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Labour Rights Protection in Post-Conflict and Post-Disaster Recovery: What Role for International Labour Standards?

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*“Whereas universal and lasting peace can be established
only if it is based upon social justice”¹*

¹ *Constitution of the International Labour Organisation*, 1 April 1919, entry into force 28 June 1919, preambulatory paragraph 1.

Abstract

The world continues to be shaped by crises in both new and familiar forms. International and non-international armed conflicts and disasters are barriers to individual wellbeing, development, stability, and in the case of the former, represent a basic challenge to peace. The aftermath of such crises, in which communities can be rebuilt and the fabric of society can be mended, can be a time for recovery and reconstruction. It can also be period in which fundamental challenges to human rights, including fundamental labour rights, can emerge, become entrenched, and impede long-term progress to the processes identified above.

This thesis explores the role of international labour standards in responding to and mitigating the risks to fundamental labour rights that can emerge in post-crisis contexts. It will approach this endeavour by examining one emerging International Labour Recommendation in particular – the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205). The thesis will establish its potential role in rights protection in an existing international legal framework of hard and soft regulation, before turning to an examination of the impacts of conflicts and disasters on different forms of national capital, and the implications of impacts for national labour markets and the priorities of post-crisis employment policies. It will next explore the scope and emphasis of the Recommendation in detail. The thesis will conclude by developing a human rights risk analysis framework through which the application of Recommendation No. 205 for the protection of the fundamental rights to freedom of association and collective bargaining, to freedom from forced labour, to freedom from child labour, and to equality and non-discrimination on the grounds of ethnic origin, sex, and disability, can be tested, and its utility as an instrument of general human rights protection, and of soft law, will be elucidated.

Keywords: labour rights, human rights, international labour standards, ILO, post-conflict, post-disaster, post-crisis, development, decent work, employment, rights at work, right to work

Preface

I would like to take this opportunity to acknowledge and thank those without whom this thesis would not have been possible.

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Abbreviations

BiH	Bosnia and Herzegovina
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CYFA	Children and youth formerly associated with the armed forces
DDR	Disarmament, Demobilisation and Reintegration
GDP	Gross Domestic Product
HRRA	Human Rights Risk Analysis
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
ILS	International Labour Standards
PwD	Persons with disabilities
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNISDR	United Nations Office for Disaster Risk Reduction
WFCL	Worst forms of child labour

Chapter 1 – Introduction

1.1 Introduction and purpose

Access to employment and decent conditions of employment have long been recognised as fundamental human rights in international law, from early recognition in the International Labour Organisation instruments, to the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, and later, in the international non-discrimination treaties and regional instruments. On the individual level, employment and decent work are inherently linked to maintaining one's livelihood and independence, and are entwined with the enjoyment of a spectrum of other human rights, from the right to an adequate standard of living to the right to adequate food, clothing and housing. On a broader level, access to decent work has implications for poverty and development, economic growth, and peace. In the context of widespread destruction of human, physical and environmental assets which often characterise post-conflict and post-disaster settings, experience has demonstrated that labour rights that are fundamental on both an individual and broader level are seriously endangered.

While the nexus between economic growth, development and peace has been acknowledged at the international policy level for some decades, recognition of the core role of employment that ensures respect for the rights of workers, particularly following a national crisis such as a conflict or disaster, is a more recent development. Thus, while there has been a development in soft law and guidance on, for example, the protection of persons with disabilities in post-disaster contexts, and the role of women in conflict prevention and post-conflict recovery, there has not existed, prior to the development of Recommendation No. 205, an international legal instrument that focuses on providing guidance on priority measures for states to take in the sphere of employment, and that makes the connection between employment measures and human rights.

The International Labour Conference, at its 106th Session in June, 2017, discussed and adopted Recommendation No. 205, 'Concerning Employment and Decent Work for Peace and Resilience', which supersedes and updates the Employment (Transition from War to Peace) Recommendation, 1944 (No. 71). Recommendation No. 205 aims to provide guidance 'on the role of employment and decent work in prevention, recovery, peace and resilience with respect to crisis situations arising from conflicts and disasters',² and represents an opportunity to clarify, in standards form, the operation of key aspects of labour law and labour rights in post-crisis settings, and address key labour rights vulnerabilities and human rights concerns related to employment in these contexts.

² ILO, *Employment and decent work for peace and resilience – Revision of the Employment (Transition from War to Peace) Recommendation, 1944 (No. 71)*, Report V(2B), International Labour Conference 106th Session, 2017, preamble.

A key question surrounds the Recommendation, however – one that queries how successful it will be as an instrument that goes beyond employment generation and economic recovery, to one that ensures respect for labour rights, in order to achieve long-term development and peace dividends. That question is one that drives this thesis, and it seeks to respond to this question from a number of angles that have informed its content and structure. These include interrogating, for example, how Recommendation No. 205 complements existing regimes of protection, its utility as an instrument of soft law, how it approaches economic and labour market disruptions spurred by crises, whether its provisions addressing rights concerns of vulnerable groups are sufficiently robust, and whether it reflects a human rights-based approach to a necessary extent so that these concerns are not sidelined.

The purpose of this thesis is to respond to these questions, and to address the lacuna in academic literature on the role of international law in guiding post-crisis recovery and response on the part of states from the perspective of employment.

1.2 Research question

The research question for this thesis is *‘what role can, and should, international labour standards, specifically Recommendation No. 205, play in securing labour rights and decent work in post-conflict and post-disaster recovery and reconstruction?’*

1.3 Delimitations

In light of the purpose of established above, it is necessary to establish some delimitations for this thesis. This thesis does not seek to provide an exhaustive account of all of the rights connected to employment that come under risk in post-crisis contexts. To this end, Chapter 2 principally considers international human rights and labour law instruments, and does not address the application of international humanitarian law or international refugee law, which are outside the scope of this paper. Likewise, regional instruments are not considered, given that this paper adopts an international perspective. Within the international human rights and labour law, Chapter 2 addresses the main instruments relevant to employment in post-conflict and post-disaster recovery. Likewise, Chapter 5 aims to build upon this international legal framework to extrapolate and analyse the risks to fundamental labour rights that arise in post-crisis recovery, for the purposes of assessing the utility of Recommendation No. 205 as an instrument in addressing these risks.

1.4 Structure

The thesis begins, in Chapter 2, by establishing the existing international legal framework that structures labour rights protection relevant to post-conflict and post-disaster recovery. It explores the growing international consensus on the links between labour rights, and economic growth,

development and peace that has increasingly been reflected in soft law, and confirms the continuing relevance and applicability of obligations under international legal instruments in the post-crisis period. Chapter 2 establishes the international legal framework on two levels, in international human rights law generally, and in international labour law and guidance instruments specifically. Finally, it examines the different forms of international labour standards. Chapter 3 looks beyond the law to examine the impacts of conflicts and disasters on socio-economic capital, physical capital, political and institutional capital and human capital, and the implications these impacts have for national labour markets and the priorities of post-crisis employment policies. This Chapter illustrates the context in which labour rights violations occur, the analyses in Chapters 4 and 5 can be undertaken.

The thesis turns, in Chapter 4, to a substantive analysis of Recommendation No. 205 in order to determine the ways in which the revision has broadened its scope, its coverage of key issues of concern to the international community, its adoption of a human rights-based approach and reference to international legal standards, and lastly, the role of stakeholder dialogue and international cooperation. This Chapter enables the analysis to take place in Chapter 5 of how Recommendation No. 205 responds to the challenges of post-crisis recovery. Finally, Chapter 6 develops a human rights risk analysis framework, analysing the risks in post-crisis contexts to the rights of freedom of association and collective bargaining, to freedom from forced labour, to freedom from child labour, and to equality and non-discrimination on the grounds of ethnic origin, sex, and disability. Drawing from examples of where rights violations have occurred internationally in post-crisis contexts, it establishes the implications for post-crisis programming arising from these risks, and then tests the utility of Recommendation No. 205, in responding to these risks, as an instrument for the protection of these rights. Chapter 5 concludes by assessing further gaps in the coverage of Recommendation No. 205, and analysing the implications of its recommendation format.

1.5 Methodology

This thesis generally employs critical legal analysis. Chapter 2 examines the international legal framework *lex lata*, examining the most relevant provisions in international human rights instruments broadly, and in international labour instruments more specifically. Chapter 2 also deals with soft law in two ways. First, it considers the substance of soft labour law instruments that are both relevant to the fundamental instruments presented in Chapter 1 and are influential for all Member States of the ILO for reasons that will be established in that chapter. Second, it considers implications of the form of international labour standards (namely, conventions and recommendations) that are highly relevant to the central purpose of this thesis.

Chapter 3 adopts an interdisciplinary approach to analysing the interaction of, inter alia, demographic, institutional and political changes, spurred by crises, with national economies and labour markets, to understand the climate in which labour rights abuses emerge, and the implications this has for responses through policy and law. It thus deals with some elements of labour market and economic theory. Chapter 4 analyses the scope and content of Recommendation No. 205 according to its coverage of core issues identified as most relevant to labour rights protection, and the emergence of key themes, such as the use of a human rights-based approach.

Chapter 5 develops a human rights risk analysis framework, which is adapted from a type of model most commonly utilised in the corporate sector for the purposes of undertaking human rights due diligence.³ The framework is structured according to the four fundamental labour rights identified above – freedom of association and collective bargaining, forced labour, child labour, and non-discrimination. Conducting the analysis for each right entails first examining the human rights risk, analysing the implications for post-crisis policy, and critically analysing the role of Recommendation No. 205 in addressing and mitigating these risks. To ensure a broad and thorough analysis, and given the scope of violations considered across the four fundamental rights, Chapter 5 features ad-hoc examples of specific rights abuses that have emerged in the past following crises.

1.6 Definitions

The terms ‘post-conflict’ and ‘post-disaster’ can be fluid terms depending on the context, however for the purposes of this thesis, they will be defined according to their usage in the Human Rights Council Advisory Committee’s report to the Human Rights Council on ‘Best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations’ as follows:

A post-disaster or post-conflict situation starts immediately after a disaster has occurred or after the end of a conflict. It ends once the right to life and the security, physical integrity and dignity of the affected population is protected again and the population has recovered its rights related to basic necessities of life, including economic, social, cultural, civil and political rights.⁴

The term ‘crisis’ refers collectively to conflicts and disasters, and ‘post-crisis’ refers collectively to ‘post-conflict’ and ‘post-disaster’ contexts.

³ See Mitra Forouhar, Mark B. Taylor and Luc Zandvliet, ‘Due Diligence for Human Rights: A Risk-Based Approach) *Harvard University Corporate Social Responsibility Initiative Working Paper No. 53* (2009) 8.

⁴ Human Rights Council, Final research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations, 28th Sess, Agenda Items 3 and 5, UN Doc A/HRC/28/76 (10 February 2015), [98].

The terms ‘recovery’, ‘reconstruction’ and ‘response’ refer collectively to the short- and long-term process of rebuilding society, including through physical, socioeconomic and political elements, in the aftermath of a conflict or disaster.

For the purpose of consistency, this thesis will define the following terms in line with their usage in Recommendation No. 205:

‘Disaster’ means a serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.

‘Resilience’ means the ability of a system, community or society exposed to hazards to resist, absorb, accommodate, adapt to, transform and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions through risk management.

The terms ‘disarmament, demobilisation and reintegration’ will be defined according to their usage in the United Nations Integrated Disarmament, Demobilisation and Reintegration Standards’:

Disarmament: the collection, documentation, control and disposal of small arms, ammunition, explosives and light and heavy weapons of combatants and often also of the civilian population. Disarmament also includes the development of responsible arms management programmes.’

Demobilisation: the formal and controlled discharge of active combatants from armed forces or other armed groups. The first stage of demobilization may extend from the processing of individual combatants in temporary centres to the massing of troops in camps designated for this purpose (cantonment sites, encampments, assembly areas or barracks). The second stage of demobilization encompasses the support package provided to the demobilized, which is called reinsertion.

Reintegration: the process by which ex-combatants acquire civilian status and gain sustainable employment and income. Reintegration is essentially a social and economic process with an open time-frame, primarily taking place in communities at the local level. It is part of the general development of a country and a national responsibility, and often necessitates long-term external assistance.⁵

⁵ United Nations, Integrated Disarmament, Demobilisation and Reintegration Standards (2006) 2.

Chapter 2 – International legal framework & guidance

2.1. Introduction

The purpose of this chapter is twofold; first, to canvass labour rights protection in international human rights law generally, in addition to labour rights protection in international labour standards and guidance tools that are most relevant to post-conflict and post-disaster recovery. The second purpose is to situate Recommendation No. 205 in the international legal framework, and to provide an overview of the substantive issues contained in the legal instruments to which it refers. This chapter thus provides context for the thesis in general, and in particular for Chapter 4 (which analyses the recommendation), and establishing the rights risk analysis in Chapter 5. The chapter will begin by establishing, first, the connection between labour rights and economic stability, development and peace, and second, the continuing applicability of labour rights and international law in post-crisis contexts. It will then turn to an examination of the protection of labour rights relevant to post-crisis recovery and the right to work in international human rights instruments. This will be supplemented by a consideration of more specific labour rights protection relevant to the context of this thesis under international labour standards and guidance. Finally, it will examine the different forms of international labour standards, which is relevant for this chapter, and for the analysis in Chapter 5.

2.2. Economic Stability, Development and Peace – the Nexus to and Applicability of Labour Rights and International Law in Post-Crisis Contexts

The notion that labour rights are central to economic progress, social justice and peace, principles that lie at the core of Recommendation No. 205, is one that has long been recognised in the international legal agenda, both within and outside the ILO. The ILO Constitution in 1919 recognised the intrinsic connection between ‘universal and lasting peace’ and social justice, an idea that continues to anchor the Organisation’s work. The Declaration of Fundamental Principles and Rights at Work (1998) and the Decent Work Agenda (1999) both placed workers rights at the centre of the economic growth necessary to ensure social progress, poverty reduction, and sustainable development. More recently, the Declaration on Social Justice for a Fair Globalisation (2008) recognised the importance of pursuing economic and social policies in concurrence, to achieve a more equitable globalisation that is inclusive of workers rights. The preamble of Recommendation No. 205 itself places the instrument in the context of ‘the impact and consequences of conflicts and disasters for poverty and development, human rights and dignity, decent work and sustainable enterprises’. In light of the Recommendation’s substantive provisions, it refocuses how poverty and development, human rights and economic progress can be targeted through labour rights protection.

The link between equitable economic growth, development and labour rights has concurrently been recognised in other parts of the international system. The United Nations General Assembly

emphasised the fundamental nature of the right to work in Articles 6 and 10 of the Declaration on Social Progress and Development (1969),⁶ which highlight the centrality of the right to work and free choice of employment to social development in order to raise standards of living for all members of society.⁷ UNGA Resolution 38/124 (1983) links the right to work as a precondition of the ‘full enjoyment of all rights and complete personal dignity’.⁸ The UNGA Declaration on the Right to Development (1986), which soon followed, recognised the need for states to ‘...ensure equality of opportunity for all in their access to...employment and the fair distribution of income...’ as a key step towards realising the right to development.⁹ The Human Rights Council Advisory Council, in its research report related to Resolution 22/16 on the ‘Promotion and protection of human rights in post-disaster and post-conflict situations’ (2013), emphasised that in such contexts, rights relating to economic and social protection needs ‘such as...[the right] to work...should be protected and respected through the design and implementation of concrete initiatives and mechanisms at all levels’.¹⁰ Most recently, the 2030 Agenda for Sustainable Development (2015) imports the notion of ‘decent work’ in Goal 8, which calls generally for ‘sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all’.¹¹ Finally, the 2013 World Development Report underscored the integral role of jobs for economic and social development, not just for individual wellbeing, but for ‘many broader societal objectives, such as poverty reduction, economy-wide productivity growth and social cohesion’.¹² Despite the international recognition of the interconnected nature of these issues, there has not however, until this point, been an international legal instrument recognising this link and developing its application in modern post-crisis contexts.

In the context of this consensus within the international community on the nexus between employment, development and peace, it is important to establish the continuing applicability, during post-crisis reconstruction, of the international legal framework relevant to labour rights that is the subject of this chapter. One of the core purposes of Recommendation No. 205 is that it underscores the absolute necessity of observing and applying labour rights, without distinction, during the recovery and reconstruction stages of conflicts and disasters. Neither the ICESCR, nor any ILO

⁶ *Declaration on Social Progress and Development*, GA Res 2542 (XXIV), UN GAOR, 1829th plen mtg, UN Doc A/7630 (11 December 1969).

⁷ *Ibid.*, arts 6 and 10.

⁸ *Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms*, GA Res 38/124, UN GAOR, 38th Sess, Agenda Item 100, UN Doc A/RES/38/124 (16 December 1983), para. 14.

⁹ *Declaration on the Right to Development* (1986), GA Res 41/128, UN GAOR, 97th plen mtg, UN Doc A/RES/41/128 (4 December 1986), art 8.

¹⁰ Human Rights Council, *Promotion and protection of human rights in post-disaster and post-conflict situations*, Resolution 22/16, 22nd Sess, Agenda Item 5, UN Doc A/HRC/RES/22/16 (10 April 2013); Human Rights Council, *Final research-based report on post-disaster and post-conflict situations*, above n 4, [98].

¹¹ *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70th sess, Agenda Items 15 and 116, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015), 19/35.

¹² World Bank, *World Development Report 2013: Jobs* (2012) xiii.

Conventions (with the exception, in some circumstances, of the Forced Labour Convention, 1930 (No. 29)),¹³ contain provisions specifically enabling derogation from the rights contained therein *during* times of public emergency, including disasters and armed conflict. In the context of the ICESCR, many scholars and the Committee itself suggest that the Covenant does not permit the suspension of the rights contained therein in such contexts, and that the Covenant continues to apply.¹⁴ In light of the general limitations clause in Article 4,¹⁵ and the fact that the rights under the Covenant are subject to progressive realisation under Article 2(1), the Covenant may thus ‘accommodate the exigencies of emergency situations, without further requiring the suspension of rights’.¹⁶

In the absence of derogation provisions states parties may, in some circumstances, invoke doctrines such as *force majeure* to preclude the wrongfulness of non-performance of obligations under treaties, provided that the obligation in question is not a peremptory norm.¹⁷ This extends both to ‘natural or physical events’ and ‘human intervention’.¹⁸ However, *force majeure* only precludes wrongfulness ‘for as long as the circumstances in question continue to exist and to satisfy the conditions laid down for their invocation’,¹⁹ and requires existence of an impossibility to perform the relevant obligation. It thus only temporarily suspends an obligation.²⁰ The concept of *force majeure* is interpreted restrictively in international law; the performance of the obligation must not be merely more difficult, but materially impossible.²¹ A similarly restrictive approach to *force majeure* has been adopted by the ILO bodies in their decisions on states invoking the doctrine as a justification for non-performance of

¹³ See below, and footnote 24, for further explanation on exceptions to the use of forced labour in emergencies, and important caveats to the operation of the provisions of Convention No. 29.

¹⁴ See, for example, David Kinley, Jacqueline Mowbray and Ben Saul, *The International Covenant on Economic, Social and Cultural Rights: commentary, cases and materials* (Oxford University Press, 2014), 258; CESCR, *Report on the Sixteenth and Seventeenth Sessions – Concluding Observations on Iraq*, Supp No 2, UN Doc E/1998/22 (28 April-16 May 1997, 17 November-5 December 1997), [253].

¹⁵ Also note the specific limitations contained, for example, on trade union rights under Article 8(1) and (2).

¹⁶ Kinley, Mowbray and Saul, *Commentary on the ICESCR*, above n 14, 259; Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights (1987) 9(2), *Human Rights Quarterly*, 156, 217.

¹⁷ A valid invocation of *force majeure* requires that the act in question is brought about ‘by an irresistible force or an unforeseen event’, which is beyond state control, and which makes performance of the obligation materially impossible. *Force majeure* further requires that a state has not played a substantial role in causing or inducing the situation in question, and that a state has not undertaken to prevent the particular situation arising or has otherwise assumed the risk. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (November 2001) 183, 188, arts 23(1), 23(2)(a)-(b). Another doctrine that may be applicable in such circumstances is that of necessity (see *Draft Articles* art 25), which precludes the wrongfulness of non-performance of obligations where it is the sole means by which a state can safeguard an essential interest threatened by a grave and imminent peril.

¹⁸ *Ibid*, 184. The examples given in the commentary include, for natural events, earthquakes, floods, or drought, and for human intervention, loss of control of a state’s territory as a result of military operations.

¹⁹ *Ibid*, 183, 188, art 27(a). Yearbook of the International Law Commission, Volume II, Part I, 51st sess, UN Doc A/CN.4/SER.A/1999/Add.1 (Part 1), 85, [350].

²⁰ Ultimately, the ‘exceptional character of the event, on the State obligations in question, and the means at the disposal of the State’, must be taken into account. James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010), 480.

²¹ *Ibid*, 480.

obligations under international labour conventions. An ILO Commission of Inquiry into Greece's performance of obligations under the freedom of association and collective bargaining conventions thus found that 'a plea of *force majeure* generally requires a showing of irresistible force of circumstances'.²² In a later Commission of Inquiry into Poland's non-compliance with the same conventions, the Commission found that actions conflicting with ILO conventions could be justified only by 'circumstances of extreme gravity' that are 'limited in scope and in duration to what is strictly necessary given the exigencies of the situation'.²³

In the specific context of forced labour, Article 2(2)(d) of the Forced Labour Convention, 1930, states for the purposes of this Convention, the term forced or compulsory labour shall not include [...] (d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic...and in general any circumstances that would endanger the existence or the well-being of the whole or part of the population.²⁴

As emphasised by the ILO Committee of Experts on the Application of the Conventions and Recommendations, this exception applies in 'restricted circumstances where a calamity or threatened calamity endanger the existence or well-being of the whole or part of the population'.²⁵ The enumeration of the circumstances giving rise to an 'emergency' for the purposes of the Convention reflects the restrictive nature of the concept, which includes genuine circumstances of *force majeure*.²⁶

²² Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaints concerning the Observance by Greece of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Made by a Number of Delegates to the 52nd Session of the International Labour Conference, ILO Official Bulletin, Special Supplement, Vol. 54, No.2, 1971, para 110.

²³ Report of the Commission appointed under Article 26 of the Constitution of the International Labour Organisation to examine the complaints concerning the Observance by Poland of the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87) and the Rights to Organise and Collective Bargaining Convention 1949 (No. 98), International Labour Office Official Bulletin, Special Supplement, Vol. 67, 1984, para 479.

²⁴ Two caveats must be made in connection with this provision. First, the Protocol of 2014 to the Forced Labour Convention, 1930 does not change the definitions of forced and compulsory labour established in Convention No. 29, but article 7 confirms that the 'transitional provisions of article 1, paragraphs 2 and 3, and articles 3 to 24' of Convention No. 29 are no longer in force. Second, the Abolition of Forced Labour Convention, 1957 (No. 105) (which is discussed further below in section 2.4.1) supplements Convention No. 29, incorporating its definition of forced and compulsory labour, and explicitly prohibits its use in five key areas. The exceptions contained in Article 2(2) of Convention No. 29, which apply 'for the purposes of this Convention' do not apply automatically to Convention No. 105. This means that states that have ratified Convention No. 105 are obliged to 'suppress and not make use of any form of forced or compulsory labour' contained in article 1 of that instrument, including, inter alia, '(b) as a method of mobilising and using labour for purposes of economic development'. ILO, *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, International Labour Conference, Report III (Part 1B), 101st Session 2012 [300].

²⁵ ILO, *General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1951 (No. 105)*, International Labour Conference, Report III (Part 1B), 96th Session, 2007, [62].

²⁶ *Ibid.*

In such cases, the ‘duration and extent of the compulsory service, as well as the purpose for which it is used’ must be strictly limited by the exigencies of the circumstances, and must only be used to counter an ‘an imminent danger to the population’.²⁷

The consequence of the above analysis is twofold; first, in light of the strict approach towards non-performance of obligations under international human rights law, including labour conventions, *during* times of crises, it is evident that state obligations under these conventions will apply in the post-conflict and post-disaster recovery and reconstruction period except, perhaps, in the most extreme of circumstances. Second, it emphasises the central role Recommendation No. 205 can play in bringing to the fore priority actions, based on the principles described above and the legal framework examined below, for states in post-conflict and post-disaster recovery. The human rights aspects of labour protection therefore not only apply in post-crises contexts, but, as will be established in this thesis, they are absolutely essential to a sustainable and equitable recovery process that fosters long-term social and economic development. Recognition of this point by the international community at large through the instruments outlined above reflects the existence of both the legal scope and pragmatic policy impetus for Recommendation No. 205 in confirming the primacy of labour rights protection in post-crises recovery. Recommendation No. 205 therefore sits within and supplements the framework of international consensus, of widely ratified international human rights conventions containing labour rights, and of more specific protections contained in international labour standards.

2.3. Labour Rights Protection in International Human Rights Instruments

2.3.1. The Universal Declaration of Human Rights

The right to work is recognised as a fundamental right in article 23 of the *Universal Declaration of Human Rights* (UDHR).²⁸ Article 23 contains four relevant principles: the right to work, the principle of equal pay, the principle of just remuneration, and the principle of freedom of association. Article 23(1) is comprised of four further aspects.²⁹ First, the right to work stresses the positive aspect of individuals gaining access to productive activity, rather than the negative obligations on states to address labour market barriers and discrimination or to provide protection from unemployment

²⁷ ILO, *General Survey on the Forced Labour Convention 2007*, above n 25.

²⁸ Article 23 provides that: ‘(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; (2) Everyone, without any discrimination, has the right to equal pay for equal work; (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection; and (4) Everyone has the right to form and to join trade unions for the protection of his interests’.

²⁹ It is not clear whether these elements are individually severable rights or whether the four elements collectively comprise the right to work. H Collins, ‘Is There a Human Right to Work?’ in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, 2014), 24.

through social security.³⁰ Second, free choice of employment refers to the freedom of the individual ‘to pursue an occupation of his or her choice without unjustified restrictions or discrimination’ imposed by the government or private actors and confers on the state a responsibility to afford the individual free access to the labour market.³¹ Third, ‘just and favourable conditions of work’ refers to terms of employment that are just and beneficial to the worker. The fourth aspect – right to protection against unemployment – is conceptually vague and gives rise to a number of interpretations.³² Article 23(2) on equal pay for equal work refers to the notion that pay should correspond to the work done and not be dependent on the characteristics of the worker, but does not prohibit “reasonable disparity”...such as higher pay to workers with more seniority.³³ Article 23(3) seeks to ensure adequate salaries, taking into account family obligations that may justify higher wages to certain workers.³⁴ Finally, article 23(4) underscores the right of all persons to form and join trade unions.

The UDHR is a soft law instrument creating a comprehensive system of rights, and provides a foundation for standard-setting and monitoring activities in the human rights field for the United Nations and other international organisations.³⁵ Politically, it provides ‘the primary source of the global consensus on human rights...[it] represents the only common ground when many states discuss human rights’.³⁶ As the UDHR is adopted by a resolution of the UNGA, it is not subject to the ratification and accession process required for treaties, and thus, it does not impose legally binding obligations upon those states.³⁷ Some of its provisions have, however, been increasingly recognised as reflecting customary international law.³⁸ Further, widespread international acceptance of its principles does afford it a significant level of influence, with the rights it contains having been largely operationalised through the binding ICCPR and ICESCR. The UDHR thus provides a platform through which international consensus on human rights issues can be built.³⁹

³⁰ H Collins, ‘Is There a Human Right to Work?’, above n 29, 24.

³¹ Gunnar Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, 1999), 493.

³² For example, if applied in the contexts of groups facing disadvantages in accessing employment, it could give rise to positive obligations to address unemployment. *Ibid*, 24.

³³ Alfredsson and Eide, *The Universal Declaration of Human Rights*, above n 31, 494.

³⁴ *Ibid*, 494.

³⁵ *Ibid*, xxx.

³⁶ Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’, (1995) 25 *Georgia Journal of International and Comparative Law* 287, 353.

³⁷ Alfredsson and Eide, *The Universal Declaration of Human Rights*, above n 31, xxx. The debate over whether all or part of the UDHR constitutes customary law in accordance with article 38 of the Statute of the International Court of Justice is outside the scope of this thesis.

³⁸ Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’, above n 36, 321-6.

³⁹ Notably, it has been widely used in the preparation of international treaties, such as the ICCPR, ICESCR and CEDAW. Kinley, Mowbray and Saul, *Commentary on the ICESCR*, above n 14, 273.

2.3.2. The International Covenant on Economic, Social and Cultural Rights⁴⁰

The ICESCR contains two labour-related articles relevant to the focus of this paper: Article 6, which states the general principle of the right *to* work, and Article 7, which contains more general principles of rights *at* work.

(i) Article 6⁴¹

As confirmed by the Committee on Economic, Social and Cultural Rights, Article 6 defines generally and non-exhaustively the right of every person to decent work that respects the workers rights ‘in terms of conditions of work safety and remuneration’.⁴² Article 6 includes the right to freely accept or choose work, as well as the right to refuse employment, and protects against the arbitrary denial of work through unjustified dismissal.⁴³ It implies the right not to be unfairly deprived of employment, but the Committee has underscored that it ‘should not be understood as an absolute and unconditional right to obtain employment’.⁴⁴ The right to choose or accept work may be conditional upon a number of considerations however, including the inherent requirements of a job and security considerations.⁴⁵ The ‘right of everyone to the opportunity to gain his living by work’ also necessitates protection from discrimination in all aspects of work and the protection of equal opportunity of employment, in conjunction with ICESCR Articles 2(2) and 3, which the Committee considers to be a core obligation.⁴⁶ Article 6 further implicitly prohibits forced or compulsory labour, which would be contrary to the right to freely choose employment and the freedom not to work.⁴⁷ The Committee has underscored that states must take steps to give full effect to the right to work in terms of availability of employment, accessibility of the labour market and acceptability and quality of work.⁴⁸

⁴⁰ As at 4 April 2017, there were 165 states parties to the ICESCR, and 5 signatories. States parties are states that are bound by its obligations, while signatories are states that have signed the covenant, but which have not consented to be bound. Signatories do have an obligation to refrain, in good faith, from actions that would defeat the objects and purpose of the treaty. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), arts 10 and 18.

⁴¹ Article 6 provides that: 1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right; and 2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual. As at 15 April 2017, one state party had made a reservation concerning its right to impose restrictions, on the basis of birth or qualifications, on the taking of employment in its regions or territories in order to safeguard the employment opportunities of workers in those regions or territories.

⁴² CESCR, *General Comment No. 18: The Right to Work*, 35th session, UN Doc E/C.12/GC/18 (6 Feb 2006) [7].

⁴³ Kinley, Mowbray and Saul, *Commentary on the ICESCR*, above n 14, 280, 282.

⁴⁴ CESCR, *General Comment No. 18: The Right to Work*, above n 42 [6].

⁴⁵ Kinley, Mowbray and Saul, *Commentary on the ICESCR*, above n 14, 283-289.

⁴⁶ CESCR, *General Comment No. 18: The Right to Work*, above n 42 [31]. This is subject to the regular exception of reasonable, objective and proportionate differential treatment under non-discrimination law as set forth in CESCR General Comment No. 20: Kinley, Mowbray and Saul, *Commentary on the ICESCR*, above n 14, 290.

⁴⁷ CESCR, *General Comment No. 18: The Right to Work*, above n 42 [6].

⁴⁸ CESCR, *General Comment No. 18: The Right to Work*, above n 42 [12].

States parties under the ICESCR are obliged to progressively realise most of the rights contained in the Covenant under article 2(1), and must ‘adopt, as quickly as possible, measures aimed at achieving full employment’.⁴⁹ The duty to guarantee that article 6 rights are not exercised in a discriminatory way, and the duty to take steps to fully achieve the right to work, are immediate obligations.⁵⁰ States parties are further required to respect the right to work by prohibiting forced labour and guaranteeing non-discrimination,⁵¹ and protect the right through legislation and other measures to ensure non-discrimination and equal.⁵² States must fulfil the right by creating and implementing a national employment policy that addresses the quality and quantity of employment opportunity, paying particular attention to disadvantaged groups.⁵³

(ii) *Article 7*⁵⁴

The Committee has emphasised that article 7 applies universally, regardless of gender, geography and type of work.⁵⁵ Concerning the remuneration provision in article 7(a), ‘wage’ includes additional allowances of any kind,⁵⁶ and the notion of a ‘fair wage’ in article 7(a)(i) is dynamic, depending on a range of objective criteria reflecting the worker’s responsibilities, the level of skill and education for execution of the work and impact on the worker’s health and safety.⁵⁷ ‘Equal remuneration for work of equal value’ means that remuneration should be equal where the work is the same or similar, and also when work is different but is objectively assessed to be of equal value.⁵⁸ Remuneration must provide a ‘decent living’ for workers and their families that will enable them to enjoy other rights in the text.⁵⁹ The minimum wage should be established in legislation and applied consistently, taking

⁴⁹ CESCR, General Comment No. 18: The Right to Work, above n 42 [19].

⁵⁰ Ibid [19] and [33].

⁵¹ Ibid [23].

⁵² Ibid [23] and [25].

⁵³ Ibid [26]. This is modelled off ILO Convention No. 122 on employment policy, discussed below.

⁵⁴ Article 7 provides that: The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; and (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. As at 15 April 2017, six states parties had made reservations in connection with article 7: two regarding art 7(a)(i), three regarding art 7(d), and one regarding 7(c).

⁵⁵ CESCR, General Comment No 23: The Right to Just and Favourable Conditions of Work, 57th session, UN Doc E/C.12/GC/23 (27 April 2016), [5].

⁵⁶ Ibid [7].

⁵⁷ Ibid [10]. Further, an assessment of fairness should consider the position of female workers where their work has been conventionally undervalued, and the wage of workers with less stable contracts should reflect the lack of job security.

⁵⁸ Ibid [11]-[12]. This provision extends across discrimination on the basis of sex as specified in the article but also implies equality across race, ethnicity, national, national, disability, age, or any other ground.

⁵⁹ Ibid [18].

into account, inter alia, general level of wages and national living standards.⁶⁰ Under article 7(b), states are obliged to adopt a ‘national policy for the prevention of accidents and work-related health injury’ that applies to all economic activities and workers.⁶¹ Article 7(c) calls for fair, merit-based promotion processes that take into account individual circumstances in a non-discriminatory manner, and direct and indirect obstacles to promotion.⁶² Finally, the Committee has interpreted article 7(d) as placing upon states parties an obligation to set, through enforced regulations, minimum concerning limits on daily and weekly work hours, rest periods, leave periods, and flexible work arrangements.⁶³

Similarly to article 6, states parties are required to take ‘deliberate, concrete and targeted steps towards the progressive realisation’ of the full implementation of the right to just and favourable conditions of work, using maximum available resources,⁶⁴ and must effectively regulate the right as regards to its implementation by employer and worker organisations.⁶⁵ States parties should further establish a system of labour inspectorates to monitor all aspects of this right.⁶⁶ Article 7(a)(i) gives rise to an obligation to take immediate steps towards achieving equal remuneration for men and women for work of equal value.⁶⁷ States should respect the right by not interfering with its enjoyment, for example by not introducing discriminatory pay scales, must protect the right by ensuring that laws and regulations surrounding its enjoyment are adequately enforced,⁶⁸ and fulfil the right by legislating on, inter alia, issues discussed above on non-discrimination, minimum wage and safety and health.⁶⁹

(iii) *Article 8*⁷⁰

⁶⁰ CESCR, General Comment No 23: The Right to Just and Favourable Conditions of Work, above n 55 [21].

⁶¹ Ibid [25]-[26]. The Committee further describes the minimum requirements of national policy based on the ILO Convention No. 155 on Occupational Safety and Health and its 2002 Protocol, which will not be replicated here for brevity. See *ibid* [27]-[28]. See also Occupational Safety and Health Convention, 1981 (No. 155), arts 1(1), 2(1), 5(a), (b), (c) and (e).

⁶² CESCR, General Comment No 23: The Right to Just and Favourable Conditions of Work, above n 55 [31]-[32].

⁶³ Ibid [35]-[46].

⁶⁴ Ibid [50], referencing CESCR, *General Comment No 3: The Nature of States Parties Obligations*, 5th session, UN Doc E/1991/23 (14 December 1990).

⁶⁵ CESCR, General Comment No 23: The Right to Just and Favourable Conditions of Work, above n 55 [51].

⁶⁶ Ibid [54].

⁶⁷ Ibid [16].

⁶⁸ Ibid [59].

⁶⁹ Ibid [60]-[62].

⁷⁰ Article 8 provides that: 1) The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations; (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country. 2) This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of

Article 8(1) entrenches the right of everyone to form and join trade unions, and the right of trade unions to function freely, both of which can be subject to limitations only as prescribed by law, as necessary in a democratic society in national security or public order interests, or for the protection of the rights of others. It further contains the right of trade unions to form federations, and the right to strike in conformity with national laws. These rights are immediately applicable and not subject to progressive realisation,⁷¹ however article 8(2) does not preclude lawful restrictions on these rights by state administrations or armed forces. Under article 8(3), this provision do not authorise states parties to take measures that would prejudice their obligations under ILO Convention No. 87 (discussed below).

(iv) *The relationship between the ICESCR articles and ILO Standards*

The content of articles 6 and 7 is closely linked to specialised ILO standards, some of which are discussed in the next section. The ILO standards therefore can, and do, inform the interpretation of both articles. In practice, they have informed the scope of article 6 as interpreted by the Committee, even when a state has not ratified to the ILO convention in question.⁷² Further, the Committee has brought in evolving normative frameworks in its interpretation of the Article, such as the ILO's 'decent work' agenda.⁷³ During the drafting process, States intended article 7 to 'serve as a link between general human right aspirations and the more substantive labour instruments.'⁷⁴ The Committee has also called on states under article 7(b) to implement ILO conventions where states are party to those instruments.⁷⁵

2.3.3. International Covenant on Civil and Political Rights⁷⁶

(i) *Article 8*

ICCPR article 8 prohibits the imposition of slavery or servitude (which are non-derogable rights). It further guarantees freedom from forced or compulsory labour, except where imposed as a punishment for a crime or in the course of detention following a lawful court order, military service, service exacted 'in cases of emergency or calamity threatening the life or well-being of the community', or

the police or of the administration of the State. 3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

⁷¹ Kinley, Mowbray and Saul, *Commentary on the ICESCR*, above n 14, 495.

⁷² *Ibid* 277.

⁷³ *Ibid* 277-278.

⁷⁴ Including, inter alia, the Equal Remuneration Convention, 1951 (No. 100) and the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26). *Ibid*, 395.

⁷⁵ See, for example, CESCR, Concluding Observations: Kazakhstan, E/C.12/KAZ/CO/1 (7 June 2010), [21].

⁷⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR). As at 15 April 2017, there were 169 states parties to the ICCPR and six signatories.

work forming part of normal civil obligations.⁷⁷ The Human Rights Committee has referenced trafficking in persons and forced prostitution in the course of its jurisprudence on article 8.⁷⁸

(ii) *Article 22*

In article 22 of the International Covenant on Civil and Political Rights (ICCPR),⁷⁹ the right to form and join trade unions is located within the general right to freedom of association, and is subject to the same conditions as ICESCR article 8 concerning lawful restrictions on these rights by the state.⁸⁰ Similarly to ICESCR article 8, article 22(3) does not authorise states parties to take measures that would prejudice their obligations under ILO Convention No. 87.

2.3.4. The Convention on the Elimination of All Forms of Discrimination against Women⁸¹

Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW) imparts broad obligations on states parties to eliminate structural discrimination against women in occupation and employment.⁸² Under articles 1 and 2(e), this includes measures to eliminate discrimination and ensure equality in the right to work, employment opportunities, working conditions, remuneration, benefits and equal treatment and in both the public and private sectors. The right to work is defined in the text of article 11(1)(a) as ‘inalienable’, and at its core, requires states parties to ensure equal opportunity in access to the labour market (formal equality).⁸³ States parties are required to take appropriate measures to facilitate women’s economic participation and reduce their

⁷⁷ ICCPR, art 8(3).

