

Perspectives on Labour Migration

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Globalization, Labour and Migration: Protection is Paramount

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Summary

Under contemporary globalization, international labour mobility has increased, while levels of exploitation and deregulation have accelerated. Lack of legal protection for migrant workers heightens their attractiveness as instruments of “maintaining competitiveness” because they are obliged to work in situations where decent work conditions are not enforced. Irregular migrants are especially vulnerable because the threat of apprehension and deportation thwarts unionizing and exposure of dangerous working conditions.

Current practices regarding labour migration represent fundamental policy dilemmas for States, social partners, and civil society. Many States have placed increasingly strict barriers on legal entry of labour migrants, yet appear to tolerate the presence of large numbers of irregular migrants, especially those working in low-paid sectors lacking offer of national workers. Sectors employing irregular workers are usually those where little or no regulatory activity upholds minimum safety, health and working conditions that should ensure “decent work.” The absence of regulation reinforces employment of irregular migrant workers in substandard conditions, and provides incentive for shifting capital and employment from formal to informal economic activity.

Whether deliberate or not, increasing application of restrictive policies has corresponded in many countries to increasing vilification of migrants – foreigners – in press, political discourse and public sentiments. The association of migrants and migration phenomena with criminality and, now, terrorism appear to be reinforced by usage of terminology of *illegal migrants* and language of *combating illegal migration*. In this context, increased occurrence of discrimination and outright violence reported in all regions is clearly more than mere coincidence.

Democratic governance depends on the rule of law; governance of migration and requisite regulation of the labour market are viable only to the extent they derive from a legislative foundation in turn based on sound international standards.

If the rule of law and democracy are to be strengthened under economic and social conditions of globalization, regulation of migration and of the labour market must be strengthened. Just as international refugee standards have become a universal guide for national policy and practice, the complementary existing international instruments for migration should serve as coherent global guidance for both national and international migration policies. Based on these norms and long experience, ILO experience proposes five key elements for viable and comprehensive standards-based national policy.

The role of social partner and civil society organizations in promoting comprehensive, sustainable and standards-based approaches to migration by governments is essential. ILO calls for adoption and ratification of an *International Charter of Migration*: comprising ILO Conventions 97 and 143 on Migrant Workers, the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of

Their Families, and the Palermo Protocols against Smuggling of Migrants and Trafficking in Persons.

1. Globalization and mobility

Growing economic interdependence of states has been a widely acknowledged component of globalization. The immediate effects on global population movements have been less easy to determine. However, as a recent ILO study put it, “The evidence points to a likely worsening of migration pressures in many parts of the world.... Processes integral to globalization have intensified the disruptive effects of modernization and capitalist development.”¹ Many developing countries face serious social and economic dislocation associated with persistent poverty, growing unemployment, loss of traditional trading patterns, and what has been termed a “growing crisis of economic security.”

Most permanent immigrants and refugees – as well as migrant workers – seek remunerative activity, participate in the labour force, and face discrimination and xenophobia directed at foreigners in host countries.

The ILO notes, "countries' statistics are lamentably scarce in regard to international migration and they do not account for, or only barely, persons who are present without proper documentation." Their best estimates for the numbers of international migrant workers and members of their families as of 1995 – the latest year for which comprehensive data is available – are thus:

Africa	18-21,000,000
South and East Asia	5-7,000,000
Europe ²	26-30,000,000
North America	16-18,000,000
South / Central America	7-12,000,000
West Asia (Arab States)	8-9,000,000
<hr/> Total	<hr/> 80-97,000,000 ³

Extrapolating from these figures and recent trends, ILO estimates the current global total number of migrant workers and family members to be about 120 million. The International Organization for Migration (IOM) and the UN estimate the total global population residing temporarily or permanently outside their country of origin at around 180 million people.

¹ Stalker, P.: “Workers without Frontiers – the impact of globalisation on international migration”. ILO, Geneva, 2000.

² For Western Europe, about 22 million economically active foreigners and dependents.

³ ILO, “Migrant Workers”, Geneva, 1999, Report III (Part 1B).

While future projections remain speculative, a notable starting point is that global estimates for international migration figures more than doubled between 1975 and 2000, from a total of 75 million people living outside their homelands to well over 150 million (including labour migrants, dependants, refugees, permanent immigrants).

The anticipated growth in the trade of goods and foreign direct investment will not be able to significantly reduce the propensity to migrate in most countries. Rather, both continued demand for low- and high-skilled foreign labour as well as vast differences in living standards will continue to structure the nature of migration flows.

In a number of countries, accelerated trade is replacing or undercutting domestic industrial and agricultural production with cheap imports, but at the expense of many jobs in those sectors. For example, a ton of corn to Callao, Peru or ton of rice to Manila can now be delivered more cheaply than what local, small-scale labour-intensive production costs. It is argued that the efficiency of mechanized large-scale agribusiness lowers food costs. However, growing each ton of corn occupied several farmers and labourers in Peru, and supported their families; similarly with rice farming in the Philippines.

Structural Adjustment Programs (SAPs) imposed reductions in government spending, state budgets and state subsidies. Reductions also meant significant reductions in government employment including professionals as well as skilled and unskilled workers. Data seems to indicate that job creation by private sector in many countries affected by SAPs has not matched the numbers rendered unemployed by downsizing governments. In some countries, it has lagged behind. As well, in many countries, structural adjustment conditions included the termination of government subsidies or food price supports that also indirectly supported employment in agriculture, food processing and distribution.

All of these factors mean migration pressures are increasing as possibilities for employment and economic survival at home disappear.

