



International Labour Office

MIGRANT WORKERS RIGHTS IN EUROPE ISSUES AND CHALLENGES

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I. ISSUES AND CHALLENGES

Migration today, and the contention over protection of the human and labour rights of migrants has become a cutting edge issues of politics, governance, and social cohesion across Europe. It is often headline news, and the subject of almost innumerable news headlines, conferences, and pronouncements by politicians across the partisan spectrum.

Migration and the protection of migrants rights has also become the cutting edge issue of contention between capital and labour. The treatment of migrant workers becomes a central and significant arena of dispute and redefinition between labour and capital in the level of protection and regulation of conditions of employment and work, in the distribution of benefits deriving from economic activity, and in the extent working people –foreign workers in particular-- can organize to articulate and defend their interests.

What makes this an issue of human rights? Certainly, the widespread and visible abuse of migrants, of foreign workers across Europe as well as elsewhere. This is only exacerbated by the global economic and financial crisis that has also become a crisis of employment in many countries.

This report includes:¹

- 1) A brief overview of some important challenges and issues in protection of migrants rights
- 2) Some contextual words on the role and importance of labour migration today
- 3) A summary of relevant international and European normative instruments applying
- 4) An introduction to the policy agenda required to give effect to protection of migrants

¹ This paper draws on the just published book edited by this author: [Economic Migration, Social Cohesion and Development: Towards an Integrated Approach](#). Council of Europe. Strasbourg. 2009. Based on the Thematic Report for the 8th Conference of Ministers Responsible for Migration Affairs (Kiev 4-5 September 2008).

- 5) A review of implementation and lacuna in implementation of relevant norms and policy
- 6) Lines of action to improve the protection of rights and dignity of migrants in Europe

The Europe referred to in this paper corresponds to the membership of the Council of Europe, the 47 countries from Iceland to the Caucasus countries. However, some specific references are made to the European Union with its 27 member States.

This report complements the report covering migrant worker protection issues in Arab countries prepared for this Dialogue by ILO Senior Economist Azfar Khan. As either article may be used separately, there is some overlap in explanation of the existing international normative and policy frameworks.

Challenges

A few recent headlines suggest the more dramatic issues of protection of migrant workers:²

Body count in Moscow for January: 24 migrant workers murdered by racist gangs.

Migrant workers held in slavery like conditions in Italian farms

Would be migrant workers demonstrate in detention centres in Lampedusa (Spain) and Malta.

Health and Safety

Serious abuses represented by absences of health and safety protections are sufficiently widespread that they don't make headlines. For example, occupational accident rates are about twice as high for migrant workers as for native workers in Europe (Braunschweig et al, 2001). Migrant workers generally face increased levels of precariousness and higher risk of adverse health outcomes (ILO, 2003b). Migrant workers tend to be employed in high-risk and hazardous sectors, such as agriculture, mining, construction and informal sector work; sectors where inspection and enforcement of Occupational Safety and Health (OSH) standards are weak or non-existent. Furthermore, language and cultural barriers require specific OSH communication, instructions and training approaches. Thirdly, many of these workers overwork and/or suffer from poor general health and are therefore particularly prone to occupational injuries and work-related diseases. Migrants, particularly those in irregular situations, often accept dangerous working conditions for fear of bringing attention to themselves and losing their jobs or being deported.

Temporary workers, and in particular migrants in an irregular status, are often unable to access social security benefits such as health insurance and employment injury coverage. In addition, they tend to resist seeking medical treatment because of the cost, inability to take time off work, lack of childcare, and problems of transportation. Many are unfamiliar with the local health-care systems and may have linguistic or cultural difficulties in communicating their problems. These problems are compounded for migrants in irregular status and trafficked persons. In a number of

² Examples cited solely for purposes of illustration of situations found throughout Europe

countries, there is also stereotyping of migrant workers as a “threat” to public health and as disease carriers without any solid evidence. This leads to further discrimination.

Other workplace protection issues

A passage from the Resolution and Conclusions on migrant workers of the 2004 International Labour Conference offers a very brief snapshot of the protection issues faced generally by migrant workers, in Europe as elsewhere.

Despite the positive experiences of migrant workers, a significant number face undue hardships and abuse in the form of low wages, poor working conditions, virtual absence of social protection, denial of freedom of association and workers’ rights, discrimination and xenophobia, as well as social exclusion.

Underpayment or non-payment of wages, physical abuse, sexual harassment and violence against women workers, denial and repression of freedom of association and trade union rights are widespread situations.

Many immigrant workers more commonly face atypical employment and problems in gaining entry to the professions or in taking up self-employment and they are barred from most public-service jobs. Employment conditions for immigrants are often less favourable than local people's and they are likelier to be in temporary employment. There are disproportionately large numbers of them in vulnerable employment sectors and in undeclared and unskilled employment. The larger proportion of immigrants in atypical employment – temporary employment, part-time employment and so on – means that those immigrants are more often exposed to discrimination and exploitation. In Spain, for example, almost 56% of immigrants are in temporary work, 25% more than for the indigenous population (OECD, 2007a). Immigrant workers, forced to take atypical jobs that suffer from the flexibility imposed by economic change, are not covered by regulations ensuring adequate protection. They suffer from financial insecurity, are ill-protected and receive no income when they are in between jobs.

