article 23

hours of work, weekly rest, holidays with pay, health and safety protections – that are not less favourable than those which apply to nationals *regardless of any irregularity in their migration status*.⁵⁸ They are entitled to social security, access to a wide range of social rights, and state efforts to facilitate family reunification.⁵⁹

In addition, migrant workers are protected under the broad range of standards on working conditions, occupational health and safety and social security adopted by the ILO. Unless an ILO Convention expressly excludes migrant workers, they are entitled to the same protections and rights as the nationals of the country where they labour.⁶⁰ Among these generally applicable conventions, three have particular relevance to migrant workers.

First, Convention 181, the *Private Employment Agencies Convention, 1997* applies with respect to agencies that operate nationally or transnationally to match offers and applications for employment, to employ workers “with a view to making them available to a third party”, or to engage in any other services related to job seeking.⁶¹ It requires Member States to regulate the operation of private employment agencies through a system of licensing or certification accompanied by periodic reviews, and to ensure that private employment agencies “shall not charge directly or indirectly, in whole or in part, any fees or costs to workers.”⁶² It requires that private employment agencies not deny rights to freedom of association and bargain collectively, not discriminate, and not use or

⁵⁸ *Migrant Worker Convention*, Articles 25, 54, 55; *C97 - Migration for Employment Convention*, Article 6; *C143 - Migrant Workers (Supplementary Provisions) Convention*

⁵⁹ *Migrant Worker Convention*, Articles 27-31, 43, 44

⁶⁰ ILO, *International labour migration: A rights-based approach*, above note 2 at 120.

⁶¹ ILO C181, *Convention Concerning Private Employment Agencies*, 19 June 1997 (entered into force 19 January 1997), Article 1

⁶² C181, *Private Employment Agencies Convention*, Articles 3(2), 7(1), 13.

supply child labour to employers.⁶³ It requires that Member States take necessary measures to ensure adequate protection for and clarity of responsibility as between the employment agency and employer for issues including minimum wages, working times and other working conditions, access to training, occupational health and safety, and a range of social security benefits.⁶⁴ Member States are also required to “adopt all necessary and appropriate measures ... to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies” and “shall ensure that adequate machinery and procedures ... exist for the investigation of complaints, alleged abuses and fraudulent practices.”⁶⁵

Second, Convention 189, the *Domestic Workers Convention, 2011* was adopted in recognition that “domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination ... and to other abuses of human rights.”⁶⁶ The Convention commits Member States to take measures to ensure that domestic workers enjoy freedom of association, the right to bargain collectively and protection from abuse, harassment, and violence; and that national laws move towards “ensuring equal treatment between domestic workers and workers generally” with respect to minimum wage, hours of work, overtime, daily and weekly periods of rest, and annual leave.⁶⁷ Recognizing that much of domestic work takes place in informal relationships, the Convention requires states, where possible, to ensure domestic workers have easily understood written contracts and/or that their conditions of work be subject to bilateral

⁶³ C181, *Private Employment Agencies Convention*, Articles 4, 5, and 9

⁶⁴ C181, *Private Employment Agencies Convention*, Articles 11 and 12

⁶⁵ C181, *Private Employment Agencies Convention*, Articles 8 and 10

⁶⁶ ILO C189, *Domestic Workers Convention, 2011*, 15 June 2011 (entered into force 5 September 2013), Preamble

⁶⁷ C189, *Domestic Workers Convention*, Articles 3, 4, 5, 6, 10 and 11

agreements with their states of origin.⁶⁸ It reiterates the need for Member States to ensure that migrant domestic workers are not subject to abuses or fraudulent practices by private employment agencies, and that States “shall develop and implement measures for labour inspection, enforcement and penalties with due regard for the special characteristic of domestic work” and establish “effective and accessible complaint mechanisms.”⁶⁹

Third, the ILO’s newest Convention 190, the *Violence and Harassment Convention, 2019* recognizes “the right of everyone to a world of work free from violence and harassment”, including gender-based violence, and requires Member States to adopt “an inclusive, integrated and gender-responsive approach” to eliminating violence and harassment at work.⁷⁰ The Convention in particular recognizes “the important role of public authorities in the case of informal economy workers”, and requires States to take measures to prevent violence and harassment in informal work and other sectors where workers are particularly at risk.⁷¹ In addition to monitoring and enforcing national laws regarding violence and harassment, and ensuring accessible and effective complaint mechanisms and remedies, the Convention requires States to take measures to “ensure that labour inspectorates ... are empowered to deal with violence and harassment in the world of work, including by issuing orders requiring measures with immediate executory force, and orders to stop work in cases of an imminent danger to life, health or safety.”⁷²

All of the above binding instruments that articulate substantive rights equally mandate that states ensure those rights are effectively enforced by establishing a

⁶⁸ C189, *Domestic Workers Convention*, Articles 7, 8, and 15

⁶⁹ C189, *Domestic Workers Convention*, Articles 15, 16 and 17

⁷⁰ ILO C190, *Violence and Harassment Convention, 2019*, 21 June 2019 (entry into force 25 June 2021), Articles 4, 5, and 6

⁷¹ C190, *Violence and Harassment Convention*, Articles 7, 8 and 9

⁷² C190, *Violence and Harassment Convention*, Article 10

functioning system of labour inspection.⁷³ Under the *Universal Declaration of Human Rights* “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted [them] by the constitution or by law.”⁷⁴ Further, “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of [their] rights”.⁷⁵ *Labour Inspection Convention, 1947 (No. 81)* and the related 1995 Protocol most directly articulate states’ responsibility to establish and maintain a system of labour inspection to enforce legal protections regarding conditions of work and protection of workers in industrial, commercial and non-commercial workplaces.⁷⁶ Convention No. 129 and Recommendations No. 82 and No. 13 set out corresponding duties to establish labour inspection systems in agriculture and in mining and transportation.⁷⁷ In addition, where particularly marginalized workers like migrant domestic workers are excluded from national labour protections, states are directed to develop mechanisms by which to monitor their conditions of work and to “strengthen labour inspection services to carry out

⁷³ Effective labour inspection has been a priority responsibility for states since the Treaty of Versailles which established the ILO: Committee of Experts on the Application of Conventions and Recommendations, *Labour Inspection: General survey of the labour inspection conventions*, 2006, ILC 95th Session, Report III, Part 1B at para. 3; Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the Right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 7 April 2016, E/C.12/GC/23 at para. 54; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, 28 August 2013, CMW/C/GC/2 at para. 63; CMW, *Concluding observations on the initial report of Turkey* (31 May 2016), CMW/C/TUR/CO/1 at para. 58(c) and (d).

⁷⁴ *Universal Declaration of Human Rights*, Article 8

⁷⁵ *Universal Declaration of Human Rights*, Article 10

⁷⁶ ILO C81 - *Labour Inspection Convention, 1947*, 11 July 1947 (entered into force 7 April 1950) at Articles 1, 3, 22-24; ILO P81 - *Protocol of 1995 to the Labour Inspection Convention, 1947*, 22 June 1995, ILC 82nd Session, (entered into force 9 June 1998)

⁷⁷ ILO C129 - *Labour Inspection (Agriculture) Convention, 1969*, 25 June 1969 (entered into force 19 January 1972) ILO R133 - *Recommendation 133, Labour Inspection (Agriculture) Recommendation, 1969*, International Labour Conference, 53rd Session, 25 June 1969, and R82 – *Recommendation 21, Labour Inspection (Mining and Transport) Recommendation, 1947*, International Labour Conference, 30th Session, 11 July 1947

such monitoring and to receive, investigate and address complaints of alleged violations".⁷⁸

B. Non-Binding International Normative Frameworks

The UN and ILO binding rights-based framework is supplemented by non-binding normative instruments, including a lengthy inventory of non-binding ILO Recommendations and operational guidelines. This section focuses on two ILO frameworks and one UN Global Compact which provide practical guidance on how states can meet their obligations under the binding conventions.

Two comprehensive non-binding ILO frameworks that address key concerns relating to migrant labour are the 2006 *ILO Multilateral Framework on Labour Migration*⁷⁹ and the ILO's 2019 *General principles and operational guidelines for fair recruitment*.⁸⁰ These non-binding documents articulate principles and operational guidelines which encourage states to empower and protect migrant workers by taking various actions, including to:

- (a) develop national policies regarding labour migration and engage in multilateral cooperation to promote policies of managed migration for employment purposes that expand channels for regular migration and decrease undocumented migration;⁸¹

⁷⁸ CMW, *General Comment No. 1 on migrant domestic workers*, 23 February 2011, CWM/C/GC/1

⁷⁹ See above, note 11.

⁸⁰ ILO, *General principles and operational guidelines for fair recruitment and Definition of recruitment fees and related costs* (ILO, Geneva: 2019)

⁸¹ *ILO Multilateral Framework on Migration*, above note 11 at Principles 2, 4, 5 and 11

- (b) develop “coherent, comprehensive, consistent and transparent policies to effectively manage labour migration” in a way that benefits migrant workers, their families, countries of origin and countries where labour is performed;⁸²
- (c) manage labour migration in a way that promotes “decent and productive work in conditions of freedom, equity, security and human dignity” for migrant workers⁸³ and on terms of equality with national workers;⁸⁴
- (d) prevent and protect against abusive recruitment and migration practices;⁸⁵
- (e) promote and protect the human rights and labour rights of all migrant workers regardless of their status on terms that are guided by relevant international and regional instruments;⁸⁶
- (f) adopt national measures and enter into bilateral, regional or multilateral agreements to ensure that migrant workers have access to social security, health care and other social rights;⁸⁷
- (g) adopt measures that promote the social integration of migrant workers in the states where they labour, and that prevent discrimination, racism and xenophobia directed against migration workers;⁸⁸ and

⁸² *ILO Multilateral Framework on Migration*, above note 11 at Principle 4, Guideline 4.1, Principle 15, Guidelines 15.1-15.10

⁸³ *ILO Multilateral Framework on Migration*, above note 11 at Principle 1, Guidelines 1.1-1.2;

⁸⁴ *ILO Multilateral Framework on Migration*, above note 11 at Principle 9(b), Guidelines 9.3, 9.4, 9.12

⁸⁵ ILO, *General principles and operational guidelines for fair recruitment*, above note 80 at 12-18; *ILO Multilateral Framework on Migration*, above note 11 at Principle 11, Guidelines 11.1-11, Principle 12, Guidelines 12.1, Principle 13, Guidelines 13.1-13.8, Guideline 8.4.2, Principle 9(a) and (b), Guidelines 10.5, 10.6

⁸⁶ *ILO Multilateral Framework on Migration*, above note 11 at Principle 8, Guidelines 4.4, 8.1-8.4.4, 9.2, 9.9, 14.4, Principle 10

⁸⁷ *ILO Multilateral Framework on Migration*, above note 11 at Principle 9(c), Guidelines 9.3-9.5, 9.8-9.12

⁸⁸ *ILO Multilateral Framework on Migration*, above note 11 at Principle 14, Guidelines 14.1-14.3

- (h) establish effective, appropriately resourced, trained and competent labour inspectorates that “extend[] labour inspection to all workplaces where migrant workers are employed”.⁸⁹

These non-binding ILO frameworks recognize the breadth of actors beyond national states which are critical to building a culture of compliance with the normative rights-based framework. They underscore that “social dialogue is essential to the development of sound labour migration policy and should be promoted and implemented.”⁹⁰ To this end, they strongly encourage social dialogue between states, social partners (workers’ and employers’ organizations), civil society organizations and migrant worker associations in developing the international and national policies and measures outlined above.⁹¹

Following several years of regional and global social dialogue, including with civil society organizations and migrant worker associations, in 2018 the UN General Assembly adopted the *Global Compact on Safe, Orderly, and Regular Migration*.⁹² The Global Compact is a non-binding framework for international cooperation which expresses the States’ “collective commitment to improving cooperation on international migration” and