⁷⁸ Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 68th Sess, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) para 12; Human Rights Committee, *Concluding Observations on Portugal (Macau)*, UN Doc CCPR/C/79/Add.77 (5 May 1997), [13] and [19].

⁷⁹ Article 22 provides that: 1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. 2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. 3) Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

⁸⁰ ICCPR art 22(2).

⁸¹ *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). As at 15 April 2017, there were 189 states parties to CEDAW and two signatories. Six states parties have made reservations in connection with article 11.

⁸² Christine Chinkin, Marsha A. Freeman and Beate Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 307. ‘Discrimination against women’ is defined in article 1 as ‘mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.

⁸³ CEDAW Committee, Report of the Committee on the Elimination of Discrimination against Women on its thirtieth session: Dominican Republic, Supp No 38, UN Doc A/59/38 (2004) [303]. This work should also be decent work: CESCR, General Comment No. 18: The Right to Work, above n 42 [12].

unemployment, and encourage participation in the paid labour force.⁸⁴ Enforcement of labour laws should be directed towards women workers in all areas, including those in the informal sector.⁸⁵

The principles of equal remuneration for work of equal value without discrimination based on sex, and equality of treatment in the evaluation of the quality of work (article 11(1)(d)) is shared with those in the Equal Remuneration Convention, 1951 (No. 100).⁸⁶ CEDAW further enshrines the right to safety and health in working conditions, including protection of reproduction functions.⁸⁷ The other provisions in article 11(1) include ‘the right to education and training necessary for the same employment opportunities’, free choice of employment, the right to promotion, job security and all benefits and conditions of service’ and to social security. Article 11(3) obliges states to periodically review protective legislation enacted with respect to matters covered in article 11. It is relevant to note that the CEDAW Committee, in its General Recommendation No. 30 on ‘women in conflict prevention, conflict and post-conflict situations’, has recommended that states promote gender equality ‘as a necessary pre-condition for a sustainable post-conflict economy’, drawing specific attention to targeting women both the formal, informal and rural economies.⁸⁸ The principles of equality and non-discrimination in employment enshrined in CEDAW overlap to an extent with ILO instruments on gender equality, including the Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (considered below in section 2.4).⁸⁹ The CEDAW Committee has called upon states parties to adopt and enforce legislation pursuant to their obligations under the ILO non-discrimination conventions they have ratified.⁹⁰

⁸⁴ CEDAW Committee, Report of the Committee on the Elimination of Discrimination against Women on its twenty-ninth session: Morocco, Supp No 38, UN Doc A/58/38 (2003) [174]-[175].

⁸⁵ CEDAW Committee, General Recommendation No. 16: Unpaid Women Workers in Rural and Urban Family Enterprises, adopted at its 10th Session (1991), UN Doc A/46/38.

⁸⁶ CEDAW art 11(d) and Convention No. 100 arts 1(b), 2 and 3. CEDAW’s definition of ‘remuneration’ incorporates the wide definition of the term accorded in C100. Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination against Women* (Brill-Nijhof, 1993) 136.

⁸⁷ CEDAW art 11(1)(f).

⁸⁸ CEDAW Committee, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc CEDAW/C/GC/30 (18 October 2013) [52].

⁸⁹ A point of distinction between Convention No. 111 and CEDAW is that the former adopts a gender-neutral prohibition on discrimination in employment and occupation on the grounds of a range of factors, including sex, except where necessitated by the inherent requirements of a job (see arts 1(1)-(2) and 2, whereas CEDAW requires elimination of discrimination against women workers specifically.

⁹⁰ CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women on its twenty-ninth session: Morocco*, Supp No 38, UN Doc A/58/38 (2003) [175]. The CEDAW Committee has further called upon states parties to ratify Convention No. 100 and implement gender-neutral criteria for comparison of the value of jobs. See CEDAW Committee, *General Comment No 13: Equal Remuneration for Work of Equal Value*, 8th session (1989).

2.3.5. The Convention on the Rights of Persons with Disabilities⁹¹

The Convention on the Rights of Persons with Disabilities (2006) (CRPD) does not create new rights in itself, but applies existing human rights to the specific circumstances of persons with disabilities (PwDs).⁹² It comprehensively addresses employment rights in article 27, which must be read in light of the general principles of the Convention in article 3 including, inter alia, respect for inherent dignity, non-discrimination, equality of opportunity and equality between men and women.⁹³ Article 27(1), at its core, recognises the right of PwDs to work, on an equal basis with others, in an inclusive and accessible labour market, and is predicated on an understanding of the central role work plays in enabling personal development and social participation, and in providing access to other rights, such as adequate income.⁹⁴ Similarly to the ICESCR, article 27 does not confer an absolute right to work, but contains steps states parties should take to realise the right to work for PwDs in accordance with basic tenets.⁹⁵ States must prohibit discrimination concerning employment of PwDs, including in recruitment and regarding safe and healthy working conditions, and must protect the rights of PwDs to just and favourable conditions of work (including, inter alia, equal opportunity, and equal remuneration for work of equal value, reflecting the terminology in Convention No. 100), and to equally exercise trade union rights.⁹⁶ States parties must ensure that reasonable accommodation is provided, and failure to provide such accommodation amounts to discrimination.⁹⁷ This connects to the philosophy of the Convention as advocating the social model of disability.

Article 27 also requires states parties to undertake a number of employment promotion measures, including in relation to public, private, and self-employment, to ensure access to vocational rehabilitation and guidance services, and to implement affirmative action programmes.⁹⁸ Article 27(2) requires states parties to ensure that PwDs are not held in slavery, and ‘are protected, on an equal basis with others, from forced or compulsory labour’. Article 4 requires states to bring national practice into line with Convention standards by, inter alia, adopting legislative and administrative measures, and abolishing laws and practices constituting discrimination against persons with

⁹¹ *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008). As at 15 April 2017, there were 173 states parties to CRPD and 14 signatories. Four states parties have made reservations in connection with article 27.

⁹² Rachele Cera, Valentina Della Fina and Guiseppa Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities – A Commentary* (Springer, 2017) 253.

⁹³ CRPD art 3(a)-(b), (e), (g).

⁹⁴ Cera, Della Fina and Palmisano (eds), *CRPD – A Commentary*, above n 92, 498.

⁹⁵ CESCR, General Comment No. 18: The Right to Work, above n 42 [6].

⁹⁶ CRPD art 27(1)(a)-(c). The ICESCR Committee has underscored that the Covenant article 7 enjoyment of just and favourable conditions of work applies to all disabled workers, both in sheltered facilities and in the open labour market. See CESCR, *General Comment No. 5: Persons with Disabilities*, 9 December 1994, E/1995/22 [25].

⁹⁷ CRPD arts 27(1)(i) and 2. Accessibility of facilities is addressed in Article 9. See CRPD Committee, *General Comment No. 2 – Article 9: Accessibility*, 11th Sess, UN Doc CRPD/C/GC/2 (22 May 2014) [41]: ‘persons with disabilities cannot effectively enjoy their work and employment rights, as described in article 27...if the workplace itself is not accessible’.

⁹⁸ CRPD art 27(1)(d)-k).

disabilities.⁹⁹ Finally, as relevant to the issue at the core of this thesis, article 11 requires states to take measures to protect persons with disabilities in situations of ‘risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters’. The CRPD is the leading instrument in the disability area for the entire UN system, and it, and the comments of its Committee, have been referenced by the ILO Committee of Experts.¹⁰⁰ The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), and its accompanying Recommendation No. 168,¹⁰¹ and also relevant in this context. The scope of Convention No. 159 is much narrower compared to the CRPD, requiring states parties to implement policies for vocational rehabilitation for disabled persons to promote their employment in the open labour market, which should be based on the principle of equal opportunity.¹⁰² Article 4 further proscribes positive measures aimed at achieving such equality as non-discriminatory.

2.3.6. The International Convention on the Elimination of all Forms of Racial Discrimination¹⁰³

Under the Convention on the Elimination of all Forms of Racial Discrimination (1965) (CERD) states parties undertake to guarantee equality before the law of everyone, irrespective of race, colour, national or ethnic origin, in respect of ‘the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration’.¹⁰⁴ The Convention ‘obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights’.¹⁰⁵ The CERD Committee has, on numerous occasions, observed instances of racial discrimination in employment in both the public and private sectors,¹⁰⁶ and the low participation rates of minorities in the labour market.¹⁰⁷ The Committee has

⁹⁹ CRPD art 4(1)(a)-(b).

¹⁰⁰ See, for example, CEACR, *Observation – Discrimination (Employment and Occupation Convention) 1958 (No. 111) – South Africa*, adopted 2014, published at the 99th International Labour Conference session (2010).

¹⁰¹ Convention No. 159, article 1(1) defines a disabled person (non-comprehensively, for the purposes of clarifying the impacts of disability in the employment context) as ‘an individual whose prospect of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment’.

¹⁰² Convention No. 159 arts 2-3, 5.

¹⁰³ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (CERD). As at 15 April 2017, there were 178 states parties to CERD and 5 signatories.

¹⁰⁴ CERD, art 5(e)(i). Article 1 defines racial discrimination as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’.

¹⁰⁵ CERD Committee, *General Recommendation XX*, adopted at its 48th Session (1996) UN Doc A/51/18, Annex VIII, [1].

¹⁰⁶ See, for example, the CERD Committee, *Concluding Observations on the United Kingdom*, 50th Sess, UN Doc CERD/C/304/Add.20 (23 April 1997) [17].

¹⁰⁷ CERD Committee, *Concluding Observations on the Netherlands*, 52nd Sess, UN Doc CERD/C/304/Add.46 (30 March 1998) [12].

further called upon states to protect ‘non-citizens and minority workers against exploitative work conditions and discrimination in job recruitment’.¹⁰⁸

CERD was drafted ‘bearing in mind’ Convention No. 111 (as per the preamble), indicating a level of congruence between the two non-discrimination instruments. Aspects of the definition of discrimination in CERD do bare semblance to the later instrument, applied specifically to discrimination on the grounds of race, colour, descent, national or ethnic origin. The Committee has encouraged states parties to ratify Convention No. 111 as a treaty that has ‘a direct bearing on the subject of racial discrimination’.¹⁰⁹ One distinction between the ILO non-discrimination instruments arises from the fact that CERD replicates the UDHR concept of ‘equal pay for equal work’, as distinct from the ILO concept of ‘equal remuneration for work of equal value’. As clarified by the ILO Committee of Experts, the latter concept ‘includes but goes beyond equal remuneration for “equal”, the “same” or “similar” work, and also encompasses work that is of an entirely different nature, which is nevertheless of equal value’.¹¹⁰ It is thus enables a far broader comparison between work performed by men and women in different enterprises and employers.

2.3.7. Other human rights instruments

Provisions on the right to work feature in a number of additional international human rights treaties that will not be discussed in detail here. Treaties such as, inter alia, the Convention relating to the Status of Refugees (Articles 17, 18 and 19) and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, contain provisions relating to rights at work of certain specified groups. The Convention on the Rights of the Child (Article 32) underscores the need to protect children against harmful and exploitative work. Labour rights provisions further feature in regional instruments including the European Social Charter (Article 1), the African Charter on Human and People’s Rights (Article 15), amongst others.

2.4. Labour Rights Protection in International Labour Instruments

This section contains an overview of the most relevant international labour standards (ILS) to post-conflict and post-disaster recovery. The first section will deal with fundamental instruments – those containing rights and principles that are regarded as fundamental and that are reflected in the Declaration of Fundamental Principles and Rights at Work (1998). The second section will turn to governance instruments – those that have been designated as ‘priority instruments’ due to their

¹⁰⁸ CERD Committee, *Concluding Observations on the Russian Federation*, 73rd Sess, UN Doc CERD/C/RUS/CO/19 (22 September 2008) [25].

¹⁰⁹ CERD Committee, *Concluding Observations on Japan*, 76th Sess, UN Doc CERD/C/JPN/CO/3-6, [27].

¹¹⁰ CEACR, *General Observation – Equal Remuneration Convention, 1951 (No. 100)*, adopted 2006, published at the 96th International Labour Conference session (2007) [3].

importance to the functioning of the ILS system.¹¹¹ This section will subsequently examine other ILS relevant to post-crisis response, and those specific to this period, before turning to soft law and guidance instruments that supplement these international labour standards. Finally, this section will examine the implications of the form – conventions and recommendations – that these ILS take.

2.4.1. Fundamental principles and rights

(i) *Freedom of association and right to collective bargaining*

The Convention on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87)¹¹² establishes the right of workers and employers to establish and join organisations of their own choosing, for the purposes of furthering and defending their interests. As underscored by the ILO Committee of Experts, the right to freedom of association is ‘a basic human right with universal scope enabling the enjoyment of other rights’, including all of the fundamental labour rights discussed in this section, and is the core principle enabling social dialogue that lies at the heart of ILO activities.¹¹³ Under Convention No. 87 article 5, workers’ and employers’ organisations have the right to establish and join federations and confederations, and to affiliate with international workers and employers organisations. The public authorities of states parties must not interfere in any way that would restrict or impede the lawful undertaking of trade union activities, including the free elections of representatives, planning and execution of activities, formulation of regulations, and organisational management.¹¹⁴ While these organisations must respect the laws of the countries in which they operate, these laws may not apply so as to restrict these rights. As reaffirmed by the ILO supervisory bodies, the right to strike is an ‘intrinsic corollary of the right to organise protected by Convention No. 87’¹¹⁵ and is an ‘essential [element] of trade union rights’.¹¹⁶

The Right to Organise and Collective Bargaining Convention, 1949 (No. 98)¹¹⁷ safeguards these rights by guaranteeing the freedom of unions to operate independently of governments and employers. Article 1 provides that workers shall be protected against anti-union discrimination, including against acts aimed at requiring non-membership of a union as a condition of employment, or dismissing or prejudicing an employer by reason of union membership or participation in union activities. Further, workers’ and employers’ organisations must be protected against acts of interference against each

¹¹¹ ILO, *ILO Declaration on Social Justice for a Fair Globalisation*, International Labour Conference, 97th Sess (10 June 2008), 18.

¹¹² As at 15 April 2017, Convention No. 87 has been ratified by 154 states, and is in force for 153 states. The convention will come into force for Uzbekistan, which ratified it in December 2016, in December 2017. For all data on ratifications, see NORMLEX at <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:>

¹¹³ ILO, *General Survey on the fundamental Conventions 2012*, above n 24 [49].

¹¹⁴ Jean-Michel Servais, *International Labour Law* (Wolters Kluwer, 2nd ed, 2009), 114 [254].

¹¹⁵ ILO, *General Survey: Freedom of Association and Collective Bargaining*, International Labour Conference, Report III (Part 4B), 81st Session 1994 [151].

¹¹⁶ As per the Committee on Freedom of Association, as cited in *ibid* [146].

¹¹⁷ As at 15 April 2017, Convention No. 98 has been ratified by, and is in force for, 164 states.

other. Articles 3 and 4 place upon states parties the obligation to implement mechanisms to facilitate the right to organise and collective bargaining. As highlighted by the Committee of Experts, protection against anti-union discrimination is integral to Convention No. 87 in that ‘such acts may result in practice in a denial of freedom of association...and also consequently of collective bargaining’.¹¹⁸ Collective bargaining has a key role to play in social peace and achieving equitable working conditions and other benefits for workers.¹¹⁹

(ii) *Freedom from forced or compulsory labour*

As identified by the Committee of Experts, freedom from forced or compulsory labour is ‘pivotal for the attainment of social justice and its nexus with rights and freedoms’, and is integral to the protection of vulnerable groups and prevention of exploitation.¹²⁰ Its prohibition is now a peremptory norm of international human rights law, meaning that it is a universal, binding norm from which no state is excepted.¹²¹ Article 1 of the Forced Labour Convention, 1930 (No. 29)¹²² requires states parties to suppress, in the shortest possible time period, the use of forced or compulsory labour, which is defined in article 2 to mean ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. States parties are thus under a dual obligation to refrain from imposing forced labour, and to ensure that those within their jurisdiction do not impose it, and must ensure that no legislation is in place upon which recourse to forced labour may be had.¹²³ Convention No. 29 also contains exceptions for work that will not be considered forced or compulsory labour, including work of a military nature, work forming part of normal civil obligations of citizens, work as a result of a conviction in a court of law (with certain requirements), work in cases of emergency, and minor communal services.¹²⁴

As discussed in section 2.2 above, in 2014, the International Labour Conference adopted the Protocol of 2014 to the Forced Labour Convention, 1930,¹²⁵ with the aim of enhancing the prevention of forced labour, protection and compensation measures for victims, acknowledging the link of forced labour to human trafficking, and fostering international cooperation on the issue, without changing the definition of forced and compulsory labour established in Convention No. 29. Protocol Article 7 also deletes the ‘transitional provisions of Article 1, paragraphs 2 and 3, and Articles 3 to 24’ of

¹¹⁸ ILO, General Survey on the fundamental Conventions 2012, above n 24 [167].

¹¹⁹ Ibid [167].

¹²⁰ Ibid [251].

¹²¹ Ibid, [252].

¹²² As at 15 April 2017, Convention No. 29 has been ratified by, and is in force for, 178 states.

¹²³ Servais, *International Labour Law*, above n 114, 132 [335].

¹²⁴ Forced Labour Convention, 1930 (No. 29) art 2(2). However, see footnote 26 above, regarding the application of Convention No. 105, which may affect state obligations in respect of these ‘exceptions’ to forced labour. See, also, the Forced Labour (Indirect Compulsion) Recommendation, 1930 (No. 35), which is aimed at guiding state policy in ‘endeavouring to avoid any indirect compulsion to labour which would lay too heavy a burden upon the population’.

¹²⁵ Protocol No. 29 has been ratified by 13 states and is in force for 5 states.

Convention No. 29. The Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203) provides further guidance on prevention, protection and remedies for victims.

The Abolition of Forced Labour Convention, 1957 (No. 105)¹²⁶ supplements Convention No. 29, and while it does not change the definition of forced labour established in Convention No. 29, it expands areas in which forced labour is prohibited.¹²⁷ It prohibits absolutely the use of forced labour in certain situations, including for the purposes of political coercion, as a means of labour discipline, as punishment for participation in strikes, as a means of discrimination on racial, social, national or religious grounds.¹²⁸ Relevantly for this thesis, Article 1(b) prohibits the use of forced or compulsory labour as a strategy for economic development, where ‘recourse to forced or compulsory labour has a certain quantitative significance and is used for economic ends, even where the use of forced or compulsory labour for this purpose is ‘of temporary or exceptional nature’.¹²⁹ The Committee of Experts has noted the wide array of methods of work compulsion that could result in forced labour for economic purposes that are particularly relevant in the context of post-crises recovery, including, inter alia, ‘compulsion in the recruitment, assignment and transfer of labour, taken in conjunction with other restrictions on freedom of employment, such as preventing workers from terminating their employment contracts or compulsorily extending contracts’.¹³⁰ The Committee has further underscored that ‘no exceptions to universally recognised human rights should be sought in the name of development’.¹³¹

(iii) *Freedom from child labour*

As reiterated by the Committee of Experts, child labour is a ‘significant violation of children’s rights, fundamental rights at work and other human rights as well as an important barrier to national development’.¹³² The Minimum Age Convention, 1973 (No. 138)¹³³ and the Minimum Age Recommendation, 1973 (No. 146) collectively establish the goal of the complete abolition of child labour, and further aim to protect children’s ability to attend schooling, and regulate the type and conditions of work acceptable for children.¹³⁴ Convention No. 138 applies to all types of employment,

¹²⁶ As at 15 April 2017, Convention No. 105 has been ratified by 175 states, and has been denounced by, and thus is not in force for, 2 states: Malaysia and Singapore.

¹²⁷ ILO and Asian Development Bank, *Core Labor Standards Handbook* (2006) 48. Also note, as highlighted in footnote 24 above, that the exceptions contained in article 2(2) of Convention No. 29, which apply ‘for the purposes of this Convention’ do not apply automatically to Convention No. 105: ILO, *General Survey on the fundamental Conventions 2012*, above n 24 [300].

¹²⁸ Abolition of Forced Labour Convention, 1957 (No. 105), art 1.

¹²⁹ ILO, *General Survey on the Forced Labour Convention 2007*, above n 25 [167].

¹³⁰ *Ibid* [170].

¹³¹ *Ibid* [169].

¹³² ILO, *General Survey on the fundamental Conventions 2012*, above n 24 [327].

¹³³ As at 15 April 2017, Convention No. 138 has been ratified by 169 states and is in force for 168 states. The convention will come into force for Canada, which ratified it in June 2016, in June 2017.

¹³⁴ ILO, *General Survey on the fundamental Conventions 2012*, above n 24 [330].

except to work carried out in schools or training institutions for educational purposes, and the Committee of Experts has confirmed that this extends to all forms of economic activity irrespective of formal employment status.¹³⁵ Article 1 contains the basic aim of the Convention, requiring states parties to pursue a national policy to abolish child labour and raise the minimum working age to one that is consistent with their fullest physical and mental development, and to specify a minimum age in a declaration accompanying its ratification, however states also fulfil their obligations under the Convention through programmatic and legislative means.¹³⁶ The Convention and Recommendation also set minimum ages for entry into employment generally, in addition to employment involving hazardous work – work that is likely to risk the health, safety or morals of young persons.

The Worst Forms of Child Labour Convention, 1999 (No. 182)¹³⁷ and the Worst Forms of Child Labour Recommendation, 1999 (No. 190) require states parties to take immediate and effective measures to prohibit and eliminate the worst forms of child labour as elucidated in the convention, both in law, and in practice. The Convention designates the worst forms of child labour as all forms of slavery and trafficking, debt bondage, and compulsory recruitment for use in armed conflict, the use of children for pornographic purposes or illicit activities or the production and trafficking of drugs, and work which is likely to harm the child's health, safety or morals (this includes hazardous work – guidance on determining the existence of which is contained in Recommendation No. 190).¹³⁸ Actions required of states parties under the Convention include establishing and implementing programmes of action for the elimination of the worst forms of child labour as a priority, implementing monitoring mechanisms, and imposing appropriate penal or other sanctions for non-compliance.¹³⁹ States parties are also required to undertake time-bound measures to achieve the aims of the Convention under article 7, such as providing assistance for the removal and rehabilitation of children engaged in the worst forms of child labour, and ensuring access to free basic education. Finally, as highly relevant for the subject of this thesis, the Committee of Experts has emphasised the relationship between child labour and poverty, and in this regard has underlined the obligation of states parties to adopt measures to combat poverty to mitigate the risks of children entering the worst forms of child labour.¹⁴⁰

¹³⁵ Minimum Age Convention, 1973 (No. 138) art 6; ILO, *Minimum age: General survey of the reports relating to Convention No. 138 and Recommendation No. 146 concerning minimum age*, International Labour Conference, Report III (Part 4B), 67th Session 1981, [35], [117].

¹³⁶ ILO, *General Survey on the fundamental Conventions 2012*, above n 24 [337], [360].

¹³⁷ As at 15 April 2017, Convention No. 182 has been ratified by, and is in force for, 180 states. It is the most widely ratified international labour convention.

¹³⁸ Worst Forms of Child Labour Convention, 1999 (No. 182) art 3; Worst Forms of Child Labour Recommendation, 1999 (No. 190) para 3. Note that, according to the Recommendation, para 4, engaging in the types of work contained in Convention art 3 may be authorized from the age of 16 provided that workers' and employers' organisations are consulted, the health, safety and morals of the children are not compromised, and the children have received adequate instruction or vocational training.

¹³⁹ Worst Forms of Child Labour Convention, 1999 (No. 182) arts 1, 5-7.

¹⁴⁰ ILO, *General Survey on the fundamental Conventions 2012*, above n 24 [621], [625].

(iv) *Elimination of discrimination*

As noted by the Committee of Experts, equality and non-discrimination are core principles in human rights discourse, and in the context of employment, are rights that are fundamental to securing material well-being, economic security and social justice that likewise anchor the ILO Constitution.¹⁴¹ The Equal Remuneration Convention, 1951 (No. 100),¹⁴² in addition to the corollary Equal Remuneration Recommendation, 1951 (No. 90), was the first binding instrument adopted with the exact purpose of promoting gender equality and eliminating discrimination.¹⁴³ Convention No. 100 requires states parties to, by means of appropriate methods, promote and ensure the application to all workers of the ‘principle of equal remuneration for men and women workers for work of equal value’.¹⁴⁴ This principle is to be applied by way of legislation, wage fixing machinery, collective agreements, or a combination of these means.¹⁴⁵ Article 3 advocates the use of objective appraisals of jobs on the basis of work performed, where appropriate, and provides that differential rates of pay correspond to differences in the work performed without regard to sex is not regarded as contrary to the Convention No. 100. The Committee of Experts has therefore determined that effectively applying this Convention calls for two levels of inquiry: first, at the job level (to determine whether the work is of equal value) and at the remuneration level (to determine whether the remuneration is equal).¹⁴⁶ Once the legal and policy framework advocated by the Convention is in place, its efficacy on a state level must then be monitored on an ongoing basis by.¹⁴⁷ Convention Nos. 100 and 111 are ‘mutually reinforcing’, and linking the two instruments is crucial ‘as equal remuneration for work of equal value cannot be achieved in a general context of inequality’, as identified by the Committee of Experts.¹⁴⁸

The Discrimination (Employment and Occupation) Convention, 1958 (No. 111)¹⁴⁹ and its accompanying Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111) establish general standards on the promotion of occupational equality.¹⁵⁰ All states parties to

¹⁴¹ ILO, General Survey on the fundamental Conventions 2012, above n 24 [649].

¹⁴² As at 15 April 2017, Convention No. 100 has been ratified by 173 states, and is in force for 171 states. The convention will come into force for Suriname and Timor-Leste, which ratified the convention in January 2017 and May 2016, respectively, in January 2018 and May 2017, respectively.

¹⁴³ ILO and Asian Development Bank, *Core Labor Standards Handbook*, above n 127, 36.

¹⁴⁴ Equal Remuneration Convention, 1951 (No. 100) art 2(1). ‘Remuneration’ is defined in article 1(a) to mean ‘ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment’.

¹⁴⁵ Equal Remuneration Convention, 1951 (No. 100) art 2(2).

¹⁴⁶ ILO, General Survey on the fundamental Conventions 2012, above n 24 [657].

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid* [653].

¹⁴⁹ As at 15 April 2017, Convention No. 111 has been ratified by 174 states, and is in force for 172 states.

¹⁵⁰ Discrimination (Employment and Occupation) Convention, 1958 (No. 111) art 1 defines ‘discrimination’ as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin (or such other ground as may be specified by the State concerned), which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’. Note that, as elaborated in Chapter 5, discrimination on the grounds of disability falls within the scope of Convention

Convention No. 111 undertake to declare and pursue a national policy to promote equality of opportunity and treatment, with a goal of eliminating discrimination in access to vocational training, access to employment and particular occupations, and terms and conditions of employment.¹⁵¹ Recommendation No. 111 enunciates aspects of employment which should be enjoyed free of discrimination, including security of tenure, remuneration of work for equal value, access to vocational guidance and training, and conditions of work.¹⁵² Convention No. 111 further requires states parties to undertake legal, economic and administrative measures in support of this goal (article 3), and to take steps to address the underlying causes of discrimination and inequality.¹⁵³

The Convention addresses both direct and indirect discrimination,¹⁵⁴ and it does not include distinctions based on the inherent requirements of the job, security measures, or special measures to target specific groups, as constituting discrimination.¹⁵⁵ Convention Nos. 100 and 111 both underscore the importance of tripartism, with the Committee of Experts having noted that ‘where there is an absence of genuine social dialogue in a country, the application of [the Conventions] is seriously hindered’.¹⁵⁶ Member states are to cooperate with workers’ and employers’ organisations in operationalising the provisions of Convention No. 100, while Convention No. 111 entails that member states cooperate with such organisations in pursuance of the acceptance and observance of the national equality policy required under the Convention.

2.4.2. Governance instruments

(i) *Employment Policy Convention 1964 (No. 122)*¹⁵⁷

Many ILO conventions and recommendations concern the realisation of the right to work without explicitly guaranteeing it as a fundamental right.¹⁵⁸ The foremost instrument in this regard is the Employment Policy Convention 1964 (No. 122), which references the right to work in its preamble by way of the Declaration of Philadelphia and the UDHR.¹⁵⁹ Convention 122 contains detailed provisions on measures to be taken to ensure ‘an active policy designed to promote full, productive and freely

No. 111.

¹⁵¹ Discrimination (Employment and Occupation) Convention, 1958 (No. 111) art 2.

¹⁵² Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111) para 2.

¹⁵³ ILO, General Survey on the fundamental Conventions 2012, above n 24 [732].

¹⁵⁴ International Labour Conference, *Equality in employment and occupation*, 83rd sess, 1996, paras 91, 105, 107-108.

¹⁵⁵ Servais, *International Labour Law*, above n 114, 150 [397].

¹⁵⁶ ILO, General Survey on the fundamental Conventions 2012, above n 24 [655].

¹⁵⁷ As at 15 April 2017, Convention No. 122 has been ratified by, and is in force for, 111 states.

¹⁵⁸ Oxford University Press, *Max Planck Encyclopedia of Public International Law* (as at March 2007) ‘Work, Right to, International Protection’, [12].

¹⁵⁹ The first instrument to explicitly recognise a right to work was the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169), which provides that ‘the promotion of full, productive and freely chosen employment provided for in [Convention 122] should be regarded as the means of achieving in practice the realisation of the right to work’. Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169) (adopted 26 June 1983), para 1.

chosen employment’.¹⁶⁰ It places upon states an obligation to declare and pursue an employment policy as a major goal in the national agenda, with the aim of stimulating economic growth and development, raising standards of living, meeting labour force requirements and addressing unemployment and underemployment.¹⁶¹ Article 1(2) contains three goals to be pursued: (a) availability of work for all who are available for and looking for work, (b) availability of work that is as productive as possible, and (c) existence of freedom of choice of employment that is free from discrimination. States are also required to keep the national policy under review. The ILO has stated that the concept of full employment does not exclude a degree of short-term unemployment,¹⁶² and has underscored the importance of addressing informality in achieving productive employment.¹⁶³

Convention No. 122 plays a key role in directing the development of employment generation policy towards meeting the needs of those most vulnerable. Article 1(2)(c) provides that states should ensure freedom of choice of employment for each worker ‘irrespective of race, colour, sex, religion, political opinion, national extraction or social origin’. The Committee of Experts has underscored that an employment policy in conformity with this article ‘must aim at ensuring freedom of choice of employment and the fullest possible opportunity in employment and training, in particular for vulnerable groups...’¹⁶⁴ Convention No. 122 article 3 further calls for consultations concerning development of employment policies to include representatives of those persons affected by the policies, meaning that representatives of the most vulnerable and marginalised groups must be closely involved with the development of policies for which they are the main beneficiaries.¹⁶⁵ Convention No. 122 is therefore a valuable tool in linking full employment, development and the fight against poverty. This link was explicitly recognised by the UN General Assembly in Resolution 60/1 on the 2005 World Summit Outcomes, in which the Heads of State and Government reaffirmed their commitment to ‘make the goals of full and productive employment and decent work for all...a central objective...of our national development strategies, including poverty reduction strategies’.¹⁶⁶

(ii) *Employment Policy Recommendation, 1964 (No. 122) and the Employment Policy (Supplementary Provision) Recommendation, 1984 (No. 169)*

While Convention No. 122 provides the general national policy aim and goals to be achieved in binding form, two recommendations provide detailed guidance on more specific aspects of

¹⁶⁰ Employment Policy Convention, 1964 (No. 122) art 1.

¹⁶¹ Employment Policy Convention, 1964 (No. 122) art 1(1).

¹⁶² ILO, Guide on Employment Policy and International Labour Standards (2013) 22.

¹⁶³ Ibid 23.

¹⁶⁴ Application of International Labour Standards 2006 (I), International Labour Conference, Report III (Part 1A), 95th Session, 2006, 317.

¹⁶⁵ ILO, General Survey on the fundamental Conventions 2012, above n 24 [91].

¹⁶⁶ 2005 World Summit Outcome, GA Res 60/1, UN GAOR, 60th sess, Agenda Items 46 and 120, UN Doc A/RES/60/1 (24 October 2005) [47]; ILO, General Survey on the fundamental Conventions 2012, above n 24 [20].

employment policy. The Employment Policy Recommendation, 1964 (No. 122) contains general long- and short-term measures for development of sustainable employment policies in addition to proposing selective measures to address specific issues arising from structural changes to the labour force and market, youth unemployment and regional employment disparities within states. It also proposes specific policies to be adopted in connection with the broader unemployment policy, including investment and income policy, promotion of industrial and rural employment, and population growth. The Employment Policy (Supplementary Provision) Recommendation, 1984 (No. 169) provides additional guidance on population policies, employment for youth, disadvantaged groups and migrant workers, and the importance of addressing the informal economy through progressive formalization and regulation.¹⁶⁷ Recommendation No. 169 applies a human rights dimension to the application of Convention No. 122, underlining that the promotion of full, productive and freely chosen work advocated in that Convention ‘should be regarded as a means of achieving in practice the realisation of the right to work’, which should be linked to the broader implementation of a state’s social and economic policies.¹⁶⁸ Both Recommendations emphasise the role of tripartism in successfully developing a national employment policy through consultation and promotion within employers’ and workers’ organisations.¹⁶⁹

Both Recommendation Nos. 122 and 169 build upon the link established in Convention No. 122 between employment generating opportunities and development, inclusive of the most vulnerable parts of the population. Recommendation No. 169, for example, draws out the link between deficiencies in employment opportunities in developing countries and ‘the conviction that poverty, unemployment and inequality of opportunity are unacceptable in terms of...social justice’, and goes on to recognise the role that this can play in ‘provok[ing] social tension and thus creat[ing] conditions which can endanger peace and prejudice the exercise of the right to work’.¹⁷⁰ It also recommends implementing public investment and special public works programmes as measures aimed to create and maintain employment, raise incomes, and reduce poverty.¹⁷¹ Both Recommendation Nos. 122 and 169 further emphasise the inextricable link between employment creation and development, with Recommendation No. 169 advocating coordination between employment policies and national and regional development policies (Parts IV and VII).

¹⁶⁷ Employment Policy (Supplementary Provision) Recommendation, 1984 (No. 169), paras 27-29.

¹⁶⁸ Employment Policy (Supplementary Provision) Recommendation, 1984 (No. 169), para 1. ILO, *General Survey on the fundamental Conventions 2012*, above n 24 [12].

¹⁶⁹ Employment Policy Recommendation, 1964 (No. 122) paras 29, 30-37; Employment Policy (Supplementary Provision) Recommendation, 1984 (No. 169), paras 5, 12, 19, 36-38.

¹⁷⁰ Employment Policy (Supplementary Provision) Recommendation, 1984 (No. 169), preambular para 8.

¹⁷¹ Employment Policy (Supplementary Provision) Recommendation, 1984 (No. 169), para 35.

2.4.3. Other international labour standards relevant to post-crisis response

In addition to the fundamental instruments discussed above, specific mention should be made here of the Protection of Wages Convention, 1949 (No. 95)¹⁷² and the Protection of Wages Recommendation, 1949 (No. 85), which are particularly relevant in protecting against exploitative conditions of employment and forced labour in post-crisis reconstruction. Convention No. 95 requires the payment of wages in legal tender, and prohibits the use of, inter alia, promissory notes, vouches or coupons.¹⁷³ While the Convention recognises that *part* of the wage may be paid in in-kind benefits, these must be reasonably valued and must satisfy the needs of the workers and their families.¹⁷⁴ Wages must also be paid regularly and directly to the worker, who may decide exclusively the manner in which those wages are disposed of, to avoid risk of abuse.¹⁷⁵

2.4.4. Instruments specific to post-crisis response

The original Employment (Transition from War to Peace) Recommendation, 1944 (No. 71), adopted in the throes of the Second World War, focused on post-war recovery and reconstruction, and provided guidance on employment promotion policies in states transitioning from war to peace. This Recommendation offered at the time a new approach to upholding peace and social justice through employment-based recovery and reconstruction.¹⁷⁶ Having been drafted specifically with the end of that war in sight, its focus was on: the conversion of industrial activities from wartime to peacetime; demobilisation of armed forces and repatriation of prisoners of war which, in both instances, would require reintroduction into civilian life and the workforce; vocational training for young people; redistribution of women workers in the national economy; incorporation of disabled workers into the labour market; and the regularisation of irregular forms of work. Further, the scope of Recommendation No. 71 was restricted to issues arising from armed conflicts between states.

The genesis of Recommendation No. 205, which is the key instrument considered in this thesis, can be traced to the 320th Session of the ILO Governing Body in March 2014, which placed its revision as a standard-setting item on the agenda of the 105th Session of the International Labour Conference (held in June 2016).¹⁷⁷ Following that decision in 2014, the International Labour Office engaged in a

¹⁷² As at 15 April 2017, Convention No. 95 has been ratified by 98 states, and has been denounced by 1.

¹⁷³ Convention No. 95, art 3(1). National authorities may permit non-cash methods of payment by means such as bank cheque in certain circumstances. For the purposes of Convention No. 95, article 1 defines wages as ‘remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered’.

¹⁷⁴ Convention No. 95, art 4.

¹⁷⁵ Convention No. 95, arts 5, 6 and 12.

¹⁷⁶ ILO, Employment and decent work for peace and resilience – Revision of the Employment (Transition from War to Peace) Recommendation, 1944 (No. 71), Report V(1), ILC.105-V(1) (2016) 13.

¹⁷⁷ International Labour Office Governing Body, *Second Item on the Agenda – Agenda of the International Labour Conference*, 320th sess, GB.320/INS/2 (13-27 March 2014); International Labour Office Governing

series of consultations with Member State governments and with the most representative organisations of employers and workers, in addition to other international organisations with a mandate in crisis response, in order to draft a proposed revision, the final iteration of which was discussed and adopted at the International Labour Conference 106th Session, 2017. This builds upon broad Member State consensus on the need to revise and update guidance provided in Recommendation No. 71. The Governing Body, in its discussions on the revision of Recommendation No. 71, decided that a change in emphasis in any new revised instrument should more effectively address the challenges arising from modern crises in a globalised world.¹⁷⁸ Recommendation No. 205 will be analysed comprehensively in Chapter 4.

2.4.5. Soft law & guidance instruments

(i) *ILO Declaration on Fundamental Principles and Rights at Work (1998)*

The Declaration on Fundamental Principles and Rights at Work (1998) is a promotional instrument establishing a set of four principles and rights at work as fundamental labour standards of universal application. Under the instrument, all ILO member states are legally obliged ‘to respect, promote and realise, in good faith and in accordance with the [ILO] Constitution’, the principles concerning the fundamental rights as codified in the four fundamental conventions areas described above.¹⁷⁹ This is required even if a member state has not ratified the conventions corresponding to the specific right in question, by virtue of its membership to the organisation.¹⁸⁰ As a declaration and non-binding instrument, it links to binding obligations contained in these conventions, and requires states to pursue the realisation of these principles in a manner appropriate for their context.¹⁸¹ The Declaration signified ‘a shift in terminology from core labour “standards” to fundamental “rights” at work’, emphasising that these four basic classes of rights find their bases in fundamental human rights, and not merely in labour standards that had been seen as representing a distinct, technical area.¹⁸² The Declaration also contains two follow-up mechanisms. First, member states that have not ratified all eight fundamental conventions are requested to report annually on implementation of the principles contained in the declaration, which is subject to review by the Governing Body.¹⁸³ Second, the ILO Director-General submits annually a global report on application on one of the four classes of

Body, *Decision on the second item on the agenda: Agenda of the International Labour Conference*, 28 March 2014.

¹⁷⁸ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 43.

¹⁷⁹ ILO, Declaration on Fundamental Principles and Rights at Work, 86th Sess, adopted 18 June 1998, para 2.

¹⁸⁰ Ibid, para 2.

¹⁸¹ Lee Swepston, *International Legal Materials – ILO Declaration on Fundamental Principles and Rights at Work*, Vol 37 (1998) 1234.