In OECD countries (apart from Poland, Hungary and the United States) the unemployment level for immigrants is higher than for the indigenous population. In Austria, Belgium, the Netherlands and Switzerland the proportion of immigrants among the unemployed is twice their proportion in the active population (OECD, 2007a). Immigrants are relatively more liable to suffer long-term unemployment than the indigenous population. In Finland, the Czech Republic, the Netherlands, Norway and Switzerland the gap exceeds 10 percentage points. In Belgium over 17% of immigrants are looking for work, and nearly 60% of these have been doing so for over a year.

Discrimination

Significant and pervasive discrimination against immigrants and persons of immigrant origins in access to employment, housing, and public services has been amply documented across Europe. Migrants also face obstacles to obtaining access to education and training and limited opportunities for taking part in civic life. For many immigrants, the combination of these factors adds up to exclusion that precludes possibilities for integration.

Large scale *situation testing* carried out in nine European countries has shown discriminatory behaviour by employers and labour market gatekeepers against immigrant and immigrant origin applicants to be significant and pervasive. These studies showed that young applicants of migrant

origin had to apply four to five times as many times as persons of national backgrounds with equivalent skills, education and experience in order to obtain positive responses in seeking employment (Cediey, 2007). Results of the most recent study showed results similar to previous testing: in nine out of ten cases the choice between equally qualified candidates was made before the employer had seen either one (Cediey et al, 2007). Somewhat higher discrimination rates were detected in the services sector than in other sectors, and in small and medium-sized enterprises than in bigger ones (Zegers De Beijl, 2000)³. (This testing done under ILO auspices is to date the only methodologically consistent, statistically significant research on actual behaviour in labour markets.)

Freedom of Association

Migrant workers' rights to organise and protect their interests are still far from fully respected in European countries. Permanent migrant workers are more often able to exercise these rights than temporary workers or, in particular, migrant workers in irregular status.⁴ But legal restrictions based on nationality may make it more difficult for migrant workers to act as trade union officials, to be active as members of an organisation, or to form their own unions. For example, restrictions on union membership and on taking leadership positions remain in effect in several countries in Europe. Workers in an irregular situation are generally not in a position to demand any rights, given their precarious position.

II. ROLE AND IMPORTANCE OF MIGRATION FOR EUROPE

Some contextual background may help understand the challenges of obtaining protection of migrant workers rights in Europe. These address the significance of migration in a globalized economy, its importance to Europe, and some underlying issues at stake for law and policy. What happens in law and policy is derived to a large degree from this context and its interpretation.

Migration today is essentially a labour issue. It serves as an instrument to adjust the skills, age and sectoral composition of national and regional labour markets. Migration provides responses to fast-changing needs for skills and personnel resulting from technological advances, changes in market conditions and industrial transformations. In countries of aging populations, migration offers a potential to replenish declining work forces as well as to inject younger workers, increasing dynamism, innovation and mobility in work forces.

³ Country discrimination testing studies can be downloaded from: www.ilo.org/migrant/publ/imp-list.htm See list in Bibliography at: ILO (1995-2008) International Migration Papers (Situation Testing)

⁴ According to the 29 Council of Europe member country responses to the ILO International Labour Migration Survey of 2003, only 3 Council of Europe member states (Albania, Bulgaria and Hungary) reserve for nationals both the right to form or join workers' organisations and the right to bargain collectively. 22 member states provide both of these rights to all migrant workers and nationals, though one limits the right to organise to joining but not forming workers' organisations and one did not provide information on the right to collective bargaining. 10 of these 22 States extend both rights to workers in irregular status, and 3 extend only the right to organise to workers in irregular status (though one limits this to the right to join and not form, and another imposes conditions). 4 member State respondents did not provide information on either of these rights for any categories of workers.

ILO estimates that 95 to 100 million of the total 200 million people living outside their countries of birth or citizenship are economically active, engaged in the world of work. This involves most working-age adults, taking into account that the migrant population includes children and aged dependents. In Western European countries, the foreign born proportion of the work force is ten percent or more, nearly 15% in Ireland, 25% in Switzerland and some 40% in Luxembourg.

Already some time ago, the International Labour Office ran a simulation using the methodology its actuarial section used over the last ten years to predict—quite accurately—the future performance of social security systems. This simulation carried forward calculations to the year 2050 based on presumed continuity of current trends in population aging and decline, retirement age, female workforce participation rates, immigration numbers, and modest economic growth and productivity rates. The simulation outcome suggested that some 40 years from now, the standard of living of Western Europe, as measured by per capita income of gross national product, may be 78% of what it is today. That is to say, 22% lower.⁵

As the recently issued annual OECD report on migration trends highlights, Europe's need for low and medium skilled migrants are as critical as for high skilled.

Due to economic, demographic and technological changes, increasing numbers of jobs in industrialized economies simply cannot be filled by native-born workers. Ageing of native work forces combined with declining populations is an important factor. By current projections, the populations of Italy will be 25% less in 2050 than in 2000. Latvia and Lithuania have already seen reductions of nearly 10% since 1989—almost entirely of working age adults. Fertility rates in Spain and in the Ukraine are about 1.2 children per woman, far below replacement. Rates in most of the European Union countries are or soon will be at or below replacement. France is one of the few exceptions.

The current projection for the European Union region is that while today the average social security dependency is 2 retired persons for seven economically active, the ratio will rise to 4 per 7 by 2050: meaning either twice the contributions per working person or halving the income for retirees. The European Commission itself made a projection that the EU will need an annual influx of some 700,000 immigrants by 2050.