1.1. Growing demand for migrant labour

Meanwhile, the demand for migrant labour is not declining. Demographic trends and ageing work forces in many industrialized countries suggest that immigration will be an increasingly important option to address, both increasing ratios of retired to active population and aging work forces, taking into account that older work forces tend to be less innovative, less flexible and less adaptable to technological change. Some governments have begun to consider “replacement migration” as one policy option.⁴

Globalization and trade liberalization have had contradictory impacts on employment conditions in countries of destination. Demand for cheap, low-skilled labour in industrialized countries as well as a considerable number of developing nations in Africa, Asia, Latin America and the Middle East remains evident in agriculture, food-processing,

⁴ UN Population Division: “Replacement Migration – Is it a solution to Declining and Ageing Populations?” New York, March 2000.

construction, semi-skilled or unskilled manufacturing jobs (textiles, etc.), and low-wage services like domestic work, home health care and the sex sector.

Small and medium size companies and labour-intensive economic sectors do not have the option of relocating operations abroad. Responses in these sectors include downgrading of manufacturing processes, deregulation, and flexibilization of employment, with increased emphasis on cost-cutting measures and subcontracting⁵. In a considerable number of countries, these measures have expanded the number of jobs at the bottom of the employment scale. Such employment needs are met only partially or not at all by available or unemployed national workers, for reasons of minimal pay, degrading and dangerous conditions, and/or low status in those jobs and sectors, as well as alternative access available for unemployed in some countries to social welfare and unemployment insurance.

The resulting demand for migrant workers provides a significant impetus to labour flows and facilitates the incorporation of undocumented migrants⁶. Despite relatively high unemployment in a number of developed countries, foreign workers – including particularly unauthorized migrants – are able to find jobs easily⁷. On average, for example, a Mexican undocumented migrant worker to the USA will find a job two weeks after his/her arrival. Similar evidence in Europe indicates that undocumented migrants are rarely “unemployed”⁸.

It is often said that migrant labour fills the “three-D” jobs: *dirty, degrading and dangerous*. Research in Southern European countries demonstrates the extent to which “the migrants take jobs that the locals refuse. It’s simply a matter of substitution.”⁹ A recent study prepared for ILO concluded, “We can conclude that migrants are in competition only with marginal sections of the national labour force ...when they are not sufficiently sustained by welfare provisions, in specific sectors, and/or in the less-developed areas inside these countries.”¹⁰

Industrialized countries and numerous developing nations have remained a pole of attraction for migrant workers, who migrate before the presumed economic equalization forces of trade liberalization have time to act.¹¹ Often they are well-educated people who are ready to take up jobs that they would not accept in their home environment and this

⁵ Lean Lim, Lin; “Growing Economic Interdependence and its Implications for International Migration” in *United Nations: Population Distribution and Migration*, New York, 1998, p. 277.

⁶ Escobar Latapí, A., “Emigration Dynamics in Mexico, Central America and the Caribbean”, 12th IOM Seminar on Migration, Managing International Migration in Developing Countries, Geneva, April 1997, p. 4.

⁷ Lean Lim, *op. cit.*

⁸ OSCE Office for Democratic Institutions and Human Rights Conference Report: Europe Against Trafficking in Persons’, Berlin, 15-16 October 2001, at 72.

⁹ Reynieri, E., “Migrants in Irregular Employment in the Mediterranean Countries of the European Union”, International Migration Paper No. 41, ILO, Geneva, 2001.

¹⁰ *Ibid.*

¹¹ Stanton Russell, Sharon; “Migration between Developing Countries in Sub-Saharan Africa and Latin America” in *United Nations: Population Distribution and Migration*, New York, 1998, p. 242.

process involves an enormous loss of human resources. Wage differentials however between countries of origin and destination justify their interest especially where conditions at home are akin to poverty.

While many traditional migrant-receiving countries adopted restrictive immigration policies in the last two decades, a growing competition for highly educated specialists in expanding service sectors has resulted in a significant rise in skilled labour migration over the past years. Serious labour shortages in the area of information and communication technologies have prompted a number of countries to launch recruitment strategies for highly qualified immigrants.

While not a subject this paper can address, we note that recent comparative ILO research¹² confirms that some developing countries continue to lose 10-30% of qualified manpower through “brain drain”. This clearly has negative effects on productivity and economic growth. However, findings also point to a number of potentially positive side-effects: precious foreign exchange through worker remittances, new skills brought by returning migrants and migration-induced ‘brain exchanges’ between countries that expand possibilities for the transfer of knowledge or technology.

1.2. Labour insertion of irregular migrants workers

The persistence of dual labour markets under globalization appears to be expanding the number of precarious jobs which national workers are reluctant to take. As a result, the demand for foreign labour reflects the long term trend of informalization of low skilled and poorly paid jobs, where irregular migrants are preferred as they are willing to work for inferior salaries, for short periods in production peaks, or to take physically demanding and dirty jobs.¹³

Recent changes in migration policies in a number of OECD countries intended to respond to labour market needs have generally focused on recruiting high-skilled candidates with little attention to low skilled migrants. Nonetheless, in several developed countries, the actual foreign workforce is on average less qualified than the national profile, it is concentrated in the lowest socio-professional categories, and it is characterized by high mobility in response to the cyclical fluctuations of the labour market.¹⁴

The insertion of irregular migrants in the lowest skilled occupations responds to a structural need in developed societies. Employers demand for the least qualified jobs workers who will not exercise pressures on the salary structures. Given that, at least initially, immigrant workers won’t challenge the relation between salary and the social status attached to specific occupations, contracting migrant workers avoids the economic

¹² Lindsay Lowell B. and Findlay, A.: “Migration of Highly skilled Persons from Developing Countries – Impact and Policy Responses, Synthesis Report”, International Migration Paper No. 44, ILO, Geneva, 2002.

¹³ Stalker P., *op. cit.*

¹⁴ “OECD Employment Outlook”, OECD, June 2001.

risks – particularly structural inflation – that national workers induce when they demand salary increases.

The exploitability of migrant labour, particularly when it is legally unprotected, renders it an attractive instrument for maintaining competitiveness. However, this is at the expense of formal protections of decent work standards and protection of basic human rights conditions. Migrants without authorization for entry or for employment are especially at the margin of protection by workplace safety, health, minimum wage and other standards. They often are employed in sectors where such standards are not respected, not enforced or simply non-existent.