⁸⁹ *ILO Multilateral Framework on Migration*, above note 11 at Principle 10, Guidelines 10.1-10.11

⁹⁰ *ILO Multilateral Framework on Migration*, above note 11 at 13

⁹¹ *ILO Multilateral Framework on Migration*, above note 11, Principle 2, Guideline 2.2, Principle 6, Guidelines 6.1-6.5, Principle 7, Guidelines 7.1-7.2, Guideline 9.14, Principle 11, Guideline 12.4, Principle 14. The 2012 *Dhaka Principles for Migration with Dignity* which are based on the UN *Guiding Principles on Business and Human Rights* are one outcome of social dialogue. They were adopted by the Institute for Human Rights and Business following consultations and support from business, governments, trade unions and civil society. The *Dhaka Principles* identify three pillars for migration with dignity: (1) States’ responsibility to protect against human rights abuses by non-state actors; (2) corporations’ responsibility to respect human rights; and (3) migrant workers’ ability to access a remedy when their rights are violated: Institute for Human Rights and Business, *Dhaka Principles for Migration with Dignity* (2014), online: <https://www.ihrb.org/dhaka-principles/> (accessed 29 May 2020); United Nations, Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights* (New York, 2011)

⁹² *Global Compact on Safe, Orderly, and Regular Migration*, adopted by the UN General Assembly on 19 December 2018, 73rd Session, Agenda items 14 and 119, A/RES/73/195

“sets out [States’] common understanding, shared responsibilities and unity of purpose regarding migration, making it work for all.”⁹³ It reiterates States’ commitment to the UN, ILO and regional instruments that protect the human rights of migrants and articulates its ambition, in part, as being:

...to mitigate the adverse drivers and structural factors that hinder people from building and maintaining sustainable livelihoods in their countries of origin, and so compel them to seek a future elsewhere. It intends to reduce the risks and vulnerabilities migrants face at different stages of migration by respecting, protecting and fulfilling their human rights and providing them with care and assistance.⁹⁴

To this end, the Global Compact identifies ten cross-cutting and interdependent guiding principles. It states that migration must place individuals at its core by being “people-centred”, “gender-responsive” and “child-sensitive”.⁹⁵ While reaffirming the importance of national sovereignty, the Compact requires that action on migration must involve “international, regional and bilateral cooperation and dialogue” and recognizes that adherence to the rule of law and due process demands that States, public and private entities and individuals be accountable “to laws that are publicly promulgated, equally enforced and independently adjudicated, and are consistent with international law”.⁹⁶ Under the Compact, migration must support sustainable development and “ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle”, including by eliminating all forms of discrimination.⁹⁷ The Global Compact recognizes that “to develop and implement effective migration policies and practices, a whole-of-government

⁹³ *Global Compact on Safe, Orderly, and Regular Migration*, above note 92 at Preamble and para. 7, 9.

⁹⁴ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 2 and 12

⁹⁵ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 15(a), (g) and (h)

⁹⁶ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 15(b), (c) and (d)

⁹⁷ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 15(e) and (f)

approach is needed” and that a “whole-of-society approach” must promote broad multistakeholder engagement.⁹⁸

The Compact then sets out a cooperative framework for action which identifies 23 objectives. Each objective articulates further commitments and lists practical actions and best practices from which States will draw to realize the objective. Of particular relevance to this report, the Global Compact sets out objectives which aim to “facilitate fair and ethical recruitment and safeguard conditions that ensure decent work”; “address and reduce vulnerabilities in migration”; “prevent, combat and eradicate trafficking in persons in the context of international migration”; “provide access to basic services for migrants”; “empower migrants and societies to realize full inclusion and social cohesion”; and “eliminate all forms of discrimination”.⁹⁹ These objectives and actions will be addressed in more detail in Part IV.

C. Limitations to and Utility of Analysis Using a Rights-Based Framework

Cumulatively, the binding rights instruments and the non-binding frameworks address all the dimensions from Vosko’s model for mapping practices that create conditions of security or insecurity for migrant workers. They do this, on one hand, by articulating that migrant workers are entitled to conditions of work that are not below those of national workers, and, on the other hand, by proactively establishing standards and principles that target and condemn known harmful practices by which migrant workers are marginalized.

⁹⁸ *Global Compact on Safe, Orderly, and Regular Migration*, above note 92, at para. 15(i) and (j).

⁹⁹ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 16

It is undeniable, however, that the impact of the rights-based framework outlined above is severely hampered because most states have not ratified the binding conventions which set out the substantive labour norms. The low rate of ratification is particularly notable for the instruments specifically pertaining to migrant worker rights. As of November 2021, the UN's *Migrant Workers Convention* has only been ratified by 56 states, most of which are primarily states of origin rather than states of labour for migrant workers. None of the five countries profiled in this report have ratified it. ILO Convention 97 on *Migrating for Employment* has been ratified by only 53 states and the supplementary Convention 143 by only 28. Meanwhile, ILO Convention 181 regarding *Private Employment Agencies* has been ratified by 37 states; Convention 189 on the rights of domestic workers by 35; and Convention 190 on violence and harassment at work by only 9.¹⁰⁰ Political will to ratify these instruments, particularly in states of labour, is lacking. The ILO Committee of Experts on the Application of Conventions and Recommendations ("CEACR") noted that while a small number of countries were considering whether to ratify one or more Conventions, most governments stated that "ratification was not currently foreseen or intended."¹⁰¹ Despite hosting large populations of migrant workers, the countries of focus in this research have a disturbingly weak record on ratifying these five ILO conventions. Germany has ratified Conventions 97 and 189; South Africa has ratified Convention 189. The others have ratified none.¹⁰² Thus the ILO Committee of Experts is left to use moral suasion to seek compliance, exhorting that "even where States have not ratified the relevant Conventions, the Committee urges them to

¹⁰⁰ The low rate of ratifications for Convention 190 is due in part to its very recent adoption in 2019.

¹⁰¹ ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), *Promoting Fair Migration: General survey concerning the migrant worker instruments*, 2016, ILC 105th Session, Report III, Part 1B at para. 565-576

¹⁰² Malaysia's federal state of Sabah has ratified Convention 97 but the rest of Malaysia has not.

ensure respect for the rights of all migrant workers in keeping with international standards.”¹⁰³

By contrast, Convention 81 on *Labour Inspection* has been ratified by 148 states, including all five countries that are profiled. This provides a direct route for ILO oversight of states’ compliance with the binding norms to ensure effective rights enforcement for all workers, including migrant workers. Norms for labour inspection, then, offer a potentially more meaningful point of leverage for compliance within the rights-based framework. The efficacy of state-based labour inspectorates in empowering migrant workers is the subject of the second report in this series.

Beyond the broadly-ratified Convention 81, the panoply of binding labour standards in the rights-based framework, even if not ratified, have utility in analysis and advocacy because they represent a tripartite consensus on baseline protections that must be afforded to all workers – national and migrant workers alike. By providing a comprehensive normative framework on rights at work that serves as a counterpoint to unrestrained economic exploitation, the rights-based framework takes on particular significance as a foundation for social dialogue between states, social partners, civil society organizations and migrant organizations at national, regional and international levels in advocating for progressive realization of those rights.

¹⁰³ CEACR General Survey, *Promoting Fair Migration*, above note 101 at para. 577

III. MIGRANT WORKERS' PRECARIETY: STRUCTURAL IMPEDIMENTS TO RIGHTS ENFORCEMENT

To develop effective strategies to empower migrant workers, it is necessary to first examine the structural barriers that create the workers' precarity. Using the five dimensions of precarity discussed in Part I, the comparative analysis below reveals remarkably consistent patterns across the five countries studied.

A. Status of Employment

An initial marker of precarity is whether a migrant is remunerated in the context of formal or informal work relationships or through self-employment. Under guidelines adopted by the International Labour Conference for the purposes of keeping statistics on informal work, work is considered to be "informal" if the

employment relationship is, in law or in practice, not subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits (advance notice of dismissal, severance pay, paid annual or sick leave, etc.) for reasons such as: nondeclaration of the jobs or the employees; casual jobs or jobs of a limited short duration; jobs with hours of work or wages below a specified threshold (e.g. for social security contributions); employment by unincorporated enterprises or by persons in households; jobs where the employee's place of work is outside the premises of the employer's enterprise (e.g. outworkers without employment contract); or jobs for which labour regulations are not applied, not enforced, or not complied with for any other reason.¹⁰⁴

While migrant and national workers in all states encounter combinations of all these experiences of informality, this section focuses on informality related to workers' undocumented status. That is, to what extent do workers lack the state-required residency

¹⁰⁴ Ralf Hussmanns, *Statistical definition of informal employment: Guidelines endorsed by the Seventeenth International Conference of Labour Statisticians (2003)* (ILO Bureau of Statistics, Geneva: 2004) at 6. See also ILO, Recommendation 204, *Transition from the Informal to the Formal Economy Recommendation, 2015*, 12 June 2015, ILC 104th Session at Article 2. The Guidelines and ILO R204 also address informality from the perspective of the economic unit for which labour is performed which is beyond the scope of this overview report.

or work permits for migrant labour, or work or reside in conditions which are inconsistent with their permits. It must be recognized that the boundary between documented and undocumented status is highly porous. Individual workers move back and forth across that boundary, sometimes repeatedly, due to gaps in the national migration policies, due to employer or recruiter manipulation, or through their own agency. While national workers may work in informal contexts, the risk of precarity is heightened for migrant workers whose undocumented labour leaves them open to detention, deportation and/or criminal charges. Employers also effectively leverage workers' undocumented status to set terms and conditions of work below legal minimums. Moreover, by using the threat of reporting them to migration authorities, employers deter undocumented migrant workers from exercising their right to unionize and from enforcing the workplace and social protections available under national law.

Unlike the other countries of focus, in South Africa “there is a lack of a proactive management of international migration” because, as a government White Paper notes, the country “has not yet built consensus at policy, legislative and strategic levels on how to manage international migration for development.”¹⁰⁵ While high-wage workers are welcomed as making a valuable economic contribution, low-wage migrant workers are viewed as social, economic and security threats and have been targets of xenophobic violence.¹⁰⁶ In this political and legal context, there is “very little opportunity or access for

¹⁰⁵ South Africa, *White Paper on International Migration for South Africa* (Department of Home Affairs, July 2017) at 2

¹⁰⁶ Human Rights Watch, *World Report 2020: Events of 2019* (USA: Human Rights Watch, 2020) at 510-513

low skilled migrants to enter and work legally in the country”¹⁰⁷ with the result that an estimated 1 to 2 million low wage migrant workers in South Africa are undocumented.¹⁰⁸

Meanwhile, Malaysia does have a formal, if *ad hoc*, labour migration policy which for many years has featured successive, frequently changing short-term plans. This instability has produced a large number of undocumented workers which in turn has generated sequential efforts to regularize workers’ status as temporary migrant workers; to grant “amnesty” to allow for voluntary deportations; or to conduct targeted raids in sectors with undocumented workers.¹⁰⁹ The influx of migrant workers, however, continues to be portrayed as a security threat with the result that “the Government has typically formulated labour migration policy from the standpoint of controlling immigration and maintaining public safety rather than labour administration.”¹¹⁰

By contrast, Qatar, Germany and Canada have each integrated labour migration as an established, and growing, element of their economic policy, Qatar most extremely so as citizens make up only 5 percent of the national labour force.¹¹¹

Formal labour migration in Canada, Germany, Qatar and Malaysia is driven by employer demand and is structured through highly regulated systems of circular migration. These labour migration programs are designed to bring workers into the formal

¹⁰⁷ Zaheera Jinnah, “Examining Labor Migration Policy in South Africa” (23 October 2015) *World Policy*. Online at: <http://worldpolicy.org/2015/10/20/examining-labor-migration-policy-in-south-africa/> (accessed 30 May 2020)

¹⁰⁸ Sarah Meny-Gibert and Sintha Chiumia, “FACT SHEET: Where do South Africa’s international migrants come from?”, *Africa Check*, 16 August 2016.