¹⁸² Janice Bellace, ‘The ILO Declaration of Fundamental Principles and Rights at Work’ (2001) 17(3) *International Journal of Comparative Labour Law and Industrial Relations*, 269, 272.

¹⁸³ Declaration on Fundamental Principles and Rights at Work, part II.

fundamental principle and rights in both countries that have and have not ratified the conventions, in order to assess the technical cooperation priorities of the organisation.¹⁸⁴

(ii) *Decent work agenda*

One year after the release of the 1998 Declaration, the ILO introduced a further soft law initiative – the decent work agenda – with the aim of rendering globalisation more equitable and inclusive of workers rights, reducing poverty, and achieving more inclusive and sustainable development.¹⁸⁵ In his report to the International Labour Conference in 1999, the ILO Secretary-General defined decent work as ‘productive work in which rights are protected, which generates an adequate income, with adequate social protection. It also means sufficient work, in the sense that all should have full access to income-earning opportunities’.¹⁸⁶ ‘Work’ reflects a number of ways that people contribute socially and economically, both in formal and informal economies, while ‘decent’ refers to work that meets ‘social norms of income, of conditions of work and security, of rights and dignity’.¹⁸⁷ To that end, four core notions comprise the idea of decent work:

- (a) Rights at work – emphasises a renewed focus on labour standards, and on effective implementation of the Declaration of Fundamental Principles and Rights at Work;
- (b) Fostering employment and income opportunities – draws attention to the role of national policies aimed at expanding employment opportunities, with appropriate remuneration, as a means to achieve poverty reduction;
- (c) Expansion of social protection – improving the coverage and governance of social protection systems, addressing major issues such as unemployment and healthcare insurance, gender disparities in coverage, and improving protection at the workplace through occupational health and safety; and
- (d) Social dialogue and tripartism – encouraging consultation with representative groups as a means to improve social stability and of conflict resolution.¹⁸⁸

2.4.6. Implications of the form of international labour standards

This chapter has made reference to a number of different forms of instruments relevant to labour rights protection on an international level, ranging from UN General Assembly Resolutions and Declarations, to UN Agendas, and International Conventions and Covenants. ILO-specific instruments have also been referenced, including Agendas and Declarations, Conventions and

¹⁸⁴ Declaration on Fundamental Principles and Rights at Work, part III.

¹⁸⁵ Gerry Rogers et al, *The International Labour Organisation and the Quest for Social Justice, 1919-2009* (International Labour Office, 2009) 224.

¹⁸⁶ ILO Director-General, *Report of the Director-General: Decent Work*, 3 (1999) 13.

¹⁸⁷ Rogers et al, *The International Labour Organisation and the Quest for Social Justice*, above n 185, 224.

¹⁸⁸ ILO Director-General, *Report of the Director-General: Decent Work*, above n 186, 13; Gillian MacNaughton and Diane F. Frey, ‘Decent Work, Human Rights and the Sustainable Development Goals (2016) 47 *Georgetown Journal of International Law*, 607, 622.

Recommendations. Conventions and Recommendations collectively comprise the category of ILS, which are significant not only in terms of the legal obligations they create for states (namely, incorporation into domestic law and reporting), but also because they ‘represent the international consensus on minimum best practices [in certain areas], whether on human rights generally or more precisely on labour matters’.¹⁸⁹ Establishing the distinction between the two types of instruments is useful for the purposes of this chapter, and also for providing context for the discussion below of the value of Recommendation No. 205 in recommendation format.

Conventions are treaties that give rise to binding obligations on states parties upon ratification to take the necessary steps to make effective the provisions contained therein.¹⁹⁰ The steps required to do so are determined by the convention in question. Programmatic conventions, for example, generally require states to adopt a type of policy in a certain area, while technical conventions may require incorporation of certain provisions into domestic law by the relevant mode of the state’s jurisdiction. In the event of non-ratification, ILO Member States are under the legal obligation to periodically report to the International Labour Office on the position of domestic law in relation to the subject matter of the convention.¹⁹¹ Ratification of a convention leads not only to an obligation to apply the provision contained therein, but also to an obligation to participate in supervision of their application in two ways. First, Member States are required to submit periodic reports on domestic measures taken to give effect to provisions contained in ratified conventions.¹⁹² Second, states must participate in two of the Organisation’s supervisory mechanisms: the regular system, as well as the special procedures system based on the submission of a representation or complaint.¹⁹³

Recommendations are non-binding, non-ratifiable instruments that either supplement a convention, and provide more detailed guidance on its application and interpretation, or, as in the case of Recommendation No. 205, are autonomous instruments adopted to provide recommendations of desirable law or policy. They can be adopted by the General Conference where a subject is not regarded as ‘suitable or appropriate at that time for a Convention’.¹⁹⁴ Recommendations share a number of similar characteristics with conventions. First, both conventions and recommendations are

¹⁸⁹ ILO and Asian Development Bank, *Core Labor Standards Handbook*, above n 127, 10.

¹⁹⁰ Servais, *International Labour Law*, above n 114, 76 [123].

¹⁹¹ *Constitution of the International Labour Organisation*, 1 April 1919, entry into force 28 June 1919, art 19(5)(e)

¹⁹² *Constitution of the International Labour Organisation*, art 22.

¹⁹³ The Committees in the regular supervisory system include the Committee of Experts on the Application of Conventions and Recommendations, and the International Labour Conference’s Tripartite Committee on the Application of Conventions and Recommendations. There are also three special procedures tracks; procedures in the case of representations on the application of ratified Conventions, procedures in the case of complaints over the application of ratified Conventions, and special procedures before the Freedom of Association Committee. See ILO, *ILO supervisory system/mechanism* <<http://ilo.ch/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>>.

¹⁹⁴ *Constitution of the International Labour Organisation*, art 19(1)(b).

drafted through the same extensive, tripartite consultative process, both are adopted by the same organ (the International Labour Conference), and both require two-thirds majority to be successfully adopted.¹⁹⁵ Second, with the exception of those dedicated to monitoring the application of conventions, recommendations and conventions are both subject to follow-up mechanisms.¹⁹⁶ Upon adoption, recommendations are to be communicated to all Member States ‘with a view to effect being given to [them] by national legislation or otherwise’.¹⁹⁷ Member States must then present the recommendation to domestic authorities empowered to take appropriate legislative or other steps to give effect to the recommendation within twelve, and no later than eighteen months, after the closing of the Conference at which it was adopted.¹⁹⁸ As highlighted by Rubin, this provision has the effect of ‘giving explicit authority for the promotion of legislation as a consequence of a Recommendation, on the part of the secretariat as well as the principal supervisory authorities’, and ‘provides the basis for General Surveys by the Committee of Experts on practice regarding...Recommendations, which in practice contain commentaries on the appropriateness with which effect is given to instruments’.¹⁹⁹ Further, the ILO Governing Body may request reports on the law and practice of the Member State that actions the substance of the recommendation.²⁰⁰

ILO recommendations form part of the corpus of international ‘soft law’, the proliferation of which, particularly in the international human rights field, has been observed both in connection with instruments that seek to address gaps in treaty law, and those that seek to settle interpretation to ‘expand and delimit human rights protection in the context of existing regimes’.²⁰¹ There is no broad agreement, in theory or practice, on the actual legal effects of soft law instruments, ‘partly because of the variety of instruments classified as soft, and partly because soft law’s effects can be changing as distinct instruments evolve in practice’.²⁰² The value of a legal instrument should not be assessed solely on its ability to expose states parties to sanctions in the event of non-performance of obligations. Rather, as argued by Duplessis, ‘whether a law is hard or soft and whether or not it

¹⁹⁵ Francis Maupain, ‘International Labour Organisation: Recommendations and Similar Instruments’ in Dinah Shelton (ed), *Commitment and Compliance – The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) 374.

¹⁹⁶ ILO, *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (2007), 223. For this reason, ILO recommendations have been ‘generally treated by ILO members and the ILO Labour Office as part of the ILO legislative process’. José E. Alvarez, *International Organisations as Law-makers* (Oxford University Press, 2005), 228.

¹⁹⁷ Constitution of the International Labour Organisation, art 19(6)(a).

¹⁹⁸ Constitution of the International Labour Organisation, art 19(6)(b). José E. Alvarez, *International Organisations as Law-makers* (Oxford University Press, 2005), 228.

¹⁹⁹ Neville Rubin (ed) *Code of International Labour Law, Volume I* (Cambridge University Press, 2005), 52 [3.08.5.5.2.1-2].

²⁰⁰ José E. Alvarez, *International Organisations as Law-makers* (Oxford University Press, 2005), 228. Constitution of the International Labour Organisation, art 19(6)(c)-(d).

²⁰¹ John Cerone, Thomas Gammeltoft-Hansen and Stephanie Lagoutte (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press, 2017) 1. For a discussion on defining and categorising soft law, see Cerone et al, *Tracing the Roles of Soft Law in Human Rights*, 15-18.

²⁰² *Ibid* 221.

carries a sanction, a rule of law...proposes a sequence for the future occurrence and performance of human activities, and sets out a factual framework for judging whether events comply with this'.²⁰³ A soft norm in particular 'sets out guidelines that are deemed appropriate for actors to follow, while at the same time organising how much discretion and room for manoeuvre they have'.²⁰⁴ Rather, the value of soft law is in how it is accepted and upheld by states, and the traction that it gathers in doing so.²⁰⁵

In the context of ILO instruments, the distinction between 'hard' regulation (referring to ratified conventions) and 'soft regulation' (a wide range of techniques that are not directly legally inferable, including recommendations and guidelines) is not always definitive.²⁰⁶ As argued by Alvarez, 'there are gradations of "softness", even within soft law'.²⁰⁷ International labour recommendations, similarly to unratified conventions, 'can exercise a real influence on national law and practice, with the degree of influence varying widely depending on the subject matter'.²⁰⁸ Recommendations also have a particular significance in the ILO institutional context and indeed in the international legal framework generally in comparison to other independent soft law instruments, for example, those developed outside of the context of participatory, intergovernmental organisations. The prolonged tripartite consultation period through which they are adopted, that they are products of collective input, and the method by which they are discussed and voted upon at the International Labour Conference all confer legitimacy on recommendations, and reflect Member State's acceptance of the principles they contain. Maupain argues that recommendations derive special status in international law from the two features: 'the legitimacy [in] the labour field of the organ which adopts them, strengthened by careful adoption procedures and specific means to promote and verify their implementation'.²⁰⁹ Recommendations are thus, at the very least, considered as persuasive soft law, and at the most, are considered by some to form the corpus of international common law. Scholars such as Neville Rubin argue that upon adoption, recommendations will 'enter, and become part of, the general body of international labour law',²¹⁰ however consideration of this argument is beyond the scope of this thesis.

²⁰³ Isabelle Duplessis, 'Soft International Labour Law; The Preferred Method of Regulation in a Decentralised Society', in International Institute for Labour Studies (ed.), *Governance, International Law and Corporate Social Responsibility*, Research Series 116 (International Labour Organisation, 2008) 12.

²⁰⁴ Ibid 13.

²⁰⁵ See Cerone, Gammeltoft-Hansen and Lagoutte, *Tracing the Roles of Soft Law in Human Rights*, above n 201, where the authors develop the concept of 'traction' as one of the indicators in determining whether a given norm has reached the threshold required to achieve 'soft law' status.

²⁰⁶ ILO, *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (2007), 222.

²⁰⁷ José E. Alvarez, *International Organisations as Law-makers* (Oxford University Press, 2005), 230.

²⁰⁸ Maupain, *International Labour Organisation: Recommendations and Similar Instruments*, above n 195, 372, 383.

²⁰⁹ Maupain, *International Labour Organisation: Recommendations and Similar Instruments*, above n 195, 392.

²¹⁰ Rubin (ed) *Code of International Labour Law, Volume I*, above n 199, 8 [1.02.6], 15 [1.03.15].

Chapter 3 – The impacts of conflicts and disasters on domestic labour markets and the situation of workers

3.1 Introduction

The purpose of this chapter is to provide an illustration of core socio-economic, institutional, human, and labour market challenges experienced by conflict- and disaster-affected states, and to explore the context in which violations of rights can occur. This provides the basis on which the Chapter 4 analysis of Recommendation No. 205 can be framed, and highlight key human rights risks that will be addressed in further depth in Chapter 5. As noted in a preparatory report to Recommendation No. 205,

Post-conflict, fragile and disaster-affected environments are characterised by instability, insecurity, poverty and inequality. This results in the destruction of livelihoods, sources of income, workplaces and business, all of which is aggravated when it occurs in low-income and poverty-stricken areas, often resulting in the weakening or even destruction of the institutions that foster justice and good governance in the world of work.²¹¹

These effects may be compounded by a loss of income and livelihood, a shortage of employment opportunities, or unequal access to decent work. Conflicts and disasters may aggravate existing levels of poverty and informality, resulting in greater state instability.²¹² Understanding the impacts of conflicts and disasters on the sectors listed above is central to developing sustainable post-crisis employment programmes.²¹³

A number of caveats should be made at this point. First, naturally every conflict and disaster event occurs in a unique manner that will give rise to a particular set of circumstances concerning socio-economic, institutional, human and labour market factors once the crisis ends and the recovery period begins. Even states that experience cyclical disaster events will experience these differently each time, and states may experience conflict and disaster events concurrently. Given that there is ‘no single labour market theory and no single theory of war’,²¹⁴ or indeed, disasters, establishing a framework for assessing the interaction of the two, and the implication for workers rights, is complex. But core questions can be asked around labour force participation, mobilisation, supply and demand, and the quality of labour and working conditions.²¹⁵ This section therefore extrapolates general observations that commonly occur in these contexts to draw out key principles and areas for labour rights concerns. Second, while Recommendation No. 205 is addressed at the post-crisis period, in considering conflict-

²¹¹ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 13.

²¹² Ibid.

²¹³ Eugenia Date-Bah (ed), *Jobs After War* (International Labour Office, 2003) 7.

²¹⁴ Christopher Cramer, ‘From Waging War to Peace Work: Labour and Labour Markets’ in Neil Cooper, Michael Pugh and Mandy Turner (eds). *Whose Peace? Critical Perspectives on the Political Economy of Peacebuilding* (Palgrave Macmillan, 2008), 123, 128.

²¹⁵ Ibid.

affect states, this section examines the effects on the issues noted above both during conflicts, and in the post-conflict period. This is because the state of institutions, governance, economics, social relations, and human capital during a conflict has powerful implications for the trajectory of these factors and the labour market in the post-conflict period.²¹⁶ Characteristics of wartime economies and social relations will most often not dissipate at the signing of a formal peace agreement and will endure in peacetime, and therefore remain relevant factors for post-conflict reconstruction.²¹⁷ Further, while there may be a cessation of hostilities or a formal surrender that signifies an end of a conflict, the distinction between a conflict and post-conflict period may not always be clear.²¹⁸ For this reason, it is necessary to examine how these factors are affected during conflict. Third, section 3.3, concerning disaster-affected states, will focus solely on post-disaster recovery, given that disasters are more temporally restricted than conflicts, and will examine a range of disaster scenarios aligned with the wide definition afforded to the term in Recommendation No. 205. Section 3.3 is also geared towards examining the effects of disasters on low-middle income states, given the particular risk of human and labour rights abuse in these contexts, and given that these states are the major beneficiaries of post-disaster international aid.

It is also useful to examine the concept of ‘fragility’, which appears in much of the literature on employment interventions into crisis-affected states. Recommendation No. 205 itself does not use the language of ‘fragility’ due to the absence of an internationally agreed definition of the term, and the fact that forms of fragility differ depending on each context.²¹⁹ Rather, Recommendation No. 205 relates to fragile situations ‘arising from conflict or disasters, and situations of instability and insecurity which, if not properly addressed, are likely to deteriorate into turmoil, conflict or disasters’.²²⁰ Fragility is a very broad concept; it is ‘not synonymous with conflict or post-conflict situations, but seeks to capture the societal, political and economic dynamics of prevailing or recurring vulnerability and instability’.²²¹ However, there can be a strong association between the two

²¹⁶ Cramer, *From Waging War to Peace Work: Labour and Labour Markets*, above n 214, 123, 133.

²¹⁷ Christopher Cramer, ‘Labour markets, employment, and the transformation of war economies’ (2006) 6(3) *Conflict, Security and Development* 389, 398.

²¹⁸ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster* (2016) 16.

²¹⁹ ILO, *Revision of Recommendation No. 71, Report V(1) 2016*, above n 176 [16]. The ILO has defined fragility as ‘sudden or cyclical situations in which one or more exogenous or endogenous risk factors exacerbate pre-existing or emerging political instability and socio-economic vulnerability.’ Exogenous factors include, inter alia, health pandemics, catastrophic events and external military threats, while endogenous factors include, inter alia, socio-political inequalities, armed group activity, and weak public institutions. ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 13. Compare this to the World Bank’s classification of fragile states, which takes into account 16 criteria structured around measuring economic management, structural policies and policies for social inclusion, and public sector management, and/or the presence of a UN or regional peacekeeping mission during the last three years. World Bank, *Harmonized List of Fragile Situations FY 17 a/* (2017) <<http://pubdocs.worldbank.org/en/154851467143896227/FY17HLFS-Final-6272016.pdf>>. See also ILO, *Selected Definitions and Characteristics of ‘Fragile States’ by Key International Actors’* (2016).

²²⁰ ILO, *Revision of Recommendation No. 71, Report V(1) 2016*, above n 176 [16].

²²¹ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 14.

concepts, which may share many indicators such as weak or collapsed state institutions and a failing economy, and both conflict and disasters, and fragility, can lead to the other. For example, in the context of Liberia and Haiti, exogenous factors (the 2014 Ebola crisis (a health pandemic) and the 2010 earthquake, respectively) exacerbated pre-existing situations of fragility (weak domestic governance and infrastructure).²²² Fragility should be conceptualised as a non-linear process in which cycles of fragility frequently occur, with states also being able to move within and outside of the spectrum of fragility.²²³ The same causal factor may also lead to fragility across states. Thus, while the Ebola crisis had particular ramifications in Liberia, it caused widespread effects across West Africa.

In the context of employment programmes, fragility ‘translates into the extent to which labour market actors are no longer able to provide or access employment and decent work opportunities’.²²⁴ A key point to be made here is that labour-based interventions play a central role in social and economic development in the post-crisis period, but are also important in addressing the structural issues that lead to situations of fragility that can, in the case of conflicts, directly contribute to the outbreak of hostilities, and for disasters, can significantly worsen their impact. Employment and decent work interventions can therefore play a core role in ‘preventing, mitigating and responding to [fragile] situations when implemented across the spectrum of immediate impact and long-term resilience building...covering rights-to-work and rights-at-work approaches.’²²⁵ It is therefore pertinent to recall from Chapter 2 that just as labour market and labour conditions affect social justice and development in times of peace and prosperity, they are central to fragile, crisis-affected states.

3.2 Conflict-affected states

States experience socio-economic, institutional, human and labour market impacts of conflict that can severely impact state development, which can create environments of persistent insecurity where lawlessness and human rights abuses can flourish. There will be a high degree of disparity between internal conflict and civil wars, and inter-state conflict. The nature of employment challenges will also differ depending on if a conflict is spatially isolated in parts of a state. If other parts of the state remain functioning, they may be able to provide service, financial, and institutional support. If the country as a whole is conflict-affected, the challenges will be more severe.²²⁶

²²² ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 14.

²²³ *Ibid.*, 13.

²²⁴ Oliver Jütersonke and Kazushige Kobayashi, *Employment and Decent Work in Fragile Settings: A Compass to Orient the World of Work* (2016) Graduate Institute of Geneva, 14.

²²⁵ *Ibid.*, 31.

²²⁶ World Bank, *World Development Report 2013*, above n 12, 194.

3.2.1 *Effects on socio-economic capital*

Conflict affects economies in a spectrum of ways that are largely dependent on the state of the economy pre-conflict, however some general observations can be made. Developing states particularly experience a deterioration in economic performance and development following a conflict, which may be observed in terms of a breakdown in agricultural and industrial production that affects output and exports.²²⁷ Direct and indirect economic costs can also be perceived at the macroeconomic and microeconomic levels. Direct economic costs may include damaged 'economic infrastructure, physical capital stock, and interruption of trading networks'.²²⁸ Indirect costs may include high inflation and the decline of state, foreign, public and private investment, with foreign firms being reluctant to re-enter the state's market due to political instability and security concerns, displacement of skilled workers, and corruption.²²⁹ A decrease in small-scale investment in enterprises often has a direct negative impact on the informal economy, which may be the largest source of work and income.²³⁰ The conflict economy may lead to both restrictions in movement that 'disrupt production and market transactions',²³¹ and the misuse of public and private assets from their legitimate uses.²³² There may be disproportionate impacts on parts of the population, such as 'the landless, urban poor, women and children', as well as certain sectors of the economy, such as those described by Collier as 'war-vulnerable' (such as construction, finance and manufacturing).²³³

Many of the same features of a conflict economy continue into the post-conflict period, which presents an opportunity for 'grey and black market economies' to consolidate.²³⁴ There may also be a further reduction in productivity post-conflict in light of displacement and difficulties in accessing workplace due to infrastructure damage, which affects the ability of the population to re-engage in wage-earning activities. Foreign trade and investment may be hampered during this period due to the fragile economy and the breakdown of state institutions required for international economic participation.²³⁵ Date-Bah highlights that the 'post-war economy suffers from a reduction in foreign exchange resources' that impacts trade and restricts the import of raw materials and equipment required for reconstruction.²³⁶ Finally, gaps in social protection systems (in terms of coverage, delivery, adequacy, benefit levels and costs), which are often severely impacted during conflict and continue in the post-conflict period, due to a decrease in the tax base and public expenditure,

²²⁷ Date-Bah (ed), *Jobs After War*, above n 213, 9.

²²⁸ ILO, *Guidelines for Employment and Skills Training in Conflict-Affected Countries* (1998) 7.

²²⁹ World Bank, *World Development Report 2013*, above n 12, 195; ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 17.

²³⁰ Date-Bah (ed), *Jobs After War*, above n 213, 6.

²³¹ *Ibid* 9. United Nations, *Policy for Post-Conflict Employment Creation, Income Generation and Reintegration* (2009) 15.

²³² United Nations, *Policy for Post-Conflict Employment Creation*, above n 231, 15.

²³³ Paul Collier, 'On the Economic Consequences of Civil War' (1998) 51 *Oxford Economic Papers* 168, 178.

²³⁴ Date-Bah (ed), *Jobs After War*, above n 213, 10.

²³⁵ *Ibid*.

²³⁶ *Ibid*.

compound the vulnerabilities of beneficiaries in terms of income protection and the provision of essential health services.²³⁷

3.2.2 *Effects on physical capital, political capital and institutions*

Institutional weaknesses and a collapse of governance are both common symptoms of conflict that have direct consequences for the labour market and labour rights. Distrust within and towards the political system and parties to the conflict, a lack of social cohesion, weak institutional structures and administrative organs, and restricted capacity for the provision of social services and for employment creation are all contributing factors.²³⁸ There may also be a destruction of social capital, with impaired community cohesion, and a loss of trust in local and state institutions and authorities.²³⁹ A breakdown in the rule of law and the functioning of judicial services is also common. The regulatory structure of the labour market in the form of institutions and laws, as one part of the ‘regulation of economic activity through publicly negotiated and accepted legislation and practices’, may also be impaired or non-existent.²⁴⁰ The vacuum of governance and absence of labour market regulation may give rise to ‘vicious market fundamentalism’ which exploits workers through exploitative labour practices, very low remuneration, and poor working conditions that clearly have serious ramifications for labour rights.²⁴¹ Forced and child labour can flourish in these circumstances.

Collective representation through employers’ and workers’ organisations may be weakened or they may be unrepresentative due to economic or political pressure, or a complete collapse of these institutions. This reduces the ability of workers to address the concerns raised above, while reduced social participation in representative organisations may exclude parts of the population from decision-making, and fuel further social discontent.²⁴² Finally, the delivery of vocational training and educational programmes may be disrupted or non-existent, due to a range of factors including closure of facilities and an absence of teaching staff.²⁴³ This interrupts development of the state’s human capital, and the lack of skilled manpower may significantly impede post-conflict reconstruction, particularly in states where the levels of education are already low.²⁴⁴ The absence of schooling facilities both interrupts children’s access to education and exposes them to particular exploitation and use in child labour. Many of the disruptions experienced by institutions during conflict continue into the post-conflict period. The recovery of the labor market is also disturbed by damaged ‘social relations and a consequential lack of trust within communities, the inability to enforce contracts and

²³⁷ Ibid.

²³⁸ ILO, Guidelines for Employment and Skills Training in Conflict-Affected Countries, above n 228, 7-8.

²³⁹ ILO, Employment and Decent Work in Situations of Fragility, Conflict and Disaster, above n 218, 17.

²⁴⁰ Cramer, Labour markets, employment, and the transformation of war economies, above n 217, 389, 396.

²⁴¹ Ibid.

²⁴² ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 13.

²⁴³ Date-Bah (ed), *Jobs After War*, above n 213, 13.

²⁴⁴ Ibid, 8.

lack of purchasing power'.²⁴⁵ Distrust of and within the political sphere may also endure well past the conclusion of ceasefires and/or peace accords, as may a lack of central governmental authority.

3.2.3 *Effects on human capital and labour market consequences*

One of the most significant effects of conflict is on human capital, which has clear consequences for the composition of a state's population and labour market. Conflict affects labour supply, in part due changes in the population profile and demographics through increased mortality and morbidity from combat, or health crises exacerbated by diminished health services.²⁴⁶ This will likely be accompanied by an increase of the number of people with physical disabilities and psychological trauma. Demographic changes may take place in the form of 'youth bulge, male deficits, uncommonly high fertility rates...or increases in women-headed households'.²⁴⁷ Conflict can have profound gendered implications, with an increase of female labour force participation to stabilise household income shocks,²⁴⁸ and an increase in the number of women-headed households. Working conditions 'plummet in all settings', with a higher workload due to damaged housing and infrastructure.²⁴⁹ Disrupted protection afforded by family networks, as well disrupted education through the closure of schools, may lead to increased risks of child exploitation and exposure to some of the worst forms of child labour.²⁵⁰ The quality of labour supplies may change, with a substantial loss of skilled workers, and a reduction in the number of educated people with the breakdown of health and education services.²⁵¹ Conflict generally exacerbates existing levels of unemployment and underemployment as the labour market undergoes changes in its demand for skills, which affects the fulfilment of basic needs.²⁵² Consequently, poverty is likely to substantially increase, compelling people to take insecure employment with poor remuneration and working conditions.

Conflict generally causes displacement in the form of internal migration, and forced internal and external displacement, which may lead to concentrations of certain demographics of the population in particular regions within and beyond the state,²⁵³ further affecting labour supply. Displacement can be spurred as a result of forcible appropriation of land or assets, of the population searching for labour opportunities in rural areas or in urban areas, or joining flows of displaced persons to neighbouring

²⁴⁵ United Nations, Policy for Post-Conflict Employment Creation, above n 231, 16.

²⁴⁶ Date-Bah (ed), *Jobs After War*, above n 213, 7.

²⁴⁷ Olivia D'Aoust and Debarati Guha-Sapir, Demographic and Health Consequences of Civil Conflict (World Bank, 2010) 38. Cramer, Labour markets, employment, and the transformation of war economies, above n 217, 389, 394.

²⁴⁸ World Bank, *World Development Report 2013*, above n 12,194.

²⁴⁹ ILO, Employment and Decent Work in Situations of Fragility, Conflict and Disaster, above n 218, 27.

²⁵⁰ *Ibid*, 30.

²⁵¹ Cramer, *Labour markets, employment, and the transformation of war economies*, above n 217, 389, 395; Date-Bah (ed), *Jobs After War*, above n 213, 7, 12. Date-Bah cites Cambodia as an example of where most of the country's doctors, lawyers and teachers were among the 1.7 million people killed.

²⁵² Date-Bah (ed), *Jobs After War*, above n 213, 12.

²⁵³ *Ibid* 8.

countries or internationally.²⁵⁴ Displacement is one of the most pressing current international issues from the perspective of human security, human rights, and the labour markets in countries of origin and destination. According to statistics published by UNHCR, there were 65.3 million people forcibly displaced as of the end of 2015,²⁵⁵ with over half of the refugees worldwide originating from three countries experiencing protracted conflicts (in the Syrian Arab Republic, Afghanistan and Somalia). The impacts of displacement can be observed on three levels: impacts to the displaced persons themselves, to their country of origin, and to the host region (if they have moved within their own country) or country (if they have moved internationally). Displacement disrupts people from their means of production and from self-sufficiency,²⁵⁶ and displaced persons may face many barriers to accessing the labour market in the form of discrimination, legal and administrative challenges, language barriers, and a shortage of skills. This may push them into precarious and unregulated forms of work in host countries, with exploitative conditions. Concurrently, displacement may lead to brain drain in the country of origin, creating gaps in service delivery.²⁵⁷ Finally, displacement places a strain on the economy of host states, and distorts labour supply in the local job market, increasing competition through expanding wage labour classes. This is particularly relevant considering that of the 21.3 million refugees globally, a majority of these (13.9 million) have been hosted by developing countries.²⁵⁸

Conflict further affects the labour market in terms of labour demand. This can occur in contradictory ways: it can impact existing employment opportunities where, for example, infrastructure needed to support industry has been destroyed, or where transportation infrastructure required to access sites of employment is dysfunctional.²⁵⁹ Conflict also creates new forms of labour demand, in the form of combat-related functions (as combatants, or in other roles supporting combatants directly) or less directly in roles that may support warring parties (for example, assisting to finance war efforts through activities such as narcotics production and mining).²⁶⁰ However, those that find themselves in this form of employment may be subject to more insecure and exploitative conditions which, in some cases, may tread the line of forced labour. Armed conflict may result in forced recruitment to fight or support parties to the conflict, forms of which may constitute slavery.²⁶¹ Women may be coerced into providing sexual services, or may be compelled by desperation into providing these services in

²⁵⁴ Cramer, *From Waging War to Peace Work: Labour and Labour Markets*, above n 214, 123, 133.

²⁵⁵ This comprises 21.3 million refugees, 3.2 million asylum seekers and 40.8 million internally displaced persons. UNHCR, *Global Trends: Forced Displacement in 2015* (June 2016) 6-7.

²⁵⁶ Cramer, *Labour markets, employment, and the transformation of war economies*, above n 217, 389, 393.

²⁵⁷ Date-Bah (ed), *Jobs After War*, above n 213, 8.

²⁵⁸ UNHCR, *Global Trends: Forced Displacement in 2015*, above n 255, 6-7.

²⁵⁹ Cramer, *Labour markets, employment, and the transformation of war economies*, above n 217, 389, 395.

²⁶⁰ *Ibid.*, 389, 395.

²⁶¹ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 26.

exchange for basic goods, services, or protection.²⁶² Further, ‘non-agricultural, precarious self-employment and the urban informal economy tends to explode in conflict-affected countries’, with labour demand pushing workers into more lucrative but dangerous forms of employment.²⁶³ The informal economy may become the only viable option for income generation, but this presents widespread risks to workers. Alongside the strong link between informality and risks of poverty, workers in this sector are exposed to exploitative and unsafe working conditions, a lack of training opportunities, and the absence of collective bargaining tools.²⁶⁴ As they are located outside the scope of state regulation, workers in the informal economy are not covered by social security systems or legal regimes regarding, inter alia, occupational health and safety standards.²⁶⁵

Youth (those aged 15-24)²⁶⁶ often face disrupted schooling as a result of conflict, pushing them into the labour force, where they may face difficulties obtaining employment outside the war economy in the context of rising unemployment, due to educational, experience and skills deficits. This may lead to increased poverty, increased participation in illicit activities or the informal sector, and feelings of disenfranchisement that render youth vulnerable to recruitment into the armed forces.²⁶⁷ In Liberia, youth supplement their income through illegal mining and logging, while in Afghanistan, working in the poppy trade provides a critical source of income for rural families.²⁶⁸

Demographic changes and disruptions to the labour market may also continue in the post-conflict period, while changes can be observed in the shift from a wartime to peacetime economy when a transition to civilian production starts. Unemployment experienced during conflict will be exacerbated following the cessation of hostilities by the loss of conflict-related employment.²⁶⁹ Thus, on the supply side, ex-combatants and returnees must find alternate employment opportunities, while those already engaged in civilian employment may seek work with improved conditions and remuneration.²⁷⁰ Participation in illicit sectors that began during the conflict may persist in the absence of strong governance. Likewise, the absence of skilled workers may seriously impair reconstruction efforts and a return to normalcy in civilian life. ‘Urban and rural unemployment rates are generally high in both formal and informal labour markets’.²⁷¹ Policies addressing employment and reintegration must take into account the peculiarities of urban and rural contexts, which differ in terms of labour market

²⁶² Cramer, Labour markets, employment, and the transformation of war economies, above n 217, 389, 395-396.

²⁶³ Date-Bah (ed), *Jobs After War*, above n 213, 13.

²⁶⁴ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 33. Also see the Transformation from the Informal to the Formal Economy Recommendation, 2015 (No. 204).

²⁶⁵ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 33.

²⁶⁶ This age range is consistent with the usage of the term in UN General Assembly Resolution 50/81. *United Nations World Programme of Action for Youth to the Year 2000 and Beyond*, GA Res 50/81, UN GAOR, 50th Sess, Agenda Item 105, UN Doc A/RES/50/81 (14 December 1995) para 9.

²⁶⁷ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 28.

²⁶⁸ World Bank, *World Development Report 2013*, above n 12, 194.

²⁶⁹ Date-Bah (ed), *Jobs After War*, above n 213, 12.

²⁷⁰ *Ibid* 56.

²⁷¹ United Nations, Policy for Post-Conflict Employment Creation, above n 231, 16.

composition, levels of organisation and training, the types of sectors, and the extent of self-employment. Long-term unemployment that continues into the post-conflict period may also lead to the loss of skills in certain occupations.²⁷² Labour force participation practices according to sex and age that emerged during the conflict are often tested during peacetime.²⁷³ Women may have assumed non gender-prescribed roles in the war economy and may not wish to revert back to ‘lesser’ or more poorly remunerated work. Exploitative labour relations that were accepted during wartime may carry over to peacetime, which may go unchecked in the absence of enforced labour regulations, monitoring institutions, and disrupted representation through representative organisations such as trade unions.²⁷⁴

3.2.4 *Specific considerations for post-conflict employment policies*

As established, conflict-affected states tend to be characterised by weak state institutions, disrupted social services, poor or failing economies and generally reduced capacities at all levels. In comparison to post-disaster states, this translates in a ‘greater need for policy support, institutional development and coping capacities’.²⁷⁵ Vis-à-vis post-disaster states, recovery is generally slower given the wide-range damage to social and physical structures, natural assets, and the loss of human life.²⁷⁶ Post-conflict employment policies that look towards more sustainable and inclusive work must address regional and social disparities described above, which may cause social tension and engender conflict. Policies should aim to address security and equity considerations, particularly when implementing measures aimed at specific groups of individuals.²⁷⁷ One such group is ex-combatants, who may present particular integration challenges and a threat to the consolidation of peace.²⁷⁸ While targeted programmes are necessary, they can ‘fuel resentment in communities if it is not part of an overall strategy that respects community-based needs and equity’.²⁷⁹ Targeted temporary employment and cash-for-work programmes may produce short-term benefits, but can strain public budgets and lead to tensions within the community.²⁸⁰

Concomitantly, post-conflict reconstruction presents an opportunity to engineer social and economic change, and may allow states to address grievances that fuelled conflict. States should capitalise on this to manage recovery in a way that benefits the entire population. Reconstruction also enables states to confront ‘horizontal inequalities’, described by Stewart as group-based inequalities in access to economic, political and social resources, including employment opportunities, which may play a

²⁷² World Bank, *World Development Report 2013*, above n 12, 23.

²⁷³ Date-Bah (ed), *Jobs After War*, above n 213, 57.

²⁷⁴ Cramer, *From Waging War to Peace Work: Labour and Labour Markets*, above n 214, 135.

²⁷⁵ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 17.

²⁷⁶ *Ibid.*, 17.

²⁷⁷ ILO Governing Body, *United Nations Policy for post-conflict employment creation, income generation and reintegration*, GB.306/TC/5, [6].

²⁷⁸ Date-Bah (ed), *Jobs After War*, above n 213, 56.

²⁷⁹ ILO Governing Body, *United Nations Policy for post-conflict employment creation*, above n 277 [6].

²⁸⁰ World Bank, *World Development Report 2013*, above n 12, 195.

serious role in provoking violent conflict.²⁸¹ This may be in the form of policies that target groups directly, positively (for those who have been deprived), negatively (for the privileged groups), or indirectly (through general policies which affect the whole population but aim to reduce horizontal inequalities with respect to certain groups).²⁸² Direct policies may include quotas for employment or special credit and investment programmes for particular groups, while indirect policies include, inter alia, anti-discrimination legislation and regional development programmes.²⁸³

In the context of the analysis above, the centrality of post-conflict employment strategies to overall state recovery and development is clear. However, the approach of both the state and intervening agencies must reflect this fact by prioritising employment in programming, which historically has not been the case. As identified in the United Nations Policy for Post-Conflict Employment Creation, Income Generation and Reintegration, ‘the main challenge for post-conflict employment policy is to effect the transition from aid supported employment generation to sustainable, subsidised private and public sector job growth’.²⁸⁴ While labour-intensive reconstruction funded by donor aid can create employment during the relief stage and may assist in stabilising immediate post-conflict livelihoods, this creates the conditions of unsustainable dependency, and may have negative effects on the local economy.²⁸⁵ Many scholars have noted pitfalls in the approach of international agencies and donors in addressing broader employment strategies, including ‘adopting a market-led approach... facilitating credit for trade, transport and export promotion’,²⁸⁶ ‘import liberalisation and enhanced competition, privatisation and public sector reform’,²⁸⁷ and ‘training...and apprenticeship projects...without strategic employment creation’²⁸⁸ which fail to contribute significantly to improving long-term employment or improving socio-economic rights.²⁸⁹

The type and quality of work at the centre of employment policies is crucial. Employment must be ‘decent work’ that ensures adequate working conditions and income, which is a philosophy at the centre of Recommendation No. 205. Crucially, decent work must provide a viable alternative to

²⁸¹ Langer, Stewart and Venugopal, Horizontal Inequalities and Post-Conflict Development, above n 282, 1; Stewart, Employment Policies and Horizontal Inequalities, above n 626, 65

²⁸² Amim Langer, Frances Stewart, and Rajesh Venugopal, ‘Horizontal Inequalities and Post-Conflict Development: Laying the Foundations for Durable Peace’ in Amim Langer, Frances Stewart, and Rajesh Venugopal (eds), *Horizontal Inequalities and Post-Conflict Development* (Palgrave, 2011), 1, 22.

²⁸³ *Ibid.*, 23.

²⁸⁴ United Nations, Policy for Post-Conflict Employment Creation, above n 231, 15.

²⁸⁵ *Ibid.*

²⁸⁶ Michael Pugh, ‘Employment, Labour Rights and Social Resistance’ in Neil Cooper, Michael Pugh and Mandy Turner (eds), *Whose Peace? Critical Perspectives on the Political Economy of Peacebuilding* (Palgrave Macmillan, 2008) 141, 146.

²⁸⁷ Frances Stewart, ‘Employment Policies and Horizontal Inequalities in Post-Conflict Situations’ in Amim Langer, Frances Stewart, and Rajesh Venugopal (eds), *Horizontal Inequalities and Post-Conflict Development* (Palgrave, 2011) 79.

²⁸⁸ Pugh, Employment, Labour Rights and Social Resistance, above n 286, 141, 148.