At lower skilled levels, migrants are too often perceived as exploitable and expendable, a source of cheap, docile and flexible labour, apt for the 3-D -- dirty, dangerous and degrading-- jobs nationals are unavailable for and/or unwilling to take. The vulnerability of migrant workers makes them attractive for some employers, because they can be underpaid, provided with little or no workplace safety and health protections, hired and dismissed on a moments notice, and union organizing can be impossible.

ILO has estimated that, globally, some ten to twenty percent of international migrant workers are in irregular situations, without legal authorization or undocumented. A newly established on-line database project on irregular migration in the European Union provides detailed estimates

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ILO. *Towards a Fair Deal for Migrant Workers in the Global Economy*. International Labour Conference 92nd Session June 2004. Report VI. P. 37-38. Available on line at: <http://www.ilo.org/public/english/standards/reim/ilc/ilc92/pdf/rep-vi.pdf>

indicating that migrants in irregular situations number between 2.8 and 6 million, giving a range of 11% to 23% of total stocks.⁶ Migrants in irregular situations are even more vulnerable to exploitation and abuse. However, the presence of migrants in irregular situations appears to have been tolerated by authorities in certain circumstances in some countries. This appears to coincide with the fact that absence of legal recognition heightens the exploitability and lowers the costs of migrant labour, in some cases allowing marginally competitive economic activity to remain in business.

The flow of low-skilled migrants is channelled by clandestine means precisely because of the non-existence of legal migration categories that would allow for their legal entry in 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.⁷ In contrast, ILO research underlines that legal labour migration channels contribute to both reducing trafficking and the smuggling of migrants.

Market mechanisms don't suffice

Historical experience shows that regulation providing protection for migrant workers cannot be left alone to market mechanisms. When highly competitive and now globalized market pressures are brought to bear in the absence of protections and appropriate regulation, migration is usually characterized by:

- Abuse and exploitation of migrant workers
- Irregular migration, and ultimately, trafficking in migrants
- Fear of loss of jobs blamed on immigration
- Increasing anti-immigrant sentiments
- Ultimately, communal violence

With an understanding that preventing exploitation and ensuring equality of treatment are essential elements of building prosperity, social cohesion and democratic governance of societies, a substantial set of international and European protection and regulatory standards have been elaborated on labour migration.

III. THE NORMATIVE FOUNDATION

Specific international and European legal instruments set minimum standards relating to the protection of migrants, their families, and refugees as well as for international co-operation on migration. International law has established three fundamental notions that characterize protection for migrants, particularly migrant workers and members of their families:

⁶ CLANDESTINO *Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe.*

Research project funded by the European Commission, DG RTD, FP6, 2007-2009. For more information, visit <http://clandestino.eliamep.gr> (country reports and research briefs), and <http://irregular-migration.hwwi.net> (database).

⁷ Abella, M.I., "Mondialisation, marchés du travail et mobilité", in *Migrations et avenir*, CIEMI, Paris, Vol. 14, No. 79, January-February 2002.

- Equality of treatment between regular migrant workers and nationals in the realm of employment and occupation.
- Core universal human rights apply to all human beings, including all migrants, regardless of status.
- A broad array of international labour standards providing for protection in treatment and conditions at work (including occupational safety and health, maximum hours of work, minimum remuneration, non-discrimination, freedom of association, and maternity leave) apply to all workers.

.i International Standards

Five categories of international law directly set standards providing for protection of rights of migrant workers:

- 1) International Human Rights law, notably the eight fundamental human rights instruments, comprising the two Covenants respectively on Political and Civil rights and on Economic social and Cultural Rights, along with the six international conventions addressing specific groups and situations: victims of racial discrimination, victims of torture, women, children, migrant workers, and disabilities.
- 2) International Labour Standards, in effect all of them, except where –rarely—foreign workers are exempted.
- 3) Refugee and asylum law, namely the 1951 Convention and the 1967 Protocol on the Status of Refugees
- 4) Consular Relations, namely the Vienna Convention on the subject of protection of foreign nationals through access to representatives of their governments
- 5) International Criminal Law, particularly the Protocols on Trafficking in persons and smuggling of migrants of the International Convention on Transnational Organized Crime.

International Human Rights Conventions provide a broad and ample normative framework for the protection of migrants. The Universal Declaration of Human Rights of 1948 laid out a comprehensive set of universal human rights principles. Two major International Covenants elaborated these principles into binding normative standards on political and civil rights, and economic, social and cultural rights in the 1960s⁸. These Covenants, together with the UDHR, are often referred to as the "International Bill of Human Rights", and are applicable to all human beings. Specific conventions subsequently explicitly extended the application of universal rights to victims of racial discrimination, women, children, and migrants: Convention for the Elimination of Racism and Racial Discrimination (CERD), Convention Against Torture (CAT), Convention for the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMR).⁹

⁸ See, *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, entered into force on 23 March 1976 and *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, entered into force on 3 January 1976.

⁹ Texts and status of ratifications of these conventions are available on the website of the Office of the UN High Commissioner for Human Rights, at: www.unhcr.ch.

These seven instruments --the two Covenants plus the five Conventions cited above-- have been characterised as the seven fundamental human rights instruments that define basic, universal human rights and ensure their explicit extension to vulnerable groups world-wide.¹⁰ It has been noted that more than ample human rights protection for all migrants would be assured by full implementation of the two Covenants and the CERD, CAT, CEDAW and CRC in countries concerned. Most European states have ratified these six instruments.