¹⁰⁹ Joseph Trawicki Anderson, “Managing labour migration in Malaysia: foreign workers and the challenges of ‘control’ beyond liberal democracies” (2021), 42:1 *Third World Quarterly* 86-104 at 92-94; Benjamin Harkins, *Review of labour migration policy in Malaysia* (Bangkok: ILO, 2016) at 2

¹¹⁰ Harkins, *Review of labour migration policy in Malaysia*, above note 109 at 2-3, 10-11

¹¹¹ Author’s calculations from Qatar, *Labor Force Survey 2019*, above note 35 at Table 2. This is down from 2013 when Qatari citizens made up 6% of the labour force: Ray Jureidini, “Irregular Migration in Qatar: The Role of Legislation, Policies, and Practices” in *Skilful Survivals: Irregular Migration to the Gulf*, Philippe Fargues and Nasra M. Shah, eds. (Geneva: Gulf Research Center Foundation, 2017) 135-156 at 136

economy, in formal employment relationships, on terms and conditions of work that accord with national economic policy. Nevertheless, each state has significant populations of undocumented migrants.

The routes by which migrant workers become undocumented are very similar in all four states and occur at all stages of the migration journey.¹¹² Workers may arrive without documented status, or may arrive through one documented route (such as travel or education) and work in a way that is inconsistent with that authorization. Workers may arrive through the formal routes for labour migration but on arrival may be denied a work permit for failing the mandatory medical exam (Malaysia);¹¹³ may find that their arranged job is not available and they need to find other work;¹¹⁴ may be placed by employers in jobs inconsistent with the work permits; or may exercise their agency to enter a different kind of work than that authorized. Workers who were documented can become undocumented if employers fail to renew their residency or work permits; if migrants do work that is inconsistent with the restrictions on their work permit; if migrants leave an employer,¹¹⁵ and perform work for another without or before receiving a subsequent valid

¹¹² Jureidini, “Irregular Migration in Qatar”, above note 111 at 138-140; Anderson, “Managing labour migration in Malaysia”, above note 101; Fay Faraday, *Profiting from the Precarious: How recruitment practices exploit migrant workers* (Toronto: Metcalf Foundation, 2014); Kadri Soova and Michele LeVoy (*Undocumented Migrants and the Europe 2020 Strategy: Making Social Inclusion a Reality for All Migrants in Germany* (Brussels: PICUM, 2016); Lilana Keith and Michele LeVoy, *A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice* (Brussels: PICUM, 2020).

¹¹³ Anderson, “Managing labour migration in Malaysia”, above note 101 at 90, 92

¹¹⁴ Among domestic workers in Canada, this practice is common enough that it has its own name: “release on arrival”: Faraday, *Profiting from the Precarious* above note 112 at 38-39

¹¹⁵ While this is referred to as “absconding” in Qatar and Malaysia, it is a practice that occurs in all four countries, particularly in order to leave abusive employment.

work permit;¹¹⁶ or if an employer loses their authorization to employ migrant workers.¹¹⁷ In Qatar, trading in “free visas” which are unattached to a job or employer is also a “major” route into undocumented status.¹¹⁸

Numerical estimates of undocumented workers are unavailable for Qatar as the issue has only recently been studied. Estimates are available of the number of migrant workers in Malaysia, but they vary widely both for documented and undocumented workers. An estimate prepared by the World Bank calculates that there are 2.96 to 3.26 million migrant workers in Malaysia, of whom 1.23 to 1.46 million (38-49%) are undocumented.¹¹⁹ In addition, work in Malaysia is highly informalized through complex layers of outsourcing and subcontracting such that even “identifying the employer who bears legal responsibility often proves a daunting task”.¹²⁰ Germany’s labour force is estimated to include 500,000 to 800,000 migrants with undocumented status,¹²¹ and Canada’s, 250,000 to 500,000.¹²² While Canada’s estimate of undocumented workers is

¹¹⁶ In Canada, if a worker leaves the job for which they have a permit, to work legally, they must get another government authorized work permit. This requires that they find an employer who is willing to apply for government authorization to hire a migrant worker, only after which they can apply for a work permit. The entire process can take 9 months or more than a year with the result that many migrants must, out of necessity, work with undocumented status while waiting for a new permit.

¹¹⁷ Fay Faraday, *Canada’s Choice: Decent work or entrenched exploitation for Canada’s migrant workers* (Toronto: Metcalf Foundation, 2016) at 25-27

¹¹⁸ Jureidini, “Irregular Migration in Qatar”, above note 111 at 148-152

¹¹⁹ Wei San Loh, Kenneth Simler, Kershia Tan Wei, and Soonhwa Yi, *Malaysia: Estimating the Number of Foreign Workers* (Washington, DC: The World Bank, 2019) at 44. This report helpfully explains why there are such widely varying estimates and runs through multiple calculations using different source information.

¹²⁰ Harkins, *Review of labour migration policy in Malaysia*, above note 109 at p. 6

¹²¹ Phillip Connor and Jeffrey S. Passel, *Europe’s Unauthorized Immigrant Population Peaks in 2016, Then Levels Off* (Washington, D.C.: Pew Research Center, 2019) at 11

¹²² In 2009, a federal government committee reported an estimate of 80,000 to 500,000 undocumented workers: David Tilson, *Temporary Foreign Workers and Non-Status Workers*, Report of the Standing Committee on Citizenship and Immigration (May 2009), Canada, 40th Parliament, 2d Session at 47. Although this is recognized as a conservatively estimate, the most commonly cited figure at the time of writing is 200,000 to 500,000 undocumented workers, most of whom are located in Toronto, Montreal and Vancouver: Basia D. Ellis, “The production of irregular migration in Canada” (2015), 47:2 *Canadian Ethnic Studies* 93-112 at 94

the lowest of the five countries, those figures are equal to 31% to 62% of the documented migrant workers and international students with work permits in the country.¹²³

Ultimately, despite state migration policies that range from permissive to prohibitive, highly regulated to informal, all five states of focus have significant populations of undocumented people working in their labour markets. Moreover, through the COVID-19 pandemic, the number of migrants with undocumented status has increased as borders were closed to international travel, workplaces shut down, processing of visas and work permits halted entirely or slowed for extended periods of time, and many migrant workers, international students and undocumented workers lost their jobs and were ineligible to receive state-provided emergency income support.¹²⁴

B. Form of Employment

Migrant workers in sectors with low pay in all five countries face the same fundamental insecurity in the form of their employment. For all, their work is ultimately temporary. Even if the nature of work is enduring, the workers only have status to do it for a temporary period. All migrant labour in Qatar is “temporary”, even if it continues for years, as no foreign nationals can secure permanent status in the country. Migrant

¹²³ Author’s calculations based on the federal government’s Immigration, Refugees and Citizenship Canada statistics government of Canada Temporary Resident statistics for 2019. In that year, a total of 403,770 migrant workers and 401,185 international students (whose permits allow them to work on campus) were present in Canada. Figures from 2019 were used to avoid any distortion due to the COVID-19 pandemic: *Canada - Temporary Foreign Worker Program (TFWP) work permit holders by province/territory of intended destination, program and year in which permit(s) became effective, January 2015 - April 2021*; *Canada - International Mobility Program (IMP) work permit holders by province/territory of intended destination, program and year in which permit(s) became effective, January 2015 - April 2021*; and *Canada - Work permit holders for Humanitarian and Compassionate purposes by country of citizenship (2020 ranking) and year in which permit(s) became effective, January 2015 - April 2021* (all updated 30 April 2021).

¹²⁴ ILO Policy Brief, *Protecting migrant workers during the COVID-19 pandemic: Recommendations for Policy-makers and Constituents* (Geneva: ILO, April 2020); ILO and International Social Security Association, Policy Brief, *Social protection for migrant workers: A necessary response to the COVID-19 crisis* (Geneva: ILO, June 2020)

workers in the country are called “temporary contract workers.”¹²⁵ In the other four states, permanent immigration is focused on workers in “high skilled”, professional or managerial positions and there are scant opportunities for workers in low-wage jobs to secure permanent status.¹²⁶ The temporary status of migrants’ work is exponentially more precarious than temporary work by nationals because, for migrant workers, temporariness implicates the lawfulness of their presence in the country. Temporariness leaves them vulnerable to criminalization, detention, deportation and denial of an opportunity to return if they remain beyond their authorized time limit.

Many migrant workers in the countries studied also face heightened precarity because they do seasonal work. Canada and Germany in particular rely on migrants to do seasonal work in tourism, fairgrounds, hospitality, construction, food processing and, especially, agriculture.¹²⁷ Migrant agricultural workers make up 27% of agricultural labour across Canada and over 41% in Ontario, the province with the highest number of agricultural workers.¹²⁸ The majority enter Canada under the Seasonal Agricultural Worker

¹²⁵ Jureidini, “Irregular Migration in Qatar”, above note 111 at 138

¹²⁶ For Canada: Faraday, *Canada’s Choice*, above note 117 at 10-14, and 65-69. In Germany, the *Residence Act* in the version promulgated on 25 February 2008 (Federal Law Gazette I p. 162), most recently amended by Article 4b of the Act of 17 February 2020 (Federal Law Gazette I p. 166) focuses permanent immigration on categories of skilled workers, researchers and intra-company transfers. In Malaysia, investors, experts, professionals, spouses of Malaysian citizens and others who meet the immigration points system can apply for permanent residence: Immigration Department of Malaysia; Alice M. Nah, “Globalisation, Sovereignty and Immigration Control: The Hierarchy of Rights for Migrant Workers in Malaysia” (2012), 40:4 *Asian Journal of Social Science* 486-508 at 495-497. South Africa’s migration policy is in development following the 2017 White Paper, but a clear preference has been expressed for “attraction and retention of skilled international migrants and business persons who contribute positively to the economy”: South Africa, *White Paper on International Migration*, above note 105 at 34, 45-46. See also, then-Director-General of Home Affairs Mkuseli Apleni quoted in Kudakwashe P. Vanyoro, “Zimbabwean migrant domestic worker activism in South Africa”, *Migrating Out of Poverty Working Paper* 55 (Brighton, UK: University of Sussex, 2019) at pp. 8-9.