As the International Confederation of Free Trade Unions (ICFTU) highlights, organizing migrants and immigrants into unions or organizations to defend their interests and rights is often extremely difficult. When it is not considered illegal under national laws, organizing – especially of those without legal authorization for employment – is easily intimidated and disrupted by the threat or actual practice of deportation.¹⁵

1.3. Fundamental policy dilemmas

In a considerable number of countries, migration is being simultaneously encouraged and combated. Distance between policy pronouncements and de facto arrangements reflects a major contemporary contradiction in States' practice. Despite all the political rhetoric about illegal migration, numerous governments informally tolerate irregular migration while they officially reinforce controls against "illegal" migrant workers. The effects are, on the one hand, a continued supply of cheap labour, while on the other hand, "illegal" migrants unable to organize in the workplace to defend their dignity and decent work conditions, stigmatized and isolated as well from allies and support.

The practices of many States of tolerating the presence of migrant workers in irregular status to meet labour needs in certain sectors of the market constitutes a de facto employment policy in which part of the work force becomes a variable which can be reduced or even eliminated (in theory) in periods of economic downturn, through exercise by States of their prerogative to expel foreigners from their territory. In effect, by the same manner that migration policy can be utilized to satisfy labour market needs with foreign labour, deportation or expulsion can be utilized to regulate and even force the return to countries of origin of this temporary labour.

A recent – but pre-September 11 – example from the USA serves to illustrate duality in managing irregular immigration. Early in 2000, the US Immigration and Naturalization Service (INS) quietly suspended internal enforcement immigration raids and deportations, except at the borders. Acknowledgement of this suspension came just after US economic chief Alan Greenspan warned that the most significant threat to the US economy was inflation driven by wage increases. Implicit in Mr. Greenspan's message, and explicit in comments by other US economic analysts, was that potential wage

¹⁵ See for example, Linard, A., "Migration and Globalisation - the New Slaves". ICFTU, Brussels. July 1998.

increase pressures were being countered by increased employment of women and the large presence of undocumented migrant workers. News articles reported on a national policy decision tying non-enforcement of immigration control to labour market and inflation control needs of the economy.¹⁶

The effects of that policy also seem to have been well understood by some unions and undocumented workers themselves. It was reported that undocumented workers in Chicago were able to expand unionization efforts, and to negotiate agreements that employers demand warrants for any future enforcement actions and advise migrant workers in advance of any planned immigration enforcement raids.¹⁷

Trade and finance have become increasingly deregulated and integrated across regions and globally. By contrast, however, migration policies have not been liberalized, nor have they otherwise addressed the gulf between continued demands for cheap labour and the increasing supply of such labour in other countries. On the contrary, most industrialized countries imposed restrictive immigration laws and policies over the last decade, and many developing countries across the South appear to be following suit.

These restrictive measures have been established with little or no consideration of labour domestic labour demand and supply. In some regions, imposition of tighter border controls and restrictions on movement have cut across traditional routes and patterns of labour and trade migration. To put it in perhaps oversimplified terms: basic labour economics theory would suggest that placing restrictive barriers between high demand and large supply creates a potentially lucrative market for services of getting the supply to where the demand is.

Tighter border controls have not halted migratory flows nor have they had projected results in reducing the number of workers crossing borders. Instead they have put more pressure on those who migrate. With few options available for legal migration in the face of strong pull-push pressures, irregular migration channels become the only alternative, and one which presents lucrative “business” opportunities for helping people arrange travel, obtain documents, cross borders and find jobs in destination countries.

The flow of low-skilled migrants to more developed regions is channelled by clandestine means precisely because of the non-existence of legal migration categories that would allow for their legal entry in many destination countries. Once they are in host countries, they remain confined to jobs in unstructured or informal sectors, in irregular work and under exploitative conditions of employment.¹⁸

Testimony to the fact that restrictive immigration policies fail is the fact that the trafficking and smuggling “business” is considered to be worth 10-15 billion US

¹⁶ See for example, “U.S. Farmers Are Forced to Rely on Illegal Labor”, in *International Herald Tribune*, October 4, 2000.

¹⁷ *International Herald Tribune*, March, 2000.

¹⁸ Abella, M.I., "Mondialisation, marchés du travail et mobilité", in *Migrations et avenir*, CIEMI, Paris, Vol. 14, No. 79, January-February 2002.

dollars¹⁹, second only to drugs and arms smuggling. As noted by the ILO Global Report on Forced Labour: ‘The recent rise in labour trafficking may basically be attributed to imbalances between labour supply and the availability of legal work in a place where the jobseeker is legally entitled to reside.’²⁰

Ultimately, labour trafficking would have far less reason to take place if jobseekers had more freedom of geographical movement and freedom of access to employment. Smuggling occurs because borders have become barriers between jobseekers and job offers. Trafficking occurs not only when borders are barriers to labour supplies meeting demands, but when no knowledge is available about proper migration channels, when employment is itself illegal and/or underground, and where conditions of work much worse than legal minimums are tolerated or ignored.²¹

2. Discrimination and xenophobia

Worldwide, today almost every nation is a country of origin, of transit, of destination; many are all three. Virtually every country has become or is fast becoming multi-cultural, multi-ethnic, multi-racial, multi-lingual and multi-religious.

At the same time, virtually every country is experiencing increasing manifestations of hostility and violence against non-nationals – migrants, refugees, immigrants, even sometimes students and tourists. In Africa, Asia, Latin America, and the Middle East, discrimination and abuse is rampant against persons coming from neighbouring countries with shared racial, ethnic, cultural and historical characteristics.

While racism generally implies distinction based on difference in physical characteristics, such as skin coloration, hair type, facial features, etc, xenophobia describes attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity.’²²

Recognizing the importance of discrimination issues at work, the ILO launched a project “Combating discrimination against (im)migrant and ethnic minority workers in the world of work” in 1991 to document levels of discrimination and to identify remedies. Project research covered a number of countries in Europe and North America. Detailed country studies in Belgium, Germany, the Netherlands and Spain found net discrimination rates to be as high as 37 percent, that is to say that more than one in every three applications by minorities of immigrant backgrounds were rejected or not given consideration while

¹⁹ Widgren, J., "Le trafic d'hommes, un marché lucratif", in *Courrier International*, No. 505, July 2000.