An International Charter on migrants rights

Three international *Conventions on migrant workers* can be considered as an “international charter” for their protection and provide a normative framework covering their treatment and related inter-state co-operation. They are the ILO Migration for Employment Convention 1949 (No. 97), the ILO Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143), and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).

These conventions lay out a comprehensive agenda for national policy and for consultation and co-operation among States on labour migration policy formulation, exchange of information, providing information to migrants, and, where necessary, facilitating their orderly return and reintegration. The 1990 International Convention establishes that migrant workers are more than labourers or economic entities; they are social entities with families. It reinforces the principles in ILO migrant worker Conventions on equality of treatment with nationals of states of employment in a number of legal, political, economic, social and cultural areas. ILO Convention 143 and the 1990 Convention explicitly address unauthorised or clandestine movements of migrant workers, and provide for resolving irregular situations, in particular through international co-operation.

These Conventions resolved the lacuna of protection for non-national migrant workers and members of their families in irregular status and in informal work by providing norms for national legislation of receiving states and their own states of origin, including minimum protections for unauthorised migrant workers. The extensive, detailed and complementary text contained in these instruments provides specific normative language that can be incorporated directly into national legislation, reducing ambiguities in interpretation and implementation across diverse political, legal and cultural contexts.

Twenty Council of Europe member countries have ratified at least one of the three migrant worker instruments: nineteen have ratified one or both of the ILO instruments and four have ratified the 1990 International Convention.

Eleven members States of the EU have ratified one or both of the ILO Conventions on migrant workers, among them most of the larger migrant destination countries: Belgium, France, Germany, Italy, the Netherlands, Spain, Portugal and the UK, as well as Norway, Slovenia and Sweden.

International Labour Standards

¹⁰ Noted in UN General Assembly: *Status of the UN Convention on migrants rights*, Report of the Secretary General, 55th Session of the UN General Assembly, Doc. A/55/205, July 2000.

Some principles and rights at work that derive from the ILO Constitution and that have been expressed in eight ILO Conventions¹⁷ are deemed to be fundamental for the protection of human rights for all workers, including migrant workers, by the international community and the ILO. They concern freedom of association and the right to collective bargaining, freedom from forced labour and child labour and non-discrimination in employment and occupation. Moreover, following the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work,

all members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of their membership of the Organization, to respect and to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions (ILO, 1998: para.2).

Migrant workers' rights are not only a matter of fundamental rights found in the eight core ILO Conventions. The International Labour Standards in the areas of occupational safety and health, conditions of work, protection of wages and labour inspection, employment policy, maternity protection, the regulation of private and public employment agencies, as well as those covering sectors employing a large number of migrant workers have been identified by ILO as equally important to the promotion of decent work of all migrant workers. The ILO instruments that promote equality of treatment between migrant workers and nationals in the field of social security are also particularly relevant¹⁸

International jurisprudence has amply reinforced the application of *International Labour Standards* to policy and practice regarding employment dimensions of migration. Decisions and opinions of the ILO treaty supervisory Committee of Experts have repeatedly underscored the applicability to all migrant workers of International Labour Standards covering conditions at work, occupational safety and health, maximum hours of work, minimum remuneration, non-discrimination, freedom of association, collective bargaining, and maternity leave, among others. The ILO Committee on Freedom of Association supervising the core international conventions on freedom of association and collective bargaining has specifically ruled that all migrant workers regardless of status are entitled to protection and expression of basic association and representation rights.

Other relevant international law

The 1951 Convention and 1967 Protocol on the Status of Refugees provide essential standards regarding recognition, protection of and assistance to *refugees and asylum seekers*. The Convention defines who is a refugee, sets out rights of individuals granted asylum, delineates the responsibility of States to non-refoulement and provides other provisions such as regarding refugee travel documents. It was initially limited to protecting European refugees after World War II, but the 1967 Protocol removed the geographical and time limits, expanding the Convention's scope.

The refugee instruments have particular relevance for an integrated migration policy given that migratory movements today often comprise *mixed flows*, including some individuals who merit refugee protection. At the same time, recognised refugees and asylum seekers usually enter the world of work once resettled or granted status, meaning they seek and obtain employment and many eventually integrate in resettlement or asylum countries.

Two Protocols on *trafficking and smuggling* to the International Convention Against Transnational Organized Crime provide specific definitions and measures to combat trafficking

and criminalise smuggling. The Palermo Convention Against Transnational Organized Crime and its Protocols on Combating Trafficking in Persons and against Smuggling of Migrants were adopted in December 2000 in the spirit of the fight against organised crime. The main provisions of the Convention and Protocols provide for criminalising offences committed by organised groups, cracking down on the proceeds of crime, speeding up and widening the reaches of extradition of members of criminal groups and tightening law-enforcement co-operation to seek out and prosecute suspects.¹¹

These instruments assist in clarifying distinctions between smuggling of migrants across borders and trafficking in persons --the latter by definition comprising deception, coercion and exploitation—in the context of inadequate regular migration channels and important imbalances between labour supply and demand. The trafficking protocol in particular provides for an approach of prevention, prosecution of traffickers, and, notably, some protections for victims of trafficking.