¹²⁷ Yuqian Lu, *The distribution of temporary foreign workers across industries in Canada* (Ottawa: Statistics Canada, 3 June 2020) at 3; Claudia Lechner, *Attracting and Protecting Seasonal Workers from Third Countries*, Working Paper 89 (Germany: Federal Office for Migration and Refugees, 2020) at 5

¹²⁸ Lu, *The distribution of temporary foreign workers across industries in Canada*, above note 127 at 3

Program on work permits which are valid for a maximum of eight months.¹²⁹ In Germany, there are nearly 300,000 seasonal agricultural workers, who make up over 90% of workers in vegetable production and 73% in fruit production.¹³⁰ Seasonal workers in Germany have work permits that are valid from 90 days to six months.¹³¹ Apart from the short term of their contracts, both groups of workers are dependent on individual employers to select them by name to return the following season, magnifying the already extreme power imbalance between migrant worker and employer. Employers' power to request workers by name is frequently used to "blacklist" workers from future seasons when employers consider them "troublemakers" for protesting poor working conditions or attempting to organize.¹³² Canada's and Germany's reliance on migrant labour in agriculture was underscored as, despite pandemic-driven border closings in 2020 and 2021, both countries made exceptions to open the border specifically to transport across thousands of migrant agricultural workers to secure the national food supply.¹³³ This has

¹²⁹ In 2019, a total of 72,158 migrant agricultural workers entered Canada; of these, 46,717 or 65% arrived under the Seasonal Agricultural Worker Program: Canada. Employment and Social Development Canada LMIA System statistics. *Number of temporary foreign worker (TFW) positions on positive Labour Market Impact Assessments (LMIAs) under the Primary Agriculture stream by province/territory*. The 8-month limit is embedded in the mandatory contracts under the Seasonal Agricultural Worker Program: *Contract for the Employment in Canada of Seasonal Agricultural Workers from Mexico - 2021 SAWP*, Article 2(a) online: https://www.canada.ca/content/dam/canada/employment-social-development/migration/documents/assets/portfolio/docs/en/foreign_workers/hire/seasonal_agricultural/documents/20201214-SAWPContract-Mexico-PDF-EN.pdf (accessed 4 July 2021) and *Contract for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers – 2021*, Article 2, online: https://www.canada.ca/content/dam/canada/employment-social-development/migration/documents/assets/portfolio/docs/en/foreign_workers/hire/seasonal_agricultural/documents/20201214-SAWPContract-Caribbean-PDF-EN.pdf (accessed 4 July 2021)

¹³⁰ Lechner, *Attracting and Protecting Seasonal Workers from Third Countries*, above note 127 at 15-16

¹³¹ Lechner, *Attracting and Protecting Seasonal Workers from Third Countries*, above note 127 at 18

¹³² Faraday, *Profiting from the Precarious*, above note 112 at 42-45; Philip Martin and Mark Miller, *Employer Sanctions: French, German and US Experiences* ILO International Migration Branch Working Paper #30 (Geneva: ILO 2000) at p. 26

¹³³ Kate Dubinski, "Canada lifts restrictions on foreign workers, including migrant farm labourers", *CBC News* (21 March 2020), online: <https://www.cbc.ca/news/canada/london/canada-lifts-travel-restrictions-for-foreign-workers-1.5505579> (accessed 4 July 2021); Brooklyn Currie, "Exemption allowing temporary foreign workers into Canada a relief for some employers", *CBC News*, (21 March 2020), online: <https://www.cbc.ca/news/canada/nova-scotia/temporary-foreign-workers-travel-exemption-reaction-1.5505659> (accessed 4 July 2021); "Germany relaxes

raised considerable concern as thousands of migrant agriculture workers in both countries have been infected with COVID-19 and a rising number have died.¹³⁴ In Canada, migrant agricultural workers report enduring abusive treatment in quarantine, including workers who were denied access to fresh air for the full 14 days of their quarantine; others who were quarantined with numerous workers in close quarters, some of whom had infections; and being denied sufficient or culturally appropriate food.¹³⁵ Moreover, the existing power imbalance migrant workers face was exacerbated as new problematic practices emerged during the pandemic. These included states of origin requiring workers to sign waivers relieving the state of any responsibility if they became infected with COVID-19; and employers requiring workers to sign waivers and preventing them from leaving the bunkhouse or the farm property when not working, even to go to the store or to send money home.¹³⁶ That has been compounded in 2021 by farm employers requiring migrant

restrictions on seasonal workers”, *EurActiv*, (10 June 2020), online: <https://www.euractiv.com/section/economy-jobs/news/germany-relaxes-restrictions-on-seasonal-workers/> (accessed 4 July 2021); Melissa Eddy, “Farm Workers Airlifted Into Germany Provide Solutions and Pose New Risks”, *New York Times* (18 May 2020), online: <https://www.nytimes.com/2020/05/18/world/europe/coronavirus-german-farms-migrant-workers-airlift.html> (accessed 4 July 2021)

¹³⁴ Migrant Workers Alliance for Change, *Unheeded Warnings: COVID-19 and Migrant Workers in Canada* (Toronto: MWAC, June 2020); Reuven R. Jhirad, *Deputy Chief Coroner’s Review: COVID-19 Related Deaths of Temporary Foreign Agricultural Workers in 2020* (Ontario: Office of the Chief Coroner, 2020); Raluca Bejan and Manuela Boatcă, “Migrant Workers’ Safety Concerns Should be a Pandemic Priority,” *VerfBlog* (28 April 2021). In Canada, more migrant farm workers died in 2021, the second growing season during the pandemic, than did in 2020.

¹³⁵ Migrant Workers Alliance for Change, *Unheeded Warnings*, above note 134; Krista Hessey and Mark Carcasole, “Hundreds of migrant farm workers in Ontario denied fresh air during quarantine”, *Global News*, (15 May 2021), online: <https://globalnews.ca/news/7862350/ontario-county-migrant-farm-workers-fresh-air-quarantine/> (accessed 4 July 2021)

¹³⁶ Migrant Workers Alliance for Change, *Unheeded Warnings*, above note 134 at 22; Sara Mojtehdzadeh, “Migrant farm workers from Jamaica are being forced to sign COVID-19 waivers”, *Toronto Star* (13 April 2020), online: <https://www.thestar.com/business/2020/04/13/migrant-farm-workers-fear-exposure-to-covid-19.html> (accessed 4 July 2020); Molly Thomas, “Migrant farm workers allege pressure to sign away movement rights amid COVID-19”, *CTV News* (4 August 2020)

agricultural workers to sign waivers indicating that if they decline to receive the COVID-19 vaccine, they “consent” to the employer not recalling them next season.¹³⁷

C. Dimensions of Labour Market Insecurity

Migrant workers in all five states experience multiple, and similar, forms of labour market insecurity. This report is focused on workers in low paid and undocumented work so their poverty, as a measure of labour market insecurity, is a given as it aligns with the parameters of the research. Nevertheless, it is worth emphasizing that in the states in question, migrant workers predominate in the lowest paid, most precarious work in the national labour markets. This section examines workers’ precarity in relation to (i) recruitment practices; (ii) restrictive terms on their work permits; (iii) degree of certainty of continuing work; (iv) control over the labour process; and (v) degree of regulatory effectiveness.

1. Migrant worker recruitment

In all five states, a large proportion of low-wage migrant workers enter the labour markets through predatory migration and recruitment practices that amplify the insecurity caused by all the other dimensions of their precarity. In South Africa, complex webs of smugglers, brokers and community networks help migrant workers avoid migration controls to seek work in the state.¹³⁸ Each of the other four states have bilateral

¹³⁷ Canadian Press, “Advocates call for accessible COVID-19 vaccine plan for Ontario migrant farm workers”, *CTV News* (8 April 2021), online: <https://toronto.ctvnews.ca/advocates-call-for-accessible-covid-19-vaccine-plan-for-ontario-migrant-farm-workers-1.5379005> (accessed 4 July 2021)

¹³⁸ Vanyoro, “Zimbabwean migrant domestic worker activism in South Africa”, above note 126 at p. 9; Fekadu Adugna, Priya Deshingkar and Takalign Ayalew, “Brokers, migrants and the state: *Berri Kefach* ‘door openers’ in Ethiopian clandestine migration to South Africa”, *Migrating out of Poverty Working Paper 5* (Brighton, UK: University of Sussex, 2019); Zaheera Jinnah, “Negotiated Precarity in the Global South: A Case Study of Migration and Domestic Work in South Africa (2020), 14:1 *Studies in Social Justice* 210-227

agreements which provide for some degree of government-to-government recruitment and each has laws prohibiting the charging of recruitment fees.¹³⁹ But much of low-wage migrant labour recruitment occurs through private third-party recruiters who are subject to little effective oversight or enforcement of the relevant legislation. As a result, migrant workers, even in formal channels for documented labour, are regularly forced to pay predatory “fees”, or bribes, to recruiters to place them in jobs and to cover other expenses of migration. As workers typically require loans to pay these charges, they arrive effectively in a stage of debt bondage, needing to work to repay recruitment loans at exploitative interest rates.¹⁴⁰ Workers also arrive through servitude, forced labour and labour trafficking, issues which the CEACR has noted are significant concerns in Malaysia.¹⁴¹ In some cases, recruiters are paid based on the number of workers they deliver, and employers and other actors in the labour supply chain receive kick-backs by the same measure. In Qatar, concerns arise about recruiters sending many more workers

¹³⁹ Canada has bilateral agreements with Mexico, Jamaica and the Eastern Caribbean states governing the recruitment of migrant seasonal agricultural workers. Germany previously had “first placement” agreements with Poland, the Czech Republic, Slovakia, Hungary, Romania, Bulgaria and Croatia which ended when each of these countries joined the European Union. In 2020, Georgia reached a bilateral agreement with Georgia and was initiating the negotiation of others: Lechner, *Attracting and Protecting Seasonal Workers from Third Countries*, above note 127 at 15-16. Malaysia has bilateral agreements with several countries establishing the terms and conditions of work for migrant domestic workers: Bridget Anderson, *Worker, helper, auntie, maid? Working conditions and attitudes experienced by migrant domestic workers in Thailand and Malaysia* (Bangkok: ILO, 2016) at Harkins, *Review of labour migration policy in Malaysia*, above note 109 at 14. Qatar has signed over 30 bilateral agreements with migrant sending countries: François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, Mission to Qatar, Human Rights Council, 26th Session, Agenda Item 3, Addendum (23 April 2014) at para. 39

¹⁴⁰ Faraday, *Profiting from the Precarious*, above note 112 at 23-45; European Union Agency for Fundamental Rights (FRA), *Protecting migrant workers from exploitation in the EU: workers’ perspectives* (Luxembourg: Publications Office of the European Union, 2019) at 34-35; CEACR, Direct Request - *Domestic Workers Convention, 2011 (No. 189) – Germany* (2017), ILC 106th Session re Article 15; CEACR, Direct Request - *Domestic Workers Convention, 2011 (No. 189) – Germany* (2021), ILC 109th Session, re Article 15; Ulrike Hoffmann and Heike Rabe, “Severe forms of Labour Exploitation: Supporting victims of severe forms of labour exploitation in having access to justice in EU Member States – Germany, 2014” (German Institute for Human Rights, 2014) at p. 24-25; Anja Karlsson Franck and Joseph Trawicki Anderson, “The Cost of Legality: Navigating Labour Mobility and Exploitation in Malaysia” (2019), 50:1-2 *International Quarterly for Asian Studies* 19-38 at 31-33; Ray Jureidini, *Migrant Labour Recruitment to Qatar: Report for Qatar Foundation Migrant Worker Welfare Initiative* (Doha: Bloomsbury/Qatar Foundation Publishing, 2014).

¹⁴¹ CEACR – Observation, *Forced Labour Convention, 1930 (No. 29) – Malaysia*, ILC 108th Session (2019)

than required to maximize the fees and kick-backs received, but leaving migrants without adequate work and income.¹⁴² These recruiting agencies are able to evade effective regulation because of the complexity of their supply chains. Recruitment networks often involve multiple layers of subcontracting but are, at the same time, often hyper-localized – connecting some regions of the state of origin to some regions of the state of labour. As a result, enforcement is difficult because none of the recruiters in the chain is responsible for the whole of the migrants' journeys, and many of these recruiters, especially in the state of origin, are very small operations, sometimes consisting of one individual.¹⁴³

2. Restrictions on labour mobility

On arrival, low-wage migrant workers in all five states face restrictions on their labour mobility in terms of who they can work for and what jobs they can do. Under Qatar's *kafala* system, the worker's residency and work permits tie them to their employer.¹⁴⁴ In Canada, Germany and Malaysia, migrant workers' mobility is also constrained through work permits that restrict them to working for a single specific employer doing a specific job. In Germany, migrant workers' residency permits are also tied to their employer.¹⁴⁵ In Canada, employers in some labour migration streams are required to provide housing for migrant workers so their actual residence is by law under the employer's control.¹⁴⁶

¹⁴² Jureidini, *Migrant Labour Recruitment to Qatar*, above note 140; Ray Jureidini, "Transnational Culture of Corruption in Migrant Labour Recruitment", in *Migration Research Leaders' Syndicate: Ideas to inform international cooperation on safe, orderly and regular migration*, M. McAuliffe and M. Klein Solomon, conveners (Geneva: IOM, 2017) at 67-72

¹⁴³ Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants – Thematic Report on recruitment practices*, above note 2; Faraday, *Profiting from the Precarious*, above note 112.