²⁰ ILO, ‘Stopping Forced Labour’, Global Report, Report I (B), Geneva, 2001, at 53.

²¹ ILO, “Stopping Forced Labour”, *op. cit.*.

²² *Declaration on Racism, Discrimination, Xenophobia and Related Intolerance against Migrants and Trafficked Persons*. Asia-Pacific NGO Meeting for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Teheran (Iran), 18 February 2001.

identically qualified nationals were considered.²³ Similar findings were made in Canada, the United Kingdom, the USA and other countries. While similarly detailed studies have not been conducted in countries in other regions, anecdotal evidence suggests high rates of discrimination against legal migrant workers in countries in Africa, Asia and in a number of Latin American countries as well.

Discrimination outside the workplace affects, conditions, and even prevents outright access to work and to decent working conditions for target groups. Systemic discrimination may be manifested by differential access to housing – such as relegating minorities to ghettos, or distant suburbs; by provision of inferior education through under-funding and understaffing schools in minority neighbourhoods; areas or regions, provision of inferior health facilities; by lack of public transportation between minority/target group living areas and places of available employment; and so on. These forms of discrimination have significant impacts on access to employment. “In this sense, the racialization of areas can operate as a form of structural discrimination that perpetuates exclusion and disadvantage for ethnic minority groups.”²⁴

The intersection between race, ethnicity and nationality begs elaboration. On the one hand, popular perceptions in a considerable number of countries associate racial and ethnic identities differing from the ‘national norm’ with presumed foreign status. Non-whites remain perceived as ‘foreigners’ in many European countries. On the other hand, perceived convergences between race and nationality led to huge policy contention in the USA, to the extent that the AFL-CIO reversed last year its support for ‘employer sanctions’ enacted in 1986. Legal sanctions against employers who hired unauthorized foreign workers were found to have resulted in widespread discrimination in hiring against citizen and authorized resident blacks, Hispanics, Asians, and other non-white workers. Employers usually cited difficulties in verifying work-authorizing documentation presented by applicants as reason for excluding some or all minority candidates from consideration. However, civil rights and labour advocates widely raised concerns that concerns over sanctions provided a convenient cover for employers disposed to discriminate. The extensive patterns and practices of discriminatory treatment were sufficient for the US labour movement – and mainstream civil rights organizations – to reverse policy to now explicitly oppose employer sanctions.

An especially frightening aspect is a surge in official and public associations of migrants and migration with criminality. These include frequent news reports that attribute both particular incidences and rising general crime rates to foreigners or immigrants, putting immigration control in the same category as crime, arms and drug control, and the generalized use of the terminology of *illegal migrant* or *illegal alien*. Legally and semantically, the term *illegal migrant* is an oxymoron – a contradiction – by any reading of human rights values. It contradicts the spirit, if not directly violates the letter, of the

²³ Zegers de Beijl, R. (ed.), “Documenting discrimination against migrant workers in the labour market”, ILO, Geneva, 2000.

²⁴ Wrench, J. and Modood, T. “The Effectiveness of Employment Equality Policies in Relation to Immigrant and Ethnic Minorities in the UK”, International Migration Paper No. 38, ILO, Geneva, 2001, pages 37-39.

Universal Declaration of Human Rights, which clearly establishes in Article Six that *every person* has the right to recognition before the law, and in Article 7, that every person has the right to due process.

It is now commonly said that xenophobia and racism against migrants are caused by immigration, or sometimes more specifically, by irregular “illegal” migration. By extension of demagogic logic, the victims are the cause, and by removing or stopping these causes, the problem can be resolved. Draconian measures, and violence against foreigners, can only be encouraged by the combination of language of illegality, the terminology of combating illegal migration – as if it were an enemy in military confrontation – and the banal association of irregular migration with crime, arms, drug trafficking and terrorism.

2.1. Gender and migration

A word on the gender dimensions of discrimination against migrants is more than warranted. Differential opportunities for legitimate employment affect men and women differently. Demand for migrant workers from receiving countries is very much defined by the labour market segmentation in these countries, i.e., opportunities are available for precisely these low-skilled jobs considered suitable for women.

The feminisation of international labour migration, together with the fact that most job opportunities for women migrants are in unregulated sectors (domestic work, sex industry) and the existence of sex-disaggregated labour markets contribute to the increase of discriminative labour markets in countries of destination. In addition, women have less access to information on migration/job opportunities, recruitment channels, and often have less preparation than men to cope with the working and living conditions in the countries of destination.

Further to this, restrictions on entry, admission and work affect men and women migrants differently. For instance most legal channels of migration offer opportunities in typically male-dominated sectors (construction and agricultural work). As a result women typically lack even more access to legal labour migration channels compared to men. This situation seems to marginalize female migrants even further and exposes them to worst forms of abuse. Gender-selective migration policies and regulations for admission and entry often reproduce and intensify existing social, economic and cultural inequalities between male and female migrants; e.g. the right to entry does not necessarily mean the right to work for women in certain Western European countries.

3. The importance of standards

It is increasingly evident that migration policy and practice can only be viable and effective when it is based on a firm foundation of legal norms, and thus operates under the rule of law.

Policy responses to labour migration must address that victims of exploitative or forced labour conditions, as well as of trafficking, usually comprise persons in situations in which they have no choice or perceive having no choice but to submit to that labour exploitation. Deception and exploitation constituting trafficking of migrant agricultural workers, domestic workers, sweatshop workers, and particularly those in the informal sector, has been detected on many continents²⁵. Growth in many countries of a visible but legally restricted “sex industry” has expanded a major area of demand for foreign ‘workers’ not subject to any inspection or regulatory control, and thus more highly exploitable.