²⁸⁹ See, for example, *ibid.*, 146.

violence and participation in illicit activities.²⁹⁰ Employment in the informal sector could comprise a large sector of the post-conflict economy and thus remain a key source of survival for large parts of the population. Reconstructions that target formalisation of work may thus not compensate for growth in the formal sector.²⁹¹ The timing of these interventions is also key. While it is evident that unemployment and underemployment have serious implications for state fragility, ‘they are often relegated to the long-term development phase of post-conflict reconstruction’.²⁹² Even in the UN Policy on Post-Conflict Employment, ‘sustainable employment creation and decent work’, which aims at respecting fundamental rights and gender equality and addressing marginalised groups, is considered to fall within the third phase of interventions.²⁹³

3.3 Disaster-affected states

Similarly to conflict-affected states, disasters can have significant impacts on socio-economic, human and political capital, with labour market implications, but with largely different effects. A number of factors will determine the impact of a disaster, including a state’s developmental level, preparedness and mitigation measures, and the nature of the disaster (including how widespread its effects are).²⁹⁴ Likewise, a state’s economic activity may lead to increased vulnerability to natural disasters – Kellenberg & Mobarak argue that there is a correlation between individuals at the low-wage level engaging in ‘income-generating activities that carry environmental risks...[which] could actually increase individuals’ risk of exposure to natural disaster’.²⁹⁵ Comparatively, for states with higher levels of development, the effect of increasing income may enable expenditure on protection and mitigation measures for disaster reduction.²⁹⁶

3.3.1 *Effects on socio-economic capital*

Disasters can have significant short- and long-term effects on economic growth, poverty reduction and development. Similarly to conflict situations, post-disaster contexts are characterised by general economic instability. UNISDR’s 2015 Global Assessment Report on Disaster Risk Reduction indicated that disaster-related economic losses now amount on average to US\$ 250 billion to US\$ 300 billion annually.²⁹⁷ Macroeconomic vulnerability generally occurs after external shocks, including natural disasters, but the extent of vulnerability is determined by factors such as the nature of the disaster, the state’s economic structure, the size of the state, its levels of income and development, and

²⁹⁰ World Bank, *World Development Report 2013*, above n 12, 196.

²⁹¹ Cramer, Labour markets, employment, and the transformation of war economies, above n 217, 389, 398.

²⁹² Date-Bah (ed), *Jobs After War*, above n 213, 12.

²⁹³ United Nations, Policy for Post-Conflict Employment Creation, above n 231, 11.

²⁹⁴ Derek Kellenberg and A. Mushfiq Mobarak, ‘The Economics of Natural Disasters’ (2011) 3 *Annual Review of Resource Economics*, 297, 303.

²⁹⁵ *Ibid* 304.

²⁹⁶ *Ibid*.

²⁹⁷ Centre for Research on the Epidemiology of Disasters and UNISDR, *The Human Cost of Weather Related Disasters 1995-2015* (2015) 23.

socio-economic conditions.²⁹⁸ For example, the physical impact of disasters on least-developed economies can be harsh in terms of destruction of physical infrastructure and loss of life and can exacerbate poverty. Due to poor initial infrastructure and ‘weak intersectoral linkages’, however, ‘absolute losses as a consequence of a particular disaster may be small relative to the levels reported in developed countries’.²⁹⁹ A more developed state may have a more integrated economy by geography and sector that increases linked effects from disasters, but this may be offset by more sophisticated financial flows and a large capacity for self-funded recovery, as opposed to reliance on foreign aid.³⁰⁰ Further, even in a state that is reasonably developed, ‘poor and socially disadvantaged groups can become differently vulnerable’ – development-spurred changes, especially if associated with urbanisation, may alter familial support and departures from traditional ways of life.³⁰¹ Environmental change, including through climate change, and level of disaster management in the form of mitigation and preparedness measures, are further variables.³⁰² Socioeconomically, key factors include poverty reduction policies, reliance on certain export sectors and markets, and the prevalence of other shocks such as conflicts or health crises.³⁰³

Disasters regularly cause short-term drops in GDP, but once again, this differs according to a number of factors. Data from the Centre for Research on the Epidemiology of Disasters suggests that for low-income states, economic losses from weather-related disasters in absolute values, between 1995-2015, amounted on average 5% of total GDP.³⁰⁴ Small island states are particularly affected, whereas geographically larger states are affected where a disaster impacts much or all of their territory.³⁰⁵ In the Philippines, for example, which experiences a diverse range of disasters, those that affect only parts of its territory do not typically cause fluctuations in national economic performance.³⁰⁶ Adverse effects on the GDP of less developed states which are ‘not as diversified in their productive capacity and financial markets’ and are thus less able to insure against external shocks, may be observed.³⁰⁷ A

²⁹⁸ Charlotte Benson and Edward J Clay, *Understanding the Economic and Financial Impacts of Natural Disasters* (World Bank, 2004) 16.

²⁹⁹ Benson and Clay, *Understanding the Economic and Financial Impacts of Natural Disasters*, above n 298, 18.

³⁰⁰ *Ibid.*, 18. Benson and Clay highlight that small island states comprise a separate category of states due to the potentially catastrophic consequences of disasters on the state economy, which can decimate human capital, and destroy communications networks and productive capacity.

³⁰¹ *Ibid.*

³⁰² *Ibid.* 16.

³⁰³ *Ibid.* 19. Macroeconomic volatility can be mitigated through precautionary policies aimed at cushioning these shocks, in the form of, for example, a state disaster risk financing strategy, such as a National Disaster Reserve Fund, with a fast disbursement mechanism that enables immediate public post-disaster recovery works. World Bank, *World Development Report 2013*, above n 12, 23; World Bank, Indonesia: *Advancing a National Disaster Risk Financing Strategy – Options for Consideration* (2011) 2-3.

³⁰⁴ Centre for Research on the Epidemiology of Disasters and UNISDR, *The Human Cost of Weather Related Disasters*, above n 297, 26.

³⁰⁵ Benson and Clay, *Understanding the Economic and Financial Impacts of Natural Disasters*, above n 298, 23.

³⁰⁶ *Ibid.*

³⁰⁷ World Bank, *World Development Report 2013*, above n 12, 23; Kellenberg and Mobarak, *The Economics of Natural Disasters*, above n 294, 306.

number of similar challenges facing conflict-affected states can also be observed. Fluctuations spurred by disasters in terms of ‘the exchange rate, the interest rate, or the tax burden serve as a major deterrent to private investment, the proximate driver of growth’, and affects employment and earnings in the short-term.³⁰⁸ Such fluctuations can also affect other aspects of the economy. A sudden ‘surge of a country’s foreign exchange earnings often lead to an overvaluation of its currency, making imports more affordable and exports less competitive’.³⁰⁹ Currency overvaluation may also occur if there is an influx in foreign assistance to assist in reconstruction following the disaster event.³¹⁰ While foreign aid does generally foster growth (although this declines over time), it ‘induces overvaluation and has a negative impact on export diversification’.³¹¹ International assistance may also drive inflation and distort markets – cash for work programmes may, for example, cause wage inflation.³¹²

Poorer households with an inability to mitigate disaster-induced losses may forego long-term investment in, for example, education and healthcare, for more immediate needs,³¹³ and they may also alter the consumption of goods and services.³¹⁴ This phenomenon is particularly acute in the aftermath of aggregate shocks from disasters (as opposed to idiosyncratic shocks which may selectively affect certain households) given that sudden-onset disasters are not generally conducive to preparatory measures such as accumulating savings or increasing labour force participation.³¹⁵ Finally, ‘capital assets and other resources can be severely damaged by natural disasters, and the productivity of undamaged capital and labor can be reduced by associated disruptions of infrastructure and markets’.³¹⁶ State fiscal spending on social services may contract as it is diverted to disaster recovery, or in the case of a health epidemic, towards healthcare services. Increased domestic transaction costs in national trade brought around by measures introduced following a health crisis, due to border and road closures and inspections will increase import costs for the domestic market and lower the prices that domestic producers receive.³¹⁷ Long-term investment programmes may be disrupted, and a climate of economic uncertainty and stability may also deter potential private investment.

³⁰⁸ World Bank, *World Development Report 2013*, above n 12, 293.

³⁰⁹ World Bank, *World Development Report 2013*, above n 12, 294.

³¹⁰ Martina Kirchberger, ‘Natural Disasters and Labour Markets’, *Oxford University CSAE Working Paper WPS/2014-19* (2014) 2.

³¹¹ World Bank, *World Development Report 2013*, above n 12, 294.

³¹² ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 18.

Inflation may occur following an influx of local assistance if the supply of good and services does not sufficiently meet demand. In Sri Lanka, following the 2004 Tsunami, a shortage in skilled labour in the construction sector led to an increase in the cost of house construction of 37%. UNDP and International Recovery Platform, *Guidance Note on Recovery – Livelihoods* (2010) 29.

³¹³ Jesse K Anttila-Hughes and Solomon M Hsiang, ‘Destruction, Disinvestment, and Death: Economic and Human Losses Following Environmental Disaster’, *Goldman School of Public Policy Working Paper* (2013) 2.

³¹⁴ *Ibid* 8-9.

³¹⁵ *Ibid*.

³¹⁶ Benson and Clay, *Understanding the Economic and Financial Impacts of Natural Disasters*, above n 298, 23.

³¹⁷ World Bank, *The Economic Impact of the 2014 Ebola Epidemic: Short and Medium Term Estimates for West Africa* (2014) 57.

3.3.2 *Effects on physical capital, political capital and institutions*

A rapid-onset disaster can be expected to destroy physical capital such as public and private service and transportation infrastructure, buildings and equipment, and communications infrastructure, which reduces physical capital stock.³¹⁸ Infrastructure damage has obvious consequences for the loss of trade and commercial functions (which has flow-on effects for the labour market, as discussed below), disruption of electricity and water supply networks, and health facilities. Further, emergency relief measures that are critical in the immediate post-disaster phase may be compromised due to infrastructure damage,³¹⁹ and infrastructure that is constructed post-crises to enable such operations to take place may create dangerous working conditions for those engaged in crisis response. Research also shows that in ‘large scale destructive shocks...in lower and middle income countries...a large proportion of the damage occurs in the housing sector’.³²⁰ Data from the Centre for Research on the Epidemiology of Disasters indicates that between 1995-2015, weather-related disasters damaged or destroyed 87 million homes worldwide, and damaged 130,000 educational and healthcare facilities, with a large proportion of these due to floods and storms.³²¹ Large-scale damage can also occur after one single disaster event; one cyclone event in 2007 in Bangladesh, for example, destroyed 4000 schools.³²² Further, disasters may weaken or inhibit the function of labour market institutions, training and education facilities and employment offices may have been damaged or closed, or must shift their service delivery considerably in order to accommodate the post-disaster environment.³²³

Disasters are also more liable to destroy physical capital and infrastructure rather than political and institutional capacity and authority. Rather, there is evidence of a stronger causal relationship between weak institutional and governance capacity and more severe economic and human consequences of disaster, compared to an inverse relationship of conflict as a driver of political and institutional weakness (although such weakness may also contribute to the outbreak of conflict). Political and institutional weaknesses clearly reduce a government’s capacity to respond to economic consequences of sudden-onset disasters.³²⁴ In a study on five types of natural disasters (earthquakes, extreme temperature events, floods, avalanches/landslides and windstorms) occurring in 73 states between 1980 and 2002, Khan found that ‘institutions play a role in shielding the population from natural-disaster death’ – states with higher levels of political accountability tend to take ‘proactive steps to

³¹⁸ Kirchberger, *Natural Disasters and Labour Markets*, above n 310, 12.

³¹⁹ Rajib Shaw (ed), *Disaster Recovery: Used or Misused Development Opportunity* (Springer, 2014) 353.

³²⁰ Kirchberger, *Natural Disasters and Labour Markets*, above n 310, 2.

³²¹ Centre for Research on the Epidemiology of Disasters and UNISDR, *The Human Cost of Weather Related Disasters*, above n 297, 21.

³²² *Ibid.*

³²³ ILO, *Earthquake-Tsunami Response: ILO Proposals for Reconstruction, Rehabilitation and Recovery* (2005) 5.

³²⁴ Benson and Clay, *Understanding the Economic and Financial Impacts of Natural Disasters*, above n 298, 14.

adapt to [disaster] shocks at to mitigate their impact when they do occur'.³²⁵ Finally, the viability of insurance and risk transfer options (for example, through weather derivatives or catastrophe bonds), which are key measures in mitigating disaster risk, requires a transparent and attractive financial environment where firms have confidence that 'contracts will be honoured and...will not be prejudiced by short term political considerations and rent-seeking behaviour', requiring institutional stability.³²⁶

3.3.3 *Effects on human capital and labour market consequences*

Similarly to in conflict-affected states, disasters may precipitate a loss of human capital in the economically active population through death, illness and labour migration.³²⁷ According to data collected by the Centre for Research on the Epidemiology of Disasters, in the period 1995-2015, there were 6457 recorded weather-related disasters, which in total resulted in the death of 606,000 people, with '4.1 billion injured, left homeless, or in need of emergency assistance'.³²⁸ Effects of a disaster on a state's demographic profile and the repercussions for the labour market may vary considerably depending on the nature of the disaster. A physical, weather-related event that strikes indiscriminately may have more random effects on population composition, although levels of vulnerability may differ according to location, socio-economic class, ethnicity, age and gender. These vulnerabilities may be amplified by a health-related disaster such as an epidemic, where differences in factors such as location, age, socioeconomic class, living conditions and access to healthcare, rendering them more exposed to health-related risks. Health-related crises also have different ramifications for the labour market. A World Bank study on the economic impact of the 2014 Ebola epidemic in West Africa revealed that impacts on the labour force in affected countries could be observed in two ways: first, the direct and indirect impact of mortality and illness remove labour force participants. Second, behavioural effects 'resulting from the fear of contagion...leads to a fear of association with others and reduces labour force participation, closes places of employment, disrupts transportation...and motivates private decision-makers to disrupt trade, travel and commerce...'.³²⁹ According to World Bank estimates, between 80 to 90 per cent of the total economic impact of the SARS epidemic of 2002-2004 and the H1N1 epidemic of 2009 could be attributed to behavioural effects.³³⁰

A similarly high degree of variance in labour market impacts can be observed in disaster-affected

³²⁵ Matthew E. Kahn, 'The Death Toll from Natural Disasters: the Role of Income, Geography and Institutions (2005) 87(2) *The Review of Economics and Statistics* 271, 282-283.

³²⁶ Benson and Clay, *Understanding the Economic and Financial Impacts of Natural Disasters*, above n 298, 59.

³²⁷ *Ibid* 14.

³²⁸ Centre for Research on the Epidemiology of Disasters and UNISDR, *The Human Cost of Weather Related Disasters*, above n 297 5. For an event to be classified as a natural disaster in this database, it must meet one or more of the following criteria: there must be ten or more deaths; 100 or more people must have been reported affected; there must have been a declared state of emergency; and/or there must have been a call for international assistance.

³²⁹ World Bank, *The Economic Impact of the 2014 Ebola Epidemic*, above n 317, 7.

³³⁰ *Ibid* 7-8.

states, depending on factors linked to those established above, and the nature of the disaster. Behavioural responses of the population and government tend to differ significantly depending on whether the disaster is a rapid-onset disaster, such as an earthquake or hurricane, as opposed to a slow-onset disaster, such as a drought.³³¹ For a rapid-onset disaster, a direct effect on the labour market from the demographic changes outlined above is a decrease in labour supply due to mortality, morbidity and migration. Depending on the level to which labour supply is affected and the existing levels of unemployment, this may increase wages.³³² Some more general observations can be made, however. If a state experiences a decline in economic activity (in a manner established above) and affects a broad range of industries and firms, the regular process of job creation and destruction is disturbed, where job creation is constant or decreases, and does not match job destruction, which increases. As described by the World Bank, this ‘leads to unemployment in formalised economies and under-employment in less formalised ones’.³³³ Generally, however, when the source of the crisis ceases, job creation generally increases and unemployment decreases.³³⁴ Additionally, the availability of skilled labour in post-disaster states is generally higher than in states affected by protracted conflict, since survivors will not have lost their skills, and will generally have access to education and training at a faster pace.³³⁵ During reconstruction, an influx of foreign aid generally increases demand for local labour. For firms that have experienced loss of physical capital, to the extent that this can be substituted with human labour, labour demand may increase.³³⁶

The labour market effects will vary depending on the form and sector of employment. Those working in the informal sector may suffer from greater losses in the absence of protection measures, however they could also shift to differing sources of employment or capitalize on the recovery activities. In low-income countries with high degrees of informality, livelihood reconstruction will be a priority since social safety nets are not in place.³³⁷ In terms of employment sectors, ‘if labour is a complement to capital there will be an increased demand for workers’ in the construction and service sector, given that reconstruction measures will centre on these.³³⁸ Wages may or may not increase depending on whether there is a labour surplus. Workers in the manufacturing sector may face increased job losses, depending on disruptions to supply chains caused by infrastructure damage.³³⁹ Finally, the impact on the agricultural sector will largely depend on the extent of damage to crops and agricultural equipment and infrastructure, with crop destruction leading to decreased labour demand in affected

³³¹ Kirchberger, *Natural Disasters and Labour Markets*, above n 310, 12.

³³² Kirchberger, *Natural Disasters and Labour Markets*, above n 310, 12.

³³³ World Bank, *The Economic Impact of the 2014 Ebola Epidemic*, above n 317, 277.

³³⁴ *Ibid* 277.

³³⁵ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 18.

³³⁶ Kirchberger, *Natural Disasters and Labour Markets*, above n 310, 12.

³³⁷ *Ibid* 2.

³³⁸ *Ibid* 13.

³³⁹ *Ibid* 13.

sectors. Given that wages are generally on the lower in the agricultural sector, workers are likely to seek employment in other sectors when the opportunity arises,³⁴⁰ and may be inclined to take on work in the recovery activities with more precarious conditions of employment. However, a downward shift in labour supply in the agricultural sector, mixed with increase in demand for agricultural products in areas that are net consumers, may lead to wage increases for those workers.³⁴¹

Disaster-related employment responses raise particular concerns for the protection of certain vulnerable and/or marginalised groups. These include, for example, children who have lost family members and who are vulnerable to the risk of being trafficked or exploited through child labour, particularly following the closure of schools. Other particularly vulnerable groups include youth who may have not been participating in the labour force because of unemployment before the disaster, women, including those who head households, who may be exposed to discrimination and violence, and migrant workers, especially undocumented workers, who may be excluded from post-disaster social assistance and support programmes.³⁴²

3.3.4 *Specific considerations for post-disaster employment policies*

While some specificities of post-disaster states vis-à-vis post-conflict states have been noted above, there are some key factors which should be taken into account during interventions. Recovery is expected to begin more rapidly following a natural disaster, so it is crucial that rights-based measures addressing areas of concern are introduced at the start. A further integral point is that if disasters occur cyclically, disaster preparedness measures should put in place mechanisms to deal mitigate key rights concerns. Experience from previous disasters highlighting vulnerabilities should inform future planning, and while disaster response remains entrenched in humanitarian assistance and emergency measures, these cannot forego employment policies based on decent work.³⁴³ Further, states should capitalise on international aid that follows from large-scale disasters to recover and regenerate in a manner conducive to long-term development and sustainable employment solutions.³⁴⁴

³⁴⁰ Ibid,13.

³⁴¹ Ibid 24.

³⁴² ILO, Earthquake-Tsunami Response: ILO Proposals for Reconstruction, Rehabilitation and Recovery (2005) 6.

³⁴³ ILO, Employment and Decent Work in Situations of Fragility, Conflict and Disaster, above n 218, 18.

³⁴⁴ Shaw (ed), Disaster Recovery: Used or Misused Development Opportunity, above n 319, 353-354.

Chapter 4 – Analysis of Recommendation No. 205

4.1. Introduction

The aim of this chapter is to analyse key substantive changes to the scope and content of Recommendation No. 205, as well as thematic changes in its approach to, for example, human rights, social dialogue and international legal instruments, in order to facilitate the risk analysis in Chapter 5. It is relevant to note at this point both the structure of the Recommendation, and the way in which this analysis chapter will proceed. At its core, Recommendation No. 205 seeks to provide states with guidance on generating employment and productive, freely chosen, and decent work as key steps in achieving peace, crisis prevention, enabling economic recovery and resilience, and achieving development goals. One of the ways it seeks to achieve this is through a raft of provisions on key labour issues of general application, and of specific application to certain groups, that are of particular relevance to crisis response. Following its perambulatory paragraphs and Part I on ‘Objectives and Scope’, these general labour issues are encapsulated in Part II (‘Guiding Principles’) and Part III (‘Strategic Approaches’), which briefly outline key measures in crisis response and approaches to achieve the goals of the Recommendation. Part IV of the Recommendation is on ‘Employment and Income-Generation Opportunities’. Employment generation for ‘income security and longer term development...[and] decent work’, that respects international labour standards lies at the core of the ILO approach to crisis situations,³⁴⁵ and the key labour issues contained in Recommendation No. 205 and discussed below all aim to achieve this goal.

One of the main benefits of Recommendation No. 205 is that it brings this notion of sustainable and decent work generation into the context of recovery, relief and development efforts that traditionally have not taken this issue into account.³⁴⁶ Recommendation No. 205 generally advocates adopting ‘a comprehensive and sustainable employment strategy to promote full, productive, freely chosen employment and decent work for women and men, taking into account the Employment Policy Convention, 1964 (No. 122), and guidance provided in relevant resolutions of the International Labour Conference’.³⁴⁷ The remaining Parts deal with more specific aspects of employment policy, some of which target certain groups. Part V looks at ‘Rights, Equality and Non-Discrimination’, addressing issues such as gender, disability, child labour and forced labour. Part VI deals with ‘Education, Vocational Training and Guidance’, Part VII with ‘Social Protection, Part VIII with ‘Labour Law, Labour Administration and Labour Market Information’, and Part IX with ‘Social Dialogue and Role of Employers’ and Workers’ Organisations’. Part X is on ‘Migrants Affected by Crisis Situations’, while Part XI is on ‘Refugees and Returnees’, and deals with both refugee access to

³⁴⁵ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [39].

³⁴⁶ Ibid [42].

³⁴⁷ Recommendation No. 205, para 10. This wording reflects that contained in Convention 122 art 1.

labour markets, and the voluntary repatriation and reintegration of returnees. Part XII is on ‘Prevention, Mitigation and Preparedness’ and finally, Part XIII deals with ‘International Cooperation’.

The content of Recommendation No. 205 has therefore been expanded in key areas compared to Recommendation No. 71, as canvassed in section 2.4.4 above, that will inform the structure of the analysis in this chapter. Section 4.2.1 will start by looking at its expanded objectives and scope (in regards to the types of crisis situations it addresses and the types of action called for), before turning to the key labour issues of general application and of application to specific groups in section 4.2.2. The measures of general application, considered first, include policies on employment generation; educational and vocational training; and social protection measures. The measures targeted at addressing the employment-based needs of specific groups, examined subsequently, include policies on combatting child labour and reintegration into the workforce; integration of youth into the workforce; forced and compulsory labour; integration of a gender perspective and non-discrimination; persons with disabilities; internally displaced persons and refugees; workers in the informal economy; and integration of ex-combatants into the workforce. Section 4.2.3 will examine the adoption in Recommendation No. 205 of a human rights-based approach, its use of international legal instruments anchoring the recommended measures, and the role of the law it advocates in post-crisis economic recovery. Finally, section 4.2.4 will follow with a discussion of the expanded types of stakeholder participation Recommendation No. 205 addresses, including reinforcing the tripartite consultative system, the role of employers and businesses, and the expanded place of international cooperation and international development assistance.

4.2. Analysis of Recommendation No. 205

4.2.1. Objectives and scope

(i) *Objectives*

Paragraph 1 frames the objective of the instrument as providing ‘guidance to Members on the measures to be taken to generate employment and decent work for the purposes of prevention, recovery, peace and resilience with respect to crisis situations arising from conflicts and disasters’.³⁴⁸ Recalling Chapter 2, the purpose of the instrument, as a recommendation, is to provide ‘more detailed, non-binding guidance that encapsulates good practices and up-to-date experience’.³⁴⁹ The Recommendation is thus not aimed at regulating how all relevant actors should work to generate employment and decent work in crisis situations, at the intersection of development, humanitarian and

³⁴⁸ Recommendation No. 205, para 1.

³⁴⁹ International Labour Office, *Employment and decent work for peace and resilience – Revision of the Employment (Transition from War to Peace) Recommendation, 1944 (No. 71)*, Report V(1), ILC.106/V/1 (2017) 7.

peacebuilding assistance. As an instrument of general application to all Member States, it must be read in conjunction with the labour standards and other international instruments to which it refers. Further, it builds upon international practice of both the ILO in post-crises affected countries over the last three decades, as well as actors such as the UN through, for example, its Policy for Post-Conflict Employment Creation, Income Generation and Reintegration, which aims to structure the approach of UN bodies to programming for employment and reintegration in post-conflict states.³⁵⁰ At the same time, it is intended to supplement, in more comprehensive and updated terms, the more specific tools such as the UN Policy for Post-Conflict Employment Creation, Income Generation and Reintegration, and the Sendai Framework for Disaster Risk Reduction 2015-2030, to ‘provide guidance to constituents from an employment and decent work perspective’.³⁵¹ As the majority of post-crises interventions by the UN and other international agencies are focused primarily on recovery, relief and reconstruction, without addressing an employment dimension, Recommendation No. 205 aims to bring decent work to the fore of such recovery.

A major shift in emphasis from Recommendation No. 71 to its revision in Recommendation No. 205 is in the form of the type of action it advocates. Whereas the original Recommendation focused on recovery and reconstruction in the post-WWII period, there was broad state consensus in the preparatory discussions on Recommendation No. 205 that its focus should be extended to prevention and resilience in order to anticipate and mitigate the impacts of crises, as recognised in the preamble.³⁵² The Recommendation not only links these concepts to the overarching notion of full, productive, freely chosen and decent work, but extends them to key measures such as non-discrimination measures and social protection assistance.³⁵³ The instrument as a whole identifies labour, social protection and respect for fundamental principles at work as key access points for socio-economic resilience, in addition to taking specific risk mitigation steps in tripartite consultation, particularly where conflict or disaster risks are foreseeable.³⁵⁴ Part XII highlights risk identification and evaluation at local, national and regional levels, risk management through contingency planning,

³⁵⁰ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 1; United Nations, Policy for Post-Conflict Employment Creation, above n 231.

³⁵¹ ILO, *Reports of the Committee on Employment and Decent Work for the Transition to Peace: Summary of Proceedings, Provisional Record*, 105th Sess, May-June 2016, 15-2(Rev.)/1 [14].

³⁵² ILO, *Revision of Recommendation No. 71, Report V(1) 2017*, above n 349, 3. ‘Resilience’ is defined in para 2(b) as ‘the ability of a system, community or society exposed to hazards to resist, absorb, accommodate, adapt to, transform and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions through risk management’.

³⁵³ Recommendation No. 205, paras 6(a), (m), 14, and preamble. While these terms are not defined in Recommendation No. 205, in its preparatory work, the ILO defined prevention, mitigation, preparedness and risk management in accordance with the definitions offered by the UN International Strategy for Disaster Risk Reduction. See United Nations Office for Disaster Risk Reduction, *Terminology on Disaster Risk Reduction* (May 2009) <http://www.unisdr.org/files/7817_UNISDRTerminologyEnglish.pdf>.

³⁵⁴ Recommendation No. 205, para 41.

and public and private business continuity management in light of the Declaration on Fundamental Principles and Rights at Work.³⁵⁵

(ii) *Scope*

The scope of the Recommendation was broadened in two main ways: first, the proposed revision expands Recommendation No. 205 from application solely to global inter-state conflict, to include ‘conflicts’ generally (including those which are international and non-international in nature), in addition to natural or man-made disasters. ‘Conflict’ is not defined in the Recommendation, however a definition was initially included during the early discussions on the revision.³⁵⁶ The issue of the definition of ‘conflict’ was discussed during the Committee discussions at the 105th International Labour Conference, with some Member States suggesting a broadening of the notion of ‘conflict’ to more generalised forms of violence.³⁵⁷ While earlier versions of the draft Recommendation referred in paragraph 1 to ‘international and non-international armed conflict’, this was amended to ‘conflict’ in order to include all conflicts within the scope of the Recommendation, given that ‘armed conflict’ has a particular definition in law which would preclude its application to some conflicts.³⁵⁸ Turning to the notion of ‘disaster’, it is defined in Recommendation No. 205 as ‘a serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts’.³⁵⁹ The decision to broaden the scope of the Recommendation to include disasters was partly due to the commonalities they share with conflicts with regards to the ‘impact and consequences on the world of work and beyond’.³⁶⁰ Further, Recommendation No. 205 refrains from using the term ‘fragile state’ – which is used by the ILO in other contexts – given the lack of international consensus on the term, while Recommendation No.

³⁵⁵ Recommendation No. 205, para 41.

³⁵⁶ ILO, *Employment and decent work for peace and resilience – Revision of the Employment (Transition from War to Peace) Recommendation*, 1944 (No. 71), Report V(2A), ILC.106/V/2A (2017) 13. The first law and practice report published in 2015 on the issue of the revision of Recommendation No. 71 contained a suggested definition of ‘conflict’ as ‘A prolonged struggle between two or more parties, including international armed conflict (opposing two or more States) and non-international armed conflict (between governmental forces and non-governmental armed groups, or between such groups only), as well as other situations of violence that destabilize societies and economies’. ILO, *Revision of Recommendation No. 71*, Report V(1) 2016, above n 176, 8.

³⁵⁷ ILO, *Reports of the Committee on Employment and Decent Work for the Transition to Peace: Summary of Proceedings*, Provisional Record, 105th Sess, May-June 2016, 15-2(Rev.)/1 [304-322].

³⁵⁸ ILO, *Reports of the Committee on Employment and Decent Work for the Transition to Peace: Summary of Proceedings*, Provisional Record, 106th Sess, June 2017, 13-2 [144].

³⁵⁹ Recommendation No. 205 para 2(a). This definition is in accordance with the definition developed by the Open-ended Intergovernmental Expert Working Group on Indicators and Terminology Relating to Disaster Risk Reduction in November 2016. See ILO, *Revision of Recommendation No. 71, Report V(2A) 2017*, above n 356, 13; *Report of the open-ended intergovernmental expert working group on indicators and terminology relating to disaster risk reduction*, UN GAOR, 71st sess, Agenda Item 19(c), UN Doc A/71/644 (1 December 2016), 12, 21.

³⁶⁰ International Labour Conference, *Provisional Record – Fifth item of the agenda: Decent work for peace, security and disaster resilience: Revision of the Employment (Transition from War to Peace) Recommendation*, 1944 (No. 71), 105th Sess, May-June 2016, 15-2(Rev.)/1 [12].

205 relates to situations of fragility that surround states in post-conflict and post-disaster recovery.³⁶¹ Finally, ‘crisis’ refers exclusively to situations of conflict and disaster, and excludes crises of an economic or financial nature, which are addressed in other instruments.³⁶²

The second way in which Recommendation No. 205 broadens its scope is in its application to ‘all workers and jobseekers, and to all employers, in all sections of the economy affected by crisis situations arising from conflicts and disasters’.³⁶³ Paragraph 5 provides that the Recommendation’s provisions on fundamental rights at work, health and safety apply to all workers engaged in crisis response in affected countries, while its provisions on human rights and safety and health apply to voluntary crisis response workers.³⁶⁴ This emphasises that crisis response workers are captured by the term ‘all workers’ in the instrument,³⁶⁵ and importantly, extends human rights protection (including basic labour rights) to volunteer workers, who ‘are often among the first responders and...may be working without training, preparation and appropriate protective equipment’.³⁶⁶

4.2.2 General employment policies and policies targeted at specific groups

(i) *Employment and income-generation opportunities*

Part IV on ‘Employment and Income-Generation Opportunities’ contains a raft of more general recommendations aimed at employment generation, and some of which relate to more specific groups discussed below, such as employment for youth and internally displaced persons. The more general provisions include advocating, through tripartite consultation:

- *Employment-intensive investment strategies, including public employment programmes:*³⁶⁷ this entails focusing infrastructure investment on ‘creating higher levels of productive employment and improved access to basic goods and services’.³⁶⁸ Infrastructure investments in public facilities including, for example, drainage systems, flood control, irrigation, transport systems and public buildings for healthcare and education services provide the foundation for workers and enterprises to regain their livelihoods post-crisis.³⁶⁹
- *Supporting the transition towards an environmentally sustainable economy:*³⁷⁰ public employment programmes offer the chance to incorporate environmentally sustainable, climate resilient infrastructure. This is highly beneficial in terms of preserving natural

³⁶¹ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [16].

³⁶² Ibid [15].

³⁶³ Recommendation No. 205 para 4.

³⁶⁴ Recommendation No. 205 para 5.

³⁶⁵ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [18].

³⁶⁶ ILO, Revision of Recommendation No. 71, Report V(2) 2016, above n 395, 25.

³⁶⁷ Recommendation No. 205 para 11(a).

³⁶⁸ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [43].

³⁶⁹ Ibid.

³⁷⁰ Recommendation No. 205 para 11(e).

resources at large and supporting disaster risk management, in light of the negative consequences of climate change on social and economic development.³⁷¹

- *Local economic recovery and development initiatives:*³⁷² in the short term, local economic recovery focuses on providing temporary job opportunities in affected areas, and in the long term, to create conditions for stabilisation of local economies through social inclusion and reconciliation.³⁷³ Local economic development targets employment promotion through small enterprise development and social dialogue, including through public-private partnerships. In this regard, Recommendation No. 205 stresses the inclusion of local and regional actors and authorities in a number of provisions.³⁷⁴
- *Supporting sustainable enterprise development and business continuity:*³⁷⁵ targeting enterprises to become more sustainable, including small to medium enterprises, is crucial, given their contribution to socio-economic stability and vulnerability in the wake of crises in light of their ‘limited resource base’ and, often, lack of business continuity plans.³⁷⁶ Ensuring the timely recovery of small to medium enterprises, which are often not included in national disaster risk reduction plans, is important in minimising disturbances to the market and employees.³⁷⁷

(ii) *Educational and vocational training*

The provisions on educational and vocational training in Recommendation No. 205 reflect an approach targeting key issues in different aspects of education and training. In terms of primary and secondary education, which is frequently disrupted in crises situations, Recommendation No. 205 underscores that children should have access to education without discrimination, including those who are internally displaced, migrants or refugees, and children and young people should be able to continue programmes that have been interrupted.³⁷⁸ This reflects key principles contained on the issue in other international law instruments.³⁷⁹ In terms of higher level and vocational training,

³⁷¹ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [47].

³⁷² Recommendation No. 205 para 11(b).

³⁷³ LER capitalises on incoming financial resources from the aid economy for building socio-economic security and state authority. ILO, *Revision of Recommendation No. 71, Report V(1) 2016*, above n 176 [48].

³⁷⁴ See, for example, Part II on ‘Guiding Principles’ para 7(d), encouraging states to take into account the ‘need to respect national laws and policies and use local knowledge, capacity and resources’. See, also, paras 7(e) and 8(k).

³⁷⁵ Recommendation No. 205 para 11(c) and (d).

³⁷⁶ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [49].

³⁷⁷ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [50].

³⁷⁸ Recommendation No. 205 para 18(a) and (b).

³⁷⁹ The Convention on the Rights of the Child (1989) obliges states to ensure access to education, without discrimination, for all children resident in their territory. The obligation to provide timely access to education and integration into the regular education system also extends to children seeking refugee status. See *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), arts 2(1), 22, and 28(1)(a). The provisions are also in line with the requirement in the Refugee Convention (1951) that refugees must be afforded the same treatment as nationals regarding elementary

Recommendation No. 205 advocates development of a coordinated national education and vocational guidance programme that incorporates emerging skills needs in the recovery and reconstruction process, as well as teaching on reconciliation and disaster risk.³⁸⁰ This is needed in order to address skills shortages that emerge in the post-crisis period, as is coordination between employment services, educational institutions and those involved in developing labour market policies in order to ensure coherence between employment needs and training programmes.³⁸¹ In particular, Recommendation No. 205 provides that attention should be paid to affected populations in rural areas, in the informal economy, and adapting programmes to those whose employment and training has been interrupted by crises.³⁸² No labour standards are referred to in the text of Recommendation No. 205 on educational and vocational training.

Recommendation No. 205 also places an emphasis on equality of opportunity and non-discrimination of education and vocational training for ‘women and men, girls and boys’ which, if disrupted, should be restored as quickly as possible.³⁸³ The gender perspective is reinforced in a separate paragraph, which seeks to ensure that women and girls have equal access to education and training programmes.³⁸⁴ This is consistent with the non-discrimination provision in UN General Assembly Resolution 64/290 on the right to education in emergency situations.³⁸⁵

(iii) *Social protection measures*

Recommendation No. 205 recognises social protection measures as key strategic approach to stabilise livelihoods and income, especially for workers in the informal economy and children involved in child labour.³⁸⁶ In Part VII on ‘Social Protection’, it advocates that states should, as quickly as possible, ensure basic income security, particularly for persons whose jobs or livelihoods have been disrupted by the crisis; develop, restore or enhance re-establish social protection measures, taking into account national legislation and international agreements; and ensure access to essential healthcare and other essential social services, particularly for vulnerable groups.³⁸⁷ This provision recognises the need to address particular vulnerabilities of those such as the elderly, those with disabilities and those with chronic health conditions who rely on services, income security and access to healthcare, but

education. See *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 22(1).

³⁸⁰ Recommendation No. 205 para 19(a)-(c).

³⁸¹ ILO, *Revision of Recommendation No. 71, Report V(1) 2016*, above n 176, 37 [112]. There is a strong link here between providing training to demobilized combatants, as discussed below.

³⁸² Recommendation No. 205 para 19(c)-(e).

³⁸³ Recommendation No. 205 para 18.

³⁸⁴ Recommendation No. 205 para 20.

³⁸⁵ *The right to education in emergency situations*, GA Res 64/290, UN GAOR, 64th sess, Agenda Item 114, UN Doc A/RES/64/290 (9 July 2010) para 9.

³⁸⁶ Recommendation No. 205 paras 8(a) and (c), 11(f), 16(d).

³⁸⁷ Recommendation No. 205 para 21.

does not specifically stipulate any of these groups.³⁸⁸ It also recognises the need to address social security infrastructure as a priority in the recovery process, given that it is often one of the first complex systems to be lost in a breakdown of government functions.³⁸⁹ Finally, Recommendation No. 205 advocates developing or maintaining social security floors, and seek to close the gaps in their coverage in the post-crises context, consistent with the ‘Social Security (Minimum Standards) Convention, 152 (No. 102), the Social Protection Floors Recommendation, 2012 (No. 202), and other relevant international labour standards’ as a key measure for preparation and resilience given that social protection measures, particularly income protection, have a real ability to mitigate post-crises effects.³⁹⁰ Recommendation No. 202 provides ‘an essential framework for ensuring that at least the crucial minimum guarantees for access to health and income security for all people’ are in place, and plays a vital role in crises preparedness.³⁹¹ The text of Recommendation No. 202 recognises the integral role of social security ‘that empowers [people]...to adjust to changes in the economy and in the labour market...act[s] as automatic social and economic stabilisers, help stimulate aggregate demand in times of crisis’.³⁹² Similarly to the child labour provisions, while Recommendation No. 205 recommends taking these standards into account, and infers the applicability of all of the recommended actions contained in those instruments, it represents a missed opportunity to emphasise key aspects such as non-discrimination and gender equality.³⁹³

(iv) *Combatting child labour and reintegration*

The child labour provisions in Recommendation No. 205 capitalise to an extent on the opportunity, in the recovery and reconstruction phase, to target child labour through prevention and response.³⁹⁴ Part V on ‘Rights, Equality and Non-Discrimination’ features specific provisions on child and forced labour. Paragraph 16 recommends states take ‘all necessary measures to prevent, identify and eliminate child labour’ in crisis response, taking into account the Minimum Age Convention and Recommendation, and to take urgent action in the same respects regarding the worst form of child labour, including the trafficking and recruitment of children for armed conflict, taking into account the Worst Forms of Child Labour Convention and Recommendation.³⁹⁵ The emphasis on addressing the worst forms of child labour ‘urgently’ is in line with the language of Convention No. 182, which

³⁸⁸ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [65].

³⁸⁹ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [68].

³⁹⁰ Recommendation No. 205 para 22.

³⁹¹ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [23].

³⁹² Social Protection Floors Recommendation, 2012 (No. 202), preambular para 6.

³⁹³ See Recommendation 202, para 3.

³⁹⁴ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 36 [113].