¹⁴⁴ Qatar, *Law no. 21 of 27 October 2015 which regulates the entry, exit of expatriates and their residence*

¹⁴⁵ FRA, *Protecting migrant workers from exploitation in the EU*, above note 140 at p. 65

¹⁴⁶ Employers under the Seasonal Agricultural Workers Program are required to providing housing without cost to migrant workers. Employers hiring migrant workers outside of the SAWP (i.e. workers from countries other than Mexico, Jamaica and the Eastern Caribbean states) are required to provide workers with "adequate, suitable and affordable housing" either on-farm or off-site. Where migrant care workers (domestic workers) live with their employers, the employer must provide them a private bedroom without charging room and board: *SAWP Contract*

As noted above, individual workers' labour mobility in Canada, Germany, Malaysia and Qatar is restricted by the terms of their individual work permit. But some states restrict migrants from working in entire sectors. In Canada, migrant workers can work in any lawful type of employment except sex work. As a result, even though sex work is legal, migrants who engage in sex work by definition are doing so with undocumented status and thus face considerable precarity.¹⁴⁷ In Malaysia, migrant workers are only legally permitted to work in manufacturing, construction, agriculture, plantations, services or domestic work and are issued colour-coded work permits denoting the sector in which a migrant is authorized to work. Malaysia also imposes quotas on the number of migrants from different countries, how many can work in different sectors, and has even further restrictions based on gender and state of origin: women from the Philippines can only migrate for domestic work; workers from Bangladesh can only work in the plantation sector; men from Indonesia can work in all sectors except manufacturing; and workers from India are prohibited from working in manufacturing, and face restrictions on the construction and service jobs they are authorized to do.¹⁴⁸

3. Degree of certainty of continuing work

In all five states, including South Africa to the extent that migrant work is authorized, migrant workers' certainty of continuing work is precarious because work

(Mexico) 2021 and SAWP Contract Caribbean, above note 129; Canada, *Hire a temporary foreign worker through the Agricultural Stream: Program Requirements*, (updated 21 Sept 2020), online: <https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/agricultural/requirements.html>; Canada, *Hire a temporary worker as an in-home caregiver: Program requirements* (updated 5 July 2021), online: <https://www.canada.ca/en/employment-social-development/services/foreign-workers/caregiver/requirements.html>

¹⁴⁷ Canada, *Immigration and Refugee Protection Regulations*, SOR 2002-227, s. 196.1(a)

¹⁴⁸ Loh et al, *Malaysia: Estimating the Number of Foreign Workers*, above note 119 at Table 1; Harkins, *Review of labour migration policy in Malaysia*, above note 109 at p. 2, 9. As Bridget Anderson notes, Malaysia also imposes restrictions in terms of the ages of migrant workers: *Worker, helper, auntie, maid?*, above note 138 at 24

permits are of short duration, typically for a year or less. This increases migrants' labour market insecurity because they must repeatedly seek renewal of their residency and work permits and are, in all states, dependent on their employer to varying degrees to conduct renewals. In Canada's Seasonal Agricultural Worker Program, in Germany and in Malaysia, migrant workers are dependent on employers to identify them by name in order to return to the country for seasonal work the following season and so are vulnerable to the "blacklisting" identified earlier.¹⁴⁹ Each time workers need to renew permits also creates an opening for exploitation by recruiters. During the COVID-19 pandemic, this created significant precarity for migrant workers as government offices that process permits were closed or operating with reduced capacity. Where workers were able to continue working with their pre-pandemic employer, renewal of permits was delayed. While national and migrant workers both lost work during the pandemic as employers shut down or reduced operations, migrant workers again faced greater insecurity because without a valid employer-specific permit, any work they did was undocumented.¹⁵⁰

4. Control over the labour process

In each state studied, workers have limited to no control over the labour process. Bilateral agreements set the formal terms and conditions without migrant workers' input. Individual work arrangements typically do not involve negotiation. Moreover, even where

¹⁴⁹ Faraday, *Profiting from the Precarious*, above note 112 at 42-45; *Sidhu & Sons Nursery Ltd. v. UFCW Local 1518*, above note 19; Martin and Miller, *Employer Sanctions*, above note 132 at 26; Harkins, *Review of labour migration policy in Malaysia*, above note 109 at 9; ILO, *Situation and gap analysis on Malaysian legislation, policies and programmes, and the ILO Forced Labour Convention and Protocol* (2018) at 27; Sabrina Kouba and Nilim Baruah, *Access to the labour market for admitted migrant workers in Asia and related corridors* (Geneva: ILO, 2019) at 2

¹⁵⁰ ILO Policy Brief, *Protecting migrant workers during the COVID-19 pandemic*, above note 116

workers have signed contracts of employment, they frequently encounter contract substitution at lower pay, or placement into different work than they had been promised.¹⁵¹

In each of the five states, migrant workers have the right to unionize on the same terms as national workers. But while this formal right exists, very few migrant workers are unionized. Many are employed in sectors such as retail, plantations, hospitality, and construction where unionization rates are extremely low for both national and migrant workers. And because they are on short-term work permits, this creates a further barrier to unionizing.¹⁵² An exception to this, in Canada, exists where migrant workers have joined pre-existing unions at large meat processing factories. There, the United Food and Commercial Workers Union Canada has negotiated protections that address the unique circumstances of migrant workers, including negotiating provisions that require employers to sponsor migrant workers for permanent immigration.¹⁵³ At the same time, however, the two largest populations of low-wage migrant workers in Canada – agricultural workers and domestic workers – have no legal right to unionize in some provinces because labour relations laws exclude these occupations whether the workers are national or migrant.¹⁵⁴ In Malaysia generally, the rate of unionization (10%) and collective agreement coverage

¹⁵¹ FRA, *Protecting migrant workers from exploitation in the EU*, above note 140 at 34-35; European Center for Constitutional and Human Rights, *Accountability for forced labor in a globalized economy: Lessons and challenges in litigation, with examples from Qatar* (Berlin: ECCHR, 2018) at 4-7; Faraday, *Profiting from the Precarious*, above note 112 at 38-39.

¹⁵² CEACR – Observation, *Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Malaysia* (2019), ILC 108th Session re Migrant workers

¹⁵³ Amber Hildebrandt, “How a little Alberta union helps temporary foreign workers become Canadian”, *CBC News* (8 May 2014); UFCW Canada, *A New Vision for a Sustainable Immigration System: Reforming the Immigration System* (June 2016) at 3, 5.

¹⁵⁴ In some provinces farm workers have full rights to unionize, bargain collectively and strike. But the access to these rights varies across provinces. In Ontario, Quebec and Alberta, agricultural workers are excluded from the right to unionization, collective bargaining, and the right to strike: in Ontario, *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, s. 3(b.1); in Quebec, *Labour Code*, R.S.Q., c-27, s. 111.27; in Alberta, *Labour Relations Code*, R.S.A. 2000, c L-1, s. 4(e.1). Domestic workers are excluded from the various provincial labour relations statutes. See, for example, Ontario, *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, s. 3(a)

(1-2%) is extremely low.¹⁵⁵ Migrant workers there can join a union as long as they do not hold official positions within the union.¹⁵⁶ However, “a recent judicial decision in the paper industry rul[ed] that migrant workers under fixed-term contracts could not benefit from the conditions agreed in collective agreements”.¹⁵⁷ The Malaysian Trade Union Conference (MTUC) “has twice applied for government registration of a Domestic Workers Association and has been rejected without an explanation.”¹⁵⁸ In Qatar, workers are now allowed to elect representatives to a worker’s committee at their workplace, but collective action is restricted and so even more rare.¹⁵⁹ In South Africa, the high incidence of undocumented status and work in the informal economy (especially in hospitality, construction and domestic work) leave migrant workers open to intimidation by employers who threaten to report them to immigration officials if they join a union.¹⁶⁰

It is noteworthy that the CEACR and the ILO Committee on Freedom of Association (which responds to specific complaints) have issued several Observations, Direct Requests and Reports raising concerns about the ability of migrant workers to unionize in the states studied.¹⁶¹

¹⁵⁵ CEACR – *Observation, C98 – Malaysia* (2019), above note 152 re Application of the Convention in practice.

¹⁵⁶ The government has promised a legislative amendment that would allow non-citizens to run for trade union office after they have lived legally in Malaysia for at least three years: CEACR – *Observation, C98 - Malaysia* (2019), above note 144 re Migrant workers.

¹⁵⁷ CEACR – *Observation, C98 – Malaysia* (2019), above note 152 re Migrant workers

¹⁵⁸ Harkins, *Review of labour migration policy in Malaysia*, above note 109 at p. 22

¹⁵⁹ Qatar, *Decision No. (21) Of 2019 by the Minister of Administrative Development, Labour, and Social Affairs Regulating the conditions and procedures of the election of workers’ representatives to joint committees*. Hundreds of construction workers did, however, go on strike in 2019: Human Rights Watch, “Qatar: Migrant Workers Strike Over Work Conditions” (8 August 2019)

¹⁶⁰ Stella Vettori, “The exploitation of migrant labour in the hospitality industry in South Africa” (2017), 6:4 *African Journal of Hospitality, Tourism and Leisure* 1-12 at 8-9

¹⁶¹ See, for example: ILO Committee on Freedom of Association, Case No. 2704 (Canada), complaint date 23 March 2009, *Report in which the committee requests to be kept informed of development* - Report No 363, March 2012 (re agricultural workers’ right to unionize); CEACR – *Observation, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Canada* (2021), ILC 109th Session (re agricultural workers and domestic workers); CEACR – *Direct Request, Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – Canada* (2021), ILC 109th Session; CEACR – *Direct Request, C189 – Germany* (2017), above note 140 (re domestic workers);

5. Degree of regulatory effectiveness

Most critically, though, regardless of the scope of migrant workers' coverage under national laws, enforcement of those rights is extremely weak with the result that migrant workers in all five countries face widespread ongoing rights violations.

