International Labour Standards: Rights of Non-nationals

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This information note summarizes the applicability of International Labour Standards and jurisprudence to the protection of migrant workers and the elaboration of national legislation and policy on migration. It outlines general notions regarding their relevance, describes main features of relevant instruments and mechanisms, describes challenges to making this applicability more effective in the arena of human rights and policy debate, and poses several responses to address these challenges.

The ILO concurs with the general observation that a sufficient normative basis for governance of migration and protection of non-nationals already exists in international law. The challenge is one of implementation, not elaboration.

I. The Context of Applicability

Both the ILO and the United Nations are standard-setting organizations, with the ILO concentrating on the field of labour and economic life. In general terms, the United Nations adopts standards of general application laying down broad principles; the ILO deals with the subjects within its mandate in greater detail. While neither organization usually follows the lead of the other, their respective member States are almost identical and similar concerns tend to be raised in both organizations at much the same time. On occasion, the ILO has adopted standards or supervisory procedures at the direct request of the General Assembly of the United Nations. Representatives of each participate in the standard-setting process of the other, to ensure both continuity and mutual reinforcement.

ILO Conventions have equivalent status to other United Nations instruments in providing the normative basis for elaborating national legislation. While there is some specificity to labour law application and enforcement in some countries, most laws incorporating International Labour Standards are national laws enacted by national legislative or parliamentary bodies and enforced through national judicial systems as well as specialized mechanisms. Worthy of note is that discrimination in employment is a topic central to the agendas of many national human rights monitoring bodies.

The Fundamental Principles and Rights at Work are a core component of the international system and practice of Human Rights and the Rule of Law. Certain articles of the Universal Declaration on Human Rights address labour matters, in particular Articles 4 (prohibition of slavery or servitude), 23 (right to work, to freedom from discrimination at work, to just and favourable remuneration and to trade unions) and 24 (right to rest and leisure).

Most rights at work established in international legal instruments derive directly and often explicitly from the principles codified in the Universal Declaration of Human Rights.

II. Basic International Norms regarding migrant workers

Three fundamental notions characterize the protections in international law for migrant workers and members of their families.

1. Equality of treatment between regular migrant/immigrant workers and nationals in the realm of employment and work.

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2. Core universal human rights apply to all migrants, regardless of status. This was established implicitly and unrestrictedly in ILO Convention 143 of 1975 and later delineated explicitly in the 1990 Convention.

3. The broad array of international standards providing protection in treatment and conditions at work —safety, health, maximum hours, minimum remuneration, non-discrimination, freedom of association, maternity, etc.—apply to all workers. This notion was most recently upheld in the recent Opinion issued by the Inter-American Court.

A review of the ILO treaty body, the Committee of Experts found that issues of treatment of non-nationals under ILS have been addressed frequently, consistently and often emphatically over the last several decades. Most International Labour Standards have been cited, reported on, addressed in complaints and/or in requests to governments for information or explanations, and in decisions and recommendations by this body regarding non-nationals. In fact, application of several international instruments has been raised literally hundreds of times!

Three Core Standards

Three complementary and sequential international standards provide the core definitions of rights of nonnationals. These are the ILO Migration for Employment Convention, 1949 (No. 97), the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

ILO Convention 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 offers provision for appeals against unjustified termination of employment or expulsion, and other measures to regulate the entire migration process. 42 States have ratified this instrument.

The two main objectives of ILO Convention 143 are to regulate migration flows, eliminate clandestine migration and combat trafficking and smuggling activities; and to facilitate integration of migrants in host societies. This instrument 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. The main 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. The Convention deliberately did not limit interpretation of which were applicable universal rights by delineating them. The Committee of Experts on the Application of Conventions and Recommendations (the ILO treaty supervisory body) has interpreted these to be the fundamental human rights contained in United Nations human rights instruments, particularly those that comprise the International Bill of Human Rights and the, as well as those rights articulated in the 1990 International Convention on rights of migrant workers and the 1998 ILO Declaration on Fundamental Principles and Rights at Work.2

The 1990 International Convention extended the legal framework for migration, treatment of migrants, and prevention of exploitation and irregular migration. 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 NGOs. Since this campaign was initiated, ratifications and signatures have quadrupled.

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.

In the context of current international discussions towards formulating common approaches to “managing international migration”, ILO notes that the content of these instruments is broader than defining applicable human rights. 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. In particular, Section 5 of the International Convention provides in eight articles defines a very substantial agenda for international inter-State consultation and cooperation on international migration.

A total of 78 different States have now ratified one or more of these three complementary standards. The ILO Migration for Employment Convention No. 97 of 1949, is ratified by 45 countries, the ILO Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975 is ratified by 22 countries; and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ratified by 37 countries and signed by 14 others. A number of countries have ratified two or all three of these instruments.

**Application of Labour Standards**

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.