.ii European Instruments

The Council of Europe has a number of instruments in the field of migration covering general human rights as well as more specific agreements relating to migrants and migrant workers. The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) (Council of Europe, 1950) has the broadest application in that it applies to all persons within the jurisdiction of States parties, including migrant workers and regardless of their legal status. While there are no specific provisions on migrant workers in the ECHR, migrants have obtained remedies from the European Court of Human Rights under its case law in protection of their right to respect for family life and the non-discrimination principle¹².

The European Social Charter (1961) and its Additional Protocol (1988), as well as the Revised European Social Charter (Council of Europe, 1996), in addition to being firmly based on the non-discrimination principle, include a number of provisions relating to individuals living and working in countries of which they are not nationals, covering the right to engage in a gainful occupation in another Contracting Party's territory, provision of information to migrant workers, facilitation of the migration process, equality of treatment of nationals and non-nationals in employment, the right to family reunification, and guarantees against expulsion, etc. These instruments, at the outset apply to foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned. However, in its case law the European Committee of Social Rights¹³ has extended the personal scope of the Charter to cover all foreigners present in the territory under certain circumstances, notably where the right to life and human dignity are at stake. Thus in its 2004 decision on the merits in the

¹¹ See *After Palermo: An Overview of what the Convention and Protocols Hope to Accomplish* at www.undcp.org/palermo/sum1.html.

¹² Regarding the strengthening of the principle of non-discrimination, see: Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), open for signature on 4 November 2000, not yet entered into force.

¹³ In order to monitor States' compliance with their obligations there are two procedures, the reporting procedure and the collective complaints procedure. In both procedures, an independent body, the European Committee of Social Rights, is responsible for making the legal assessment of whether the situation is in conformity with the Charter.

collective complaint *International Federation of Human Rights Leagues (FIDH) v. France* the Committee held that “legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.”¹⁴

The European Convention on the Legal Status of Migrant Workers (Council of Europe, 1977) includes provisions relating to the main aspects of the legal status of migrant workers coming from Contracting parties, and especially to recruitment, medical examinations and vocational tests, travel, residence and work permits, family reunion, housing, conditions of work, transfer of savings, social security, social and medical assistance, expiry of the contract of employment, dismissal and re-employment, and preparation for return to the country of origin. Eleven Council of Europe member states have now ratified this Convention.

The Council of Europe Convention on Action against Trafficking in Human Beings (CETS N° 197) was adopted by the Committee of Ministers in May 2005. It is a comprehensive treaty mainly focussed on the protection of victims of trafficking and the safeguard of their rights. It also aims at preventing trafficking as well as prosecuting traffickers. The Convention applies to all forms of trafficking; whether national or transnational, whether or not related to organised crime. It applies whoever the victim: women, men or children and whatever the form of exploitation: sexual exploitation, forced labour or services, etc. 17 Council of Europe member countries have ratified this Convention, 21 others have signed it.

European Union

Regarding the EU framework, differences exist in terms of rights and benefits granted to migrant workers coming from within the EU, from future accession countries, and migrant workers coming from third countries. The Treaty Establishing the European Community (EC Treaty) provides for freedom of movement for workers from EU member states, although transitional arrangements are in place limiting this freedom for nationals from certain new member states. The Treaty prohibits any discrimination based on nationality between these workers as regards employment, remuneration and other conditions of work and employment, including social security. The EC Treaty also invites the EU Council of Ministers to take measures necessary to ensure equality of treatment and opportunity between men and women and to combat discrimination based on, inter alia, race, ethnic origin, religion or belief, and sexual orientation. It affords migrant workers from EU member states a set of social rights unequalled in other regions of the world. Furthermore, the Council is also empowered to take measures in the field of asylum, immigration and safeguarding of the rights of nationals of third countries, although the measures adopted to date on legal migration have afforded third-country nationals lesser rights than those granted EU citizens.

Although not a legally binding instrument, the EU Charter of Fundamental Rights, adopted in 2000 is a major point of reference in this context as most of its provisions are applicable to all persons irrespective of their nationality. It sets out in a single text, for the first time in EU history, the whole range of civil, political, economic and social rights of EU citizens and all persons resident in the European Union.

¹⁴ *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, decision on the merits, of 5 September 2003.

IV. REALIZING RIGHTS: A POLICY AGENDA

Defense of migrants rights along with an enabling policy environment are only viable and effective when based on a firm foundation of legal norms, and thus operate under the rule of law. International standards set parameters for the protection of migrant workers and the preservation of States' interests. They also provide an essential framework for national legislation, policy and practice as well as for co-operation within States and between States across the migration process.

The foundation for measures to ensure adequate protection for migrant workers is articulated in the international labour norms referred to earlier. However, realizing rights and dignity and obtaining decent work for migrant workers require a comprehensive set of actions to achieve.

Protection of migrant workers in destination countries is best secured by adoption of international norms into legislation of those countries, including labour code, employment legislation, and other rules concerned with the regulation and protection of foreigners. Ratification of the relevant international standards is, of course, the essential and verifiable step. However, even if countries concerned are not yet prepared to adopt in full international standards, they can –and do-- utilize these as a model for the development of national legislation.

Realizing migrants rights requires, however, considerably more than adopting legislation. In fact, implementation of norms and legislation requires a comprehensive policy and practical agenda. Policy needs to cover administration of immigration, legal protection measures, labour market regulation, labour inspection, social security, and much more. In short, an array of measures are needed to prevent abusive practices and promote decent and productive work for women and men migrants in conditions of freedom, equity, security, and human dignity.