³⁹⁵ Recommendation No. 205 paras 16(a) and (b). A previously proposed provision stated that states should ‘take urgent action to identify and eliminate *all* child labour practices’ (emphasis added) with reference to the Minimum Age and Worst Forms of Child Labour standards: ILO, *Employment and decent work for peace and resilience – Revision of the Employment (Transition from War to Peace) Recommendation*, 1944 (No. 71), Report V(2), ILC.105/V/2 (2016) 112. Recommendation No. 205 thus prioritises action against the worst forms.

requires national programmes to target these as a priority action,³⁹⁶ although Convention No. 182 article 1 requires ‘immediate and effective’ measures as a matter of urgency. Stressing trafficking and forced recruitment is also consistent with Convention No. 182’s designation of these as among the worst forms of child labour, and highlights two forms which are particularly relevant to the context of Recommendation No. 205.³⁹⁷

Recommendation No. 205 further advocates providing rehabilitation, integration and training programmes for youth ‘formerly involved with the armed forces’.³⁹⁸ While these measures are consistent with those contained in Convention No. 182 and Recommendation No. 190,³⁹⁹ Recommendation No. 205 restricts the scope of these measures to those formerly involved with armed forces, where Convention No. 182 and Recommendation No. 190 extend them to all children involved with the worst forms of child labour. Recommendation No. 205 therefore does not underscore the need to provide such programmes to trafficked children or those involved in other forms of forced or compulsory labour in the post-recovery period, the implications of which are discussed further in Chapter 5. Recommendation No. 205 paragraph 16(d) further encourages states to provide ‘social protection services to protect children, for instance through cash or in-kind transfers’. Inclusion of this provision in Recommendation No. 205 is a welcome development given that it is not reflected in the child labour standards. Further, the ILO has observed ample evidence that social protection instruments aimed at reducing economic vulnerabilities related to child labour, such as ‘cash and in-kind transfer programmes, public employment programmes, social health protection, social protection for people with disabilities, income security in old age and unemployment protection’, are ‘critical pillar[s] of a broader policy response to child labour’.⁴⁰⁰ It is unclear how this provision interacts with the specific provisions contained in Part VII on Social Protection, and whether the targeted recipient is the child themselves or their parent/guardian, so clarification and further reinforcement of social protection measures aimed specifically at children would have been beneficial. Finally, in its provisions on child labour, Recommendation No. 205 omits references to the need to take account of ‘children at special risk’, and the ‘special situation of girls’ (particularly in hidden work situations) that are highlighted in the Worst Forms of Child Labour standards,⁴⁰¹ which is discussed further in Chapter 5.

³⁹⁶ Convention No. 182 art 6(1).

³⁹⁷ Convention No. 182 art 3(a); ILO, *Revision of Recommendation No. 71, Report V(1) 2017*, above n 349, 19. According to the ILO, armed conflict is ‘one of the major challenges to meeting the target of eliminating all the worst forms of child labour by 2016’. See ILO, *Revision of Recommendation No. 71, Report V(1) 2016*, above n 176 [112].

³⁹⁸ Recommendation No. 205 para 16(c).

³⁹⁹ Convention No. 182 art 7(b) and (c), Recommendation No. 190 para 2(b).

⁴⁰⁰ ILO, *World Report on Child Labour: Economic vulnerability, social protection and the fight against child labour* (2013) xx.

⁴⁰¹ Convention No. 183 art 7(d) and (e), Recommendation No. 190 paras 2(c)(ii), (iii) and (iv).

(v) *Integration of youth into the workforce*

Within Part IV on Employment and Income-Generation Opportunities, paragraph 13 specifically addresses the issue of ‘income generation opportunities for young women and men’, through training, and employment and labour market programmes specifically addressing the challenges of youth employment. This is based both on supply-side interventions (increasing the employability of youth through training programmes) through training, and presumably also on demand side interventions, through ‘employment and labour market programmes’. Paragraph 13 also specifies that states should pay special attention to employment components of disarmament, demobilisation and reintegration (DDR) programmes incorporating support functions such as counselling, in order to address ‘anti-social behaviour and violence’.⁴⁰² Addressing youth employment as part of DDR programmes in this Part is useful as it addresses the immediate needs in terms of skills and psychological support of ex-youth combatants, who according to the ILO, ‘represent a high percentage of combatants’.⁴⁰³ These provisions are related to the issue of child labour discussed below and link to approach of IPEC in preventing the recruitment of vulnerable children, as well as the reintegration of children previously associated with armed forces, through providing sustainable, decent work opportunities for children of legal working age.⁴⁰⁴

(vi) *Forced and compulsory labour*

Recommendation No. 205 provides that in addressing forced or compulsory labour in post-crises contexts, states should ‘take urgent action to prevent, identify and eliminate all forms of forced or compulsory labour, including trafficking for these purposes, taking into account the Forced Labour Convention, 1930 (No. 29) and its Protocol of 2014, and the Abolition of Forced Labour Convention, 1957 (No. 105) and Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203).⁴⁰⁵ This provision applies to situations of forced or compulsory labour, which are defined under Convention Nos. 29 and 105, including both situations of the clear imposition of forced labour following a crisis, including trafficking in persons for labour exploitation, in addition to the exaction of labour by the state in emergency situations that does not meet the threshold of the exception in Convention No. 29 article (2), and especially subsection (d) (discussed further in Chapter 5).⁴⁰⁶ In recommending that states take ‘urgent action’ against forced labour, this provision reflects the urgency with which state action on this issue is required under the forced labour standards referenced

⁴⁰² Recommendation No. 205 para 13(b).

⁴⁰³ ILO, Revision of Recommendation No. 71, Report V(1) 2017, above n 349, 17.

⁴⁰⁴ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 25 [59].

⁴⁰⁵ Recommendation No. 205 para 17.

⁴⁰⁶ ILO, Revision of Recommendation No. 71, Report V(2) 2016, above n 395, 119.

above.⁴⁰⁷ Recommendation No. 205 does not, however, contain any more specific provisions on forced labour, the limitation of which is explored further in Chapter 5.

(vii) *Integration of a gender perspective and non-discrimination*

Adoption of a gender perspective and acknowledgment of the fact that crises affect women and men differently is evident throughout the text of Recommendation No. 205. Adoption of a gender perspective in all crisis response programme development, implementation and evaluation is explicitly included as a strategic approach in Part III,⁴⁰⁸ but it also permeates other provisions in the text. Incorporation of an ‘inclusive needs assessment with a clear gender perspective’ is included as a priority action to be undertaken in the immediate aftermath of a crisis.⁴⁰⁹ Paragraph 15(c), which encourages states to ‘take measures to ensure that women who have been employed during a crisis and have assumed expanded responsibilities are not replaced against their will when the male workforce returns’, is based on an understanding that the post-crises recovery period provides an opportunity to challenge traditional labour-based gender roles through increased independence, decision-making, and potentially, social standing.⁴¹⁰ Inclusion of women in general recovery and reconciliation processes through social dialogue is also advocated in the instrument.⁴¹¹ Paragraph 15(d), in particular, calls upon states to ensure that women are ‘empowered to effectively and meaningfully participate in decision-making processes’ in post-conflict and post-disaster recovery and resilience-building, that strategies and responses prioritise their needs and interests, and that the ‘human rights of women and girls and promoted and protected’.

The propensity in post-crises contexts toward exacerbating existing patterns of gender-based violence, including sexual exploitation, rape and harassment, is included in Recommendation No. 205, which calls for states to prevent and punish such acts.⁴¹² Paragraph 33(e) highlights the need for states to take particular measures to include refugee women in labour markets in light of their vulnerable position. Non-discrimination is likewise emphasised throughout the text, for example in the provisions on education and vocational training discussed above. Equality of opportunity and treatment for women and men is a guiding principle, and is emphasised in light of the international labour standards on Equal Remuneration and Discrimination, is emphasised.⁴¹³

⁴⁰⁷ Convention No. 29 art 1(1) (requiring the suppression of forced or compulsory labour in all its forms within the shortest possible period); Convention No. 105 art 2 (requiring the immediate and complete abolition of forced or compulsory labour).

⁴⁰⁸ Recommendation No. 205 para 8(g).

⁴⁰⁹ Recommendation No. 205 para 9(a).

⁴¹⁰ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 34 [97].

⁴¹¹ Recommendation No. 205 para 24(a).

⁴¹² Recommendation No. 205 para 15(e).

⁴¹³ Recommendation No. 205 paras 7(g), 15(a).

(viii) *Persons with disabilities*

The need to direct attention towards the needs of persons with disabilities in the post-crisis recovery period is reflected in a number of paragraphs, including as part of one of the guiding principles for the entire Recommendation,⁴¹⁴ while paragraph 8(e) advocates undertaking employment impacts needs assessments for the creation of productive and decent work for PwDs. It further recommends accounting for the needs of single-headed households headed by PwDs, as a particularly vulnerable group (paragraph 15(b)). The most comprehensive provision (and the one dedicated solely to PwDs) is paragraph 15(h) in the ‘Rights, Equality and Non-Discrimination’ Part, which recommends that states ensure that PwDs, regardless of the origin of their disability, are ‘provided with opportunities for rehabilitation, education, specialised vocational guidance, training and retraining, and employment’, taking into account ILS and documents, which includes the CRPD. This reflects the general philosophy of the CRPD employment provisions and Convention No. 159, which are focused on implementing measures for the purpose of realising the right of PwDs to work in the open labour market. Specifically, paragraph 15(h) reflects CRPD article 27(1)(d) and (g), on the provision of technical and vocational guidance programmes and training, and vocational and professional rehabilitation, in addition to Convention No. 159, the philosophy of which is providing rehabilitation for the purposes of enabling PwDs to secure and retain employment. Paragraph 14(h) recommends states pursue this goal in consultation with employers’ and workers’ organisations, further reflecting Convention No. 159’s approach (article 5).

(ix) *Internally displaced persons and refugees*

The issue of internally displaced persons and refugees⁴¹⁵ has been one of the most widely debated Parts of the revised Recommendation. An overwhelming majority of the Member States that participated in the drafting process supported inclusion of the issue of refugees in the text in light of current international events,⁴¹⁶ but there was divergence on the scope and emphasis on the provisions. Part IV on employment and income-generation opportunities includes a specific provision addressing internally displaced persons, in light of the fact that ‘internal displacement is one of the most significant consequences of conflicts and disasters’.⁴¹⁷ Under paragraph 14, states should pursue the training and employment of IDPs with the ultimate goal of their socio-economic and labour market integration. Specific focus is placed on building the capacity of host communities to promote decent work for all, facilitating the voluntary return of IDPs, and safeguarding the livelihoods of local

⁴¹⁴ Recommendation No. 205 para 7(h).

⁴¹⁵ The term ‘refugee’ in Recommendation No. 205 is defined in line with its usage in the 1951 Refugee Convention. ILO, Revision of Recommendation No. 71, Report V(2A) 2017, above n 356, 57.

⁴¹⁶ ILO, Revision of Recommendation No. 71, Report V(2A) 2017, above n 356, 57.

⁴¹⁷ ILO, Revision of Recommendation No. 71, Report V(1) 2017, above n 349, 17. Policies specifically aimed at internally displaced persons affected by crises are dealt with in a separate Part to refugees, given that the former are still governed by the state in which the crisis occurred, as opposed to refugees, who are subject to a separate international regime. ILO, Revision of Recommendation No. 71, Report V(1) 2017, above n 349, 8.

populations.⁴¹⁸ This addresses the need to support host communities with employment and training opportunities, concurrently with IDPs, in order to address the increased competition for jobs and resources for employment development.⁴¹⁹ Additionally, Recommendation No. 205 encourages states to develop active labour market policies, and establish conditions of stability and socio-economic development, taking into account the international labour standards on non-discrimination, with a focus on disadvantaged groups who have been made especially vulnerable by crises, including IDPs, migrants and refugees, as appropriate and in accordance with national laws.⁴²⁰

Specific issues concerning refugees are dealt with in Part XI of the instrument. It opens by acknowledging the relevance of national circumstances, fundamental principles and rights at work and international and national law, in responding to post-crisis refugee influx.⁴²¹ It further underscores the shared international responsibility of addressing refugee influx, providing humanitarian and development assistance to support developing and least developed countries hosting refugees, which is in line with the outcomes of the 2016 *New York Declaration for Refugees and Migrants*.⁴²² Substantively, it states in extremely broad terms that states should widen ‘opportunities for refugees to access livelihood opportunities and labour markets, without discriminating amongst refugees and in a manner which also supports host communities’.⁴²³ National action plans should also be developed to address the integration of refugees into the labour market.⁴²⁴ Recommendation No. 205 emphasises the importance of accurate data collection to assess the effect of refugees on domestic labour markets and the needs of the labour force and employers.⁴²⁵

Paragraph 33 supplements the general guidance in the instrument with more specific provisions tailored to the situation of refugees, for example through increasing access to formal job opportunities and technical and vocational training schemes, skills recognition and accreditation, coordination of public and private employment agencies, paying particular attention to refugee women and young people into the labour market. It also recommends that states facilitate, as appropriate, the ‘portability of work-related and social security benefit entitlements’, thereby incorporating coverage for refugees that is recognised under the Maintenance of Social Security Rights Convention, 1982 (No. 157).⁴²⁶ The general non-discrimination and work rights provisions detailed above are also supplemented with specific provisions directed at addressing refugee workers, including labour rights education,

⁴¹⁸ Recommendation No. 205 para 14.

⁴¹⁹ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 39 [117].

⁴²⁰ Recommendation No. 205 para 12 and 15(f).

⁴²¹ Recommendation No. 205 para 28.

⁴²² *New York Declaration for Refugees and Migrants*, UN GAOR, 71st Sess, Agenda Items 13 and 118 of the provisional agenda, UN Doc A/71/L.1, paras 11, 68, Annex I, para 1.

⁴²³ Recommendation No. 205 para 30(a).

⁴²⁴ Recommendation No. 205 para 30(b).

⁴²⁵ Recommendation No. 205 para 31.

⁴²⁶ Recommendation No. 205 para 28(f).

participation in representative organisations, and measures to combat ‘discrimination and xenophobia in the workplace’.⁴²⁷ The provisions on refugees, IDPs and returnees in Recommendation No. 205 thus reflect a welcome confirmation and interpretation of the labour rights protections for these persons, and build upon the provisions of other international instruments in this field. Recommendation No. 205 echoes generally the key tenets of the *Guiding principles on the access to refugees and other forcibly displaced persons to the labour market* adopted at the ILO tripartite technical meeting on the issue in July 2016, without replicating their specificity.⁴²⁸ Areas of convergence include on the need to develop national action plans, to foster self-reliance for refugees and other forcibly displaced persons, to promote training opportunities and particularly, concerning equality of opportunity and treatment.⁴²⁹ The Guiding Principles do cite with more frequency than Recommendation No. 205, however, the need for actions taken to be in conformity with international law, labour standards, and human rights law.⁴³⁰ A major part of divergence between the Recommendation No. 205 and the Guiding Principles is that the latter refers to ‘forcibly displaced persons’, a term from which they exclude internally displaced persons,⁴³¹ while Recommendation No. 205 refers to ‘internally displaced persons’ in light of the fact that no definition of ‘forcibly displaced persons’ exists.⁴³²

(x) *Migrants affected by crisis situations*

Recommendation No. 205 includes Part X, dedicated solely to mitigating the vulnerability and labour rights of migrants in crisis situations, particularly migrant workers. Paragraph 26 recommends that states take measures aimed not only at employment generation for migrants, through promoting access labour markets, income-generation opportunities and decent work, but also at protecting conditions of work, but protecting labour rights and safe environments for these workers. It also encourages States to take measures to eliminate forced or compulsory labour, including trafficking in persons, of migrants. While it advocates undertaking these measures ‘in accordance with national and international law’, it does not reference any of the ILS on migrant workers and their families. Recommendation No. 205 further advocates equality of opportunity and treatment for migrant workers with respect to fundamental principles and rights at work, including by educating migrants on

⁴²⁷ Recommendation No. 205 para 34.

⁴²⁸ See ILO, Third Supplementary Report: outcome of the tripartite technical meeting on the access of refugees and other forcibly displaced persons to the labour market, Governing Body, 328th Sess, Doc GB.328/INS/17/3(Rev.), (27 October – 10 November 2016), Appendix I. Recommendation No. 205 incorporates provisions from the Guiding Principles on which there was broad consensus: see ILO, Revision of Recommendation No. 71, Report V(1) 2017, above n 349, 26.

⁴²⁹ See ILO, Third Supplementary Report: outcome of the tripartite technical meeting on the access of refugees and other forcibly displaced persons to the labour market, Governing Body, 328th Sess, Doc GB.328/INS/17/3(Rev.), (27 October – 10 November 2016), Appendix I, paras 22-24.

⁴³⁰ Ibid Appendix I, paras 13, 14(d), 24 and 30.

⁴³¹ Ibid Appendix I, 3 (footnote 3)

⁴³² ILO, Revision of Recommendation No. 71, Report V(2A) 2017, above n 356, 58. This matter has been referred for consideration at the 106th session of the Conference in June 2017.

their labour rights and means for redress of violations, adopting measures to reduce discrimination and xenophobia in the workplace, and enabling their participation in employers and workers organisations. It also encourages states to consult with these organisations and civil society on employment of migrants.

(xi) *Workers in the informal economy*

The approach Recommendation No. 205 takes towards workers in the informal economy supports, foremost, the goal of transition from informality to formality, while respecting the fundamental principles and rights at work of those in the informal economy.⁴³³ While the text of Recommendation No. 205 does not contain specific guidance on measures to take to support this goal, it does provide that states should take into account the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204),⁴³⁴ which itself provides guidance on legal frameworks and implementation, employment policies, rights protection and social dialogue, and incentives. This reflects both the need to pursue the general policy of formalising work, while also recognising the need to ensure rights protections for workers in that context. While informal work presents real challenges to the stability of work, regulation of working conditions and availability of social protection, employment generation policies and rights protection should be extended to workers in both the formal and informal economies, given that the informal economy is responsible for generating a large proportion of jobs and incomes in many countries affected by conflicts and disasters.⁴³⁵ Special attention is also given to preventing the expansion of informal work through the ‘training and empowerment’ of workers affected by crises, including in the informal economy,⁴³⁶ as well as prevention of the informalisation of labour markets in which refugees are seeking work.⁴³⁷

(xii) *Integration of ex-combatants into the workforce*

Taking appropriate measures for the ‘socio-economic reintegration of persons who have been affected by a crisis, in particular those formerly associated with armed forces and groups, including through training programmes that aim to improve their employability’ is provided as a strategic approach in Part III.⁴³⁸ Part IV on employment and income-generation opportunities also recommends adopting policies to support decent employment through, inter alia, ‘facilitating the employment of persons formerly associated with armed forces and groups’.⁴³⁹ And as referenced above, Recommendation No. 205 refers to DDR measures specifically directed towards youth. The transition of ex-combatants into civilian life through the process of DDR has been identified as an ‘integral part of peace consolidation

⁴³³ Recommendation No. 205 paras 8(c) and 11(f).

⁴³⁴ Recommendation No. 205 para 11(f).

⁴³⁵ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 24 [54].

⁴³⁶ Recommendation No. 205 para 19(e).

⁴³⁷ Recommendation No. 205 para 33(b).

⁴³⁸ Recommendation No. 205 para 8(l).

⁴³⁹ Recommendation No. 205 para 11(i).

processes’.⁴⁴⁰ While the demobilisation process often causes ‘immediate loss of income and social status’ for ex-combatants,⁴⁴¹ developing employment policies that enable ex-combatants to gain civilian status and alternative, sustainable livelihoods creates an enabling environment for development. The ILO has stated that DDR programmes must be tailored to the ‘gender, age, educational qualifications and physical ability of the recipient’,⁴⁴² and Recommendation No. 205 reflects this specificity in its references to youth-oriented programmes, but not with respect to the other characteristics.

4.2.3 Adoption of a human rights-based approach, use of international legal instruments and the role of the law

(i) *Adoption of a human rights-based approach*

When Recommendation No. 71 was adopted in 1944, the ILO ‘had not described itself as a human rights organisation, and the adoption of the fundamental human rights instruments by the ILO and the United Nations had not yet begun’ (with the exception of the Forced Labour Convention adopted in 1930).⁴⁴³ This is reflected in the absence of rights-based language in the original Recommendation; indeed, the only reference in the original instrument is to the need to ensure equality of opportunity on the basis of merit for men and women in the redistribution of women workers, and to secure wages based on job content rather than sex.⁴⁴⁴ There has been a discernable shift towards a human rights-based approach in the work of the ILO (in its standards, the 1998 and 2008 Declarations and the decent work programme) and the UN system as a whole, as supported by Member States, that is reflected in the revised instrument. While Part V specifically focuses on ‘Rights, equality and non-discrimination’, the notion of human rights and fundamental labour rights permeates the entire instrument, and features heavily in the preambulatory paragraphs that serve to guide the reader in interpreting the Recommendation with a human rights lens.⁴⁴⁵ The philosophy of Recommendation No. 205 is centred not only on employment generation, but on decent work, a core tenet of which is quality work that respects fundamental rights based on labour standards, as established in Chapter 2.⁴⁴⁶ Thus, the need to respect, promote and realise fundamental labour rights and other human rights

⁴⁴⁰ ILO, Revision of Recommendation No. 71, Report V(1) 2017, above n 349, 16.

⁴⁴¹ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 24 [55].

⁴⁴² ILO, Revision of Recommendation No. 71, Report V(1) 2017, above n 349, 16.

⁴⁴³ International Labour Office, Employment and decent work for peace and resilience – Revision of the Employment (Transition from War to Peace) Recommendation, 1944 (No. 71), Report V(1), ILC.105-V(1) (2016) 44.

⁴⁴⁴ Recommendation No. 71 paras 36 and 37(1).

⁴⁴⁵ This is in comparison to the preamble of the original Recommendation, which posited ‘full employment with a view to satisfying the vital needs of the population and raising the standard of living throughout the world’. The preamble in the revised version focuses specifically on the UDHR, ILO Declarations on Fundamental Principles and Rights at Work and on Social Justice.

⁴⁴⁶ See Recommendation No. 205 paras 1 and 7(a).

is provided as the second guiding principle of the entire document.⁴⁴⁷ This is valuable because it reinforces the continuing application of key instruments imparting labour rights in the recovery process, and reinforces the use of a human rights-based approach in interventions and for affected states themselves.

Given that the ILO has identified the principle that right-based concerns in recovery periods are ‘to ensure equal treatment for, and focus special attention on, the segments of the national population that have been rendered particularly vulnerable by the crisis’, equality of opportunity between men and women, non-discrimination on all grounds, and the need for attention on vulnerable groups are also provided as guiding principles.⁴⁴⁸ They are further emphasised in their own right and with respect to the fundamental conventions to which they relate (the Equal Remuneration Convention and Recommendation, and Discrimination Convention and Recommendation).⁴⁴⁹ The ‘Rights, Equality and Non-Discrimination’ Part thus structures what the drafting parties and the ILO see as the priority rights concerns. Forced and child labour, as discussed above, also feature in this Part.⁴⁵⁰

(ii) *Use of international legal instruments in the Recommendation*

A linked issue is the way in which the Recommendation No. 205 uses international law and labour standards as bases upon which it advocates its policies, in addition to encouraging legislative development in affected countries. With the proliferation of international labour standards and soft law instruments since the adoption of Recommendation No. 71 (in which the sole reference to law was in the context of those standards ‘concerning the employment of women’),⁴⁵¹ the revised instrument refers to all four fundamental conventions in areas of non-discrimination and equality, child labour and forced labour, and freedom of association and the right to collective bargaining.⁴⁵² It also refers to governance conventions on employment policy, labour inspection, tripartite consultation, and to non-fundamental standards including on the informal economy and social security.⁴⁵³ Both the provisions on access to education for children, and equality of treatment for working refugees underscore compliance with international law and ‘relevant labour laws and regulations’, respectively.⁴⁵⁴ There are limitations to the approach towards international legal instruments in Recommendation No. 205, however, that will be discussed in Chapter 5.

⁴⁴⁷ Recommendation No. 205 para 7(b).

⁴⁴⁸ ILO, *Revision of Recommendation No. 71, Report V(1) 2016*, above n 176 [92]. Recommendation No. 205 para 7(f) and (h).

⁴⁴⁹ Recommendation No. 205 para 15(a) and (f).

⁴⁵⁰ Recommendation No. 205 paras 16 and 17.

⁴⁵¹ Recommendation No. 71 para 43.

⁴⁵² See Recommendation No. 205 paras 10, 15(a) and (f), 16(a) and (b), 17 and 25.

⁴⁵³ See Recommendation No. 205 paras 11(f), 22, 23(c) and 24(a).

⁴⁵⁴ See Recommendation No. 205 paras 18(a) and 34.

(iii) *The role of the law in post-crises employment recovery*

Finally, Part VIII on ‘Labour Law, Labour Administration and Labour Market Information’ recommends that states, through tripartite consultation, should review, develop and implement labour legislation consistent with the Declaration on Fundamental Rights at work and all applicable international labour standards,⁴⁵⁵ and ensure that national labour laws are consistent with decent and productive employment opportunities. Emphasising the key role of the law in this respect is a crucial feature of Recommendation No. 205, given that in the absence of effective legal and labour administrative support, ‘employment in decent conditions can neither be neither generated nor maintained’.⁴⁵⁶ This reflects the ILO’s designation of effective laws and legal regulation as ‘among the most urgent priorities in restoring the rule of law and in ensuring protection both for workers and for employers’.⁴⁵⁷ Maintenance of a legal order that upholds international legal standards should thus be a priority area for crisis response, particularly where emergency measures unnecessarily include suspension of labour laws, given that a vacuum in which labour laws do not function may allow exploitation of vulnerable workers, particularly with respect to forced labour, child labour, and trafficking for the purposes of work.⁴⁵⁸

4.2.4 Stakeholder participation, international cooperation and development assistance

(i) *Reinforcing the tripartite consultative system*

Recommendation No. 205 capitalises on the entrenched ILO tripartite consultative system through many provisions on consultations with employers’ and workers’ organisations (and where appropriate, civil society organisations), which can offer a unique point of access to generate decent work and economic recovery.⁴⁵⁹ Consultation with representative employers’ and workers’ organisations is particularly emphasised in the proposed measures on employment generation,⁴⁶⁰ in developing educational and vocational training and guidance schemes,⁴⁶¹ and in connection to establishing and enforcing domestic labour law, labour administration and systems for labour market information collection.⁴⁶² Developing strong systems for tripartite social dialogue,⁴⁶³ taking into account the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) and the importance of strengthening employers’ and workers’ organisations, is emphasised as a key

⁴⁵⁵ Recommendation No. 205 para 23.

⁴⁵⁶ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [83].

⁴⁵⁷ Ibid [84].

⁴⁵⁸ Ibid.

⁴⁵⁹ See Recommendation No. 205 preamble, and para 8(d).

⁴⁶⁰ Recommendation No. 205 para 11.

⁴⁶¹ Recommendation No. 205 para 19(a). Engaging with ‘relevant public and private stakeholders’ is also emphasised in this context.

⁴⁶² Recommendation No. 205 para 23.

⁴⁶³ Social dialogue as defined elsewhere by the ILO ‘includes all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy’. ILO, *Social dialogue*, International Labour Organisation, < <http://www.ilo.org/ifpdial/areas-of-work/social-dialogue/lang--en/index.htm>>.

strategic approach for the achievement of decent work.⁴⁶⁴ Further, paragraph 25 underscores the indispensable function of employers' and workers' organisations in crisis response, particularly in light of the two core freedom of association and collective bargaining conventions (see Chapter 1), particularly by providing training, advice and material assistance to sustainable enterprises and workers in crisis response.⁴⁶⁵

(ii) *Role of employers and businesses*

The role of employers and businesses (particularly small and medium-sized enterprises) in stimulating employment generation and economic recovery, and that of creating an enabling environment for sustainable enterprise, is emphasised in the preamble of Recommendation No. 205 as a foundational principle. Additionally, Recommendation No. 205 places responsibility on states to, firstly, take action to ensure that employers and businesses address the risks of adverse human and labour rights impacts linked to their operations, or products, services or operations to which they may be directly linked,⁴⁶⁶ and secondly, to create incentives for multinational enterprises to cooperate with national enterprises to generate decent employment, and ensure respect for human and labour rights through due diligence.⁴⁶⁷ Recommendation No. 205 also stresses compliance in this respect with the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, revised by the ILO in March 2017. These provisions in Recommendation No. 205 are consistent with the Tripartite Declaration, which and reaffirms the 'corporate responsibility to respect human rights [which] requires that enterprises...avoid causing or contributing to adverse impacts through their own activities...and...seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services...even if they have not contributed to those impacts', and to carry out due diligence in this regard.⁴⁶⁸

(iii) *Role of international cooperation and international development assistance*

The role of international cooperation (in both bilateral and multilateral forms) is stressed throughout Recommendation No. 205 as a whole, with the preamble underscoring its importance, along with regional cooperation. The need for 'international solidarity, burden- and responsibility-sharing and cooperation' is further referenced in the 'guiding principles' part.⁴⁶⁹ Part XIII on international

⁴⁶⁴ Recommendation No. 205 paras 8(j), 24(a) and (b).

⁴⁶⁵ Recommendation No. 205 para 25(a) and (b). Paragraph 25(c) also highlights the crucial role of including disaster preparedness in collective bargaining, which can ensure that recovery actions that are taken benefit workers and employers. ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [74].

⁴⁶⁶ Recommendation No. 205 para 8(f).

⁴⁶⁷ Recommendation No. 205 para 11(h).

⁴⁶⁸ ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions, GB.329/POL/7, 4, para 10(c)-(d).

⁴⁶⁹ Recommendation No. 205 para 7(m).

cooperation emphasises cooperation in two respects; first, in encouraging cooperation between Member States and United Nations bodies, international financial institutions and other mechanisms of coordinated response in preparing for and responding to crisis situations.⁴⁷⁰ Second, it calls upon on cooperation between international organisations participating in crisis response, particularly through the exchange of information, good practices and technology,⁴⁷¹ and between humanitarian and development assistance in crisis response for the promotion of freely chosen and decent work.⁴⁷² In this respect, coordinating aid packages is crucial to ensure that overlapping programmes target the needs of target countries, rather than donor countries, and to ensure that humanitarian interventions, which often centre on short-term solutions, take into account human rights protection quality employment creation.⁴⁷³ Recommendation No. 205 further promotes cooperation in the provision of international development assistance and public and private sector investment for decent work creation.⁴⁷⁴ The inclusion of paragraph 46 emphasises the role of the ILO in crisis response focusing on ‘employment promotion, labour market integration or access, as appropriate, capacity development and institution building’, in collaboration with international and regional organisations. Crisis response through regional and international cooperation should centre on decent work and sustainable enterprises and importantly, should be applicable with international labour standards.⁴⁷⁵

⁴⁷⁰ Recommendation No. 205 para 42.

⁴⁷¹ Recommendation No. 205 para 47.

⁴⁷² Recommendation No. 205 para 48. The need for coordination between humanitarian and development assistance is further referenced in the ‘Guiding Principles’ part, para 6(n), which emphasises the need to ‘avoid duplication of efforts and mandates’.

⁴⁷³ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, [129]-[130].

⁴⁷⁴ Recommendation No. 205 para 44.

⁴⁷⁵ Recommendation No. 205 para 43. It is interesting to note that in the preparatory consultative stage, Member States were very supportive of emphasising adherence to international labour standards by states and by international organisations in all crisis response. ILO, Revision of Recommendation No. 71, Report V(2) 2016, above n 395, 132.

Chapter 5 – Human right risk analysis

5.1 Introduction

This chapter develops a human rights risk analysis framework in order to analyse the utility of Recommendation No. 205 as an effective instrument for the protection of the four fundamental labour rights in post-conflict and post-disaster recovery. It builds on the context established in Chapter 3 in which human rights abuses can flourish, and provides a framework for testing the extent of Recommendation No. 205's human rights-based approach as introduced in Chapter 4. It analyses the most significant risks in post-crisis contexts in terms of freedom of association and collective bargaining, forced labour, child labour, and discrimination (on the grounds of ethnic origin, sex and disability), and illustrates instances where these have been observed in practice. Each section will then discuss the implications for post-crises policy, before examining how Recommendation No. 205 responds to, and could mitigate, these risks. Finally, this chapter will turn an analysis of the additional gaps in the instrument, as well as the implications of its recommendation form.

This chapter adapts the format of a human rights risk analysis (HRAA), most frequently used at the enterprise level when undertaking due diligence assessments for the purposes of assessing corporate social responsibility. Adapting the Ruggie model of HRAA to post-crisis settings would involve:

- (a) assessing the human rights situation prior to a crisis;
- (b) identifying groups who may potentially be affected, paying particular attention to groups at a greater risk of vulnerability and marginalisation;
- (c) cataloguing relevant international human rights standards and issues; and
- (d) projecting how the crises may have adverse human rights impacts on groups that have been identified.⁴⁷⁶

As step (a) would require a context-specific analysis, and step (c) has been completed in Chapter 2, this chapter will focus on steps (b) and (d). In this context, the causal agents triggering adverse human rights impacts are conflicts and disasters, and the analysis will encompass adverse impacts arising from both state and non-state actors. Adopting a HRAA in this context places the emphasis on prevention and mitigation,⁴⁷⁷ which may be particularly useful for states experiencing recurring disaster events, or those in protracted conflicts.

A few notes should be made about the parameters of this analysis. First, given the diversity of socio-economic, political, institutional and labour market impacts caused by conflicts and disasters

⁴⁷⁶ United Nations, Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework (2011) 19.

⁴⁷⁷ Ibid, 18.

established in Chapter 2, the risk assessment in this chapter is a framework for general application to post-crisis situations, drawing on recurring risks observed in the past. Aside from variables related to the nature of the crisis itself, there are other key variables that will impact a more specific HRRRA. These include, inter alia, the human rights situation prior to the crisis, level of democracy and economic development, population size and geographical indicators. Second, this section establishes a HRRRA concerning the fundamental rights at work on a general basis. References are made to measures advocated under ILO conventions on the fundamental rights at work recalling, from Chapter 2, that these are amongst the most highly ratified of the ILO conventions, and even if not ratified, form the corpus of internationally-approved labour standards that contain principles for the realisation of the rights they contain. Further, states parties to the ILO are required, under the Declaration on Fundamental Principles and Rights at Work, by virtue of membership of the Organisation, to ‘respect, promote and realise’ the fundamental rights which are contained in those Conventions.⁴⁷⁸

5.2 Human rights risk analysis

5.2.1 Freedom of association and right to collective bargaining

(i) *The human rights risk*

The rights to freedom of association and collective bargaining contained in Conventions No. 87 and No. 98, as well as the right to form and join trade unions and for trade unions to function freely under article 8 of the ICESCR, commonly come under threat in post-crisis contexts, in part because they can only be fully exercised ‘in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed’.⁴⁷⁹ Concurrently, these rights are closely linked with all other fundamental labour rights, providing the means by which action can be taken against child and forced labour, and to uphold the principles of non-discrimination and equality.⁴⁸⁰ In enabling social dialogue, exercising these rights are key ways through which working conditions can be improved, and the application of labour legislation can be monitored.

First, employers’ and worker’s organisations may be unrepresentative, institutionally weak, or non-existent, thereby extinguishing the means through which these groups exercise the rights to freedom of association and collective bargaining. This may be due to the political and economic climate, or because the legal, institutional and tripartite framework that enables dialogue between employers’ and workers’ organisations may be non-existent or dysfunctional.⁴⁸¹ These organisations may suffer

⁴⁷⁸ ILO, Declaration on Fundamental Principles and Rights at Work, para 2.

⁴⁷⁹ ILO, Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (5th (revised) edition) (2006) 15 [43].

⁴⁸⁰ ILO, General Survey on the fundamental Conventions 2012, above n 24, [49], [164].

⁴⁸¹ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176 [77]; ILO, Employment and Decent Work in Situations of Fragility, Conflict and Disaster, above n 218, 26.

indirectly, through restricted activities due to loss of membership and resources, and the reduction in people working in the formal sector.⁴⁸² Further, their leaders and members may be targeted directly in the course of conflicts and in the post-conflict period.⁴⁸³ For example, in Colombia, labour leaders ‘face daily threats and are targets of attacks by the military, the police, the paramilitary groups, guerrillas and drug traffickers’,⁴⁸⁴ with 479 reported murders of trade unionists between 2004 and 2012, according to the International Trade Union Confederation.⁴⁸⁵ In Liberia, disruptions to union activities continued into the post-1997 civil war period, where anti-union discrimination prevented certain sectors of workers from establishing or joining unions.⁴⁸⁶

Second, state governments may invoke crisis situations in order to justify prohibitions on the right to freedom of association under exceptional laws or emergency powers, thereby restricting ‘one of the essential means available to workers...for furthering and defending their interests’.⁴⁸⁷ As discussed in Chapter 2, section 2.2, the ILO expert bodies have reaffirmed that the freedom of association conventions do not contain provisions permitting derogations, based on a claimed state of emergency.⁴⁸⁸ This ground is, however, frequently invoked by states in crisis situations. Cases of acute national crisis arising from ‘serious conflict, insurrection or natural disaster in which the normal conditions for the functioning of society are absent’, may justify suspension for a period of time, but extended suspensions through the post-crisis period seriously threaten the fundamental rights to freedom of association and collective bargaining.⁴⁸⁹ The Committee on Freedom of Association has held in the case of Nicaragua, for example, that where a state of emergency has been in place for several years, and used as a basis upon which to justify restrictions of trade union rights and the civil liberties required to exercise such rights, it is necessary to protect the rights to, for example, establish representative organisations, and strike.⁴⁹⁰ Restrictions on civil liberties where states of emergency have been repeatedly extended ‘removes all meaning from the concept of trade union’.⁴⁹¹

⁴⁸² Date-Bah (ed), *Jobs After War*, above n 213, 309-310.

⁴⁸³ Ibid 309.

⁴⁸⁴ Ibid 313.

⁴⁸⁵ Calculated from the Annual Surveys of Violations of Trade Union Rights for Colombia between this time period, available from <<http://www.refworld.org/publisher,ITUC,ANNUALREPORT,COL,,0.html>>.

⁴⁸⁶ Date-Bah (ed), *Jobs After War*, above n 213, 312.

⁴⁸⁷ ILO, General Survey on Freedom of Association and Collective Bargaining 1994, above n 115, [152].

⁴⁸⁸ ILO, Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (5th (revised) edition) (2006) 42 [193].

⁴⁸⁹ ILO, General Survey on Freedom of Association and Collective Bargaining 1994, above n 115, [152].

⁴⁹⁰ Rubin (ed) *Code of International Labour Law, Volume I*, above n 199, 118 [7], citing Committee on Freedom of Association, Interim Report – Report No 261 on Case No. 1129 (Nicaragua) (November 1988).

⁴⁹¹ ILO, *Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (revised) edition) (2006) 42 [194], referring to the Resolution concerning Trade Union Rights and their Relation to Civil Liberties adopted by the International Labour Conference, 54th Sess (1970).