In Canada, proactive investigations of workplaces employing migrant workers reveal that 60-80% of employers are in breach of minimum standards.¹⁶² In Germany, labour experts (including labour inspectorates, lawyers, trade unions, employers' organizations) agree that "exploitative working conditions occur most frequently when migrant workers are concerned."¹⁶³ In Malaysia repeated reports by the ILO and UN identify that forced labour, human trafficking, labour exploitation and discrimination are ongoing problems for migrant workers in the country,¹⁶⁴ that over 60% of migrant workers experience rights violations,¹⁶⁵ but that "the number of complaints filed by migrant workers remains negligible in comparison to the number of violations committed."¹⁶⁶ Domestic workers commonly faced "conditions akin to debt bondage and servitude"; withholding of

CEACR – *Observation, C98 – Malaysia* (2019), above note 152, re Article 1 (re anti-union discrimination); CEACR – Direct Request, *Domestic Workers Convention, 2011 (No. 189) – South Africa* (2021), ILC 109th Session (re domestic workers)

¹⁶² The results of Ontario's employment standards blitz are posted on the Ministry of Labour website: <https://www.labour.gov.on.ca/english/es/topics/proactiveinspections.php> (accessed 23 November 2020). Manitoba's Employment Standards Branch notes the following with respect to its Special Investigations Unit which conducts proactive employment standards investigations: "During 2014-2015, the Unit conducted over 400 investigations. Almost half of these investigations were the result of information received from the public and the Unit identified violations in 80 per cent of these cases": https://www.gov.mb.ca/labour/standards/special_investigations_unit.html (accessed 23 November 2020)

¹⁶³ Hoffmann and Rabe, "Severe forms of labour exploitation", above note 132 at 17

¹⁶⁴ CEACR – *Observation, C29 – Malaysia* (2019), above note 141; CEDAW Committee, *Concluding observations on the combined third to fifth period reports of Malaysia*, 14 March 2018, CEDAW/C/MYS/CO/3-5 at para. 43; ILO, *Situation and gap analysis – Malaysia*, above note 149; Harkins, *Review of labour migration policy in Malaysia*, above note 109; CEACR – *Observation C98 – Malaysia* (2019), above note 152; CEACR – Direct Request, *Equal Remuneration Convention, 1951 (No. 100) – Malaysia* (2020), ILC 109th Session

¹⁶⁵ Harkins Lindgren and Suravoranon, *Risks and rewards*, above note 20 at p. 3

¹⁶⁶ Benjamin Harkins and Meri Åhlberg, *Access to justice for migrant workers in South-East Asia*, (Bangkok: ILO, 2017) at 14-15

passports and other legal documents; forced contract extension; and wages not paid until the end of a two year contract.¹⁶⁷ Other migrant workers, including in construction, in the electronics industry and on agricultural and palm oil plantations also faced multiple forms of abuse, “severe and compounded labour rights violations”, “labour practices indicative of forced labour” and human trafficking.¹⁶⁸ The UN Special Rapporteur on the human rights of migrants observed in his visit to Qatar that the extreme power imbalance under the *kafala* system created conditions where “exploitation is frequent” and migrant workers are “highly vulnerable to abuse.”¹⁶⁹ During the three-year technical cooperation agreement with the ILO from 2018 to 2021, Qatar made significant steps towards reforming its labour system, including but not limited to allowing workers to change jobs without a No Objection Certificate from their employer, eliminating the need for exit permits, introducing a minimum wage law, and introducing legislated minimum standards of domestic workers.¹⁷⁰ Nevertheless, due to the significant barriers to enforcing rights in a system of profound power imbalances, the UN’s Independent Expert on human rights and international solidarity concluded following his visit to Qatar in 2019 that “access to justice in cases where their rights have been violated continues to be a serious challenge for many migrant workers.”¹⁷¹ Finally in South Africa, the lack of an institutionalized strategy on migration results in highly informalized work in conditions under which

[u]sually migrants are not provided with written contracts of employment. The consequence of this is that they do not know what their rights are, nor the details concerning their conditions of service such as whether their jobs

¹⁶⁷ CEACR – *Observation C29 – Malaysia* (2019), above note 141

¹⁶⁸ Harkins, *Review of labour migration policy in Malaysia*, above note 109 at 3-4; CEACR – *Observation C29 – Malaysia* (2019), above note 141; ILO, *Situation and gap analysis – Malaysia*, above note 149 at 8-10

¹⁶⁹ Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, Mission to Qatar, above note 131

¹⁷⁰ The changes are well summarized in ILO, “Dismantling the kafala system and introducing a minimum wage mark new era for Qatar labour market” (30 August 2020)

¹⁷¹ Obiora C. Okafor, *Preliminary findings of the United Nations Independent Expert on human rights and international solidarity at the end of his visit to Qatar* (10 September 2019) at 4

are for an indefinite period or whether they are temporary. This state of affairs allows employers to change and impose conditions of service with impunity.¹⁷²

D. Social Context

The fourth dimension of migrant workers' precarity is the social context in which they work. Migrant workers in each of the countries studied are concentrated in sectors of the economy in which the nature of their occupations, industries and geographic locations exacerbate precarity. For example, across all five states, the social and geographic isolation of migrant domestic workers and workers in agriculture and on plantations impedes both monitoring by labour inspectorates and workers access to support in protecting their rights. All states also have examples where migrant workers' labour market segmentation into particular sectors of the economy (such as domestic work, agriculture, construction, electronics, fisheries), is paired with sectoral regulation at standards below those for workers generally. This relegates migrant workers to the bottom of a two-tier rights system. In this context, even where migrant workers' rights are fully realized, they are left below the international normative standard of being entitled to equal treatment with national workers.¹⁷³ Alternatively, national and migrant workers may have the same rights, but the rights themselves fail to meet international standards. For example, in Canada's largest province, national and migrant agricultural workers are equally excluded from employment standards protections for minimum wages, overtime, vacation pay, public holiday pay, maximum hours worked in a day and week, minimum prescribed rest periods

¹⁷² Vettori, "Exploitation of migrant labour in the hospitality industry", above note 160 at 3

¹⁷³ CEACR General Survey, *Promoting Fair Migration*, above note 101 at para. 539; Maria Gallotti, *Migrant Domestic Workers Across the World: regional and global estimates* (Geneva, ILO Migration Branch, 2015) at p. 3

between shifts, minimum rest periods in a week, and minimum rest periods for meals.¹⁷⁴ As noted above, agricultural workers in Ontario are also excluded from the right to unionize and bargain collectively, while farm workers in some other provinces face restrictions on unionization based on how many employees work year-round.¹⁷⁵

Domestic workers in all five states face particular precarity because of both their social isolation and sectoral regulation. While domestic work is not the only sector to face this differential regulation, it faces the most uniform and profound rights exclusions across the five states. In Canada, domestic workers have no legal right to unionize and are excluded from occupational health and safety legislation.¹⁷⁶ In Germany, domestic workers are excluded from the *Hours of Work Act* and while they have the right to unionize, they face barriers to doing so because of their social isolation. The CEACR has asked the German government to indicate how domestic workers' freedom of association and right to collective bargaining can be realized in practice given that

the specific characteristics of domestic work, often involving triangular employment relationships, a high degree of dependence on the employer (especially in the case of migrant domestic workers) and the frequent isolation of domestic workers in their workplaces, are all factors that make it difficult for domestic workers to form and join unions.¹⁷⁷

Meanwhile, in Malaysia, domestic workers are excluded from basic rights under the *Employment Act* and *Workers' Compensation Act* including "minimum wages, working hours, rest days, leave, freedom of association and social security coverage" and they

¹⁷⁴ *Employment Standards Act 2000*, S.O. 2000, c. 41, Parts VII, VIII, IX, X, XI; O Reg 285/01 made under the *Employment Standards Act 2000*, sections 2(2), 4(3), 8, 9, 24-27. Fruit, vegetable, and tobacco harvesters are entitled to annual vacation and public holidays only if they have been employed as harvesters for 13 weeks: O Reg 285/01 made under the *Employment Standards Act 2000*, s 2(2), 8, 9 and 24-27.

¹⁷⁵ See references cited above at note 154.

¹⁷⁶ Domestic workers are excluded from the various provincial labour relations statutes. See, for example, Ontario, *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, s. 3(a)

¹⁷⁷ CEACR- Direct Request, C189 - Germany (2017), above note 140 re Article 3

“are prohibited from getting pregnant during their contract of service and ... they are required to pay higher fees for health-care services at public hospitals and clinics .”¹⁷⁸ Domestic workers’ rights are generally addressed through bilateral agreements between Malaysia and the various states from which domestic workers migrate, with the pay and other conditions of work differentiated on a hierarchy based on stereotypes that “different nationalities are ... more or less suitable for domestic work and more or less trustworthy.”¹⁷⁹ Due to this low floor of legal protections in the sector, it is estimated that 90% of migrant domestic workers in Malaysia are paid below the minimum wage with 20% not having enough to eat.¹⁸⁰ In Qatar, domestic workers were excluded from labour laws entirely until 2017.¹⁸¹ While they now have protections including with respect to paid probationary periods, maximum hours, rest periods, paid vacation time, and return tickets to visit their state of origin every two years, the law also allows the employer and worker to “agree” to standards that differ from those in the law.¹⁸² Like Malaysia, the wage rates are set through bilateral agreements with the states of origin that accord different rights to workers from different countries.¹⁸³ Meanwhile, in South Africa, domestic workers are covered by legal protections with respect to wages, contracts, working hours and benefits, but there is a strong culture of non-compliance among both employers and employment

¹⁷⁸ CEDAW Committee, *Concluding observations – Malaysia* (2018), above note 164 at para. 43; Anderson, *Worker, helper, auntie, maid?* above note 138 at p. 53, 55; Harkins and Åhlberg, *Access to justice for migrant workers in South-East Asia*, above note 166 at 15; Harkins, *Review of labour migration policy in Malaysia*, above note 109 at pp. 21-22

¹⁷⁹ Anderson, *Worker, helper, auntie, maid?* above note 138 at p. 40

¹⁸⁰ Anderson, *Worker, helper, auntie, maid?* above note 138 at p. xviii, 75

¹⁸¹ Qatar Law No. 15 of 22 August 2017 which relates to domestic workers

¹⁸² Qatar Law No. 15 of 2017, above note 182 at Sections 8, 12, 14

¹⁸³ Amnesty International, “Qatar: New laws to protect migrant workers are a step in the right direction” (30 August 2020) notes that prior to the minimum wage law Nepali domestic workers earned 900 QAR per month under their bilateral agreement while Filipino domestic workers earned 1400 QAR per month under theirs.

agencies. In practice the work is highly informal and employers' lack of compliance has been described as being

based on a *flexible understanding of their obligations as employers* and their perceptions of what constituted 'fairness'. ... employers stated they would pay what they could afford, and that low wages were better for the employee than unemployment.¹⁸⁴

E. Social Location

Finally, in all the states of focus, migrant workers experience multiple forms of precarity due to their social location. Across all countries, they face language barriers in their states of labour. This has been identified as a particular problem in Germany.¹⁸⁵ Apart from their temporary status and risk of deportability in the country, they also face discrimination on multiple grounds, including due to their race, national origin, gender, religion and fact of being migrants. In some situations, this subjects them to additional harassment and surveillance by state authorities. For example, in Canada, Asian migrant sex workers are subjected to particular harassment by by-law officers where in Toronto, Canada's largest city, nearly 20% of *all* by-law enforcement was targeted towards ticketing Asian women working in massage parlours.¹⁸⁶

Xenophobia, however, is a distinct source of precarity. This is a serious problem in South Africa where migrants have been targets of extreme xenophobic violence. Since 1994, at least 150,000 people have been killed, injured or displaced in xenophobic

¹⁸⁴ Jinnah, "Negotiated Precarity", above note 138 at 220-224

¹⁸⁵ Within the EU, Germany is one of the two countries where language barriers pose the greatest problem for migrant workers: German Institute for Human Rights, *Development of the human rights situation in Germany July 2017 – June 2018*. Report to the German Federal Parliament in accordance with sec. 2 para. 5 of the Act regarding the Legal Status and Mandate of the German Institute for Human Rights; FRA, *Protecting migrant workers from exploitation in the EU*, above note 140 at 70-73

¹⁸⁶ Elene Lam, *Survey on Toronto Holistic Practitioners' Experiences with Bylaw Enforcement and Police* (Toronto: Butterfly Asian and Migrant Sex Workers Support System, May 2018) at 13

incidents.¹⁸⁷ In September 2019 alone, 28 incidents of xenophobic violence against migrants resulted in 12 persons killed, over 800 displaced, 14 physical assaults and over 49 shops looted.¹⁸⁸ Between March 2018 and the end of 2019, 200 migrant workers, primarily truck drivers, were killed in incidents of xenophobic violence.¹⁸⁹ While South Africa in 2019 launched a National Action Plan to combat xenophobia, migrant workers lack trust in authorities as “[v]irtually no one has been convicted for past outbreaks of xenophobic violence” even when thousands of foreign nationals were affected.¹⁹⁰