Policy lines

The International Labour Organization has developed useful guidance for all those involved in the development, strengthening, implementation and evaluation of national, regional and international labour migration policies and practices. This guidance for the implementation of international norms is contained in the ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration, Geneva, International Labour Office, 2006.¹⁵

While the ILO standards provide the international framework of minimum standards, the ILO Multilateral framework is formulated in accordance with the principles and rights embodied in these standards. It reaffirms their importance in terms of guidance for policy and legislation

The Framework –and other international guidance—highlights that policy should recognise the similarities and differences in the migration experiences of different categories of women and men and should aim to eradicate all forms of discrimination as well as gender inequality. Policies, legislation and programmes should also consider the fact that women migrants often find

¹⁵ ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration, Geneva, International Labour Office, 2006.

themselves in irregular situations, in unregulated sectors of the economy, or as victims of traffickers or smugglers and subject to many forms of violence and abuse.

The social and labour conditions of migrant workers and the degree of migrants' integration determine the levels and degree of economic and social contributions they make to social and economic welfare in host countries and to their countries of origin. Specifically, the conditions of migrant workers directly affect both their abilities to remit part of their earnings and to acquire skills and knowledge which will be useful on their return or during permanent settlement elsewhere. Thus, these conditions have a direct bearing on the level and nature of migrant contributions to social welfare, human capital formation, and development, especially in their countries of origin. For example, the substantially reduced earnings of exploited migrants or earnings which deported migrants are unable to obtain prior to departure are economic resources not only stolen from the affected workers, but in effect expropriated from the countries of origin to which a significant part would have been remitted.

Migration policies and practices have to respond to measured and legitimate needs, which also take into account domestic labour concerns. Regular migration measures must rely on labour market assessments to identify and respond to current and emerging needs for workers, both high- and low-skilled. Policy and practice will need to address such areas as awareness raising, supervision of recruitment, administration of admissions, training of public service and law enforcement officials, recognition of equivalent educational qualifications, provision of social and health services, labour inspection, rights restoration and recovery for victims of trafficking, as well as many other areas.

Migration policy can only be credible and sustainable to the extent it takes into account the interests, concerns and experience of the most directly affected stakeholders. Key stakeholders are the several ministries and agencies within government with responsibility for migration concerns, including of course ministries responsible for labour and employment. Consultation and policy-making must also take into account the other stakeholders: employers' organisations and businesses that provide employment; workers' organisations representing the interests of both migrant and national workers; civil society bodies; and certainly men and women migrants.

Enforcement of labour protections

Equality of treatment in employment for authorised migrant workers is a central premise of international standards reflected in national law in many countries. Tolerance of inequalities in treatment between national and foreign workers will encourage exploitation of foreign workers and facilitate substitution of national workers by less protected non-national workers, thus contributing to expanding dual labour markets and informal employment, lowering of wages and conditions of work generally, and ultimately provoking conflict between national and foreign workers and their respective communities.

One of the most effective ways of preventing migrant workers from being exploited is to recognise their right to join a trade union without hindrance. Trade union rights comprise freedom of association and collective bargaining, and are recognised universally in the core international human rights instruments. Rights to freedom of association and collective bargaining as articulated in ILO Conventions Nos. 87 and 98 are fundamental rights which all countries are expected to uphold as per the 1998 Declaration on Fundamental Principles and Rights at Work. Both instruments have been ratified by nearly all countries in the

Council of Europe region.

Preventing exploitation of migrants requires enforcement of clear national minimum labour and human rights standards for protection of workers, whether nationals or migrants. As noted above, International Labour Standards on forced labour and child labour, freedom of association and non-discrimination, occupational safety and health, and the protection of wages provide minimum international norms for national legislation. A necessary complement is monitoring and inspection, particularly in such areas as agriculture, construction, domestic work, the sex industry, where migrants tend to be concentrated.

Labour Inspection is a key means of monitoring and enforcing equality of treatment and decent work conditions for migrant workers. Labour inspection is a supervisory tool for application of labour standards. Absence of labour inspection in sectors and workplaces attracting migrant workers is associated with higher incidences of exploitation and abuse, as well as employment of unauthorised workers. ILO Conventions numbers 81 and 129 provide the basic normative guidance for national law and policy; these norms generally apply to all workers, national and foreign.

Practical elements and management tools to extend labour inspection to migrant workers include:

- Reference in national legislation providing for inspection of all workers.
- Obtaining labour force and employment information to determine where migrants are employed and relevant data regarding compliance issues.
- Ensuring capacity, abilities and specialised approaches to extend labour inspection to work sites, places and sectors where migrant workers are commonly employed.
- Establishment of a specialised inspection unit and/or specialised training to labour inspectors to ensure competency to address specific issues of migrant workers.
- Ensuring coordinated, coherent and integrated approaches with other aspect of labour migration policy and practice.

Labour inspection must remain separate and distinct from immigration enforcement. Linking them in practice will undermine the effectiveness of both. Using labour inspection to seek unauthorised workers will only drive the latter further into clandestine situations, benefiting only unscrupulous employers exploiting migrants in vulnerable and unprotected situations.

Social cohesion

Social cohesion in destination countries will be facilitated considerably when discrimination against migrant workers and their families is eliminated. Moreover, appropriate measures assisting the integration of migrants in society and providing possibilities for family reunification play an important role in preventing the marginalisation of migrants and promoting social cohesion.