(ii) *Implications for post-crisis policy*

(a) Capitalising on the role of social dialogue in post-crisis reconstruction

States and intervening agencies should seek to cooperate with employers' and workers' organisations, where possible, at the early stages of post-crisis reconstruction. Collectively, such organisations can play an important role in bringing to the fore specific issues related to workers during the reconstruction process, for example, conditions of work and equality. Where there has been a shift in political orientation following a conflict, they can become key civil society actors, and can fulfil prominent roles in peace and reconciliation processes. By capitalising on existing relationships with local networks, these organisations can provide assistance with 'training, counseling, job services, credit schemes and social mobilisation, for instance, in the reintegration of groups such as returnees, workers with disabilities, demobilised soldiers...'⁴⁹² Employers' organisations in particular can fulfil important functions for economic recovery in the immediate aftermath of a crisis, by 'enabling local economic development' and supporting the development of small and medium-sized enterprises.⁴⁹³ Further, they can support development of the private sector, which is a key means of job creation and stabilising the labour market.⁴⁹⁴ Employers' organisations have played a role in Lebanon and Jordan, addressing issues related to the Syrian refugee influx, while in Haiti, employers coordinated and established an Economic Forum after the earthquake to develop job-creation initiatives.⁴⁹⁵

Participation of workers' organisations in post-crisis reconstruction is critical in ensuring that the interests of workers are included in the social and economic recovery process. They may also assist in delivering immediate humanitarian relief. Following the 2010 earthquake in Haiti, the International Trade Union Confederation and unions from the Dominican Republic delivered medical supplies, food, water, and committed medical personnel to assist with humanitarian relief.⁴⁹⁶ Haitian trade unions, in cooperation with international trade union confederations, have also been active in advocating decent work and vocational programmes, and in legal and human rights advocacy (enforcement of international human rights treaties, and reform of the Haitian Labour Code).⁴⁹⁷ Workers' organisations can play a further role in improving employment discrimination that may precipitate social exclusion by participating in policy- and law-making processes.⁴⁹⁸ In BiH, the Trade Union Confederations of FBiH and RS cooperated in meetings with the International Confederation of Free Trade Unions on the need for cooperative drafting of labour laws and non-discrimination

⁴⁹² Date-Bah (ed), *Jobs After War*, above n 213, 319.

⁴⁹³ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 27; ILO, *Revision of Recommendation No. 71, Report V(1) 2016*, above n 176, 27.

⁴⁹⁴ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 27.

⁴⁹⁵ ILO, *Revision of Recommendation No. 71, Report V(1) 2016*, above n 176, 29.

⁴⁹⁶ ILO, *Revision of Recommendation No. 71, Report V(1) 2016*, above n 176, 29-30.

⁴⁹⁷ Trade Union Confederation of the Americas and International Trade Union Confederation, *Trade union road map for the reconstruction and development of Haiti* (Santo Domingo, 9 April 2010).

⁴⁹⁸ Date-Bah (ed), *Jobs After War*, above n 213, 337.

provisions in the interests of all workers.⁴⁹⁹

(b) Legal and institutional capacity-building

Ensuring that a legal basis exists in national law for enforcing the rights to freedom of association and collective bargaining in accordance with Conventions No. 87 and No. 98 is a key preliminary step, as is ensuring that public authorities refrain from restricting the lawful exercise of these rights. Capacity-building assistance in recovering from crises, particularly from international donors, is an important step in remedying the organisational and structural weakness that they may have developed during the crisis as a result of, inter alia, resource and infrastructure damage,⁵⁰⁰ and should be a priority measure in post-conflict reconstruction.

(iii) The role of Recommendation No. 205

Recommendation No. 205 successfully addresses many of the key risks concerning the rights to freedom of association and collective bargaining established in the analysis above. First, while Recommendation No. 205 does not specifically state that states should refrain from interference with these rights during or in the aftermath of emergencies, and entrench these rights in legislation, it does posit that states should ‘create an enabling environment for the establishment, restoration or strengthening of employers’ and workers’ organisations’,⁵⁰¹ which implies non-interference on behalf of the state with the rights to freedom of association and collective bargaining. Recommendation No. 205 also provides that gender-inclusive social dialogue, through consultation with workers’ and employers’ organisations, should play a central role in developing or promoting all measures provided for in the instrument.⁵⁰² Second, Recommendation No. 205 highlights the key role that employers’ and workers’ organisations can play in crisis response, particularly through assisting sustainable enterprises to recover from crises, assisting workers to recover through material support and training, and taking measures for crisis recovery through collective bargaining,⁵⁰³ which parallels the outcomes of the above risk analysis. Given that this risk analysis has identified the benefits of close cooperation with representative organisations in the immediate aftermath of a crisis, highlighting the need to engage in tripartite dialogue early in the recovery process would have been welcome. Recommendation No. 205 does not make the connection between the active social dialogue and the protection of other fundamental rights (for example, through which workers’ organisations can be partners in monitoring discrimination, forced and child labour). Recommendation No. 205 does

⁴⁹⁹ Date-Bah (ed), *Jobs After War*, above n 213, 337.

⁵⁰⁰ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 27.

⁵⁰¹ Revised Recommendation No. 205 para 24(b).

⁵⁰² Revised Recommendation No. 205 para 24(a).

⁵⁰³ Revised Recommendation No. 205 para 25.

however draw out that states should encourage cooperation between civil society organisations, and workers' and employers' organisations.⁵⁰⁴

5.2.2 Forced labour and trafficking in persons for the purpose of exploitation

(i) *The human rights risk*

The exaction of forced or compulsory labour may lead to a violation of the prohibition of the practice in Convention No. 29 (which also prohibits trafficking for these purposes), and under Convention No. 105 (for specific forms). It may also lead to a violation of other fundamental rights of the victim, such as the right to liberty and security, the right not to be subjected to torture or cruel, inhuman or degrading treatment and punishment, and the right to just and favourable conditions of work. Forced labour at the behest of a state may arise in both clear and obfuscated ways. Obvious cases arise where states conscript civilians to support armed forces in the course of a conflict, as was the case in Myanmar with the provision of forced sexual services and portage.⁵⁰⁵ The Committee of Experts has noted widespread forced labour exacted by government forces and other armed groups to the conflict in the Democratic Republic of the Congo, including for the work in mines, and the abduction of women and children for the provision of sexual services and domestic servitude.⁵⁰⁶ Forced labour may also be exacted where a state mobilises its population for work that does not fall within one of the exceptions in Convention No. 29, as established in Chapter 2. Where a state exacts labour under the auspices of article 2(2)(d) of that Convention, and the facts of the situation do not meet the threshold clarified by the Committee of Experts (see Chapter 2, section 2.2), the state will be in breach of the prohibition of forced labour.⁵⁰⁷ Where this threshold is not met, such labour may fall within the prohibited category of forced labour 'for the purposes of economic development' under Convention No. 105 article 1(b), even where it is temporary or exceptional in nature.⁵⁰⁸

Post-crisis contexts also create fertile grounds for the proliferation of trafficking for labour exploitation. An integral part of the definition of trafficking in persons in the Trafficking in Persons Protocol (which provides the internationally accepted definition of the term) is its exploitative purpose, which is specifically stipulated to include 'prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.⁵⁰⁹ The fact that trafficking so defined is for the purposes of labour exploitation establishes

⁵⁰⁴ Recommendation No. 205 para 24(c).

⁵⁰⁵ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 38 [114].

⁵⁰⁶ CEACR, *Observation – Forced Labour Convention, 1930 (No. 29) – Democratic Republic of the Congo*, adopted 2013, published at the 104th International Labour Conference session (2014).

⁵⁰⁷ ILO, General Survey on the Forced Labour Convention 2007, above n 25 [62].

⁵⁰⁸ ILO, General Survey on the fundamental Conventions 2012, above n 24 [308].

⁵⁰⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) (adopted 15 November 2000, entered into force 25 December 2003) UN Doc A/55/383, art 3(a).

the link between Convention No. 29 and the Trafficking in Persons Protocol, as confirmed by the ILO Committee of Experts,⁵¹⁰ and is confirmed in Protocol to Convention No. 29 (article 1(3)).

As identified by the UN Special Rapporteur on trafficking in persons, especially women and children, post-conflict situations

are typically characterized by absent or dysfunctional justice and law enforcement institutions; a consequent climate of impunity that fosters violent criminal networks; high levels of poverty and lack of basic resources; significant inequality; large populations of highly vulnerable individuals...fractured communities and lack of trust; and militarized societies tolerant of extreme levels of violence.⁵¹¹

These factors render all persons vulnerable to trafficking, with many countries in post-crisis recovery becoming 'source, transit or destination points for victims of trafficking'.⁵¹² Many of these observations can also be applied to trafficking that occurs in post-disaster situations. Disruptions to the means by which individuals support their livelihoods, disruptions to state social protection systems, and the efficacy and availability of protection measures all increase the vulnerability of potential victims to trafficking.⁵¹³ Haitian National police and local NGOs, for example, reported 'an increase in alleged cases of forced labor and sex trafficking of children and adults' following the 2010 earthquake.⁵¹⁴

Trafficking in post-crisis contexts may take on gendered dimensions – for example, boys and men may have been trafficked to supplement armed forces or groups during a conflict, while girls and women tend to be trafficked for domestic servitude or sexual exploitation, including sexual slavery or forced prostitution.⁵¹⁵ In the post-crisis environment, the vulnerability of girls and women is increased 'by their relative lack of access to resources, education, documentation in their own name and protection'.⁵¹⁶ Increased labour demand for reconstruction efforts following crises may also lead to international trafficking, as was observed in Iraq with the trafficking of Ukrainian construction workers for labour exploitation.⁵¹⁷ The presence of peacekeeping forces may also fuel trafficking for

⁵¹⁰ ILO, General Survey on the Forced Labour Convention 2007, above n 25 [76]-[77].

⁵¹¹ Maria Grazia Giammarinaro, Report on the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/HRC/32/41 (3 May 2016) [37].

⁵¹² OHCHR, Fact Sheet No. 36 – Human Rights and Human Trafficking (2014) 43.

⁵¹³ Manuela Brülisauer, Human Trafficking in Post-Earthquake Nepal: Impacts of the Disaster on Methods for Victim Recruitment (2015) 8.

⁵¹⁴ United States of America Department of State, *Trafficking in Persons Report 2011*, (2011) 394.

⁵¹⁵ Maria Grazia Giammarinaro, Report on the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/HRC/29/38 (31 March 2015) [15].

⁵¹⁶ Giammarinaro, Report on the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/HRC/32/41, above n 511 [38].

⁵¹⁷ Maria Grazia Giammarinaro, 'Statement by Maria Grazia Giammarinaro Special Rapporteur on trafficking in persons, especially women and children' (Statement delivered at the 71st session of the UN General Assembly, 28 October 2016)

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20793&LangID=E>>.

the purposes of sexual exploitation, as was observed in the former Yugoslavia, Haiti, Sierra Leone and the Central African Republic.⁵¹⁸ The combination of ‘an economy of exploitation’, fragile law enforcement and impoverishment particularly exacerbates women’s vulnerabilities in this context.⁵¹⁹

(ii) Implications for post-crisis programming

(a) Programming targeting forced labour and trafficking for labour exploitation

Adopting a human rights-based, preventative approach is crucial to addressing the proliferation of forced and compulsory labour and trafficking. Both Protocol to Convention No. 29 (article 2) and the Trafficking in Persons Protocol (article 9) contain guidance on measures to be taken to prevent forced or compulsory labour and trafficking, respectively. Collectively, these can be characterised as education and awareness-raising measures aimed at those who are particularly vulnerable, and employers who may become complicit in forced labour practices; legislative and enforcement measures (considered below); and measures addressing the root causes of people’s economic vulnerability that make them vulnerable to trafficking. Both instruments also advocate cooperative undertakings through, for example, supporting due diligence by enterprises to combat forced labour and trafficking, and cooperation with civil society, development, and law enforcement actors. Border measures should be implemented to prevent and detect trafficking, as per article 11(1) of the Trafficking in Persons Protocol, the efficacy of which was demonstrated in post-earthquake Haiti, where rapid response teams were established at border posts to identify and prevent trafficking.⁵²⁰ Finally, integration of a gender perspective into programming and protection measures is crucial in prevention and victim protection.

(b) Legal and institutional capacity-building

States should ensure that existing legislation on forced labour and trafficking for the purposes of labour exploitation is in place, covers all workers in all sectors of the economy, and is aligned with international standards. Criminalisation in national law is required of states parties to both Convention No. 29 (article 25 – for the exaction of forced or compulsory labour), and the Trafficking in Persons Protocol (article 5 – for trafficking).⁵²¹ Beyond trafficking itself, attempts to traffic, participating as an accomplice and organizing, and directing others to do so, should also be established as offences in accordance with the Trafficking in Persons Protocol article 5(2). Labour inspections to monitor workplace compliance with national laws, law enforcement action to ‘identify victims, as well as

⁵¹⁸ Giammarinaro, Report on the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/HRC/32/41, above n 511 [39]-[42].

⁵¹⁹ Ibid, [43].

⁵²⁰ IOM, Addressing Human Trafficking and Exploitation in Times of Crisis (2015) 26.

⁵²¹ Protocol to Convention No. 29 (article 2(c)(i)) further requires Members to ensure the ‘coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate’, and the strengthening of labour inspection services required to implement the legislation.

perpetrators of trafficking, and to take corrective measures’, and effective judicial action to prosecute traffickers are complementary, integral measures to address the issue.

(iii) *The role of Recommendation No. 205*

(a) General programming recommendations

The key issue in Recommendation No. 205’s approach to forced and compulsory labour is that it lacks specificity, only recommending states to ‘take urgent action to prevent, identify, and eliminate all forms of forced or compulsory labour, including trafficking in persons’ for the purposes of labour exploitation. It thus defers substantially to the international labour standards to which it refers in this respect (Convention No. 29 and its Protocol of 2014, Convention No. 105, and Recommendation No. 203). This is useful, on the one hand, in that it infers that all principles contained in those instruments are instructive. Conversely, it is problematic in that it misses an opportunity to highlight key priority actions for states to take to address forced and compulsory labour. More detailed provisions in respect of a number of key issues could have been included. First, Recommendation No. 205 could have highlighted the need for states to observe the prohibition on forced labour following emergencies except in very limited circumstances. Second, Recommendation No. 205 fails to draw out and highlight any of the groups identified in the analysis above as being specifically at risk, for example, young women being forced into domestic servitude and the provision of sexual services. The only exception is the emphasis in paragraph 26(a) to the need for states to take measures to eliminate forced or compulsory labour, including trafficking in persons, affecting migrants and migrant workers. Third, further emphasis could have been placed on the importance of disseminating public information and supporting awareness initiatives. Fourth, specific reference could have been made to the risks of forced labour and trafficking arising to displaced persons and refugees, and measures that should be taken to actively combat forms of labour exploitation that occur with respect to displacement, as established above.

Finally, given the risk of trafficking in crisis situations, more detailed guidance could have been given on priority actions states should take to address this issue.⁵²² Recommendation No. 205 does not refer in paragraph 17 to the need for states to refer to other international instruments outside the ILO Conventions mentioned above, such as the Trafficking in Persons Protocol, so the link to more specific actions on trafficking is not clearly made in the text. For example, Recommendation No. 205 could have underscored the inter- and intra-state risks of trafficking post-crisis, as well as the need to regulate reconstruction efforts so as to ensure trafficking and forced labour for this purpose does not occur. Further, given the clear and repeated risk of increased trafficking for the purposes of sexual

⁵²² Inclusion of a provision on anti-trafficking measures was suggested by some parties to the drafting process at an early stage but was ultimately not included. See ILO, Revision of Recommendation No. 71, Report V(2) 2016, above n 395, 119.

exploitation involving personnel engaged in crisis response and peacekeeping, addressing this may have been useful.

(b) Legal regulation and institutional capacity-building

While Part VIII of Recommendation No. 205 provides general recommendations on reviewing, establishing and reinforcing labour legislation and labour administration systems, an emphasis on facilitating the prevention, identification and elimination on all forms of forced labour, including trafficking for labour exploitation, would have been highly valuable, given the central role that their absence plays in creating the conditions in which forced and compulsory labour exists. Guidance could have been given on ensuring that such legislation covers all workers in all sectors of the economy, is consistent with international standards, and covers trafficking itself, as well as attempts and assistance to traffic. Finally, the importance of effective labour inspections, law enforcement and judicial action, as identified above, would have been beneficial.

5.2.3 Child labour⁵²³

(i) The Human Rights Risk

Children and youth are among the most vulnerable people to labour exploitation in post-crisis settings, which can lead to a serious violation of their rights under international human rights law, and specifically Conventions No. 138 and No. 183, which restrict the employment of children and prohibit the worst forms of child labour. It also leads to specific violations under the Convention on the Rights of the Child (CRC), including (inter alia) the rights to life (article 6), to freedom from torture or cruel, inhuman or degrading treatment (article 37), to education (articles 28 and 29), to family life (article 16), to be protected from economic exploitation (article 32) and from exploitation prejudicial to the their welfare (article 36). Additionally, children formerly associated with the armed forces have generally experienced serious violations of their rights under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.⁵²⁴ This section analyses key risks concerning the child labour, especially in its worst forms, that have been observed in post-crisis scenarios, including hazardous and illicit work, risks of sexual exploitation and trafficking, and risks for children and youth formerly associated with the armed forces.

⁵²³ For the purposes of this section ‘child’ refers to all persons under the age of 18, in accordance with Convention No. 182 and the Convention on the Rights of the Child, and ‘youth’ refers to all persons aged 15-24 in accordance with UN General Assembly Resolution 50/81 (as established in Chapter 3). *United Nations World Programme of Action for Youth to the Year 2000 and Beyond*, GA Res 50/81, UN GAOR, 50th Sess, Agenda Item 105, UN Doc A/RES/50/81 (14 December 1995) para 9.

⁵²⁴ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, opened for signature 25 May 2000, GA Res A/RES/54/263 (entered into force 12 February 2002). Note that the CRC article 38 prohibits recruitment of persons under the age of 15 years for the armed forces, and the obligation for states parties to the CRC under article 38(4) to ‘take all feasible measures to ensure protection and care of children who are affected by an armed conflict’.

(a) Child labour exploitation and trafficking – the causal factors

A number of factors can be discerned that contribute to the increased risk of exploitation detailed above, and that should inform programming to reduce these risks. First, child labour is a symptom of poverty, and economic shocks induced by conflicts and disasters, as discussed in Chapter 3, exacerbate the household poverty that may cause children to enter exploitative work. Child labour may therefore be an important source of household income where family members have been killed or injured, and household resources have been lost in the course of the conflict or disaster. This is generally compounded by a failure of social protection systems to adequately secure household stability. In Sudan, the incidence of child labour is eight times higher in lowest-income households than highest-income households.⁵²⁵ Agricultural-related environmental shocks, such as crop failure due to floods and drought, have also been found in Cambodia and Tanzania to induce ‘substantially higher proportions of children work[ing] in villages’.⁵²⁶

Second, displacement is a key causal factor to children leaving schooling, and potentially performing inappropriate forms of work.⁵²⁷ According to the ILO, ‘the risk of bonded child labour...increases if displaced families are forced to incur debts in order to survive the transition to their new environments’, as was the case in Senegal, where children were bartered in order to repay debts that had been incurred during relocation.⁵²⁸ A survey of parents interviewed in Senegal in the course of an ILO study on the worst forms of child labour indicated that displacement was ‘the most important linkage between conflict and the worst forms of child labour’.⁵²⁹ Migrant children can be especially vulnerable to labour exploitation if they migrate independently and lack official documentation.⁵³⁰ Separation from families during or following conflicts or disasters, potentially as the result of displacement, leads to increased incidences of child labour, including in its worst forms. Finally, education may be disrupted if schools have been damaged, in the absence of teaching staff, or lack of government funding, or if families remove children to enable them to work to supplement household income.⁵³¹ Disrupted schooling stagnates children’s personal and social development, has implications for future employment prospects, and also places them at risk of exploitation and trafficking.

⁵²⁵ ILO, *World Report on Child Labour*, above n 400, 18.

⁵²⁶ *Ibid*, xvi.

⁵²⁷ *Ibid*, 24.

⁵²⁸ *Ibid*, 14, 24.

⁵²⁹ ILO, *The Worst forms of Child Labour in conflict and post-conflict settings: results from a research project (2010)* 14.

⁵³⁰ Plan International, Child Protection Working Group and ILO, *Inter-Agency Toolkit: supporting the protection needs of child labourers in emergencies (2016)* 23. See, also, Committee on the Rights of the Child, *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, 39th Sess (2005).

⁵³¹ ILO, *The Worst forms of Child Labour in conflict and post-conflict settings*, above n 529 29.

(b) Hazardous and illicit work

Post-crisis situations generally lead to an increase in hazardous work⁵³² from a multitude of reasons. Household livelihoods may be threatened as the result of crisis-induced economic shocks or destruction of assets, leading children to engage (or further engage) in hazardous work in order to support their livelihoods and supplement household income. In regions of Pakistan affected by 2010 flooding, which the ILO observed increased participation of children in hazardous forms of work, including in construction, brick kilns and saw mills, to supplement family earnings.⁵³³ The use of children to scavenge in dumpsites and in damaged structures, in which children face the risk of structural collapse and unexploded munitions, has also been observed in the Occupied Palestinian Territories.⁵³⁴ Further, work may become hazardous as the result of increased debris, or from the placement of munitions. This was the case in Senegal, where cashew crops (control over which was contested by warring parties) were mined.⁵³⁵ There may also be an increase in the amount of child workers engaged in domestic service that may constitute hazardous work, particularly where the participation of children in domestic work is traditionally accepted, or expected.⁵³⁶ This was reflected in Haiti following the 2010 earthquake, which further destabilised already fragile social protection and education systems, as well as socio-economic structures.⁵³⁷ As the result of this economic shock and the number of children orphaned or left with one parent, the number of *restaveks* (unpaid domestic child servants) in urban areas in Haiti was observed to markedly increase.⁵³⁸

Reconstruction work following rapid-onset disasters may exacerbate children's participation in hazardous work, especially where 'the urgency of the need for workers overcomes the national and international standards in place for the protection of children and young workers'.⁵³⁹ In Indonesia, widespread destruction of houses, roads and other infrastructure caused by the 2004 tsunami and 2005 earthquake greatly increased demand for supplies and workers in the reconstruction phase, which triggered the increased participation of children in hazardous work.⁵⁴⁰ Children are also prone to exploitation for illicit purposes linked to funding of a conflict, such as the production and trafficking

⁵³² Under Convention No. 182 article 4(1), states parties determine types of hazardous work in consultation with representative organisations. For the purpose of this section, 'hazardous work' refers to the type of work envisaged by Recommendation No. 190, para 3.

⁵³³ Child Protection Working Group, *Responding to the Worst Forms of Child Labour in Emergencies* (2014) 17; ILO, Mapping of Child Labour in Flood Affected Districts in Muzaffargarh (2011) 12-16.

⁵³⁴ ILO, The Worst forms of Child Labour in conflict and post-conflict settings, above n 529, 22.

⁵³⁵ ILO, The Worst forms of Child Labour in conflict and post-conflict settings, above n 529, 12.

⁵³⁶ The ILO in 2013 estimated that three quarters of all children (5 to 17 years old) in domestic service are performing hazardous work. ILO, *Ending child labour in domestic work* (2013) 24.

⁵³⁷ ICF, Child Labor in Domestic Service ("Restaveks") in Port-au-Prince, Haiti (2012) 3.

⁵³⁸ United States of America Department of Labor, 2012 Findings on the Worst Forms of Child Labor: Haiti, 1.

⁵³⁹ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 36.

⁵⁴⁰ CPWG, *Responding to the Worst Forms of Child Labour in Emergencies*, above n 533, 17.

of drugs, as has been observed by the ILO in the Occupied Palestinian Territories, where ‘children [were] actively engaged in smuggling drugs and transporting or selling arms’.⁵⁴¹

(c) Sexual exploitation and trafficking

There are countless examples that demonstrate the increased risk of sexual exploitation and trafficking of children following crises in which state law enforcement mechanisms are weakened, where there are more children seeking work, or where children have been separated from family. Sexual exploitation may be due to children turning to prostitution in order to support their livelihoods, or may be as a result of trafficking. According to a GTZ survey in 2008, the number of victims of child prostitution and trafficking networks in Côte d’Ivoire had ‘doubled or tripled, depending on the place, since the end of the crisis’.⁵⁴² In the Philippines, trafficking of children through pre-existing trafficking routes, particular from rural to urban areas, as well as sexual exploitation, reportedly intensified following Super Typhoon Haiyan in 2013, which affected approximately 14 million in total.⁵⁴³ Existing levels of child prostitution also increased, including military personnel engaged in recovery work in affected areas.⁵⁴⁴ Loss of official personal documentation following a crisis also increases the vulnerability of children to trafficking and exploitative labour, as was observed in Haiti following the earthquake in 2010. While an issue with the lack of birth registration was a pre-existing issue, the infrastructure destruction caused by the earthquake exacerbated the situation.⁵⁴⁵

(d) Risks to children and youth formerly associated with the armed forces (CYFA)⁵⁴⁶

The use of children for the purposes of armed conflicts is one of the worst forms of child labour, and in addition to the physical and psychological trauma that they may have sustained and inflicted upon others in the course of the conflict, the social exclusion and marginalisation that CYFA face upon return is an ongoing challenge for their future development. Participation in armed conflict implies separation from family, community networks and education programmes that have implications for not only their personal wellbeing, but their economic stability.⁵⁴⁷ One key issue that arises during the reintegration phase following the cessation of hostilities is that the special needs of children may not

⁵⁴¹ ILO, *The Worst forms of Child Labour in conflict and post-conflict settings*, above n 529, 22.

⁵⁴² CPWG, *Responding to the Worst Forms of Child Labour in Emergencies*, above n 533, 17.

⁵⁴³ Plan International, CPWG and ILO, *Inter-Agency Toolkit*, above n 530, 31.

⁵⁴⁴ *Ibid*, 32.

⁵⁴⁵ United States of America DoL, *2012 Findings on the Worst Forms of Child Labor: Haiti*, above n 538, 2.

⁵⁴⁶ ‘Children formerly associated with the armed forces’ refers to persons under the age of 18 years who have been recruited by armed forces in any capacity, consistent with the definition of the term in the Paris Principles: see UNICEF, *Paris Principles – ‘Principles and Guidelines on Children Associated with Armed Forces or Armed Groups’* (2007). ‘Young people formerly associated with the armed forces’ refers to young people above 18 years of age who ceased being associated with the armed forces prior to reaching 18 years of age. This is consistent with ILO usage of the term: see ILO, *Children Formerly Associated with the Armed Forces: ‘How-to Guide to Economic Reintegration’* (2010) 11. The distinction between the two groups and the implication for programming will be explained below in the programming section.

⁵⁴⁷ ILO, *Socio-Economic Reintegration of Ex-Combatants: Guidelines* (2010) 79.

be met by DDR programmes that are not sensitive to their inclusion. These include, for example, years of schooling lost, damage to community and family support networks, psychological trauma, and the fact that for youth entering the job market ‘are among those groups least likely to find work’ due to lack of education and professional skills.⁵⁴⁸

(ii) *Implications for post-crisis policy*

(a) Post-crisis programming to address children in the WFCL

Programming to address risks of child labour in post-crisis situations must take into account national policy and legislative frameworks and should capitalise, where possible, on existing programmes. It will require close coordination between national bodies involved in child protection, state agencies involved in labour inspection, law enforcement, educational actors, as well as with tripartite actors and the private sector.⁵⁴⁹ A key question in this context will be whether states have in place national policies or programmes of action to eliminate the child labour, and particularly the worst forms, in accordance with international treaties, including Convention No. 182, articles 1 and 6, and/or time-bound programmes, in accordance with article 7(2).⁵⁵⁰ Regarding to the CRC, the key question is whether the state has in place legislative, administrative or policy-based measures to combat child labour, especially in its worst forms, for protection against hazardous work (article 32), trafficking of illicit substances (article 33), sexual exploitation (article 34), trafficking of children (article 35), or protection of children involved in armed conflict (article 39). It is important, however, to retain flexibility in such programming, and to adapt it to the exigencies of the post-crisis context. A number of general implications for programming that targets child labour can be drawn from the analysis above.⁵⁵¹

First, in the pre-crisis stage, actions to mitigate the risks of child labour must be included in emergency preparedness measures, potentially through national policies to combat the WFCL referenced above, but also in disaster risk reduction plans.⁵⁵² At the pre-crisis stage, states should anticipate, based on recurring patterns of exploitation, and continually assess as the crisis develops, the risk of exploitation in the course of the humanitarian response and relief efforts, and plan to prevent and combat these.⁵⁵³ Second, regarding programming for the post-crisis period, child labour

⁵⁴⁸ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 28.

⁵⁴⁹ Plan International, CPWG and ILO, *Inter-Agency Toolkit*, above n 530, 120-121.

⁵⁵⁰ Time-bound programmes aim to address the causes of child labour, in connection with national development plans, and education, social and economic anti-poverty policies. ILO, *General Survey on the fundamental Conventions 2012*, above n 24 [431].

⁵⁵¹ Some of these measures coincide what Convention No. 182 requires time-bound measures to contain, in article 7(2).

⁵⁵² CPWG, *Responding to the Worst Forms of Child Labour in Emergencies*, above n 533, 24.

⁵⁵³ *Ibid* 35.

concerns should be mainstreamed so that they become part of the core humanitarian response.⁵⁵⁴ This could include integrating a child-specific perspective into other programmes, such as family reunification, gender based violence and child protection programmes at the local level, and training personnel accordingly.⁵⁵⁵ This can fulfil a preventative function and ensure that these issues are addressed. Further, integrating child labour-specific perspectives in livelihood support programmes, for example through training programmes, conditional and unconditional cash transfers, is key in ensuring both that children do not migrate or seek harmful employment opportunities, and that these programmes themselves do not involve exploitative work for children.⁵⁵⁶ Displaced families may require additional support (both in terms of financial and service-based support) to mitigate the risks of resorting to child labour or offering children as collateral for loans or in bonded labour.⁵⁵⁷

Third, states should engage with relevant national agencies, NGOs working in child protection, community organisations, children and parents about the risks of child labour, and in designing and implementing programmes for its elimination. Raising awareness of specific risks of child labour that may be manifested in the specific post-crisis contexts is a crucial element of this dialogue. In post-earthquake Haiti, for example, the ILO disseminated information on the WFCL in order to raise awareness amongst NGOs, international agencies, the government, and workers' and employers' organisations of specific risks to children through domestic work, hazardous agricultural work, and sexual exploitation.⁵⁵⁸ On the local level, community watch groups were mobilised to raise awareness amongst parents and teachers to the risks of WFCL.⁵⁵⁹

(b) Legal and institutional capacity-building

Legislative regulation is a core means through which states can combat child labour, especially in its worst forms, and complements the policies discussed above aimed at its elimination. The prohibition of the WFCL, required of states parties to Convention No. 182 under article 1, is largely applied by states parties through legislative means, in the form of criminal, child protection and labour legislation.⁵⁶⁰ States should therefore have in place legal provisions giving effect to the prohibition of the WFCL, in line with Convention No. 182, in addition to legislation establishing minimum age limits for work that are consistent with the provisions of Convention No. 138, and as required by article 2 of that Convention. Operationalising the legal prohibition of child labour through the investigation and prosecution of violations, enforcement at the national and local levels, and

⁵⁵⁴ Ibid 31-35.

⁵⁵⁵ CPWG, Responding to the Worst Forms of Child Labour in Emergencies, above n 533 35.

⁵⁵⁶ Ibid 39.

⁵⁵⁷ ILO, The Worst forms of Child Labour in conflict and post-conflict settings, above n 529, 30.

⁵⁵⁸ ILO, Independent thematic evaluation of the ILO's work in post-conflict, fragile and disaster-affected countries: past, present and future – Annex 1, Country Reports (2015) 140.

⁵⁵⁹ Ibid.

⁵⁶⁰ ILO, General Survey on the fundamental Conventions 2012, above n 24 [443].

consistency between law and practice, is crucial. The importance of enforcing laws prohibiting the child labour, including in its worst forms, as part of broader efforts to re-establish the rule of law, must be an essential step in the earliest stages of post-crisis recovery. Post-conflict contexts may present specific challenges to doing: ‘laws may be enforced everywhere except in particular locations, or enforced selectively depending on the ethnic group’.⁵⁶¹ Laws must therefore be enforced equally at national and local levels, and between ethnic or community groups that may have been conflicting. On an institutional level, re-establishing schooling through formal and informal means is crucial in preventing children from entering child labour, and removing children from situations in which they become more vulnerable to trafficking and sexual exploitation (if they resort to begging on the street, for example).⁵⁶²

(c) Economic reintegration for children and youth formerly associated with the armed forces

Effective economic reintegration programmes are crucial for assisting in the transition of CYFA into civilian life, addressing the underlying causes of recruitment, and preventing future recruitment. The impetus for such programmes was demonstrated in Chad where children continued to be recruited by the three main parties of the conflict after the peace accords were signed in 2007, with an estimated 7,000 to 10,000 children having been involved.⁵⁶³ While the core technical content of skills training programmes remains the same for both adults and CYFA, economic reintegration programmes must consider the type of skills training (hazardous work is prohibited for those under 18 years), account for the fact that CFYA generally have lower vocational and basic educational skills levels and no formal work experience, their involvement may have had a more severe psychological impacts, and they will generally require more familial support upon return.⁵⁶⁴ Reintegration programmes should be based on the core principles of non-discrimination (especially on grounds of sex, disability, and ethnicity), the best interests of the child, and gender equality in access, which may require female-specific interventions.⁵⁶⁵ Specific prevention and reintegration needs must also be accounted for according to age, and programming should align with these needs.⁵⁶⁶

A labour market demand analysis should factor in to the types of training being provided to ensure that there is not a mismatch of skills being provided and employment prospects, and to focus on long-term employment goals. Participants must also be provided with assistance in finding and securing

⁵⁶¹ ILO, *The Worst forms of Child Labour in conflict and post-conflict settings*, above n 529, 26.

⁵⁶² CPWG, *Responding to the Worst Forms of Child Labour in Emergencies*, above n 533, 38.

⁵⁶³ ILO, *General Survey on the fundamental Conventions 2012*, above n 24 [497].

⁵⁶⁴ LO, *Children Formerly Associated with the Armed Forces*, above n 546 15-16.

⁵⁶⁵ ILO, *Prevention of child recruitment and reintegration of children associated with armed forces and groups: Strategic framework for addressing the economic gap (2007) 7*; UNICEF, *Paris Principles – ‘Principles and Guidelines on Children Associated with Armed Forces or Armed Groups’ (2007) 8-9*.

⁵⁶⁶ For further details on programming according to age, see ILO, *Children Formerly Associated with the Armed Forces*, above n 546, 28-30.

wage employment following training, and service providers should capitalise on new forms of work.⁵⁶⁷ Participants should also be provided with assistance in starting and maintaining self-employment following completion of training. This entails support for small-scale enterprises, cooperatives, and the provision of financial services (including access to credit, money transfer services and micro-insurance) to support starting income-generating activities.⁵⁶⁸ Economic integration programmes targeted at CYFA in Liberia in 1997 were largely unsuccessful due to the lack of diversification in skills training programmes and the resulting levels of competition in a post-conflict economy, a failure to analyse skills demand in the labour market, and a lack of post-training guidance. Recruitment prevention goals of the programmes failed, and many children were re-recruited to participate in the war that commenced in 1997.⁵⁶⁹

(iii) *The role of Recommendation No. 205*

(a) General programming recommendations

The child labour provisions in Recommendation No. 205 highlight the need to take ‘all necessary measures to prevent, identify and eliminate child labour in crisis responses’, and the need to take urgent action to ‘prevent, identify and eliminate’ the WFCL, drawing out specifically the need to combat trafficking and recruitment (paragraph 16(b)). Drawing attention to the need to address the WFCL urgently is also consistent with CRC language (article 6(1)). There are a few key omissions from this section of Recommendation No. 205, the inclusion of which would have greatly strengthened the guidance given on combatting the WFCL. First, more specific guidance on the terms ‘prevent, identify and eliminate’ would have been useful in drawing attention to priority areas for states. For example, identifying potential risk areas for the emergence of WFCL in post-crisis contexts, and including actions to mitigate these in emergency preparedness measures is a key element of prevention that could have been specified.

Second, Recommendation No. 205 omits references to the need to take account of ‘children at special risk’, and the ‘special situation of girls’ (particularly in hidden work situations) that are highlighted in the Worst Forms of Child Labour standards.⁵⁷⁰ This is a missed opportunity to integrate a gender perspective to target forms of child labour for which girls are especially predisposed, such as domestic work and prostitution.⁵⁷¹ Third, while Recommendation No. 205 contains extensive provisions on work for internally displaced persons and refugees in Part XI, it focuses on access to labour markets

⁵⁶⁷ ILO, Children Formerly Associated with the Armed Forces, above n 546, 181, 194.

⁵⁶⁸ LO, Children Formerly Associated with the Armed Forces, above n 546, 127, 145, 159.

⁵⁶⁹ ILO and UNICEF Liberia, *Labour Market and Training Needs Assessment: Mapping of Reintegration Opportunities for Children Associated with Fighting Forces – A Report Covering Liberia* (2005) ix.

⁵⁷⁰ Convention No. 183 art 7(d) and (e), Recommendation No. 190 paras 2(c)(ii), (iii) and (iv).

⁵⁷¹ See, for example, ILO, *The Worst forms of Child Labour in conflict and post-conflict settings*, above n 529, 7 and 12.

and inclusion, and does not focus attention on the need for Member States to take measures to actively combat forms of labour exploitation that occur with respect to displacement. Of course, addressing formal labour market inclusion is an aspect of supporting livelihoods and reducing vulnerability of exploitation, but specific reference would have been beneficial.

(b) Legal regulation and institutional capacity-building

In light of the importance of legal regulation, enforcement and institutional coordination in combatting child labour as established above, emphasis in paragraph 16 should have been placed on taking action to prevent, identify and eliminate child labour through the development and enforcement of specific domestic legal provisions covering the offences identified above (in the form of criminal, child protection and labour legislation) consistent with international labour standards and the CRC.

(c) Educational and training opportunities

As established above, access to education and vocational training is integral not only for the long-term employment prospects of children and youth, but also for addressing the vulnerabilities children face post-crisis, in being trafficked for labour exploitation, and in being liable to exploitation in the WFCL. Recommendation No. 205 places a general emphasis on equality of opportunity and non-discrimination of education and vocational training of ‘women and men, girls and boys’, and it stresses that disrupted education should be restored as quickly as possible.⁵⁷² It also highlights the importance of restoring educational opportunities for displaced and refugee children, which is consistent with provisions in the CRC,⁵⁷³ and which is a welcome inclusion. As established in Chapter 4, paragraph 16(c) recommends that rehabilitation, integration and training programmes should be provided for CYFA (which is consistent with Convention No. 182 and Recommendation No. 190), but it does not expand this coverage to educational and training programmes for all children removed from situations of labour exploitation through the WFCL, or who have been the subject of trafficking for these purposes. In light of the above risk analysis, and that Convention No. 182 (article 7(c)) highlights that access to education and vocational training is especially relevant for such children, access to these measures for all children removed from the WFCL should have been included in this provision.

(d) Economic integration programmes

Recommendation No. 205 paragraph 13 addresses the issue of ‘income generation opportunities for young women and men’, through training, and employment and labour market programmes that target the challenges of youth employment, and specifically, youth components of DDR programmes that

⁵⁷² Recommendation No. 205 para 18.

⁵⁷³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), arts 2(1), 22, and 28(1)(a).

include ‘psychosocial counselling and other interventions to address anti-social behaviour and violence’. Two comments can be made here. First, while specific reference to the need to provide youth with support, such as counselling, is welcome, more detailed guidance on how to address children’s specific needs would have been useful, as would inclusion of the need to base such programmes on the principles of non-discrimination. Second, while paragraph 13 is contained within the broader recommendations on employment generation (focusing on the demand side), given that, as observed by the World Bank, in countries with high youth unemployment ‘the problem is often more on the demand side than the supply side’,⁵⁷⁴ more detailed guidance on policies to assist states in matching the demand and supply sides in the labour market would have been welcome.⁵⁷⁵ In this respect, the importance of providing support to participants after the completion of the programme through, for example, linking with employment services, and providing support for entrepreneurship, is a necessity that could have been highlighted, given the risks of re-recruitment if programmes do not lead to employment outcomes.

5.2.4 Discrimination in employment

Crises breed conditions of instability in which institutional breakdowns, lack of enforcement of labour laws and regulation of the labour market can lead to pervasive discrimination in employment that can continue well into the post-crisis period, magnifying pre-existing inequalities and becoming entrenched. Discrimination in employment may constitute a violation of a number of human rights and international labour rights discussed in Chapter 2, including under the ICESCR, CEDAW, CERD and CRPD.⁵⁷⁶ Discrimination also impinges on the right to equality of opportunity or treatment in employment or occupation encapsulated in Convention No. 111, which sets out a number of grounds on which discrimination is prohibited.⁵⁷⁷ While the principle of non-discrimination on all of the grounds in Convention No. 111 is to be respected, this section will consider the grounds of ethnic origin, sex and disability, as the most relevant in this context.