The ILO has emphasized\(^5\) 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, including migrant workers.

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

4 Texts and related information available respectively on the ILO website, at www.il.org/ilolex, and on that of the Office of the UN High Commissioner for Human Rights, www.unhchr.ch.

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 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 ILO. 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.

While the full application of fundamental principles of equality at work and access to employment for non-nationals remain contested in numerous national contexts, there is general recognition that freedom from forced labour and elimination of child labour are applicable universally without distinction of national/non-national.

Application of the fundamental principles is being strengthened by recent international jurisprudence. A recent decision of the supervisory Committee on Freedom of Association of the ILO held 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. The Committee invited the Governing Body to request the Government 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.

The Inter-American Court of Human Rights issued a sweeping opinion on 17 September 2003 that clearly reinforces the application of international labour standards to non-national workers, particularly those in irregular status.

The Court found that non-discrimination and the right to equality are jus cogens applicable to all residents regardless of immigration status. Non-discrimination and the right to equality, the Court said, dictate that States cannot use immigration status to restrict the employment or labor rights of unauthorized workers, giving unauthorized workers inter alia equal rights to social security (see paragraph 157). The Court acknowledged that governments have the right (within the bounds of other

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6 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).

7 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.

8 Corte Interamericana de Derechos Humanos. Condición Jurídica y Derechos de los Migrantes Indocumentados Opinion Consultativa OC-18/03 de 17 de Septiembre de 2003, solicitada por los Estados Unidos de Mexico.
applicable human rights norms) to deport individuals and to refuse to offer jobs to people without employment documents. However, the Court said, once the employment relationship is initiated, unauthorized workers become rights holders entitled to the full panoply of labor and employment rights available to authorized workers.\footnote{As reported by Beth Lyons, (USA) National Employment Law Project, September 28, 2003}

In its conclusions, "The Court decides unanimously, that…

8. The migrant quality of a person cannot constitute justification to deprive him of the enjoyment and exercise of his human rights, among them those of labor character. A migrant, by taking up a work relation, acquires rights by being a worker that must be recognized and guaranteed, independent of his regular or irregular situation in the State of employment. These rights are a consequence of the labor relationship."

Supervision and Enforcement of ILS

A word on the system of enforcement of the International Labour Standards may be useful. The two key elements of regular supervision are the submission of government reports and their examination. Concerning the first, the ILO Constitution requires that governments have to report to the ILO, among other things, on the measures taken to give effect to Conventions they have voluntarily ratified. For certain particularly important Conventions such as those dealing with basic human rights, detailed reports are requested every other year while for other Conventions, reports are normally requested at five-yearly intervals.

The second aspect of examination is carried out each year in the first instance by a Committee of Experts on the Application of Conventions and Recommendations, and subsequently at the annual session of the International Labour Conference, where the report of the Committee of Experts is examined by a special tripartite Conference committee. The Committee of Experts consists of 20 independent persons of the highest standing, with eminent qualifications in the legal or social fields and with an intimate knowledge of labour conditions or administration. Members of the Committee are drawn from all parts of the world and are appointed by the Governing Body of the ILO. The Committee's fundamental principles call for impartiality and objectivity; the members must accomplish their tasks in complete independence as regards all member States. Along with its function in examining governments' reports on the application of ratified Conventions, the Committee of Experts also examines governments' reports on the situation in national law and practice regarding selected \textit{un}ratified Conventions and Recommendations.

There is also a specialized ILO supervisory body, the Committee of Freedom of Association, (referred to above) which examines reports and practice of States regarding the Conventions addressing trade union organizing and collective bargaining rights.

Challenges to effective implementation

In our view, the full and effective application of human and labour rights to non-nationals, particularly in the ‘world of work’, has been impeded by a number of factors. These include:

1. Today, the world of work is a major focus of contention on the applicability and extent of implementation of human and labour rights. Practices of deregulation limit the practical application and enforcement of rights protections at work. Deregulation effectively removes application of legal protections and corresponding enforcement.
2. Informalization of work and the rise of homework make more difficult meaningful inspection and enforcement of labour standards. Research in Europe and elsewhere has highlighted that investor interest in higher capital returns from informal activity not subject to employment regulation has encouraged shifts of capital and employment towards informal sector activity, where employment itself is clandestine or ‘illegal,’ and largely invisible as well as unreachable by labour inspection. Irregular migrants are thus preferred due to their vulnerability and their inability to organize, protest, denounce or call in regulatory inspection.

3. Phenomena associated with globalization have heightened economic competition, increased cost pressures on business, and have resulted in increasing concentration of control over resources and wealth. These features, combined with formal deregulation, exert strong downward pressures on wages and working conditions. In industrialized countries, growth of dual labour markets and demographic trends combine to expand demands for cheap labour that national workers are unavailable for. Ensuring that economic activity remains competitive in global markets requires that this labour supply be cheap and docile.