A comprehensive and effective agenda to prevent discrimination and ensure social cohesion must include the following policy elements:

- an explicit legal foundation based on relevant international standards;
- outlawing racist and xenophobic discrimination, behaviour and action;
- outlawing sex discrimination and gender inequalities in the labour market;
- administrative measures to ensure full implementation of legislation, and accountability for all government officials;

- an independent national human rights/anti-discrimination institution with powers to address discrimination against non-citizens;
- respect for diversity and multicultural interaction;
- emphasis on positive images of diversity and of migration in news and communications media;
- inclusion of multi-cultural and diversity training in educational curricula;
- co-operation with civil society and community groups.

V. APPLICATION AND IMPLEMENTATION

The record on application of standards and guarantees for protection of migrants appears to be somewhat mixed across Europe.

An important monitoring role is played by the ILO with respect to the human and labour rights of migrant workers in the world of work. An increasing number of comments have been made by the ILO supervisory bodies concerning violations of migrant workers' rights or measures taken by states in the context of ratified fundamental conventions or technical conventions, including C97 and C143. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has increasingly addressed widespread discrimination, forced labour, exploitation and abuse, lack of trade union rights, forced labour, wages and OSH issues affecting migrant workers in its comments on the application of Conventions in Europe, for example regarding Austria, France, UK, Italy, Slovenia, Netherlands, Spain, and other countries. These comments can be easily extracted from the ILOLEX data base through the universal query tool.

The ILO annual Global Reports on the Fundamental Principles and Rights at work have also dealt with the situation of migrant workers. The 2008 Global Report focusing on discrimination gave particularly extensive attention to treatment of migrant workers and some of the responses to prevent discrimination.

European Union

In the content of EC Communications and the development of EU Directives, the references to equality of treatment and non-discrimination for regular migrant workers are prominent and unequivocal. These notions are fundamental to the ILO Conventions 97 and 143 on migration for employment, one or both ratified by 11 EU Member States, as noted above.

Ample references to the Protocols on trafficking and smuggling to the International Convention on Transnational Organized Crime are contained in recent EC Communications on the *Global Approach to Migration*, as well as in public pronouncements of Commission and member state officials.

However, few if any references are explicitly made to any of the three most relevant instruments elaborating migrant workers rights. In a notable contrast, the most recent Council Communication on the *global approach* cites the Palermo Protocols and goes on to call for their ratification by member States and by third country partner States. However, it does not even

mention the international instruments relevant to protection of migrants and to cooperation among States on labour migration.

The degree of transposition of relevant International Standards on migration in Community instruments remains ambiguous. This is especially so in the current process of elaboration of a Directive on fundamental rights of migrants. Such a Directive may, in principle, be well and good to ensure the mechanisms for compliance by member States. However, the absence of explicit reference to the existing international instruments, and without consultation with the relevant supervisory international institutions for these instruments raises potential questions of consistency regarding eventual unambiguous respect for this area of international law.

The lack of reference carries a risk of adopting an EU instrument with legal enforceability that diverges from –and in particular goes significantly below– international standards. This concern is reinforced by political discourse that either excludes any discussion of the international standards, or clearly establishes opposition to their adoption in the European context, and/or calls for their renegotiation. For example, certain officials of EU member States and of the Commission have explicitly disparaged the utility of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and called for its revision.

Recent Jurisprudence

Several recent European Court of Justice rulings regarding migration, albeit intra-community migration, have raised concerns regarding application of both equality of treatment and freedom of association and collective bargaining rights to migrant workers. These include the *Viking*, *Laval*, *Rüffert*, and *Commission v. Luxembourg* cases.

Following a review of these decisions, a Report adopted by the Committee on Employment and Social Affairs of the European Parliament and a Resolution proposed for the EP “consider(s) that the exercise of fundamental rights, as recognized in Member states, ILO Conventions, and the EU Charter of Fundamental Rights, including the right to negotiate, conclude and enforce collective agreements and the rights to take industrial action, should not be put at risk.”

Political dimensions and external implications

Migration policy is clearly recognized as essential for present and future well-being, if not survival, of the Community and its member states. The elaboration of explicit policy and legislation is enormous stride forward, one fraught with tension given the nature of migration, and its susceptibility to conflict of interests.

Given political constraints, Community policy formulation is explicitly addressing only part of the migration challenges facing Europe: high skilled, intra-company transfers, and trainees, and to some extent seasonal workers. Low skilled and indeed medium skilled are at present excluded from elaboration of common community policy measures. This poses a dilemma regarding external perceptions: it suggests interest in cherry picking, attracting the best and brightest, while seeming to ignore the need for substantive policy and regulation of access by –and protection for– lower and medium skilled workers.

The arena of EU cooperation with third countries on migration is a complementary arena for addressing protection of migrant workers. On the positive side the ILO has been implementing Technical Cooperation and capacity building with EU support in the Maghreb and West Africa, in the Russian Federation and Central Asia, as well as elsewhere. An important dimension of this cooperation is strengthening legislation and government administration of labour migration, including by adoption of relevant international Conventions.

However, cooperation with third countries appears to emphasize support for control, interception, and containment measures in partner countries, exercised in strengthened border control and surveillance. Indeed, the EU budget for migration control-related activities is several times larger than that for migration cooperation. Emphasis on these measures may not necessarily contribute to a necessary reinforcement of a 'rights based' approach to migration in these countries, or necessarily within Europe either.