⁵⁷⁴ World Bank, *World Development Report 2013*, above n 12, 18.

⁵⁷⁵ Note that paragraph 18(a) generally recommends the need to formulate and adapt training programmes to the emerging skills needs for recovery and reconstruction, in consultation with education institutions, private stakeholders and employers’ and workers’ organisations, but specific mention of the need to do this in the context of DDR programmes for youth, to fulfil prevention aims, could have been made.

⁵⁷⁶ It is also important to recognise the increased risk posed by multiple discrimination – for example, for women belonging to an ethnic minority, or for women with disabilities.

⁵⁷⁷ Convention No. 111 does not specifically include disability in its enumerated grounds of discrimination in article 1(1)(a), but it falls within the scope of other grounds of discrimination in article 1(1)(b), and disablement is included in article 5(2), as an example of an area in which special protection measures are not deemed to be discrimination.

(i) *The human rights risk*

(a) **Discrimination on the basis of ethnic and social origin**⁵⁷⁸

Pursuant to CERD article 5 (e)(i) and Convention No. 111, discrimination on the grounds of ethnic and social origin is not permitted in employment, occupations or conditions of work. Discrimination in employment on ethnic and social grounds can be a driver of crisis and a tactic used in conflict, and can continue in the post-crisis period to have negative effects on the economy, peace, and social cohesion.⁵⁷⁹ Fragile societies may be ‘marked by structural inequalities between different identity groups and legacies of marginalization’ leading to the exclusion of certain ethnic or social groups.⁵⁸⁰ Economically exclusionary practices preventing access to labour markets may be in the form of ‘ethnically disqualifying’ criteria for employment, language restrictions, economic under-funding for certain regions, or the absence or inadequate enforcement of anti-discrimination legislation.⁵⁸¹

The case of post-conflict Bosnia and Herzegovina (BiH) illustrates the risks and consequences of discrimination in employment on ethnic grounds in post-crises reconstruction and the complexities of this issue in practice. In addition to the devastating human costs, the conflict had widespread economic impacts, caused extensive displacement within the labour market, and massive unemployment of the labour force (estimated at 64 per cent).⁵⁸² The settlement reached at the end of the war resulted in a division of territorial and political control between the three parties to the conflict: Bosnian Serbs, Bosnian Croats, and Bosniaks, and clear discriminatory employment practices emerged based on this division. Disparities in employment levels in the post-conflict period were (and still are) evident among ethnic groups within regions, with explicit discrimination recorded for ‘residential minorities’.⁵⁸³ Discriminatory practices include systematic and widespread dismissal of members of persecuted ethnic minorities both during and in the aftermath of the war, non-payment of wages, and illegal expropriation of businesses and assets.⁵⁸⁴ Minority ethnic workers were at times

⁵⁷⁸ CERD refers to distinctions based on ‘race, colour, descent, or national or ethnic origin’ (article 1(1)). The terms used in Convention No. 111 relevant to this section of the analysis include ‘race, colour, national extraction or social origin’ that has ‘the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’ (Convention No. 111, article 1(a)).

⁵⁷⁹ UNDP, ‘Post-Conflict Economic Recovery: Enabling Local Ingenuity’, *Crisis Prevention and Recovery Report* (2008) 82-83.

⁵⁸⁰ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 28-29.

⁵⁸¹ Above, 18

⁵⁸² World Bank, *Bosnia and Herzegovina: The priority reconstruction and recovery program – The challenges ahead* (1996) 1.

⁵⁸³ Susan L Woodward, ‘The Bosnian Paradox: On the Causes of Post-War Inequality and Barriers to Its Recognition and Reduction’ in Amim Langer, Frances Stewart, and Rajesh Venugopal (eds), *Horizontal Inequalities and Post-Conflict Development* (Palgrave, 2011), 131, 141. ‘Residential minorities’ are those who have been afforded equal rights under the constitution as a member of one of the three constituent groups, but who do not live ‘in the territory where their group is numerically and politically dominant’.

⁵⁸⁴ Amnesty International, *Bosnia and Herzegovina – Behind closed gates*, Report EUR 63/001/2006 (2006) 7. This is also based on a summary of an OSCE report which is no longer available, ‘Employment discrimination in Bosnia and Herzegovina’, published June 1999. The summary is available from the Office of the High Representative at < http://www.ohr.int/?ohr_archive=human-rights-report-june-1999#summary1>.

placed on ‘waiting lists’ on basis of their ethnicity, and not re-hired.⁵⁸⁵ State-owned enterprises and public administrations tended only to employ members of the ethnic majority group.⁵⁸⁶ Minority returnees were pushed into work in the ‘grey economy’, further jeopardising their social and economic protection.⁵⁸⁷

A key factor in assessing discrimination risk is understanding the structural parameters in which it exists – for example, whether it is supported politically or is based in legislation.⁵⁸⁸ In BiH, there was a lacuna in effective legislative regulation of employment discrimination, with no legal framework regulating employment discrimination on ethnic grounds at the national level until 2009.⁵⁸⁹ While a level of regulation existed at the entity level in the Federation, observers cited lack of specificity in and enforcement of the laws as key limitations to its effectiveness.⁵⁹⁰ The political composition also entrenched minority disadvantages in accessing employment, while the decentralised system of government meant that there was no jurisdiction at state level over labour policy.⁵⁹¹ The ramifications of labour-based discrimination on ethnic lines during the war are still evident terms of social cohesion, and labour market performance. The ILO Committee of Experts noted in 1999 clear discrimination in employment between the three major ethnic groups,⁵⁹² while the CERD Committee in 2006 noted the low representation of ethnic minorities in the public and private sectors, and the absence of comprehensive anti-discrimination legislation.⁵⁹³ Research carried out by UNDP in 2006 also found a direct link between being part of an ‘ethnic minorit[y] and their social exclusion and poverty’, finding the minority ethnicity was generally poorer – a key determinant of social exclusion.⁵⁹⁴ Social exclusion, in turn, affects other key rights such as political participation.⁵⁹⁵

⁵⁸⁵ Amnesty International, *Bosnia and Herzegovina – Behind closed gates*, above n 584; CERD Committee, *Concluding Observations on Bosnia and Herzegovina*, 68th Sess, UN Doc CERD/C/BIH/CO/6 (11 April 2006) [18].

⁵⁸⁶ European Commission against Racism and Intolerance, *Report on Bosnia and Herzegovina*, CRI (2005) 2, 15 February 2005, para 43; Amnesty International, *Bosnia and Herzegovina – Behind closed gates*, above n 584, 8-9.

⁵⁸⁷ European Commission against Racism and Intolerance, *Report on Bosnia and Herzegovina*, CRI (2005) 2, 15 February 2005, para 43.

⁵⁸⁸ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 32.

⁵⁸⁹ *Law on Prohibition of Discrimination (Bosnia and Herzegovina) 2009*, Official Gazette of Bosnia and Herzegovina No. 59/09, arts 1-2, 6.

⁵⁹⁰ United States of America Department of State, *Country Reports on Human Rights Practices, 2000 – Bosnia and Herzegovina* (February 23, 2001) section 4; OSCE, ‘Employment discrimination in Bosnia and Herzegovina’, published June 1999, summary available from the Office of the High Representative at <http://www.ohr.int/?ohr_archive=human-rights-report-june-1999#summary1>; Amnesty International, *Bosnia and Herzegovina – Behind closed gates*, above n 584, 8, 30-33.

⁵⁹¹ UNDP, *National Human Development Report – Better Local Governance in Bosnia and Herzegovina* (2005) 62; Woodward, *The Bosnian Paradox*, above n 583, 143-144.

⁵⁹² CEACR, *Observation – Discrimination (Employment and Occupation Convention) 1958 (No. 111) – Bosnia and Herzegovina*, adopted 1999, published at the 88th International Labour Conference session (2000).

⁵⁹³ CERD Committee, *Concluding Observations on Bosnia and Herzegovina*, 68th Sess, UN Doc CERD/C/BIH/CO/6 (11 April 2006) [13].

⁵⁹⁴ UNDP, *National Human Development Report – Social Inclusion in Bosnia and Herzegovina* (2007) 65.

⁵⁹⁵ *Ibid* 9.

Ethnic discrimination in employment may also manifest itself in relief and reconstruction work carried out following a crisis, and in the distribution of humanitarian aid, which has clear ramifications for restoring people's livelihoods and accessing employment. Caste-based discrimination, which is related to discrimination on the grounds of social origin, was observed in India following the 2004 tsunami, with the selective employment of Dalits by the government for roles considered 'unfit' for higher castes, such as the collection of human remains without proper protective equipment.⁵⁹⁶

(b) Discrimination on the basis of sex⁵⁹⁷

Crises affect men and women differently, and this is reflected in equality in access to, and conditions of, employment in the post-crisis period. Discrimination in employment on the basis of sex is prohibited under CEDAW article 11 and Convention No. 111, as established in Chapter 2, and may also violate the right to equal remuneration for men and women workers for work of equal value under Convention No. 100. Demographic changes spurred by conflicts and disasters (for example the loss of income-generating family members) tend to increase women's workload in terms of household tasks and labour force participation, particularly where the household is female-headed.⁵⁹⁸ This can lead to a breakdown of conventional gendered labour roles, which may present an opportunity for increased economic empowerment. Erosion of gendered labour divisions may, however, also lead to an increase in gender-based violence, which the CEDAW Committee has determined as a form of discrimination that inhibits the enjoyment of the right to just and favourable conditions of work.⁵⁹⁹

It is not uncommon for women to lose work in the formal sector in the post-conflict period following the return of men to the labour force.⁶⁰⁰ This in turn may cause women to seek informal sector work in unsafe conditions to generate additional income. In post-conflict situations including Zimbabwe, the former Yugoslavia, Mozambique and Angola, women faced barriers in terms of retaining or accessing formal sector employment in the face of returning male returnees, and the resumption of pre-conflict

⁵⁹⁶ International Federation of Red Cross and Red Crescent Societies, *World Disasters Report: Discrimination* (2007) 48.

⁵⁹⁷ For the purposes of Convention No. 111, discrimination based on sex also includes distinctions based on civil or marital status, family situations and pregnancy: ILO, *Special Survey on Equality and Employment and Occupation in Respect of Convention No. 111*, International Labour Conference, Report III (Part 4B), 83rd Session 1996, paras 35-40. See Chapter 2 to compare this to the definition of discrimination in CEDAW.

⁵⁹⁸ A 2012 UN Women Study across six violent conflicts (Bosnia and Herzegovina, Colombia, Kosovo (under UNSCR 1244), Nepal, Tajikistan and Timor Leste) found 'strong empirical evidence...that violent conflict is associated with larger responsibilities for women through its impact on household composition': UN Women, *Women Working for Recovery: The Impact of Female Employment on Family and Community Welfare after Conflict* (2012) 9-10.

⁵⁹⁹ CEDAW Committee, *General Recommendation No. 19: Violence Against Women*, adopted at its 11th Session (1992), UN Doc A/47/38, para 7(h).

⁶⁰⁰ CEDAW Committee, General recommendation No. 30 [49].

labour divisions and gender relations.⁶⁰¹ Further, weak governance structures during the post-crisis period mean that employment generation, particular through reconstruction projects, may discriminate against women in favour of men, reinforcing gender disparities.⁶⁰² In BiH, women faced employment discrimination in the post-conflict period through an absence of effective labour laws that protected equal access to employment, equal remuneration, and childcare and maternity benefits.⁶⁰³ The CEDAW Committee has commented as recently as 2013 on the high proportion of women in BiH in the informal sector and grey economy, exclusion from the formal labour market, and the absence of institutional measures to prohibit gender-based discrimination at work.⁶⁰⁴

Discrimination in access to employment is exacerbated by the fact that women tend to be even further disadvantaged in accessing economic resources ‘including property, financial, inheritance and natural resources’ following crises.⁶⁰⁵ Traditional practices may prevent women’s land and property ownership, and women may be discriminated against in post-conflict land transfer programmes necessary for their livelihood, as was the case following the war in El Salvador.⁶⁰⁶ Further, displacement may bar women’s access to land and other assets, and the livelihoods of women who are independently involved in agriculture may be jeopardised entirely from disaster-related damage. In Indonesia, women faced discrimination in the form of non-recognition of property and land rights following the 2004 tsunami that destroyed almost 54,000 land parcels.⁶⁰⁷ Specific vulnerabilities exist in post-conflict settings for discrimination against women and girls formerly associated with fighting force,⁶⁰⁸ who tend to have diminished access to DDR programmes. These programmes are also ‘rarely designed in a gender sensitive manner that takes into consideration women’s vocational, psychological and reproductive health care needs’.⁶⁰⁹ This both undermines peacebuilding goals and reinforces gender inequality. Female ex-combatants were excluded from DDR programmes in Liberia, where they had comprised 30 per cent of armed forces, due to traditional views of gender roles, and the fact that no specific provisions were made for their participation.⁶¹⁰

⁶⁰¹ Ian Bannon, Tsjard Bouta, and Georg Frerks, *Conflict, Gender and Development* (The World Bank, 2005) 98.

⁶⁰² Marcia Greenberg and Elaine Zuckerman, ‘The Gender Dimensions of Post-Conflict Reconstruction: An Analytical Framework’ (2004) 12(3) *Gender and Development* 70, 72.

⁶⁰³ Bannon, Bouta, and Frerks, *Conflict, Gender and Development*, above n 601, 95.

⁶⁰⁴ CEDAW Committee, Concluding Observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina, 55th Sess, UN Doc CEDAW/C/BIH/CO/4-5 (30 July 2013) [33].

⁶⁰⁵ ILO, *Employment and Decent Work in Situations of Fragility, Conflict and Disaster*, above n 218, 27.

⁶⁰⁶ Bannon, Bouta, and Frerks, *Conflict, Gender and Development*, above n 601, 94.

⁶⁰⁷ World Bank, *Integrating Gender Issues in Recovery and Reconstruction Planning*, Guidance Note 5 (2012) 5.

⁶⁰⁸ This association may be as female combatants, those who fulfil support functions, and those dependent on ex-combatants through marriage or familial association: ILO, *Socio-Economic Reintegration of Ex-Combatants*, above n 547, 74.

⁶⁰⁹ ILO, *Socio-Economic Reintegration of Ex-Combatants*, above n 547, 74.

⁶¹⁰ ILO, *Socio-Economic Reintegration of Ex-Combatants*, above n 547, 76.

(c) Discrimination on the basis of disability⁶¹¹

Persons with disabilities (PwDs) are among the most socially excluded groups in the recovery period, and these situations present real risks to their enjoyment of many of their rights under the CRPD. In addition to those discussed in Chapter 2, the right to ‘live independently and be included in the community on an equal basis with others’ (article 19), to accessibility to the physical environment (article 9), and to protection in humanitarian crises (article 11) are threatened by inequities in accessing income-generating opportunities and also in accessing humanitarian assistance. These barriers threaten the principles of full inclusion and society and equality of opportunity that underlie the CRPD. The challenges PwDs face in accessing basic health, employment and education services through insufficient policies, lack of accessibility, and exclusion from decision-making which result in ‘less economic and social participation and higher rates of poverty’ are magnified.⁶¹²

Crises diminish income generating opportunities, which was identified in a study by Handicap International as the most important socio-economic impact of a humanitarian crisis for PwD.⁶¹³ Risks to the livelihoods of PwDs through the loss of social protection and income-generating opportunities can be exacerbated by the collapse of community- and family-based assistance mechanisms, and inability to access assistive tools necessary to return to productive employment. In conflict and post-conflict Mozambique, PwDs ‘often had to wait years or were forced to travel great distances’ to access such tools.⁶¹⁴ Infrastructure that enabled persons with disabilities to work, like modifications in the workplace, may have been damaged or destroyed in the course of the crisis. In turn, physical and financial mobility challenges faced by PwDs represents a barrier for migrating to seek work.⁶¹⁵ PwDs are also less likely to gain paid employment within crisis recovery programmes (particularly those involving physical reconstruction) due to both real and perceived restrictions, as was observed during the earthquake recovery in Nepal.⁶¹⁶

As identified by the UN Human Rights Council Advisory Committee in its report on human rights

⁶¹¹ Convention No. 159 defines a disabled person in article 1(1) as ‘an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment’. CRPD article 2 defines discrimination on the basis of disability as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation’.

⁶¹² World Health Organisation, *Guidance Note on Disability and Emergency Risk Management for Health* (2013) 9.

⁶¹³ This study was based on 484 persons with disabilities, including 400 who had been directly affected by a humanitarian crisis. Handicap International, *Disability in humanitarian contexts: views from affected people and field organisations* (2015) 6.

⁶¹⁴ Rebecca Irvine, ‘Getting Disability on the Post-Conflict Agenda’ in Valerie Karr and David Mitchell (eds) *Crises, Conflict and Disability* (Routledge, 2014) 163.

⁶¹⁵ Austin Lord, Bandita Sijapati and Jeevan Baniya (et al) *Disaster, Disability, & Difference: A Study of the Challenges Faced by Persons with Disabilities in Post-Earthquake Nepal* (UNDP, 2016) 30.

⁶¹⁶ *Ibid* 29.

challenges in post-disaster and post-conflict situations, such situations disproportionately affect persons with disabilities ‘because many of the resources for humanitarian aid, shelter and assistance become inaccessible for them...there is a direct correlation between discrimination against persons with disabilities and insufficient resources.’⁶¹⁷ PwDs are disadvantaged in accessing mainstream humanitarian assistance necessary to maintain their livelihoods as a result of ‘attitudinal, physical and social barriers’,⁶¹⁸ and as noted by the CRPD Committee, are often excluded from national risk protection strategies.⁶¹⁹ Barriers in accessing economic and livelihood support, for example through cash transfer systems, also disproportionately affect persons with disabilities. 82 per cent of respondents with disabilities in the Handicap International study stated that cash transfer systems were not available to them in the conflict context, and 84 per cent in the disaster context.⁶²⁰ Discrimination in employment opportunities, and in the allocation of humanitarian assistance, has profound implications to feelings of social exclusion for persons with disabilities. In the course of a UNDP study of PwDs in Nepal following the 2015 earthquakes, disability was the most commonly cited reason for feelings of social exclusion in the post-earthquake period – representing 35% of those surveyed.⁶²¹

Finally, PwDs face challenges in participating in DDR programmes, which are generally designed for ex-combatants without disabilities. As a result of exclusion, they ‘may fail to integrate into employment creation and reintegration programmes...[and] generally face great difficulty in leading independent lives and becoming economically self-reliant’.⁶²² Generally, ‘disabled ex-combatants are demobilised in an unsystematic manner’, being excluded from longer-term training, employment and resettlement programmes.⁶²³ Further, DDR programmes in many post-conflict countries separate disabled and non-disabled ex-combatants, which shifts the focus from ‘their ability and vocational interest’ to their disability, and unnecessarily duplicates costs.⁶²⁴

(ii) *Implications for post-crisis policy*

(a) Targeting discriminatory practices as a priority in interventions

A key implication of the above analysis is that where discrimination on the bases identified is an issue

⁶¹⁷ Human Rights Council, Final research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations, 28th Sess, Agenda Items 3 and 5, UN Doc A/HRC/28/76 (10 February 2015) [34].

⁶¹⁸ ILO, Employment and Decent Work in Situations of Fragility, Conflict and Disaster, above n 218, 30.

⁶¹⁹ CRPD Committee, *Concluding observations on the initial report of Paraguay*, 9th Sess, UN Doc CRPD/C/PRY/CO/1 (15 May 2013) [27]-[28].

⁶²⁰ Handicap International, Disability in humanitarian contexts: views from affected people and field organisations (2015) 12.

⁶²¹ Baniya, Lord and Sijapati (et al) *Disaster, Disability, & Difference*, above n 616, 22-23.

⁶²² ILO, Socio-Economic Reintegration of Ex-Combatants, above n 547 91.

⁶²³ *Ibid* 91.

⁶²⁴ *Ibid* 92.

in a state, post-crisis recovery policies and programmes must be based on inclusive economic development and anti-discrimination measures. Where states have in place existing national policies on equality of opportunity and treatment in access to training and employment, as required for states parties to by Convention No. 111 under article 2, and national policies for the elimination of discrimination required for states parties under the respective international human rights conventions, including CERD (article 2), CEDAW (article 2) and CRPD (article 4(c)),⁶²⁵ policies should capitalise on these policies and build on their application in post-crises contexts. Programming should mainstream a discrimination-sensitive approach in the design of post-crises employment generation policies, and in access to humanitarian assistance. This entails, first, ensuring the equitable distribution of opportunities to access training and employment-generation activities through, for example, paid recovery work and micro-credit programmes. Second, those designing labour market policies, and employment generation policies, should be cognisant of the implications of these programmes that may favour certain groups (such as dominant ethnic groups, for example, through public expenditure programmes in certain regions that create income-generating opportunities).⁶²⁶

Beyond the equitable distribution of employment programmes, such programmes must proactively address discrimination. Interventions such as the introduction of quotas for ethnic minorities, women and PwDs) may be necessary following a crisis to ensure equal access to opportunities and mitigate discrimination in certain sectors or activities.⁶²⁷ Anti-discrimination measures should be addressed early in the recovery process so that discriminatory practices do not become entrenched. In Nepal, for example, the World Bank implemented income-generating projects through community infrastructure development by providing grants to groups that had self-identified as excluded, based on objective criteria such as ethnicity and caste.⁶²⁸ Other key programming options include ensuring equality of opportunity in access to training programmes, and ensuring that employers are trained in non-discrimination practices prior to receiving donor funding.

Emergency employment generation schemes and training schemes may need to be targeted specifically towards combatting the disadvantage of these groups. Equality in public sector employment is crucial, given its high visibility and as a key source of formal sector employment.⁶²⁹ Diversifying public sector employment was therefore highlighted as a key goal by the World Bank in its intervention in post-conflict Nepal, where barriers to accessing civil service employment for lower

⁶²⁵ Also in accordance with Convention No. 159, article 2.

⁶²⁶ Stewart, *Employment Policies and Horizontal Inequalities in Post-Conflict Situations*, above n 287, 61, 81.

⁶²⁷ ILO, *ILO's Role in Conflict and Disaster Settings* (2010) 100.

⁶²⁸ Stewart, *Employment Policies and Horizontal Inequalities*, above n 626, 77.

⁶²⁹ *Ibid* 81.

castes was a key grievance for lower-caste groups in its civil war.⁶³⁰ Measures may need to target women specifically through programmes such as vocational training and microcredit assistance to compensate for the fact that women may not have equal access to these resources in male-headed households.⁶³¹ Training in non-traditional roles in order to enable women's participation in immediate-post crisis work, and space for the inclusion of PwDs in public employment and recovery programmes, should be specifically considered.

This means creating the conditions conducive to increased economic participation for these groups. In the disability sphere, this includes developing programmes, including vocational skills training, entrepreneurship and business support, that addresses the needs of PwDs through the use of accessible tools, additional coaching, and educating training staff on these needs.⁶³² A key means of achieving gender-inclusive economic development is through alleviating the increased responsibilities of women incurred in the post-crisis period. This could be achieved through the provision of labour-saving tools and training, as was provided by UNDP and UNIFEM in Chad, improved water infrastructure, childcare assistance, or flexible training modes.⁶³³

Finally, states must ensure equitable access to humanitarian relief. Disaster response must be executed 'in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable', as recognised by the UN International Law Commission.⁶³⁴ Issues related to discrimination on the grounds of ethnicity, sex and disability should therefore be mainstreamed in post-crisis needs assessments, and strategies to prevent and mitigate discrimination in the distribution of humanitarian relief should be incorporated in emergency preparedness measures, in consultation with affected persons.⁶³⁵ In the case of PwDs, outreach measures to ensure access to general emergency relief, rehabilitation and medical care should be factored in.

⁶³⁰ World Bank, *Nepal and its Relations with the World Bank*, Briefing Note (June 2007), <<http://documents.worldbank.org/curated/en/164811468059674419/text/563780WP0Nepal10Box349498B01PUBLIC1.txt>>.

⁶³¹ Bannon, Bouta, and Frerks, *Conflict, Gender and Development*, above n 601, 100.

⁶³² ILO, *ILO's Role in Conflict and Disaster Settings*, above n 627, 108. Social protection measures, including emergency measures such as transfers and cash grants, must be available for persons with disabilities who cannot work.

⁶³³ Bannon, Bouta, and Frerks, *Conflict, Gender and Development*, above n 601, 99-100. This would align practice with obligations under CEDAW article 11(2)(c).

⁶³⁴ International Law Commission, *Protection of persons in the event of disasters: Texts and titles of the draft articles adopted by the Drafting Committee on first reading*, 66th Sess, UN Doc A/CN.4/L.831 (15 May 2014) 2.

⁶³⁵ Inclusion of PwDs in this process is highlighted in the Sendai Framework for Disaster Risk Reduction, paragraph 7, which advocates inclusive and accessible disaster risk reduction practices, entailing consultation with PwDs in the design and implementation of policies, at paragraph 7.

(b) Legal and institutional capacity-building

Addressing equality of access and non-discrimination in employment opportunities, through legislation that prohibits discrimination on the grounds of identified above, is an essential part of the response to employment-based discrimination in the post-crisis period, and is required under Convention No. 111 article 3(b). Ensuring non-discrimination in legislative form is also required of states parties to the international human rights conventions also identified above – notably CERD (article 5), CEDAW (articles 2 and 15(1)) and the CRPD (articles 5). Convention No. 159 also proposes legal regulation as a means to give effect to the national policy on vocational rehabilitation and employment of disabled person required by the Convention.⁶³⁶ Legislation should cover enterprises of every size, address both indirect and direct forms of discrimination, with the only exception being ‘linked to the inherent requirements of the job’.⁶³⁷ Labour ministries, inspection agencies, employers’ and workers’ organisations, and representative ethnic, women, and disability advocacy groups must be included in this process. Post-conflict settings in particular, through the ‘changing political settlement, and processes to identify priorities for national reconstruction and development’, can enable legislative and institutional reforms around for the benefit of minorities, women and PwDs.⁶³⁸ Such legislation could also include the use of quota schemes.

Even where states have introduced anti-discrimination legislation and accompanying policies, their effectiveness will be limited by weak enforcement, lack of monitoring mechanisms and legislation that is not harmonised with the treaty standards. Legislation should therefore be supported by institutional structures conducive to supporting its implementation, for example labour inspectorates, monitoring systems, ombudsmen, or avenues of judicial redress.⁶³⁹ Institutions and complaint-handling mechanisms are key where large-scale discrimination occurs. In its reporting on BiH, the CERD Committee specifically recommended establishing State-level, independent mechanisms to hear complaints about ‘hiring and promotion practices in the public and private employment/labour sectors’.⁶⁴⁰ Women’s ownership of land, property and assets, and rights to inheritance, is a key area for law reform where possible. With regards to PwDs, legislation should contain an obligation on employers to make reasonable accommodation in accordance with the CRPD.

(c) Ensuring equality in access to reintegration programmes

Both gender and disability perspectives should be mainstreamed into every stage of DDR programming in order to respond to the specific challenges identified above. Such programmes, and

⁶³⁶ Convention No. 159, art 6.

⁶³⁷ Convention No. 111, art 1(2).

⁶³⁸ OECD, *Gender and Statebuilding in Fragile and Conflict-affected States* (2013) 46.

⁶³⁹ ILO, *Achieving Equal Employment Opportunities for People with Disabilities through Legislation – Guidelines* (2014) 83.

⁶⁴⁰ CERD Committee, *Concluding Observations on Bosnia and Herzegovina*, 68th Sess, UN Doc CERD/C/BIH/CO/6 (11 April 2006) [19].

their associated educational, training and employment assistance opportunities, should principally be offered on an equal basis to all ex-combatants, in light of their rights to equality of opportunity.⁶⁴¹ This will require specific needs analysis, identifying where, for example, women and girls are less literate and need further support, or where they have familial responsibilities. Planning for the inclusion of disabled ex-combatants should ensure that programmes must be designed around accessibility and inclusion, rather than requiring adaptations by the individual.

(iii) *The role of Recommendation No. 205*

(a) Mainstreaming non-discrimination in post-crisis employment policies

Recommendation No. 205 does demonstrate an awareness of the need to incorporate non-discrimination considerations into post-crisis recovery and employment policies, however not to the extent that the risk analysis above has demonstrated is needed. This is both in terms of the types of discrimination and the aspects of recovery that are addressed. The balance in terms of the types of discrimination it addresses falls heavily on non-discrimination with regards to sex, rather than non-discrimination generally. As established in Chapter 4, Recommendation No. 205 adopts a gender perspective throughout the text, and acknowledges that crises affected men and women differently. Adopting a gender perspective through aspects of crisis response programme development, implementation and evaluation is included as a strategic objective in in Part III,⁶⁴² but it also permeates other provisions in the text.

Paragraph 14 highlights the need for states to promote equality of opportunity and treatment for men and women (pursuant to the ILO non-discrimination conventions). Recommendation No. 205 also advocates measures to ensure that women who gained employment during the crisis are not unduly replaced when the male workforce returns, which reflects a key concern established above. The instrument does not however supplement this goal with recommendations supporting women's increased economic participation, in recognition of their increased workloads. Paragraph 15(d) emphasises the need to take measures to ensure women's effective participation in post-crisis decision making processes, to promote and protect the human rights of women and girls, and to prioritise their needs and interests in strategies and responses. The propensity in post-crises contexts toward exacerbating existing patterns of gender-based violence, including sexual exploitation, rape and harassment, is also included in Recommendation No. 205, which calls for states to prevent and punish such acts.⁶⁴³ Gender-inclusive social dialogue in recovery processes is advocated in paragraph 24(a), however more specificity in equitable gender representation in planning and decision-making processes could have been included.

⁶⁴¹ ILO, *Socio-Economic Reintegration of Ex-Combatants*, above n 547, 92.

⁶⁴² Recommendation No. 205 para 8(g).

⁶⁴³ Recommendation No. 205 para 14(e).

Less detailed provisions exist with regard to discrimination on the basis of the two other grounds analysed in this section. As a starting point, Recommendation No. 205 includes in general terms, and as a guiding principle, the need to pay special attention to particularly vulnerable groups in the recovery process, including ‘persons belonging to minorities, indigenous and tribal peoples, persons with disabilities...’⁶⁴⁴ Recommendation No. 205 does not address discrimination on the basis of ethnic and social origin in such terms, but does recommend that states should ‘pay particular attention to establishing or restoring conditions of stability and socio-economic development for population groups that have been particularly affected by a crisis, including, but not limited to, persons belonging to minorities, indigenous and tribal peoples...’.⁶⁴⁵ This provision recommends taking into account Convention No. 111, and other international instruments and documents, which would include CERD. Paragraph 15(g) also calls upon states to ensure that members of minorities are consulted, and participate directly in decision-making processes.

Turning to discrimination on the basis of disability, paragraph 8(e) advocates conducting employment impact assessments of national recovery programmes to ensure the inclusion of PwDs, while paragraph 15(b) recommends states consider specifically single-headed households when headed by PwDs. The most comprehensive provision, paragraph 15(h), recommends that states ensure that PwDs (include those whose disabilities were pre-existing prior to the crisis and those who acquired disabilities as the result of the crisis) ‘are provided with opportunities for rehabilitation, education, specialised vocational guidance, training and retraining, and employment’, taking into account the relevant ILO and international instruments, which would include the CRPD. While these provisions represent a start at mainstreaming a disability perspective into recovery activities, they could have gone further in emphasising the importance of providing reasonable accommodation and accessibility for PwDs in the recovery process. Part VII on social protection, which advocates that states should ensure basic income security, particularly for disadvantaged and marginalised groups, does not specifically make the connection to how important this is for PwDs who are unable to work. Likewise, Recommendation No. 205 does not identify the need to specifically address the risks of exclusion of PwDs in the recovery and reconstruction process, including in the distribution of humanitarian aid, where historically this has been proven to occur.

(b) Non-discrimination in education, training and reintegration programmes

In terms of education and training programmes, Recommendation No. 205 places a general emphasis on equality of opportunity and non-discrimination in access to education and vocational training for ‘women and men, girls and boys’, which should be ‘restored as quickly as possible’.⁶⁴⁶ It also

⁶⁴⁴ Recommendation No. 205 para 7(h).

⁶⁴⁵ Recommendation No. 205 para 15(f).

⁶⁴⁶ Recommendation No. 205 para 18.

provides that attention should be paid to enabling women and men whose education has been interrupted to resume these programmes, with special attention on those in rural areas and the informal economy.⁶⁴⁷ In light of the fact that many domestic workers as well as many of those working in the informal economy are women, there was scope for inclusion in the text of provisions acknowledging the need to specifically target women in these contexts.⁶⁴⁸ Paragraph 20 also adopts a gender perspective in recommending that states ensure women and girls have access to education and training programmes on the basis of equal opportunity and treatment. As established above, paragraph 15(h) provides specifically for education, training and rehabilitation programmes for PwDs. Crucially, however, Recommendation No. 205 contains no specific provisions recommending that states consider the gender and disability aspects of DDR. Given the extensive challenges identified above that both groups have faced in participating in these programmes in practice, this is a significant oversight.

(c) Legal regulation and institutional capacity-building

While Part VIII of Recommendation No. 205 contains recommendations of a general nature on reviewing, establishing and reinforcing labour legislation and labour administration system, it missed an opportunity to emphasise to states the importance of entrenching non-discrimination in employment opportunities and equality of access to decent work in legislation in Part V on ‘rights, equality and non-discrimination’. As identified above, providing legal redress through robust anti-discrimination laws that applied to all workers, in all sectors, and supplementing laws with the institutional structures to support their implementation, are key means in combating discrimination in post-crisis periods. The role of social dialogue in monitoring and bringing discrimination issues to the fore should also have been noted.

5.3 Other gaps in the coverage of Recommendation No. 205

As established in Chapter 4, Recommendation No. 205 reflects a welcome expansion in terms of its scope (the types of crises it covers, and persons and entities it incorporates), the breadth of the normative labour issues it covers, its use of international law and its adoption of a human rights-based approach, and increased stakeholder participation to address the fundamental changes in the challenges experienced by states post-crises. This section builds upon Chapter 4, and in light of the analysis in this chapter concerning specific human rights risks, draw out gaps in its coverage that may affect its ability to promote sustainable, decent work in post-crisis recovery.

⁶⁴⁷ Recommendation No. 205 para 19(c) and (e).

⁶⁴⁸ While Recommendation 204, which is referenced in Recommendation No. 205 para 11(f) does include gender-specific provisions, highlighting this link in the text of Recommendation No. 205 would have been beneficial. See R204 paras 7(h), 11(f) and 21.

5.3.1 *The focus on employment generation beyond rights protection*

First, the underlying philosophy of Recommendation No. 205 is clearly geared towards employment generation. This reflects the emphasis of the ILO's operational activities in crisis-affected states, in cooperation with other international agencies, on 'employment generation, reintegration, skills training, cash transfers and enterprise development'.⁶⁴⁹ The creation of employment opportunities for income security, coupled with the Decent Work agenda and respect for international labour standards, underscores the basic approach of the ILO in crisis contexts, and Recommendation No. 205, at its core, directs its policies towards achieving this central aim.⁶⁵⁰ While Recommendation No. 205 has made significant strides in incorporating a human rights-based approach in almost all of its provisions by continually referring to decent work, which encapsulates work rights and fair working conditions, the emphasis in the instrument falls heavily on employment generation rather than ensuring, with requisite specificity, specific standards of fair working conditions.

One area in which this is apparent is the omission of any reference to the protection of wages in crisis recovery, which is one of the conditions of work that affects workers and their families most acutely. There are no specific references to wages in the text of the document, despite wage-related indicators being central indicators of decent work.⁶⁵¹ Further, despite the issue of wages being discussed at points during the drafting process in connection to securing the minimum wage, and timely payment of wages, the issue of wage protection was not discussed. The argument could be made that the provision in para 9(d) in 'Strategic Approaches' that crisis response in the immediate aftermath of a conflict should include, 'as appropriate', 'safe and decent working conditions...for all workers' encapsulates the protection of wages, but again, this could have been clarified for specificity. Additionally, if this is the interpretation that should be made, then it could have been recommended with more force than 'as appropriate'. Given the serious ramifications of abusive pay practices or non-payment of wages by employers on the income security of workers, the risk of this occurring in periods of economic instability post-crises, and the fact that issues have arisen previously in payments for development projects through, for example, food-for-work schemes,⁶⁵² its omission from Recommendation No. 205 is questionable.

⁶⁴⁹ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 15 [33].

⁶⁵⁰ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 19 [39].

⁶⁵¹ See ILO, *Decent Work Indicators – Second Version* (2013), 65. While references to wage-related ILO instruments were originally contained in the revised Recommendation No. 71 discussed by the Committee in 2017, the Annex was deleted from Recommendation 205 in the interests of consensus. The references in the Annex were to the Labour Clauses (Public Contracts) Convention (No. 94), and Recommendation (No. 84), 1949 and Minimum Wage Fixing Convention (No. 131), and Recommendation (No. 135), 1970.

⁶⁵² See ILO, General Survey of the reports concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949, International Labour Conference, Report III (Part 1B), 91st Session, 2003, 65-57, in connection to payments managed by the World Food Programme.

5.3.2 *The timing of human rights-based interventions*

The ‘phased multi-track approach’ through which Recommendation No. 205 advocates implementation of the policies it advocates may present another challenge for labour rights protection. This wording was included to reflect ‘the need for simultaneous action over consecutive periods’,⁶⁵³ which is a valid objective, however the instrument fails to provide more guidance to Member States on what this approach entails. There are references to some priority measures – paragraph 9 in ‘Strategic Approaches’ states that crisis response in the *immediate aftermath* of a conflict or disaster should incorporate, inter alia,

- (a) a ‘coordinated and inclusive needs assessment with a clear gender perspective;
- (b) an *urgent response* to satisfy basic needs and provide services, including social protection... immediate employment measures and income-generation opportunities for [vulnerable groups]; (emphasis added)...
- (d) safe and decent working conditions, including the provision of personal protective equipment and medical assistance for all workers, including those engaged in rescue and rehabilitation activities...

Member States are urged to take *urgent* action to address the worst forms of child labour, and forced labour however with other measures, such as restoring labour laws and administration, and in the remaining provisions in the Part V on ‘Rights, Equality and Non-discrimination’, there are no references to time-frames or priority actions. This is problematic as it means the Recommendation does not emphasise, with enough force, the need to incorporate a labour rights perspective at each stage of the recovery process. As established above, this is necessary in ensuring that rights violations do not occur both in the reconstruction process, and in the vacuum of decreased state regulation. The lack of prioritisation within the instrument should thus not negate the need for states to address some core labour rights issues urgently, or enable states to focus primarily on employment and income generation without adequately ensuring the protection of fundamental worker’s rights. The key point is that the rights analysed in this chapter, amongst many others, are not issues that should be relegated to the future post-recovery stage, once the state has restored infrastructure and stabilised the economy. As this thesis has demonstrated, they are pressing issues affecting the livelihoods and human rights of the whole population, which also implications for economic recovery of the state as lasting peace.

5.3.3 *The use of international legal instruments in the Recommendation*

Further attention should be given to the way that international legal instruments are used in the Recommendation. Every reference to specific international legal instruments or labour standards in the operational part of the Recommendation provides that Member States should ‘tak[e] into account’ the given Convention and/or Recommendation in pursuance of a particular goal or certain policy. The

⁶⁵³ ILO, Revision of Recommendation No. 71, Report V(2A) 2017, above n 356, 27.

only exception is paragraph 7(b), which advocates generally the need to ‘respect, promote and realize the fundamental principles and rights at work, other human rights and other relevant international labour standards...’ While the flexibility of an approach that refers to an ILS in general is beneficial in that all its contents are seen as relevant, and emphasises the application of these standards in post-crises contexts, it lacks specificity, and misses an opportunity to draw out more specific goals contained in these ILS. Given that Recommendation No. 205 is in recommendation form, it could have gone further recalling the key principles contained in these standards.