Migrant workers’ social location has become even more precarious due to the pandemic. Across all states, they have experienced an intensification of their social and economic marginalization, including through an escalation in xenophobia and racism, extended family separation, increased housing insecurity, increased surveillance, work intensification, loss of work but exclusion from national social security and emergency COVID-19 social support, lack of access to health care, lack of safe access to vaccines, increased detention and deportation, loss of remittances and loss of documented status.¹⁹¹

¹⁸⁷ Orji Sunday, “Africa’s economic giants are fighting — and the continent may bleed” (25 September 2019) online: <https://www.ozy.com/around-the-world/the-south-africa-nigeria-spat-is-threatening-africas-economic-promise/96893/> (accessed 11 June 2020)

¹⁸⁸ African Centre for Migration & Society, *Xenowatch Factsheet 1: Incidents of Xenophobic Violence in South Africa: January-September 2019* (University of Witwatersrand, 2019)

¹⁸⁹ Human Rights Watch, *World Report 2020*, above note 106 at pp 510-513

¹⁹⁰ Human Rights Watch, *World Report 2020*, above note 106 at pp 511-513; Jean Pierre Misago, *Xenophobia and Outsider Exclusion: Addressing Frail Social Cohesion in South Africa’s Diverse Communities* (Johannesburg: Freedom House, 2017)

¹⁹¹ Caregivers Action Centre, Vancouver Committee for Domestic Workers and Caregivers Rights, Caregiver Connections Education and Support Organization and Migrant Workers Alliance for Change, *Behind Closed Doors: Exposing Migrant Care Worker Exploitation during COVID-19* (October 2020) documents how in Canada one in three migrant care workers lost their work during the pandemic, while 37.5% were trapped in their employers’ homes and prohibited from leaving for any reason; Migrant Workers Alliance for Change, *Unheeded Warnings*, above note 134; Florida Sandanasamy, Marja Paavilainen, and Nilim Baruah, *COVID-19: Impact on migrant workers and country response in Malaysia* (ILO, May 2020); ILO/UN Women, *Protecting the rights of domestic workers in Malaysia during the COVID-19 pandemic and beyond* (June 2020); ILO Policy Brief, *Protecting migrant workers during the COVID-19 pandemic*, above note 124; ILO and ISSA Policy Brief, *Social protection for migrant workers*, above note 124.

F. Summarizing Migrant Worker Precarity

In summary, despite examining countries with different forms of government, laws, migration flows, and sectors of work in which migrants are engaged, all five countries display strong similarities in the nature of precarity that migrant workers endure. While the depth of precarity may differ, the nature and drivers of workers' precarity is more uniform. The sheer multitude of dimensions of migrant workers' precarity and networks of actors involved poses a serious challenge to securing migrants' empowerment and rights protection in practice. Migrant workers share many forms of precarity with national workers, including inadequate rights protection in national laws, power imbalances between employers and workers, challenges in unionizing, low pay, wage theft, violations of minimum employment standards, weak rights enforcement, fear of employer retaliation, increasingly informalized forms of work, lack of access to or inadequate social security and systemic discrimination. However, migrants experience these deprivations more acutely. Their work is more precarious than that of national workers and more concentrated in informal forms of work. Migrants are also burdened by immigration laws that impose their permanently temporary status to be in the country; labour migration policies that restrict their labour mobility; and predatory recruitment practices that impose greater risk for them and their families and enhance the pressure to continue working under abusive conditions. They also face more profound language barriers; cultural differences; social isolation, discrimination and xenophobia than national workers. While it is difficult for national workers to undertake formal actions to enforce their rights, it is more so for migrant workers. The legal, economic and social constraints that facilitate the exploitation of migrant workers in equal measure impede workers' ability to enforce their

labour rights. In this context, then, it is important to consider what broad strategies can be advanced that may begin to empower migrant workers.

PART IV: EMPOWERING MIGRANT WORKERS IN A PRECARIOUS SITUATION

The comparative analysis in Part III reveals that the structures and practices that drive migrant workers' precarity are systemic, and systemic in a way that is not confined within the borders of individual states. Many actors are implicated in creating, perpetuating and profiting from migrant workers' precarity across the span of their migration journey. The Global Compact on Migration, then, is correct in observing that a whole-of-government and whole-of-society approach is required to ensure that the experience of migration through all its stages is safe for workers. In this context, achieving a person-centred experience of migration that is compliant with international rights-based frameworks requires changes that empower migrant workers by strengthening migrants' voice and participation in shaping the conditions under which they migrate and labour; expanding the scope of their agency; enhancing their social integration; and, especially, improving their social and economic security. On one hand, this involves removing structural and systemic barriers that restrict migrant workers' experience and exercise of their rights. On the other hand, it requires introducing measures that hold other actors accountable for the structures and practices which enable them to benefit from migrant workers' precarious situation. The multiple dimensions of migrant workers' precarity intersect and reinforce each other. Given the web of laws, institutions and practices that construct this precarious situation, macro-level reforms to empower workers can begin along any dimension of precarity, and should occur along multiple dimensions simultaneously to address the ways in which barriers are mutually reinforcing. However,

some systemic structures and practices create such deep precarity that they resonate across all stages of workers' labour migration journey. The analysis below addresses strategies for empowering migrant workers beginning with those drivers of precarity with the broadest ramifications.

A. Empowering Workers by Addressing Precarity Arising from Temporary or Undocumented Status

Migrant workers' precarity is ultimately rooted in their temporary and, in some cases, undocumented status to be in the states where they labour. Lack of permanent immigration status renders migrant workers' social condition inalterably insecure because they face considerable risk of being criminalized and/or deported. Temporary or undocumented status also undermines workers' ability to act collectively, to assert their rights, or to participate in public and political processes that can improve their social and economic conditions. The most profound shift that can alleviate this precarity is state action that targets the social, economic, environmental and political conditions that force migrants into transnational migration as an economic survival strategy. Of note, Objective 2 of the Global Compact on Migration is to "minimize the adverse drivers and structural factors that compel people to leave their country of origin."¹⁹² In signing the Global Compact, States

commit to create conducive political, economic, social and environmental conditions for people to lead peaceful, productive and sustainable lives in their own country and to fulfil their personal aspirations, while ensuring that desperation and deteriorating environments do not compel them to seek a livelihood elsewhere through irregular migration.¹⁹³

¹⁹² *Global Compact for Safe, Orderly and Regular Migration*, above note 92, Objective 2

¹⁹³ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 18

It is beyond the scope of this report to address the multitude of strategies needed to achieve a baseline of social and economic security which would allow labour migration to be a true choice for workers. The Global Compact details numerous actions by which States can accelerate progress in meeting the UN's 2030 Agenda for Sustainable Development.¹⁹⁴ As migration continues, however, interventions are necessary to empower the workers who make that journey.

Where migrants choose to migrate or are forced by need to migrate, States must increase the options for safe, regular and orderly migration. Just as the hardening of national borders to permanent immigration set the groundwork for a rapid rise in temporary labour migration, reducing precarious temporary status demands the expansion of diverse and flexible options for regular and permanent immigration. This can encompass creating routes to permanent immigration for workers at all income levels; creating options for workers to migrate with their families to ensure social and familial cohesion; creating gender-responsive options for migration which recognize women's skills and contributions to economic and community well-being so that they can immigrate in their own right rather than as dependents; and increasing flexibility and mobility for workers through multiple-entry visas.¹⁹⁵

As observed in Part III, each country of focus hosts a significant population of undocumented workers who have lived and worked in the country for a period of time, contributing to its social fabric and economy. These workers face the greatest risk because they labour under a real threat of deportability. Moreover, the political conflation

¹⁹⁴ UNGA, *2030 Agenda for Sustainable Development*, above note 11

¹⁹⁵ The *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 21, in ten subparagraphs, details numerous actions which facilitate labour mobility in ways that support the realization of decent work rather than precarity.

of undocumented migration with criminality, and the existence of laws that actually criminalize undocumented workers, further isolates them and forces them underground. The hostile political discourse about undocumented workers also exacerbates xenophobia, racism and discrimination and increases the risk of violence against migrants. Together, these factors make undocumented workers' social condition particularly precarious and renders their ability to assert workplace rights illusory. Further, undocumented workers are often unable to access basic public services, including health care and rights enforcement, because public officials may report and, in some cases, have a legal duty to report, individuals with undocumented status. To the extent that States refuse to acknowledge the presence of large undocumented populations, they facilitate economic and social practices that perpetuate workers' exploitation. Empowering migrant workers, then, requires that States implement simple, accessible and safe processes by which migrants can regularize their status.

In addition, empowering undocumented workers requires States to erect "firewalls" that prohibit labour inspectors, police, health care providers, educational institutions, and other public service providers from sharing any information about workers' immigration status with immigration enforcement bodies.¹⁹⁶ The lack of firewalls prevents workers from enforcing their rights and puts them at elevated risk of further rights violations. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families notes that

Criminalization of irregular migration fosters and promotes public perceptions that migrant workers and members of their families in an irregular situation are "illegal", second-class individuals, or unfair competitors for jobs and social benefits, thereby fuelling anti-immigration

¹⁹⁶ CEACR, *General Comment No. 23 (2016) on the Right to just and favorable conditions of work*, above note 73, at para. 54; ILO, *Promotion of Fair Migration*, above note 94 at para. 480 and 607.

public discourses, discrimination and xenophobia. Moreover, migrant workers and members of their families in an irregular situation generally live in fear of being reported to the immigration authorities by public service providers or other officials, or by private individuals, which limits their access to fundamental human rights, as well as their access to justice, and makes them more vulnerable to labour and other types of exploitation and abuse.¹⁹⁷

Accordingly, the UN has stressed the “primacy of human rights” which requires “States to place human rights of migrants above law enforcement and migration management objectives”.¹⁹⁸ The European Commission against Racism and Intolerance calls for the creation of “firewalls” as a central pillar of its *General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination* because the risk of public institutions “sharing ... personal data and information constitutes a barrier, often insurmountable, for irregularly present migrants” seeking to enforce rights or access services.¹⁹⁹ The Global Compact on Migration also endorses the principle of access to public services without fear. Under Objective 15, States “commit to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services.”²⁰⁰ Many such firewalls exist around the world, often at local levels such as sanctuary cities. These firewalls are important though because they simultaneously protect undocumented workers and protect the mission of the public service providers.

All of these efforts to mitigate the precarity caused by workers’ temporary or undocumented status are necessary preconditions to reducing migrant workers’ labour

¹⁹⁷ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, at para. 2

¹⁹⁸ United Nations Office on Drugs and Crime and International Federation of Red Cross and Red Crescent Societies, *Combating violence against migrants* (New York: UN, 2015) at p. vii, 23

¹⁹⁹ European Commission Against Racism and Intolerance, *General Policy Recommendation No. 16: On safeguarding Irregularly present migrants from discrimination* (Strasbourg: Council of Europe, 16 March 2016) at pp. 3, 13, 15-16, and 19

²⁰⁰ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 31

market insecurity but they are only part of the changes that are needed to empower migrant workers.

B. Empowering Migrants by Addressing Labour Market Precarity

Providing greater options for permanent immigration, creating greater flexibility and mobility for migrant workers, and regularizing the status of undocumented workers all assist in empowering migrant workers to enforce their workplace rights so that they realize the social and economic benefits of their labour. However, additional macro-level reforms are required to address specific practices and barriers related to recruitment, work permit restrictions, restraints on collective action, discriminatory laws, and lack of rights enforcement that specifically drive migrant workers' labour market precarity.