Council of Europe

It is evidently more difficult to assess progress in application of norms and policies across the wider Europe reflected in the Council of Europe membership. However, it is useful to highlight that the Council of Europe is responsible for a European Committee on Migration (CDMG) that incorporates operational participation from all 47 member countries. Over the last two decades, this committee has conducted studies, developed recommendations, contributed to elaborating normative standards and delineated policy guidance covering most issues of migration governance. Its policy lines are usually endorsed by the Council of Europe Conferences of Ministers on Migration Affairs; the evolution of policies of many member states demonstrates that Council of Europe policy guidance has been relevant to shaping consistent national policies and to encouraging co-operation among member countries.

As noted above, the Council of Europe developed several specific normative instruments applying to migrant workers. Many of its studies and recommendations have focused on issues applying to migrant workers, and the outcomes of the Conferences of Ministers have generally reinforced application of relevant norms and specific protections of human and labour rights of migrants.

VI. A WAY FORWARD

For the record, the International Labour Organization is the largest specialized agency of the United Nations system. It was established in 1919, with purposes of elaborating international labour standards, promoting employment and job creation, extending social protection and social security to all workers, and facilitating social dialogue between employers and worker organizations.

In the field of international migration, ILO efforts not only examine problems, they also identify and evaluate solutions. ILO activity on migration includes providing technical cooperation and capacity building in countries world-wide, providing advisory services to governments, promoting adoption of relevant legal standards, facilitating social dialogue, and encouraging international cooperation.

In the area of integration of migrants, ILO has not only conducted the discrimination situation testing referred to earlier; it has also studied effectiveness of anti-discrimination legislation and training in a number of countries in Europe and North America. Research findings¹⁶ indicated, for example, that comprehensive civil legislation appeared to establish far more effective mechanisms than criminal law for the identification, intervention, redress, and monitoring of discriminatory treatment. Experience in several countries showed that legal requirements for monitoring and reporting by employers on the diversity of their workforce are extremely useful tools. Findings clearly demonstrated that a specialized institution in the field of equality of treatment and non-discrimination provides the most effective way of guaranteeing effective enforcement and promotion of anti-discrimination legislation.

Though a regional project called “Promoting equality in diversity: integration in Europe” supported by the EU, ILO has recently:

- Expanded a website compendium data-base on anti-discrimination and integration activities to include some 160 practice profiles. See www.ilo.org/migrant click on *discrimination*.
- Determined evaluative indicators, methodology and tools to assess effectiveness of integration and anti-discrimination practices.
- Studied experiences to identify key indicators of integration.
- Compiled a practitioners handbook on discrimination and integration
- Developed tool kits for social partners, particularly small enterprises and trade unionists
- Convened European social partner networking on integration and discrimination.

The ILO is amply involved in providing technical cooperation, advisory services, training and capacity building, and facilitation of regional policy elaboration and coherence on migration not only in Europe but in Arab States, in the Maghreb countries, in West Africa, across the CIS region, and elsewhere.

Particular current initiatives cover the Caucasus and Central Asian areas, in coordination with the Russian Federation. These include efforts towards harmonization of labour law and social security regimes, and facilitation of legal labor mobility.

Similarly, we are conducting major cooperation efforts supporting countries in the Maghreb, West Africa and East Africa in building national and regional regimes and institutions to regulate labour migration that also ensure protection of rights of migrants.

We also have been conducting extensive efforts on facilitating integration and preventing discrimination against migrant workers in destination countries, notably in cooperation with social partner organizations. The ILO and its constituents have welcomed the support of the EU, and the governments of such countries as Germany, Italy, Spain and the UK in these efforts.

Some notions for the way forward include:

¹⁶ See R. Zegers de Beijl (1991); G. Rutherglen, (1993); C. Ventura (1995); R. Zegers de Beijl in W. R. Böhning and R. Zegers de Beijl (1995); U. Kulke in: A. Goldberg, D. Mourinho and U. Kulke (1996); R. Pérez Molina in Colectivo IOE and R. Pérez Molina (1996); K. Vuori (1996); D.N. Addy (1997); N.-E. Hansen and I. McClure (1998); J. Doomernik (1998); B. Smeesters and A. Nayer (1999).

- Insisting on explicit reference to and incorporation of the main relevant international standards on migration in elaboration of policy and guidelines on migration by relevant regional and national bodies, including in particular the European Union, and most certainly in any Europe-specific definition of fundamental rights of migrants.
- Inviting and encouraging trade unions to cooperate more substantially with and take cases to national human rights monitoring institutions. While national, regional and international trade unions are becoming more and more active in promoting and protecting the rights of migrant workers, they have not made full and effective use either of the ILO supervisory system, nor of national human rights institutions to raise important violations of migrant workers' rights. There is unfortunately a vast number of problems and a wealth of information available that does not reach national monitoring and enforcement bodies, let alone the ILO supervisory bodies. Regarding the ILO, it should be born in mind that the supervisory bodies can only base their findings on official information (e.g. from Governments, the UN, regional intergovernmental organizations such as the EU, ILO research, and ILO technical Cooperation activity, and communications received and transmitted by trade unions or employers' organizations.
- Improving cooperation between civil society organizations and trade unions to facilitate obtaining and transmitting information and relevant cases on violations of rights of migrants.
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Bibliography

Include: ILO NORMES and MIGRANT websites, as well as ILOLEX and APPLIS for legal information on ILO standards, ratifications, procedures and comments of the supervisory bodies.

LIST OF RATIFICATIONS Europe and Arab countries