A major incentive for exploitation of migrants and ultimately forced labour is the lack of application and enforcement of labour standards in countries of destination as well as origin. These include respect for minimum working conditions and consent to working conditions. Tolerance of restrictions on freedom of movement, long working hours, poor or non-existent health and safety protections, non-payment of wages, substandard housing, etc. all contribute to expanding a market for trafficked migrants who have no choice but to labour in conditions simply intolerable and unacceptable for legal employment. Worse still is the absence of worksite monitoring, particularly in such already marginal sectors as agriculture, domestic service, sex-work, which would contribute to identifying whether workers may be in situations of forced or compulsory labour.

Research in Europe and elsewhere has highlighted that investor interest in higher capital returns from informal activity not subject to employment standards or regulation has encouraged shifts of capital and employment creation towards informal sector activity, where employment itself is clandestine or ‘illegal,’ and largely invisible or practically unreachable by current labour standards inspection and enforcement. Irregular migrants are preferred employees due to their vulnerability and their inability to protest, denounce or call in regulatory inspection.

3.1. Fundamental rights at work

The ILO has emphasized ²⁶ the need to mobilize the entirety of its standard-setting, technical cooperation and research resources in all its areas of competence, to give particular attention to persons with special social needs, particularly migrant workers, among other groups at risk.

Following principles and rights articulated in its Constitution and in the Declaration of Philadelphia, the Governing Body achieved the *ILO Declaration on Fundamental Principles and Rights at Work* in 1998. This Declaration, approved by tripartite delegations from all 176 member countries of ILO, established that all Member States, even if they have not ratified the fundamental Conventions, have an obligation arising from the very factor of membership in the Organization to respect, to promote and to

²⁵ ILO, “Stopping Forced Labour”, *op. cit.*

²⁶ *ILO Declaration on Fundamental Principles and Rights at Work*, ILO, Geneva, 1998.

realize the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- a) freedom of association and the effective recognition of the right to collective bargaining;
- b) the elimination of all forms of forced or compulsory labour;
- c) the effective abolition of child labour; and
- d) the elimination of discrimination in respect of employment and occupation.

These principles are incorporated in the eight fundamental Conventions of the ILO²⁷. These Conventions, and the Recommendations which accompany them, are applicable to all workers, without distinction of nationality, and in many cases regardless of migration status.

A recent decision of the supervisory Committee on Freedom of Association of the ILO held²⁸ that Article 2 of Convention No. 87 recognizes the right of workers, without distinction whatsoever, to establish and join organizations of their own choosing without previous authorization.²⁹ The Committee invited the Governing Body to request the Government, as concerns the legislation in cause, to take into account the terms of Article 2 of Convention No. 87 according to which workers, without distinction whatsoever, have the right to join organizations of their own choosing.

3.2. The international labour standards on migrant workers

The ILO also elaborated the two international standards currently in force, which specifically cover migrant workers. The Migration for Employment Convention, 1949 (No. 97) provides the foundations for equal treatment between nationals and regular migrants in areas such as recruitment procedures, living and working conditions, access to justice, tax and social security regulations. It sets out details for contract conditions, the participation of migrants in job training or promotion and deals with provisions for family reunification and appeals against unjustified termination of employment or expulsion, and other measures to regulate the entire migration process. 42 States have ratified this instrument.

²⁷ Conventions on Forced Labour, 1930 (No. 29) and on Abolition of Forced Labour, 1957 (No. 105), on the Elimination of Discrimination (employment and occupation), 1958 (No.111); on Equal Remuneration, 1951 (No. 100) and Discrimination (Employment and Occupation), 1958 (No. 111); on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87) and on the Right to Organise and Collective Bargaining, 1949 (No. 98); and on Minimum Age, 1973 (No. 138) and on the Worst Forms of Child Labour, 1999 (No. 182).

²⁸ Case No. 2121, Complaint presented by the General Union of Workers of Spain (UGT) against the Government of Spain for denial of the right to organize and strike, freedom of assembly and association, the right to demonstrate and collective bargaining rights to "irregular" foreign workers.

²⁹ The only permissible exception to Convention No. 87 is that set out in Article 9 concerning the armed forces and the police.

The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) was adopted at a time when concern about irregular migration was growing. Its two main objectives are: 1) to regulate migration flows, eliminate clandestine migration and combat trafficking and smuggling activities; and 2) facilitate integration of migrants in host societies.

Neither of these two ILO migrant workers instruments operates on the basis of reciprocity. Thus, a worker citizen of a country which has not ratified these Conventions can invoke their application in a State which has ratified. While these Conventions are binding on ratifying States, the Recommendations that accompany each of these Conventions are not legally binding and thus not subject to ratification.

ILO Convention No. 143 provides specific guidance regarding treatment of irregular migration. Part I contains minimum norms of protection applicable to migrants in irregular situation, or who were employed illegally, including in situations where their status cannot be regularized. This principle is expressed in Article 1, where it establishes the obligation of ratifying States to “respect the basic human rights of all migrant workers,” independent of their migratory status or legal situation in the host State. At the same time, the rights of migrant workers in regular status that are detailed in Part II of this instrument are not applicable to migrants in irregular situations.

The Convention does not specify the basic human rights of all migrant workers. Nonetheless, the Committee of Experts on the Application of Conventions and Recommendations (the ILO treaty supervisory body) has interpreted this norm to refer to the fundamental human rights contained in United Nations human rights instruments, particularly those that comprise the International Bill of Human Rights and the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as well as those rights articulated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

a) Rights derived from past employment

Article 9, paragraph 1 of Convention 143 establishes that a migrant worker in irregular situation shall enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits. The objective of this norm is to guarantee for migrant workers in irregular situation the labour rights established by their having been employed.

The migrant worker employed illegally does have an equality of treatment with regular migrant workers in terms of labour rights. However, the Convention does not establish equality of treatment with nationals in this regard. The fact that migrants in irregular situation do not have a work permit should not impede their receiving remuneration for work they have performed. Nonetheless, the Committee of Experts has indicated that the intent of the Convention is not to address issues that cannot be easily monitored in irregular situations, such as right to prior notice of dismissal.