It is well-recognized that predatory recruitment practices and related bribes, "fees", and debt bondage directly undermine migrant workers' ability to enforce their rights. Workers cannot risk asserting their rights for fear of termination which will eliminate their ability to pay their recruitment debts and send remittances to support family members. For this reason, the Global Compact on Migration, in Objective 6 commits States to review recruitment mechanisms in order "to guarantee that they are fair and ethical, and to protect all migrant workers against all forms of exploitation and abuse in order to guarantee decent work". Just a few examples that would promote this objective include: establishing greater state oversight of recruitment through bilateral and multilateral agreements; implementing rigorous licensing and regulation of recruiters backed up by strong proactive enforcement of fair and ethical recruitment laws and policies; establishing "processes that allow migrants to change employers and modify the conditions of length

of their stay with minimal administrative burden”;²⁰¹ and where workers have experienced exploitation by recruiters, ensuring effective remedies that deliver financial compensation, secure status and authorization to work in the state of labour.

Another key driver of migrant workers precarious situation within the labour market is work permits that restrict them to working for a single named employer. It is well recognized that the extreme power imbalance created by single-employer or single-sector work permits facilitates exploitation. Employers know that the worker cannot resist unreasonable work demands because their ability to lawfully remain in the country is tied to that employer. Accordingly, empowerment requires that migrant workers must be granted work permits that allow for labour market mobility so they can leave exploitative working conditions and move easily to respond to labour market needs. Alleviating the restrictions on work permits will also reduce the incidence of undocumented work that otherwise occurs when workers work outside the authorization of single-employer permits or work while waiting for a new or renewed permit.

Migrant workers must also have a meaningful and effective ability to exercise their freedom of association. But in reality, as noted in Part III, many migrant workers lack the right to unionize in law or are in such precarious circumstances that unionization is not practically possible. The ability to join a union, to engage in collective bargaining, and to participate in collective action are bedrock entitlements in binding UN and ILO rights instruments specifically because they empower workers to counteract the power imbalance in their work arrangements, to exercise collective voice in shaping the conditions under which they work, and to enforce their rights. Accordingly, States should

²⁰¹ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 22(g)

ensure the existence of laws that allow for and effectively facilitate migrant workers' unionization. In particular, it is important to ensure that access to unionization and collective agreement coverage is responsive to the increasingly fluid and informalized structured of work in today's labour market.

The analysis of the countries of focus revealed further systemic patterns by which women's labour market opportunities in migration are often severely restricted and by which the legal regulation of their work affords significantly substandard protection. This is particularly so in the work most commonly done by female migrants: domestic work. A gender-responsive, non-discriminatory system of labour migration must ensure not only expanded opportunities for labour migration but laws which ensure that women, and in particular women working in female-dominated sectors of the labour market, are protected by laws that grant them the same level of rights protection that is granted to workers generally.

Finally, States must ensure that labour and employment laws comply with the standards established in the detailed UN and ILO conventions; that those laws are rigorously and effectively enforced; and that when there is a breach of the law, remedies and compensation are quickly and effectively delivered to workers. It is well-established that legal enforcement mechanisms that rely on individual workers to file complaints are far less effective than those in which state enforcement agencies pursue proactive enforcement. States must ensure that labour and health and safety inspectorates are given a broad mandate that is commensurate with the scope of exploitation that workers face and that they are funded and staffed levels that allow for effective proactive enforcement. The ability of state-based labour inspectorates to advance migrant workers'

empowerment is the subject of the second report in this series which contains a more detailed analysis of proposed reforms addressing this aspect of labour market insecurity.

C. Empowering Migrants by Enhancing Voice and Social Integration

Ultimately, migrant workers will not be able to overcome their marginalization unless they are empowered to advocate for themselves without risk. At present, all five dimensions of migrant workers' precarity prevent them from raising complaints about their working and living conditions; undermine their ability to unionize; and impede their ability to engage in the social, political and public life of the communities in which they live. Because their precarity isolates them and makes it dangerous to speak out, migrant workers are prevented from integrating in the society in a way that would break down the stereotypes, racism and fears that heighten their insecurity and put them at risk of violence. Empowering migrants, then, requires multilayered action to boost migrants' voice at work and in the community.

A first step to advancing social integration is to ensure that communities have accurate information about migrant workers. This would require action by States to develop and implement education and public awareness campaigns that promote and "emphasize the positive contributions of migrants"²⁰² to the economic, social and cultural health of communities, foster a culture of integration, and promote respect for human rights. Even in narrow economic terms, this would require States to make deliberate interventions to shift the public narrative away from demonizing migrant workers by making visible and valuing their presence and labour, by positively acknowledging their contributions to the collective economic well-being of communities through paying taxes,

²⁰² UNODC and IFRCRC, *Combating violence against migrants*, above note 198 at p. 31

creating jobs for national workers and creating wealth for employers. In advancing social integration, though, it is important that migrant workers be recognized not simply as workers but as human beings who are an important part of the social life of the community – friends, neighbours, members of faith groups, co-workers, customers – and participants in creating the cultural life of the community.

At the same time that States can enhance social integration by positively acknowledging and valuing the contributions of migrant workers, they must also intervene to “counter tendencies to target, stigmatize, stereotype or profile members of migrant groups.”²⁰³ To this end, in the Global Compact on Migration’s Objective 17, States

commit to eliminate all forms of discrimination, condemn and counter expressions, acts and manifestations of racism, racial discrimination, violence, xenophobia and related intolerance against all migrants in conformity with international human rights law. We further commit to promote an open and evidence-based public discourse on migration and migrants in partnership with all parts of society, that generates a more realistic, humane and constructive perception in this regard.²⁰⁴

Countering hate also requires that States avoid political rhetoric and policy making that divides and polarizes society and that they instead “increase[e] public confidence in policies and institutions related to migration”.²⁰⁵ Importantly, this requires that States move beyond words to action by enacting and enforcing laws against discrimination and hate crimes that target migrants, and by ensuring that violence against migrants is denounced, prosecuted and appropriately penalized.²⁰⁶

²⁰³ UNODC and IFRCCS, *Combating violence against migrants*, above note 198 at p. 32

²⁰⁴ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 33

²⁰⁵ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 32

²⁰⁶ UNODC and IFRCCS, *Combating violence against migrants*, above note 198; *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para 32, 33.

Finally, States must develop, implement and appropriately resource policies and programs that support migrant workers' practical integration into the national society. This can involve ensuring that migrant workers have access to language training, skills development, mentoring, decent affordable housing, health care (including mental health care), schools for their children, employment insurance, and other social benefits and public services.²⁰⁷ Social integration also requires that States

facilitate mutual recognition of skills, qualifications and competences of migrant workers at all skills levels, and promote demand-driven skills development to optimize employability of migrants in formal labour markets ... as well as to ensure decent work in labour migration.²⁰⁸

The goal of social integration of migrants is so critical to ensuring safe and orderly migration that three of the 23 objectives in the Global Compact on Migration are specifically focused on promoting full inclusion of migrant workers in conditions of social cohesion.²⁰⁹ Ultimately, migrant workers will be truly empowered when their social integration and safety are such that they can effectively enforce their rights, publicly advocate for their interests, and participate in political processes that shape the conditions in which they work and live.

PART V: CONCLUDING COMMENTS

Empowering migrant workers is necessary to correct the institutionalized structures and practices which have long marginalized them and subjected them to exploitation that is contrary to international labour rights and standards. However, migrant workers'

²⁰⁷ Task Force on Justice, *Justice for All – Final Report*. (New York: Center on International Cooperation, 2019)

²⁰⁸ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 34

²⁰⁹ *Global Compact for Safe, Orderly and Regular Migration*, above note 92, Objectives 15, 16 and 17

precarity has only deepened during the COVID-19 pandemic. At one level, their work has become infinitely more dangerous. Many migrant workers are employed in jobs where physical distancing is challenging or impossible and yet the jobs are essential to keeping communities functioning. Migrant workers are disproportionately employed in high-contact jobs in care work, agriculture, food processing, delivery services, transportation, cleaning, retail and construction that in the pandemic bring heightened risk of infection and death. At the same time, other migrant workers experience exacerbated labour market insecurity because they have lost their jobs as businesses have shut down either temporarily or permanently during the pandemic-induced economic recession. Their social condition is also more precarious as many have lost their documented status in states where the processing of work permits has slowed or stopped, and borders are largely closed to international travel. As early as April 2020, the ILO noted that

Reports document rising levels of discrimination and xenophobia against migrants and in some cases food insecurity, layoffs, worsening working conditions including reduction or non-payment of wages, cramped or inadequate living conditions, and increased restrictions on movements or forced returns (where they may be stigmatized as carriers of the virus). Human rights groups fear rising levels of violence, particularly for those in domestic work where women workers predominate.²¹⁰

²¹⁰ ILO, *Protecting migrant workers during the COVID-19*, above note 124 at 1. See for example, Migrant Workers Alliance for Change, *Unheeded Warnings*, above note 134 which, within the first six weeks of the pandemic arriving in Canada, had already documented over 1,100 complaints by migrant farm workers about widespread wage theft, inadequate housing, lack of personal protective equipment (PPE), inadequate food, coercive restrictions on workers' movement, intimidation, surveillance and heightened racism. By late summer, overcrowded housing resulted in over 1,600 migrant farm workers in one province alone becoming infected with COVID-19, while three workers died. Meanwhile thousands of migrant workers employed in food processing plants were likewise infected both in Canada and Germany: Gavin Lee, "Coronavirus: What went wrong at Germany's Gutersloh meat factory?", *BBC News* (25 June 2020), available online: <https://www.bbc.com/news/world-europe-53177628> (accessed 23 November 2020); Heather Yourex-West, "Canadian meat-packing industry looks to make big changes following COVID-19", *Global News* (27 June 2020), available online: <https://globalnews.ca/news/7054288/meat-processing-changes-coronavirus/> (accessed 23 November 2020). At the same time, migrant care worker organizations in Canada documented abuses faced by migrant care workers during, about a third of whom were essentially imprisoned in their employers' homes, being prohibited from stepping foot outdoors under threat and reality of being dismissed from their job: Caregivers Action Centre et al, *Behind Closed Doors*, above note 191

Migrant workers have also become even more precarious because they have been excluded from the social and economic supports that have been provided to non-migrants. Many have been excluded from safe access to health care, including testing for the COVID-19 virus,²¹¹ from safe access to vaccines, and from income replacement supports provided to nationals of a state. Many have become undocumented, unemployed and unable to return to their country of origin due to travel bans and closed borders. Others have been deported.

The ILO emphasizes that migrant workers must be included in national COVID-19 policy responses to ensure both social and economic protection and to “reduce the risk that migrants will be left further behind once the pandemic subsides.”²¹² The Global Compact also requires that States ensure that they proactively “account for migrants in national emergency preparedness and response” planning.²¹³ Policy responses remain significantly in flux as the pandemic continues at the time of writing but to date the pandemic has exacerbated the rights protection and enforcement deficits highlighted elsewhere in this report. Ultimately, the pandemic has exacerbated migrant workers’ precarity within a system that was already ill-equipped to protect their rights before the pandemic. Migrants continue to face the same institutional designs with even less leverage. As the world emerges from the pandemic, it will be critical that at national, regional and global levels, States rebuild economies being attentive to and meeting their commitments in international rights-based frameworks and the Global Compact on

²¹¹ ILO, *Protecting migrant workers during the COVID-19 pandemic*, above note 124 at 3. Qatar and Malaysia have provided free screening and test for migrant workers.

²¹² ILO, *Protecting migrant workers during the COVID-19 pandemic*, above note 124 at 2

²¹³ *Global Compact for Safe, Orderly and Regular Migration*, above note 92 at para. 18

Migration. Pandemic recovery must include building security and social stability by taking positive action to empower migrant workers at all stages of the labour migration journey.

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