5.3.4 *Scope for further emphasis on prevention*

As established in Chapter 4, while the focus of Recommendation No. 205 is on the post-crisis period, one of the ways that it has been adapted is by broadening the scope of response it recommends. This includes with respect to prevention measures. The preamble thus recognises ‘the importance of employment and decent work for promoting peace, preventing crisis situations arising from conflicts and disasters’. The notion of prevention does permeate some provisions of the Recommendation: the generation of decent work is seen as a preventative measure (para 7(a)), and it cites building capacity for employers and businesses to identify, prevent or mitigate adverse human and labour rights impacts as a strategic approach (para 8(f)). The role of social protection floors in preventing crises and enabling recovery and building resilience is acknowledged (para 22), and importantly, the Recommendation generally links the measures advocated in the rights and non-discrimination section with their role in preventing crises (para 15). The impetus for addressing prevention measures that was clear in the preparatory works⁶⁵⁴ is not reflected with enough force throughout the Recommendation as a whole, and this reflects a missed opportunity to emphasise preventative measures that can be taken to mitigate labour rights impacts. The provisions on law, for example, recommend taking actions to ensure labour laws are consistent with the applicable labour standards and support decent work in the *recovery* from crisis situations, while the part on social dialogue recommends that Member States consult with representative organisations in *responding* to crisis situations. These two provisions deal with fundamental elements necessary for putting in place structures and systems to help mitigate the effects of crises and to prevent rights abuses from occurring, yet do not emphasise the important role they play in prevention.

5.4 The role of Recommendation No. 205 in recommendation format

The central question for this section is whether Recommendation No. 205 will have sufficient weight as a recommendation, and not as a convention, in order to play a meaningful role in providing guidance on the employment aspects of post-conflict recovery in a way that produces greater observance of labour rights. The subject matter of Recommendation No. 205 as it currently exists and

⁶⁵⁴ ILO, Revision of Recommendation No. 71, Report V(1) 2016, above n 176, 5.

at this point in time, is by its nature suitable and perhaps, only suitable, to recommendation form, given that it does not seek to establish ‘one single threshold for determining what is legal’, but establishes a ‘series of graduated norms’⁶⁵⁵ for guiding state action in the aftermath of a crisis. It organises principles of good practice for engineering social and economic recovery and development through employment policies, while anchoring this in relevant international legal instruments and a human rights-based approach, and reflecting current international consensus on key issues such as managing disaster risk, and refugee flows. This is compounded by the fact that post-conflict and post-disaster situations with which Recommendation No. 205 deals are highly variable, and ‘cannot be governed by a precise set of legal rules which can be put into practice within a given period’.⁶⁵⁶ The guidance given by the instrument must therefore be flexible enough to adapt to the contingencies of each event. The flexibility as a soft law instrument is one of its greatest advantages – it promotes international cooperation and decision-making on the topic of the Recommendation, and is applicable to all Member States. This is particularly relevant in light of the increased role of international cooperation envisaged in the instrument (see Part XIII).

A key point to make here is that Recommendation No. 205 was not intended to create new obligations for states, but rather, to emphasise the importance of the implementation of existing rights, measures and policies under the international instruments to which it refers to the specific context of post-crisis recovery. In recommendation form, Recommendation No. 205 is able to retain its relatively comprehensive coverage of the relevant issues, while linking to key international labour standards in the text and reinforcing their relevance. Recommendation No. 205 does not impose obligations where there was no regulation before. Rather, it is a tool to refine and confirm applicable objectives and methods for achieving social and economic development, and to accompany the implementation of the international labour standards to which it refers. Further, the instrument builds both upon state consensus on the issues it contains, and upon existing practice of international organisations involved in crisis response. Recommendation No. 205 can also gain traction within the ILO system: one possibility is that it could be used in the supervisory procedures related to the Conventions to which it refers (albeit perhaps not explicitly) to inform the comments of supervisory bodies in post-conflict and post-disaster states.

An important point for consideration in this context is the way in which Recommendation No. 205 is characterised – it could either be seen as norm-filling or norm-creating.⁶⁵⁷ If viewed as supplementing the binding provisions contained in the conventions to which it refers, then it would be norm-filling in

⁶⁵⁵ Duplessis, *Soft International Labour Law*, above n 203, 13.

⁶⁵⁶ *Ibid* 19.

⁶⁵⁷ Using the dichotomy as described in Cerone, Gammeltoft-Hansen and Lagoutte, *Tracing the Roles of Soft Law in Human Rights*, above n 201 6-7.

that it creates a common understanding of the interpretation of rules for application to specific situations, or to fill the gap left by some of the existing instruments. One factor supporting this interpretation is that Recommendation No. 205 refers selectively to individual conventions and recommendations in the body of the text – mostly to the fundamental conventions, but also in respect of Convention No. 122 on employment policy, the Recommendation No. 204 on the transition from the informal to the formal economy, and Convention No. 102 and Recommendation 202 on social protection. An advantage of viewing Recommendation No. 205 in this way is that it allows for the possibility of importing the concepts and language into the monitoring procedures on these other instruments. If seen as a standalone instrument, it would be norm-creating, in that it exists in a space in where there are currently no binding international standards (even though it is not binding itself). In this way, it Recommendation No. 205 could act as a ‘reference point, both domestically and internationally’, through which the substance and wording of provisions it contains could be replicated in other instruments, or could make its way into ‘harder legalised forms beyond the UN system’.⁶⁵⁸ In any case, there is space for reconceptualising Recommendation No. 205 not merely as a way-point to hardening law, but as in an end-point in itself, and one that carries significance for the ILO and its Member States as a whole.

⁶⁵⁸ Ibid 218, footnote 30.

Chapter 6 – Conclusion and future prospects

Where there was no guidance in legal form before, Recommendation No. 205 builds on existing legal regimes of protection of the right to work and labour rights in international human rights and labour law, and on the policy impetus reflected in the proliferation of non-binding instruments aimed at establishing the links between economic growth, development and poverty reduction, and peace, as established in Chapter 2. It does so in recommendation form that, while non-binding, has the ability to exert real influence over national law and practice of Member States in post-crisis response. The participatory and representative tripartite, international process by which recommendations are adopted confer on them both legitimacy and authority. As Chapter 4 recognised, the Recommendation underscores priority measures for employment generation that produces dividends for economic and social development, as well as social justice. In doing so, it imports a human rights-based approach to the protection of labour rights and applies these specifically to post-crisis response. The notion of ‘decent work’, which, by definition, incorporates fundamental rights at work, permeates the entire instrument, and compliments references to specific measures to mitigate the risks of rights violations for vulnerable groups. Those affected by child labour and forced labour, gender-based concerns and discrimination, persons with disabilities and internally displaced persons and refugees are amongst these groups. Concurrently, Recommendation No. 205 links to international standards not only within the sphere of ILS, but also within broader human rights instruments, and reinforces the centrality of inclusive social dialogue and international cooperation in the crisis response process.

As illustrated by Chapters 3 and 5, post-conflict and post-disaster environments present significant risks to the enjoyment of basic and fundamental rights – amongst these, the right to life, to health, to an adequate standard of living – that have been conventionally identified as ones demanding priority attention in humanitarian response. As demonstrated in this thesis however, such environments also threaten the fundamental right to work, as well as rights at work, issues concerning the application of which can be relegated to later phases of humanitarian response. This means that labour rights concerns too are relegated to later stages of this process. Disruptions to physical and economic capital, weakening of labour market and justice institutions, and demographic labour market changes are some of the factors that create conditions rife for the practice of discrimination in employment on the grounds of ethnic and social origin, gender and disability and impingement on the right to freedom of association and collective bargaining. Likewise, the practice of forced labour and child labour may spread, capitalising on aggravated levels of poverty and informality.

It is pertinent to return, at this point, to the questions posited in the introduction of the thesis. One that queries how successful Recommendation No. 205 will be as an instrument that goes beyond employment generation and economic recovery, to one that ensures respect for labour rights, in order

to achieve long-term development and peace dividends. And, subsequent to that, whether its provisions addressing rights concerns of vulnerable groups are robust enough, and whether it reflects a human rights-based approach to a sufficient extent so that these concerns are not sidelined. The Officer of the High Commissioner for Human Rights has underscored that a human rights-based approach ‘cannot be expected to provide detailed recommendations for good development processes or clear answers to resource-allocation and policy choices. However, [it] can provide a conceptual framework for evaluating and improving practice...’.⁶⁵⁹ The human rights-based approach in Recommendation No. 205 does provide a framework for improving the policy, practice and law and of Member States in post-crisis response, as well as the practice of intervening international agencies. The above analysis has, however, established deficiencies in its approach to addressing labour rights vulnerabilities and human rights concerns. While the Recommendation contains operative provisions on all of the fundamental labour rights set out in the UN and ILO instruments, and as considered in the Chapter 5 human rights risk analysis, it responds to the risks identified to those rights with differing efficacy.

It successfully addresses many key risks, concerning freedom of association and collective bargaining, including the need for social dialogue in crisis response, and implicitly advocates that states should respect these rights. The provision on forced labour, conversely, lacks specificity in guiding states on how to ‘prevent, identify and eliminate all forms of forced labour’, and omits references to groups who have been proven to be at specific risk, such as displaced persons and women. The provisions on child labour are more comprehensive, however they not pick up on some key concerns, such as children at special risk, or the importance of the provision of educational and training opportunities for all children who have been involved in child labour. Finally, Recommendation No. 205 does demonstrate an awareness of the need to incorporate non-discrimination considerations into post-crisis recovery and employment policies, however not to the extent that the risk analysis above has demonstrated is needed. This is both in terms of the types of discrimination, and the aspects of recovery, that are addressed. The balance in terms of the types of discrimination it addresses falls heavily on non-discrimination with regards to sex, rather than non-discrimination generally.

This analysis has concluded that the instrument, on balance, focuses on employment generation without providing specific enough guidance on rights concerns. A linked concern is that the Recommendation missed an opportunity to emphasise the need to address all of the fundamental rights concerns raised in Chapter 5 as an urgent priority and concurrently with policies aimed at employment generation. While the Recommendation does refer to international labour standards and

⁶⁵⁹ Officer of the High Commissioner for Human Rights, *Claiming the Millennium Development Goals: a human rights approach* (2008) 7.

human rights instruments in some of its provisions, drawing out key principles from these for inclusion in the text would have greatly strengthened the guidance given. Finally, there was scope in the instrument for further emphasis on how key measures such as strengthening national labour laws to bring them into line with international standards can play a key role in preventing rights abuses from occurring. Recommendation No. 205 does, however, go further than any other existing instrument addressing labour rights in the post-crisis period. It fills the gap in international law and guidance identified in Chapter 1 on priority measures for states to take in the sphere of employment, making an explicit connection between employment measures and human rights protection. It therefore does have a central role to play in furthering human rights protection.

In light of the above, one further question remains: what are the future prospects for Recommendation No. 205? As argued in Chapter 2, the key determinants of its utility in practice will be the traction it gains amongst Member States, and the way that it is used within the ILO and wider UN system. Within this ILO, this includes whether it is utilised by the supervisory bodies in their supervision of the binding conventions to which Recommendation No. 205 refers,⁶⁶⁰ or whether these bodies seek reports on actions taken to operationalise the Recommendation's provisions. The Committee of Experts could, in this way, solidify Recommendation No. 205 as a norm-building instrument. There is also further scope for the ILO to provide support in the implementation of the recommendation through, for example, implementing guidelines that elucidate the application of certain parts of the Recommendation. This would provide an opportunity to supplement the Recommendation with more specific guidance on issues identified above as having not been addressed with requisite specificity in the text, and to provide examples of best practice. Likewise, implementing guidelines could be used to import rights-based considerations into coordination efforts between development and humanitarian actors and interveners involved in post-crisis response.⁶⁶¹ The ILO Governing Body, in October 2017, developed a follow-up strategy for Recommendation No. 205 with the aim of supporting constituents in applying local, national and regional strategies to implement the Recommendation, and includes four components: awareness-raising and advocacy; policy advice, development cooperation and capacity development; knowledge development and dissemination; and international cooperation and partnerships.⁶⁶²

⁶⁶⁰ This could be done with respect to, for example, Convention No. 122, given that employment policy and employment generation is at the heart of Recommendation No. 205.

⁶⁶¹ An example of where an existing coordination framework in which this could occur is in the programme of coordination between the World Bank, UNDP, the UN Peacebuilding Support Office, and the ILO aimed at 'strengthening the peacebuilding impact of the employment programmes' of these organisations. See World Bank, UNDP, UNPSO and ILO, *Employment Programmes and Peace: a joint statement on an analytical framework, emerging principles for action and next steps* (2016). Likewise, the ILO could clarify the interaction between Recommendation No. 205 and other UN-wide policies, such as the Policy for Post-conflict Employment Creation, Income Generation and Reintegration discussed elsewhere in this thesis.

⁶⁶² ILO, Follow-up to the resolution concerning employment and decent work for peace and resilience, 9 October 2017.

Within the wider UN system, this traction will depend on, amongst other factors, whether the Recommendation is used as a reference point and lens through which other entities approach the issue of employment generation and livelihood stabilisation in the post-crisis context. Further, the opportunity exists for UN supervisory bodies, such as the Committee on the Rights of Persons with Disabilities, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child to call upon Recommendation No. 205 in their supervision of particular states parties to the respective Convention, in light of the fact that the Recommendation includes provisions of direct consequence for persons who are the subject of these Conventions. As further established in Chapter 2, these bodies have in practice previously referred to ILO instruments in both their general comments and recommendations, and in their observations on states.

Ultimately, one must not lose sight of the basic endeavour of Recommendation No. 205, and indeed, the vast array of other international legal and policy instruments identified in this thesis as applicable to post-crisis response: development, peace, social justice, and the protection of the rights of all persons. It will now fall upon the international community to operationalise the principles espoused in Recommendation No. 205 and realise this endeavour.

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ANNEX

Text of the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205)

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 106th Session on 5 June 2017, and

Reaffirming the principle in the Constitution of the International Labour Organisation (ILO) that universal and lasting peace can be established only if it is based upon social justice, and

Recalling the Declaration of Philadelphia (1944), the Universal Declaration of Human Rights (1948), the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) and the ILO Declaration on Social Justice for a Fair Globalization (2008), and

Taking into account the need to revise the Employment (Transition from War to Peace) Recommendation, 1944 (No. 71), with a view to broadening its scope and providing up-to-date guidance on the role of employment and decent work in prevention, recovery, peace and resilience with respect to crisis situations arising from conflicts and disasters, and

Considering the impact and consequences of conflicts and disasters for poverty and development, human rights and dignity, decent work and sustainable enterprises, and

Recognizing the importance of employment and decent work for promoting peace, preventing crisis situations arising from conflicts and disasters, enabling recovery and building resilience, and

Recognizing that the countries receiving refugees may not be in situations of conflicts and disasters, and

Emphasizing the need to ensure respect for all human rights and the rule of law, including respect for fundamental principles and rights at work and for international labour standards, in particular those rights and principles relevant to employment and decent work, and

Considering the need to recognize that crises affect women and men differently, and the critical importance of gender equality and the empowerment of women and girls in promoting peace, preventing crises, enabling recovery and building resilience, and

Recognizing the importance of developing responses, through social dialogue, to crisis situations arising from conflicts and disasters, in consultation with the most representative employers' and workers' organizations and, as appropriate, with relevant civil society organizations, and

Noting the importance of creating or restoring an enabling environment for sustainable enterprises,

taking into account the resolution and Conclusions concerning the promotion of sustainable enterprises adopted by the International Labour Conference at its 96th Session (2007), and in particular for small and medium- sized enterprises, to stimulate employment generation, economic recovery and development, and

Affirming the need to develop and strengthen measures of social protection, as a means of preventing crises, enabling recovery and building resilience, and

Recognizing the role of accessible and quality public services in economic recovery, development, reconstruction efforts, prevention and resilience, and

Stressing the need for international cooperation and partnerships among regional and international organizations to ensure joint and coordinated efforts, and

Having decided upon the adoption of certain proposals with regard to employment and decent work for peace and resilience, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation,

adopts this sixteenth day of June of the year two thousand and seventeen the following Recommendation, which may be cited as the Employment and Decent Work for Peace and Resilience Recommendation, 2017:

I. OBJECTIVES AND SCOPE

1. This Recommendation provides guidance to Members on the measures to be taken to generate employment and decent work for the purposes of prevention, recovery, peace and resilience with respect to crisis situations arising from conflicts and disasters.
2. For the purposes of this Recommendation and based upon internationally agreed terminology:
 - (a) the term “disaster” means a serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts; and
 - (b) the term “resilience” means the ability of a system, community or society exposed to hazards to resist, absorb, accommodate, adapt to, transform and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions through risk management.
3. For the purposes of this Recommendation, the term “crisis response” refers to all measures on employment and decent work taken in response to crisis situations arising from conflicts and disasters.

4. This Recommendation applies to all workers and jobseekers, and to all employers, in all sectors of the economy affected by crisis situations arising from conflicts and disasters.

5. The references in this Recommendation to fundamental principles and rights at work, to safety and health and to working conditions apply also to workers engaged in crisis response, including in the immediate response. The references in this Recommendation to human rights and to safety and health apply equally to persons in volunteer work participating in crisis response.

6. The provisions of this Recommendation are without prejudice to the rights and obligations of Members under international law, in particular international humanitarian law, international refugee law and international human rights law.

II. GUIDING PRINCIPLES

7. In taking measures on employment and decent work in response to crisis situations arising from conflicts and disasters, and with a view to prevention, Members should take into account the following:

- (a) the promotion of full, productive, freely chosen employment and decent work which are vital to promoting peace, preventing crises, enabling recovery and building resilience;
- (b) the need to respect, promote and realize the fundamental principles and rights at work, other human rights and other relevant international labour standards, and to take into account other international instruments and documents, as appropriate and applicable;
- (c) the importance of good governance and combating corruption and clientelism;
- (d) the need to respect national laws and policies and use local knowledge, capacity and resources;
- (e) the nature of the crisis and the extent of its impact on the capacity of governments, including regional and local government, employers' and workers' organizations, and other national and relevant institutions, to provide effective responses, with the necessary international cooperation and assistance, as required;
- (f) the need to combat discrimination, prejudice and hatred on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, disability, age, sexual orientation or any other grounds;
- (g) the need to respect, promote and realize equality of opportunity and treatment for women and men without discrimination of any kind;
- (h) the need to pay special attention to population groups and individuals who have been made particularly vulnerable by the crisis, including, but not limited to, children, young persons,

persons belonging to minorities, indigenous and tribal peoples, persons with disabilities, internally displaced persons, migrants, refugees and other persons forcibly displaced across borders;

- (i) the importance of identifying and monitoring any negative and unintended consequences and avoiding harmful spillover effects on individuals, communities, the environment and the economy;
- (j) the need for a just transition towards an environmentally sustainable economy as a means for sustainable economic growth and social progress;
- (k) the importance of social dialogue;
- (l) the importance of national reconciliation, where applicable;
- (m) the need for international solidarity, burden- and responsibility-sharing and cooperation in accordance with international law; and
- (n) the need for close coordination and synergies between humanitarian and development assistance, including for the promotion of full, productive, freely chosen employment and decent work and income-generation opportunities, avoiding the duplication of efforts and mandates.

III. STRATEGIC APPROACHES

8. Members should adopt a phased multi-track approach implementing coherent and comprehensive strategies for promoting peace, preventing crises, enabling recovery and building resilience that include:

- (a) stabilizing livelihoods and income through immediate social protection and employment measures;
- (b) promoting local economic recovery for employment and decent work opportunities and socio-economic reintegration;
- (c) promoting sustainable employment and decent work, social protection and social inclusion, sustainable development, the creation of sustainable enterprises, in particular small and medium-sized enterprises, the transition from the informal to the formal economy, a just transition towards an environmentally sustainable economy and access to public services;
- (d) ensuring consultation and encouraging active participation of employers' and workers' organizations in planning, implementing and monitoring measures for recovery and resilience, taking into account, as appropriate, the views of the relevant civil society organizations;
- (e) conducting employment impact assessments of national recovery programmes implemented through public and private investment in order to promote full, productive, freely chosen

employment and decent work for all women and men, in particular for young persons and persons with disabilities;

- (f) providing guidance and support to employers to enable them to take effective measures to identify, prevent, mitigate and account for how they address the risks of adverse impacts on human and labour rights in their operations, or in products, services or operations to which they may be directly linked;
- (g) applying a gender perspective in all crisis prevention and response design, implementation, monitoring and evaluation activities;
- (h) creating economic, social and legal frameworks at the national level to encourage lasting and sustainable peace and development, while respecting rights at work;
- (i) promoting social dialogue and collective bargaining;
- (j) building or restoring labour market institutions, including employment services, for stabilization and recovery;
- (k) developing the capacity of governments, including regional and local authorities, and of employers' and workers' organizations; and
- (l) taking measures, as appropriate, for the socio-economic reintegration of persons who have been affected by a crisis, in particular those formerly associated with armed forces and groups, including through training programmes that aim to improve their employability.

9. Crisis response in the immediate aftermath of a conflict or disaster should include, as appropriate:

- (a) a coordinated and inclusive needs assessment with a clear gender perspective;
- (b) an urgent response to satisfy basic needs and provide services, including social protection, support to livelihoods, immediate employment measures and income-generation opportunities for population groups and individuals who have been made particularly vulnerable by the crisis;
- (c) assistance, provided to the extent possible by public authorities with the support of the international community, engaging social partners and, where appropriate, relevant civil society and community-based organizations;
- (d) safe and decent working conditions, including the provision of personal protective equipment and medical assistance for all workers, including those engaged in rescue and rehabilitation activities; and
- (e) the re-establishment, whenever necessary, of government institutions and of employers' and workers' organizations, as well as of relevant civil society organizations.

IV. EMPLOYMENT AND INCOME-GENERATION OPPORTUNITIES

10. In enabling recovery and building resilience, Members should adopt and implement a comprehensive and sustainable employment strategy to promote full, productive, freely chosen

employment and decent work for women and men, taking into account the Employment Policy Convention, 1964 (No. 122), and guidance provided in relevant resolutions of the International Labour Conference.

11. Members should, in consultation with the most representative employers' and workers' organizations, adopt inclusive measures in order to promote full, productive, freely chosen employment and decent work and income-generation opportunities through, as appropriate:

- (a) employment-intensive investment strategies and programmes, including public employment programmes;
- (b) local economic recovery and development initiatives, with a special focus on livelihoods in both rural and urban areas;
- (c) the creation or restoration of an enabling environment for sustainable enterprises, including the promotion of small and medium-sized enterprises as well as of cooperatives and other social economy initiatives, with particular emphasis on initiatives to facilitate access to finance;
- (d) supporting sustainable enterprises to ensure business continuity in order to maintain and expand the level of employment and enable the creation of new jobs and income-generation opportunities;
- (e) facilitating a just transition towards an environmentally sustainable economy as a means for sustainable economic growth and social progress, and for creating new jobs and income-generation opportunities;
- (f) supporting social protection and employment and respecting, promoting and realizing the fundamental principles and rights at work of those in the informal economy and encouraging the transition of workers and economic units in the informal economy to the formal economy, taking into account the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204);
- (g) supporting the public sector and promoting socially, economically and environmentally responsible public-private partnerships and other mechanisms for skills and capacity development and employment generation;
- (h) creating incentives for multinational enterprises to cooperate with national enterprises in order to create productive, freely chosen employment and decent work and to undertake human rights due diligence with a view to ensuring respect for human and labour rights, taking into account the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; and
- (i) facilitating the employment of persons formerly associated with armed forces and groups, as

appropriate.

12. Members should develop and apply active labour market policies and programmes with a particular focus on disadvantaged and marginalized groups and population groups and individuals who have been made particularly vulnerable by a crisis, including, but not limited to, persons with disabilities, internally displaced persons, migrants and refugees, as appropriate and in accordance with national laws and regulations.

13. In responding to crisis situations, Members should seek to provide income-generation opportunities, stable employment and decent work for young women and men, including through:

- (a) integrated training, employment and labour market programmes that address the specific situations of young persons entering the world of work; and
- (b) specific youth employment components in disarmament, demobilization and reintegration programmes that incorporate psychosocial counselling and other interventions to address anti-social behaviour and violence, with a view to reintegration into civilian life.

14. In the event of a crisis resulting in large numbers of internally displaced persons, Members should:

- (a) support the livelihoods, training and employment of internally displaced persons, with a view to promoting their socio-economic and labour market integration;
- (b) build resilience and strengthen the capacity of host communities to promote decent employment opportunities for all, with a view to ensuring that the livelihoods and employment of local populations are maintained and their ability to host internally displaced persons is strengthened; and
- (c) facilitate the voluntary return of internally displaced persons to their places of origin and their reintegration into labour markets when the situation allows it.

V. RIGHTS, EQUALITY AND NON-DISCRIMINATION

15. In responding to discrimination arising from or exacerbated by conflicts or disasters and when taking measures for promoting peace, preventing crises, enabling recovery and building resilience, Members should:

- (a) respect, promote and realize equality of opportunity and treatment for women and men without discrimination of any kind, taking into account the Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951, and the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958;
- (b) pay special attention to single-headed households, in particular when they are headed by children, women, persons with disabilities or elderly persons;

- (c) take measures to ensure that women who have been employed during a crisis and have assumed expanded responsibilities are not replaced against their will when the male workforce returns;
- (d) take measures to ensure that women are empowered to effectively and meaningfully participate in decision-making processes in the context of recovery and building resilience, and that their needs and interests are prioritized in strategies and responses, and that the human rights of women and girls are promoted and protected;
- (e) prevent and punish all forms of gender-based violence, including rape, sexual exploitation and harassment, and protect and support victims;
- (f) pay particular attention to establishing or restoring conditions of stability and socio- economic development for population groups that have been particularly affected by a crisis, including, but not limited to, persons belonging to minorities, indigenous and tribal peoples, internally displaced persons, persons with disabilities, migrants and refugees, taking into account the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958, as well as other relevant international labour standards and other international instruments and documents, as applicable;
- (g) ensure that persons belonging to minorities concerned, and indigenous and tribal peoples are consulted, in particular through their representative institutions, where they exist, and participate directly in the decision-making process, especially if the territories inhabited or used by indigenous and tribal peoples and their environment are affected by a crisis and related recovery and stability measures;
- (h) ensure, in consultation with employers' and workers' organizations, that persons with disabilities, including those who acquired a disability as a result of conflict or disaster, are provided with opportunities for rehabilitation, education, specialized vocational guidance, training and retraining, and employment, taking into account relevant international labour standards and other international instruments and documents; and
- (i) ensure that the human rights of all migrants and members of their families staying in a country affected by a crisis are respected on a basis of equality with those of national populations, taking into account relevant national provisions, as well as relevant international labour standards and other international instruments and documents, as applicable.

16. In combating child labour arising from or exacerbated by conflicts or disasters, Members should:

- (a) take all necessary measures to prevent, identify and eliminate child labour in crisis responses, taking into account the Minimum Age Convention (No. 138) and Recommendation (No. 146), 1973;

- (b) take urgent action to prevent, identify and eliminate the worst forms of child labour, including the trafficking of children and the recruitment of children for use in armed conflict, taking into account the Worst Forms of Child Labour Convention (No. 182) and Recommendation (No. 190), 1999;
- (c) provide rehabilitation, social integration and training programmes for children and young persons formerly associated with armed forces and groups to help them readjust to civilian life; and
- (d) ensure the provision of social protection services to protect children, for instance through cash or in-kind transfers. 17. In combating forced or compulsory labour arising from or exacerbated by conflicts or disasters, Members should take urgent action to prevent, identify and eliminate all forms of forced or compulsory labour, including trafficking in persons for purposes of forced or compulsory labour, taking into account the Forced Labour Convention, 1930 (No. 29) and its Protocol of 2014, the Abolition of Forced Labour Convention, 1957 (No. 105), and the Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203).

VI. EDUCATION, VOCATIONAL TRAINING AND GUIDANCE

18. In preventing and responding to crisis situations, and on the basis of the principle of equal opportunity and treatment for women and men, girls and boys, Members should ensure that:

- (a) the provision of education is not disrupted, or is restored as quickly as possible, and that children, including those who are internally displaced, migrants or refugees, have access to free, quality, public education, including with the support of international aid, in accordance with relevant international law and without discrimination of any kind at all stages of crisis and recovery; and
- (b) second chance programmes for children and young persons are available and address key needs arising from any interruption of their education and training.

19. In preventing and responding to crisis situations, Members should, where appropriate:

- (a) formulate or adapt a national education, training, retraining and vocational guidance programme that assesses and responds to emerging skills needs for recovery and reconstruction, in consultation with education and training institutions and employers' and workers' organizations, engaging fully all relevant public and private stakeholders;
- (b) adapt curricula and train teachers and instructors to promote:
 - (i) peaceful coexistence and reconciliation for peacebuilding and resilience; and
 - (ii) disaster risk education, reduction, awareness and management for recovery, reconstruction and resilience;

- (c) coordinate education, training and retraining services at national, regional and local levels, including higher education, apprenticeship, vocational training and entrepreneurship training, and enable women and men whose education and training have been prevented or interrupted to enter or resume and complete their education and training;
- (d) extend and adapt training and retraining programmes to meet the needs of all persons whose employment has been interrupted; and
- (e) give special attention to the training and economic empowerment of affected populations, including in rural areas and in the informal economy.

20. Members should ensure that women and girls have access, on the basis of equal opportunity and treatment, to all education and training programmes developed for recovery and resilience.

VII. SOCIAL PROTECTION

21. In responding to crisis situations, Members should, as quickly as possible:

- (a) seek to ensure basic income security, in particular for persons whose jobs or livelihoods have been disrupted by the crisis;
- (b) develop, restore or enhance comprehensive social security schemes and other social protection mechanisms, taking into account national legislation and international agreements; and
- (c) seek to ensure effective access to essential health care and other basic social services, in particular for population groups and individuals who have been made particularly vulnerable by the crisis.

22. In order to prevent crises, enable recovery and build resilience, Members should establish, re-establish or maintain social protection floors, as well as seek to close the gaps in their coverage, taking into account the Social Security (Minimum Standards) Convention, 1952 (No. 102), the Social Protection Floors Recommendation, 2012 (No. 202), and other relevant international labour standards.

VIII. LABOUR LAW, LABOUR ADMINISTRATION AND LABOUR MARKET INFORMATION

23. In recovering from crisis situations, Members should, in consultation with the most representative employers' and workers' organizations:

- (a) review, establish, re-establish or reinforce labour legislation, if necessary, including provisions on labour protection and occupational safety and health at work, consistent with the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)

and applicable international labour standards;

- (b) ensure that labour laws support the generation of productive, freely chosen employment and decent work opportunities;
- (c) establish, re-establish or reinforce, as necessary, the system of labour administration, including labour inspection and other competent institutions, taking into account the Labour Inspection Convention, 1947 (No. 81), as well as the system of collective bargaining and collective agreements, taking into account the Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- (d) establish, restore or enhance, as necessary, systems for the collection and analysis of labour market information, focusing in particular on population groups most affected by the crisis;
- (e) establish or restore and strengthen public employment services, including emergency employment services;
- (f) ensure the regulation of private employment agencies, taking into account the Private Employment Agencies Convention, 1997 (No. 181); and
- (g) promote synergies among all labour market actors to enable local populations to obtain the maximum benefit from employment opportunities generated by investments related to the promotion of peace and recovery.

IX. SOCIAL DIALOGUE AND ROLE OF EMPLOYERS' AND WORKERS' ORGANIZATIONS

24. In responding to crisis situations, Members should, in consultation with the most representative employers' and workers' organizations:

- (a) ensure that all measures provided for in this Recommendation are developed or promoted through gender-inclusive social dialogue, taking into account the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144);
- (b) create an enabling environment for the establishment, restoration or strengthening of employers' and workers' organizations; and
- (c) encourage, where appropriate, close cooperation with civil society organizations.

25. Members should recognize the vital role of employers' and workers' organizations in crisis response, taking into account the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and in particular:

- (a) assist sustainable enterprises, particularly small and medium-sized enterprises, to undertake business continuity planning to recover from crises by means of training, advice and material support, and facilitate access to finance;
- (b) assist workers, in particular those who have been made vulnerable by the crisis, to recover from the crisis through training, advice and material support; and
- (c) take measures for these purposes through the collective bargaining process as well as by other methods of social dialogue.

X. MIGRANTS AFFECTED BY CRISIS SITUATIONS

26. Taking into account that special attention should be given to migrants, especially migrant workers, who have been made particularly vulnerable by crisis, Members should take measures, in accordance with national law and applicable international law, to:

- (a) eliminate forced or compulsory labour, including trafficking in persons;
- (b) promote, as appropriate, the inclusion of migrants in host societies, through access to labour markets, including entrepreneurship and income-generation opportunities, and through decent work;
- (c) protect and seek to ensure labour rights and a safe environment for migrant workers, including those in precarious employment, women migrant workers, youth migrant workers and migrant workers with disabilities, in all sectors;
- (d) give due consideration to migrant workers and their families in shaping labour policies and programmes dealing with responses to conflicts and disasters, as appropriate; and
- (e) facilitate the voluntary return of migrants and their families in conditions of safety and dignity.

27. Consistent with the guidance provided in Parts V, VIII and IX, Members should promote equality of opportunity and treatment for all migrant workers with regard to fundamental principles and rights at work, and coverage under relevant national labour laws and regulations, and in particular:

- (a) educate migrants about their labour rights and protections, including by providing information on the rights and obligations of workers and the means of redress for violations, in a language they understand;
- (b) enable the participation of migrants in representative organizations of employers and workers;
- (c) adopt measures and facilitate campaigns that combat discrimination and xenophobia in the workplace and highlight the positive contributions of migrants, with the active engagement of employers' and workers' organizations and of civil society; and

- (d) consult and engage employers' and workers' organizations and, as appropriate, other relevant civil society organizations, with respect to employment of migrants.

XI. REFUGEES AND RETURNEES

Refugee access to labour markets

28. Any measures taken under this Part, in the event of refugee influx, are contingent on:

- (a) national and regional circumstances, taking into account applicable international law, fundamental principles and rights at work and national legislation; and
- (b) Members' challenges and constraints in terms of their resources and capacity to respond effectively, taking into account needs as well as priorities expressed by the most representative organizations of employers and workers.

29. Members should acknowledge the vital importance of equitable burden- and responsibility-sharing. They should reinforce international cooperation and solidarity so as to provide predictable, sustainable and adequate humanitarian and development assistance to support the least developed and developing countries hosting large numbers of refugees, including in terms of addressing the implications for their labour markets and ensuring their continued development.

30. Members should take measures, as appropriate, to:

- (a) foster self-reliance by expanding opportunities for refugees to access livelihood opportunities and labour markets, without discriminating among refugees and in a manner which also supports host communities; and
- (b) formulate national policy and national action plans, involving competent authorities responsible for employment and labour and in consultation with employers' and workers' organizations, to ensure the protection of refugees in the labour market, including with regard to access to decent work and livelihood opportunities.

31. Members should collect reliable information to assess the impact of refugees on labour markets and the needs of the existing labour force and of employers, in order to optimize the use of skills and human capital that refugees represent.

32. Members should build the resilience and strengthen the capacity of host communities by investing in local economies and promoting full, productive, freely chosen employment and decent work, and skills development of the local population.

33. Consistent with the guidance provided in Parts IV, VI and VII, Members should include refugees in the actions taken with respect to employment, training and labour market access, as appropriate, and in particular:

- (a) promote their access to technical and vocational training, in particular through ILO and relevant stakeholder programmes, in order to enhance their skills and enable them to undergo further retraining, taking into account possible voluntary repatriation;
- (b) promote their access to formal job opportunities, income-generation schemes and entrepreneurship, by providing vocational training and guidance, job placement assistance, and access to work permits, as appropriate, thereby preventing informalization of labour markets in host communities;
- (c) facilitate the recognition, certification, accreditation and use of skills and qualifications of refugees through appropriate mechanisms, and provide access to tailored training and retraining opportunities, including intensive language training;
- (d) enhance the capacity of public employment services and improve cooperation with other providers of services, including private employment agencies, to support the access of refugees to the labour market;
- (e) make specific efforts to support the inclusion in labour markets of refugee women, young persons and others who are in a situation of vulnerability; and
- (f) facilitate, as appropriate, the portability of work-related and social security benefit entitlements, including pensions, in accordance with the national provisions of the host country.

34. Consistent with the guidance provided in Parts V, VIII and IX, Members should promote equality of opportunity and treatment for refugees with regard to fundamental principles and rights at work and coverage under relevant labour laws and regulations, and in particular:

- (a) educate refugees about their labour rights and protections, including by providing information on the rights and obligations of workers and the means of redress for violations, in a language they understand;
- (b) enable the participation of refugees in representative organizations of employers and workers; and
- (c) adopt appropriate measures, including legislative measures and campaigns, that combat discrimination and xenophobia in the workplace and highlight the positive contributions of refugees, with the active engagement of employers' and workers' organizations and of civil society.

35. Members should consult and engage employers' and workers' organizations and other relevant stakeholders with respect to the access of refugees to labour markets.

36. Members should support host countries to strengthen their capacity and build resilience, including

through development assistance, by investing in local communities.

Voluntary repatriation and reintegration of returnees

37. When the security situation in the country of origin of refugees has improved sufficiently, Members should collaborate to facilitate the voluntary repatriation of refugees in conditions of safety and dignity, and to support their labour market reintegration, including with the assistance of international organizations.

38. Members should collaborate with the ILO and relevant stakeholders to develop specific programmes for returnees to facilitate their vocational training and reintegration in the labour market.

39. Members should collaborate, including with the assistance of relevant international organizations, to support the socio-economic integration of returnees in their countries of origin, through measures set out in Parts IV to IX, as appropriate, in a manner which supports the economic and social development of local populations.

40. Taking into account the principle of burden- and responsibility-sharing, Members should support countries of origin to strengthen their capacity and build resilience, including through development assistance, by investing in local communities in which returnees are reintegrated and by promoting full, productive, freely chosen employment and decent work.

XII. PREVENTION, MITIGATION AND PREPAREDNESS

41. Members should take measures, in particular in countries in which there are foreseeable risks of conflict or disaster, to build resilience, in consultation with employers' and workers' organizations and other stakeholders, to prevent, mitigate and prepare for crises in ways that support economic and social development and decent work, through actions such as:

- (a) identification of risks and evaluation of threats to and vulnerabilities of human, physical, economic, environmental, institutional and social capital at local, national and regional levels;
- (b) risk management, including contingency planning, early warning, risk reduction and emergency response preparedness; and
- (c) prevention and mitigation of adverse effects, including through business continuity management in both the public and the private sector, taking into account the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998).

XIII. INTERNATIONAL COOPERATION

42. In preparing for and responding to crisis situations, Members should strengthen cooperation and

take appropriate steps through bilateral or multilateral arrangements, including through the United Nations system, international financial institutions and other regional or international mechanisms of coordinated response. Members should make full use of existing arrangements and established institutions and mechanisms and strengthen them, as appropriate.

43. Crisis responses, including support by regional and international organizations, should provide for a central focus on employment, decent work and sustainable enterprises, and should be consistent with applicable international labour standards.

44. Members should cooperate to promote development assistance and public and private sector investment in crisis response for the creation of decent and productive jobs, business development and self-employment.

45. International organizations should reinforce their cooperation and the coherence of their crisis responses within their respective mandates, making full use of relevant international policy frameworks and arrangements.

46. The ILO should play a leading role in assisting Members to provide crisis responses based on employment and decent work and focusing on employment promotion, labour market integration or access, as appropriate, capacity development and institution building, in close cooperation with regional and international institutions.

47. Members should strengthen international cooperation, including through the voluntary and systematic exchange of information, knowledge, good practices and technology for promoting peace, preventing and mitigating crises, enabling recovery and building resilience.

48. There should be close coordination of and complementarity among crisis responses, as appropriate, in particular between humanitarian and development assistance, for the promotion of full, productive, freely chosen employment and decent work for peace and resilience.

XIV. FINAL PROVISION

49. This Recommendation supersedes the Employment (Transition from War to Peace) Recommendation, 1944 (No. 71).