This norm may be considered in connection with the dispositions of accompanying Recommendation No. 151, according to which “a migrant worker who leaves the country of employment should be entitled, irrespective of his stay therein to any outstanding remuneration for work performed, including severance payments normally due; to benefits which may be due in respect of any employment injury suffered; and in accordance with national practice to compensation in lieu of any holiday entitlement acquired but not used and to reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements.”

Therefore, the migrant worker has rights to remuneration for work performed, including any normally paid indemnities upon termination of contract, and whatever unused annual vacation benefits may be payable according to national practice, regardless of whether status was legal or not. However, given that ILO Recommendations are not binding on States, these rights should be determined in accord with national legislation and the principle of equality of treatment regarding labour rights.

This Convention also addresses social security benefits, but only those deriving directly from past employment. Nonetheless, the dispositions cover access to rights or benefits accrued during periods of employment whether legally authorized or not.

b) Access to due process

Article 9, 2) stipulates that “the worker shall have the possibility of presenting his case to a competent body, either himself or through a representative.” The objective of this norm is to guarantee to migrant workers their right to reclaim before administrative or judicial authority any non-respect in previous employment of remuneration or social security, either by conciliation or contention.

However, the migrant may encounter difficulties in the host country when reclaiming respect for rights, particularly in access to due process. In effect, in addition to the difficulties inherent in being a foreigner, such as language, knowledge of procedures and social codes, irregular status would be the most important barrier to access juridical institutions, due especially to fear of detection and expulsion. Moreover, the protection of fundamental rights of migrant workers in an irregular situation is illusory if there is no precise definition of the basic human rights of all migrant workers and if difficulties bar their access to appeal procedures.

The possibility of representation should assure that migrants who have been expelled can still exercise their rights even if no longer present in the country concerned. In effect, “once a migrant worker in an irregular situation has been seized by the law enforcement bodies, he or she is often immediately taken to the border without having had the possibility of recovering personal belongings, requesting the payment of wages or lodging an appeal with the judiciary bodies in the country of employment.”³⁰

³⁰ ILO, “Migrant Workers”, *op. cit.*, p. 112.

3.3. A set of international standards

The two ILO conventions on labour migration provide a basic framework for national legislation and practice on managing labour migration. The 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which is expected to enter into force imminently, is based on concepts and language drawn from the two ILO Conventions. It extends considerably the legal framework for migration, treatment of migrants, and prevention of exploitation and irregular migration.

For the record, ILO experts participated actively in the drafting of the 1990 UN Convention. The content of ILO Conventions 97 and 143 formed the basis for drafting the UN Convention, which expanded and extended recognition of economic, social, cultural and civil rights of migrant workers rights. ILO participates in the "global campaign" effort launched in 1998 to promote wider ratification, led by a Steering Committee that includes IOM, the Office of the UN High Commissioner for Human Rights, UNESCO and several international trade union, church, migrant and human rights NGOs³¹. Since this campaign was initiated, ratifications and signatures have tripled.

These three Conventions together provide a comprehensive “values-based” definition and legal basis for national policy and practice regarding non-national migrant workers and their family members. They thus serve as tools to encourage States to establish or improve national legislation in harmony with international standards. They are not simply human rights instruments. Numerous provisions in each add up to a comprehensive agenda for national policy and for consultation and cooperation among States on labour migration policy formulation, exchange of information, providing information to migrants, orderly return and reintegration, etc. Section 5 of the International Convention provides in eight articles a very substantial agenda for international inter-State consultation and cooperation on managing international migration.

A total of 69 different States have now ratified and/or signed one or more of these three complementary standards³².

³¹ See Global Campaign website at: www.migrantsrights.org.

³² The ILO Migration for Employment Convention No. 97 of 1949, ratified by 42 countries, the ILO Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975, ratified by 18 countries; and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ratified by 19 countries and signed by 12 others. Texts and related information available respectively on the ILO website, at www.ilo.org/ilolex, and on that of the Office of the UN High Commissioner for Human Rights, www.unhchr.ch.

4. Comprehensive policy responses required

Migration today is about work and it is being acknowledged as a major concern for employers, workers and labour ministries. Addressing migration means promoting employment and social protection; it especially requires anti-discrimination and integration initiatives.

Solidarity with migrant workers is fundamental; exclusion and disassociation from foreign workers simply facilitates situations in which migrants are exploited to the detriment of upholding decent work condition.

Assuring decent treatment for migrant workers, and resolving tensions between sometimes differing immediate interests of national and foreign workers cannot be obtained by piecemeal measures or isolated advocacy and actions here or there. The numerous and complex aspects require elaborating a comprehensive approach.

Just as international refugee standards have become a universal guide for national policy and practice, the complementary existing international instruments for migration serve as coherent global guidance for both national and international migration policies.

Furthermore, several international conferences have put together comprehensive policy frameworks incorporating all of the necessary elements. Already in 1994, Chapter X of the Program of Action of the International Conference on Population and Development held in Cairo detailed agreement achieved among some 170 governments on a comprehensive approach to international migration, both for national policy and inter-governmental cooperation.

Most recently, the Declaration and Program of Action adopted at the World Conference Against Racism and Xenophobia (WCAR) in Durban in 2001 included 40 paragraphs on treatment of migrant workers, refugees and other non-nationals. Taken together, these paragraphs constitute a comprehensive and viable program of action to combat xenophobia and discrimination against migrants. International organization³³, trade union³⁴ and NGO delegates³⁵ from all regions to WCAR preparatory meetings and the conference itself contributed much to this achievement. The text reaffirms ILO Conventions 97 and 143 and the 1990 International Convention on migrant workers rights as basic standards. It “urges States to take concrete measures that would eliminate racism, racial discrimination, xenophobia and related intolerance in the workplace against all workers, including migrants and ensure the full equality of all before the law,

³³ ILO, the OHCHR and IOM jointly produced a working paper for the Conference, entitled *Racism, Discrimination and Xenophobia and International Migration*, which summarized relevant experience and policy recommendations.