4. In some 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. Despite the vast extent that migration is about work, this shift separates administration of an increasingly sizable portion of the work force away from the State institutions responsible for labour market regulation and conditions of work.

5. Policy dilemmas in the economic and administrative realm are reinforced in the political discourse and media attention regarding migrants. Banal association of migration with crime, arms, drug trafficking and terrorism has become commonplace, along with discussion of draconian measures to “combat illegal migration”. Social stigmatisation and outright violence is encouraged by the language of illegality and by military terms.

6. Nonetheless, an important obstacle to wider ratification and application of relevant international instruments remains a lack of political will to explicitly recognize basic human and labour rights protections for migrants. Unfortunately, this has coincided with relatively fragmented and limited efforts to provide information about and promote ratification of the relevant normative instruments.

**ILO Support for Governments on migration**

The ILO offered a vital contribution to supporting States to implement effective migration policy based on the rule in the Conclusions and a Plan of Action on migrant workers adopted at the 2004 International Labour Conference in Geneva.\(^{10}\) Those Conclusions outline a comprehensive approach to regulating labour migration from a rights based approach in the context of labour market and employment considerations. Especially significant was their adoption unanimously by ministerial level government representatives and leadership of trade union and employer federations from the 177 ILO member countries. Equally important is that there are a normative system, institutional structure, organizational competence and constituent engagement behind this Plan of Action to see to its effective implementation.

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Following this Plan of Action, ILO subsequently elaborated a comprehensive Multi-lateral policy Framework for Labour Migration from a rights’ based approach that takes into account labour market concerns and sovereignty of States.11

Summarizing this framework and provisions of the complementary ICPD and Berne Initiative outcomes, echoed by the recent Global Commission on International Migration report, I highlight eight main components of the migration policy agenda required to ensure that migration benefits host and home countries and the migrants themselves:

1) **A standards-based foundation for comprehensive national migration policies.**
   As noted above, the three instruments comprising an *international charter on migration* provide the normative framework and specific model legislative language required to establish a basis for national policy. Establishing legal rights and legislative policy standards ensures social legitimacy and accountability, only guaranteed by a policy foundation in the rule of law.

2) **An informed and transparent migration policy and administration**
   Immigration practice must respond to measured, legitimate needs, taking into account domestic labour concerns as well. Such a system must rely on regular *labour market assessments* to identify and respond to current and emerging needs for workers, high and low skilled.

3) **Institutional mechanisms for dialogue, consultation and cooperation**
   Migration policy can only be credible, viable and sustainable to the extent it takes into account the interests, concerns and experience of the most-directly affected stakeholders. Key stakeholders are the social partners: the employers and businesses that provide employment and the trade unions—worker organizations—representing the interests of workers, both migrants and nationals. Labour ministries need to have a key role. Policy-making must also take into account the multiple concerned ministries in government as well as civil society and migrants themselves.

4) **Enforcement of minimum employment conditions norms in all sectors of activity**
   Preventing exploitation of migrants, criminalizing abuse of persons that facilitates trafficking, and discouraging irregular employment requires enforcement of clear national minimum standards for protection of workers, national and migrant, in employment. 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 to prevent exploitation, to detect forced labour, and to ensure minimal *decent work* conditions for all.

5) **Gender sensitive migration measures**
   The feminization of migration and the predominance of abuse of women migrants require recognizing gender equality as integral to the process of policy-making, planning and programme delivery at all levels.

6) **A Plan of Action against discrimination and xenophobia**
   Discrimination and xenophobic hostility against migrants are serious challenges to governance and social cohesion in every region of the world. The 2001 World Conference Against Racism and Xenophobia articulated a viable model national plan of action to combat discrimination and

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xenophobia against migrants at national, regional and global levels, based on common experience from different regions.12

7) **Linking Migration and Development in Policy and Practice**
Migration has long been and continues to generate significant contributions to both development and social progress and welfare in home and host countries alike. However, such contributions will certainly be enhanced by a broad array of policy measures ranging from reducing costs and constraints on transfer of migrant remittances to providing accessible mechanisms for regular migration and recognition of employment contributions of all labour migrants.

8) **International Consultation and Cooperation**
Formalized mechanisms of regular dialogue and cooperation among States-- including participation of concerned stakeholders-- are essential in all regions. Of particular note are expanding legal and operational regimes for freer circulation of labour/persons across regional economic integration initiatives in several world regions, including the Andean Community, Mercosur, and the East Africa Community as well as the European Union.

ILO welcomes the initiative of this workshop and other new efforts to better inform governments about relevant international standards applying to migrants and migration policy.

The ILO stands ready to assist governments with consideration of ratification of its relevant instruments, and with their implementation as important standards for national legislation and policy on migration.

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