³⁴ The ICFTU facilitated and coordinated much of the worker input to this process. See the ICFTU Report on WCAR.

³⁵ See “Proposed Elements for a Program of Action Against Xenophobia” at www.migrantwatch.org/WCAR

including labour law.” Many specific measures and recommendations coincide with and reflect ILO norms and experience and that of social partners in combating discrimination, such as regarding fair wages and remuneration, gender dimensions, access to social services, economic opportunities, protection of workers’ rights, adoption of national legislation, etc.

4.1. What’s needed

The existing international norms, policy recommendations agreed to by representatives of nearly all governments of the world, and the 80 years’ experience of ILO and its tripartite constituents provide a very solid policy framework. We identify five core elements for viable, comprehensive and sustainable national policy.

- 1) *An informed and transparent labour migration admissions system* designed to respond to measured, legitimate labour needs, taking into account domestic concerns as well. Such a system must be based in labour ministries and rely on regular labour market assessments conducted in consultation with social partners to identify and respond to current and emerging needs for workers, high and low skilled. ILO research underlines this as a fundamental starting point: legal labour migration channels contribute to reducing exploitation, trafficking and smuggling of migrants³⁶.
- 2) *A standards-based approach to “migration management”*, protecting basic rights of all migrants and combating exploitation and trafficking. The point of establishing legal rights and policy standards is to ensure social legitimacy and accountability, which can only be ensured by a foundation in the rule of law. Social legitimacy –and public cooperation—for law enforcement and crime suppression is not established by force. As the contrasting experience of dictatorships and democracies demonstrate, the legitimacy of law enforcement and of the State itself comes of its association with justice, human dignity and democratic values.
- 3) *Enforcement of minimum national employment conditions standards in all sectors of activity*, to serve as a complementary system of criminalizing abuse of workers and of discouraging irregular employment. Enactment of national minimum standards for protection of workers, national and migrant, in employment, is required where these do not exist. ILO Conventions on occupational safety and health, against forced labour, and on discrimination provide minimum international norms for national legislation. A necessary complement is monitoring and inspection including in agriculture, domestic work, sex industry and other sectors subject to ‘irregular’ employment, to identify and prevent exploitation of children and to detect and stop forced labour, as well as to uphold minimal decent work conditions.

³⁶ ILO; Mekong Sub-Regional Project to Combat Trafficking in Children and Women, *Legal Labour Migration and Labour Markets: Alternatives to Substitute for Trafficking in Children and Women*, p.1.

- 4) *A Plan of Action against discrimination and xenophobia* to sustain social cohesion. Main elements, identified in the Durban program of action,³⁷ include:
- Adoption in national law of relevant standards to protect rights of non-nationals.
 - Make racist and xenophobic discrimination, behaviour and action unacceptable and illegal.
 - Elaborate administrative measures and procedures to ensure full implementation of legislation, and accountability of all government officials.
 - Establish independent national human rights/anti-discrimination monitoring bodies with power to (i) monitor and enforce legislation; and (ii) receive and act upon individual complaints.
 - Promote respect for diversity and multicultural interaction.
 - Encourage communications media to emphasize positive images of diversity and of migration
 - Incorporate multi-cultural and diversity training in educational curricula.
 - Mobilize civil society cooperation.
- 5) *Institutional mechanisms for consultation and coordination with social partners in policy elaboration and practical implementation*, to ensure coordination within governments and consultation with social partners and concerned civil society bodies on all main areas of policy concern. It is as much the partnership as the foundation that will ensure workable policy. Labour migration policy must be elaborated and implemented in full consultation with the social partners, namely the workers organizations and employer associations concerned. ILO experience shows that policy will only be viable, credible and sustainable if it takes into account the concerns and interests of employers and workers.

Consultation should address supervision of recruitment, administration of admissions, public education and awareness raising, training of public service and law enforcement officials, recognition of educational equivalencies, provision of social and health services, rights restoration and recovery for victims of trafficking, and other aspects of managing labour migration.

These five themes are the most essential lines. However, fully addressing the dynamics of labour migration today also requires:

- Policies for labour mobility – freedom for labour to move – in regional integration areas.
- Changing terms of aid, trade and international relations to facilitate development in more equal terms.
- Creation of specialized institutions for policy coordination, enforcement and monitoring
- Encouraging voluntary return and reintegration of migrants into their countries of origin.

³⁷ See “List of paragraphs in the Durban Declaration and Programme of Action which include provisions relating to migrants and refugees”, OHCHR.

- Combating trafficking and exploitation of migrants by organized crime.
- Elaboration of gender sensitive policies and implementation focusing on ensuring both equal treatment and equal outcomes.

4.2. Cobbling policy lacunae

In the last few years, controlling or managing migration has become an expressed priority for many governments. Intergovernmental dialogue processes towards policy coordination have been established in virtually all regions. New legislation affecting labour migration has been established or proposed in dozens of countries worldwide.

However, some recent national and regional policy initiatives on migration management in the Americas, in the Caribbean, in Europe, in North Africa and elsewhere make no reference to the application of international norms, neither those addressing migrant workers nor *decent work* standards.

In a considerable number of countries, migration management responsibilities have been shifted from labour ministries to interior or home affairs ministries, thus transforming contexts for policy elaboration and implementation from that of labour market regulation to that of policing and national security. To the vast extent that migration is about work, ministries of labour/employment must retain a central role in administration of migrant worker policies, because labour migration inevitably has direct implications on labour market regulation, conditions of work and other fundamental areas of their competence.

Reference to social dialogue – consultation with social partners – is regrettably absent in many migration policy initiatives. The ultimate consequences are very serious. To the extent that an increasingly large and important sector of the working class is managed outside normative protections, outside social dialogue and outside labour market institutions, it contributes to accelerated deregulation of labour markets as well as to deterioration of labour-employer-State relations overall.

The predominance given to migration control is both root and reflection of fundamental impediments to rationally and effectively addressing international migration. Migration, regular and irregular, has, does and will continue as inexorably as the economic forces at work in a globalized economy. The international community – sometimes reluctantly – acknowledges the need to manage and regulate movements of capital, goods, technology, services, information, etc., whether through formal means or “market mechanisms.” It is manifestly contradictory when this logic is denied application to migration.

Promoting an agenda of migration control may be a useful vehicle to capture political attention and budgetary resources. However, when pursued to the detriment of other considerations, that focus inevitably subordinates fundamental humanitarian and human rights considerations as well as economic and developmental factors to secondary roles.

Certain controls are part of migration regimes, but cannot be either the sole or primary determinants. To be effective and viable, migration policies must be built on long term

economic, social and development considerations, in a context of respect for international human rights norms.

4.3. The role of ILO

The International Labour Organization was established in 1919 to elaborate, promote and monitor implementation of international standards regarding treatment of labour; to provide orientation and technical assistance to its tripartite constituents; and to address contemporary issues affecting workers, employers and governments worldwide. ILO is a specialized agency of the United Nations system; it is unique in having civil society participation in its governance through its tri-partite structure in which representatives of national employer and worker organizations participate alongside representatives of government.

ILO has addressed the treatment of migrant workers since its inception 80 years ago. It has elaborated standards and measures to uphold migrants' basic rights and dignity and to protect them from all types of discrimination in employment. ILO's fundamental activity extends far beyond standard setting and monitoring, to include research and documentation, technical advice, identifying options, etc. in the interests of supporting its constituents to implement effective policies and practices in accordance with agreed international standards.³⁸

4.4. Social partners and civil society engagement

The trade union movement in a number of countries has made enormous strides in recent years. Major policy shifts followed by extensive organizing drives among migrant workers have taken place in recent years by mainstream trade unions and national confederations in the Americas, Asia and Europe. National confederations in Argentina, Belgium, Canada, France, Germany, Ireland, Italy, Korea, Portugal, Spain, the UK and the USA – among others – have full-time national staff for migrant worker organizing and anti-discrimination issues; all are active in policy advocacy for improved protection of rights and decent work conditions for migrants. For example, the Korean Congress of Trade Unions (KCTU) cosponsors with church and other organizations the Joint Committee for Migrants in Korea. To better assist, support and combat discrimination against migrant workers of diverse nationalities in Korea, KCTU organized a division of work among its constituent trade unions where each one assists in translating materials and providing services for a specific language/nationality of migrants.

Much of the concrete attention to migrants, including protection of their rights and dignity, is given by the day-to-day work of local, national and regional civil society organizations. The only international survey of NGO activity in migration to date was conducted under the auspices of the UN Commission on Population and Development in 1997. This survey sought to identify the roles and activities of NGOs in implementing the recommendations on international migration adopted as Chapter X of the Program of

³⁸ See ILO International Migration Programme website: www.ilo.org/migrant.

Action of the International Conference on Population and Development held in Cairo in 1994.³⁹ More than 100 NGOs in all regions of the world responded to an extensive questionnaire. The results demonstrated that NGOs in most countries of the world provide direct services to migrants, some complementing their service activities with public education and policy advocacy with local and national government.

NGOs working in the field of international migration...provide a place for information, dialogue and cooperation between migrants (documented, undocumented and refugees), citizens, employers and government agencies in countries of origin and destination.⁴⁰

The survey documented extensive activity in information services and orientation seminars to migrants in countries of origin; assistance in return and reintegration; assistance in housing, employment, healthcare, education, legal services, skills retraining, recognition of qualifications, etc; social, vocational and psychological counselling; addressing specific problems related to trafficking and sexual exploitation of migrants; facilitating dialogue, mediation and good relations between migrants and host country nationals; combating racism and xenophobia; research on root causes of migration; public education activities, promotion of international standards and national legislation and policy; and cooperation with international agencies.

4.5. Achieving migrants rights

The rule of law and respect for universal notions of human rights are essential foundation for democracy and social peace. The fundamental premise of this paper is that labour migration must be governed by a legislative framework based on the international norms regarding migrant workers and decent work.

ILO calls on all States that haven't done so to adopt and ratify ILO Conventions Nos. 97 and 143, the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Palermo Protocols against on Smuggling of Migrants and Trafficking in Persons, that together constitute an "*International Charter of Migration*".

Adherence to basic international human rights standards, elaboration of anti-discrimination legislation and implementation of appropriate practices are shared responsibilities among government, social partners, civil society and migrants themselves. Community and political leaders, diplomats, parliamentarians, business, trade union, religious, and civil society leaders as well as by sports, arts and cultural personalities must speak out and act to promote respect for diversity and condemn xenophobic attitudes and actions.

³⁹ UN Commission on Population and Development: *Activities of intergovernmental and non-governmental organizations in the area of international migration; Report of the Secretary General*. New York, 1997. UN document E/CN.9/1997/5.

⁴⁰ *Ibid.*

International institutions can do more to support, facilitate and resource coherent migration policy by emphasizing a standards-based approach, by expanding inter-agency coordination, and by ensuring consultation and cooperation with social partners and civil society.

The ILO is prepared to do its part. In addition to assisting States in ratification and implementation of relevant standards, it offers advisory services, through technical co-operation programs, to governments, intergovernmental agencies, non-governmental organizations and others on issues related to the treatment of migrant and minority workers. As an example of concrete activity, ILO is identifying and publishing an evolving listing of “good practice” examples of anti-discrimination measures developed by governments, employers, trade unions and NGOs to make them accessible as models and references for wider implementation.

Recent progress is encouraging, but the challenge is huge. Only active engagement by governments as well as social partners and civil society will assure long term viability, credibility and sustainability to national and international measures to protect and assure decent working conditions for foreign and national workers alike.

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PERSPECTIVES ON LABOUR MIGRATION
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