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PANEL PRESENTATION**

***INTERNATIONAL NORMS: THE ESSENTIAL FOUNDATION FOR
EFFECTIVELY REGULATING MIGRATION***

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Migration is a central challenge of our time. With evolving demographic trends and fast changing technologies, labour mobility has emerged as a key feature in meeting economic, labour market and productivity challenges in a globalized economy. While migration may not be the sole solution to these challenges in OSCE member countries, it has certainly become an essential element.

Today, some 200 million people live outside their countries of birth or citizenship. That would be the fifth most populous country in the world if these people were together in the territory of one State. ILO estimates that 95 million of these persons are economically active, engaged in the world of work. This involves most working-age adults, taking into account that the global migrant population includes children and aged dependents.

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.

Market mechanisms don't suffice

Historical experience shows that regulation of labour migration 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
- Trafficking
- Fear of loss of jobs blamed on immigration
- Increasing anti-immigrant sentiments

- Ultimately, communal violence

The International Labour Conference in 2004 accurately highlighted that:

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. Gaps in working conditions, wages and treatment exist among migrant workers and between migrant and national workers.

When few options exist for legal migration in the face of strong economic pull-push pressures, irregular migration channels become the only alternative. This however creates 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 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.¹ In contrast, ILO research underlines that legal labour migration channels contribute to both reducing trafficking and the smuggling of migrants.

Development

Development gains from migration and the protection of migrant workers' rights are inseparable. Migrant workers can best contribute to the economies of both destination and origin countries when they have decent working conditions and when their fundamental human and labour rights are protected. This additionally benefits destination countries by preventing emergence of an unprotected underclass of migrant workers that undercuts prevailing pay and working conditions.

Preventing exploitation and ensuring equality of treatment are essential elements of building prosperity, social cohesion and democratic governance of societies.

A comprehensive set of laws, policies, institutional structures, and practical measures are required to effectively regulate –govern—migration.

The importance of protecting foreign workers and regulating migration has been formally acknowledged for nearly a century; it was specifically addressed in the Treaty of Versailles that ended World War I in 1919. The first international conventions on the protection of migrant workers were elaborated in the 1930s. Setting of norms on migration for employment advanced substantially with adoption of ILO Convention 97 in 1949, sixty years ago next year.

A Rights-Based Approach

The central notion of human rights is "the implicit assertion that certain principles are true and valid for all peoples, in all societies, under all conditions of economic, political, ethnic and

¹ Abella, M.I., "Mondialisation, marchés du travail et mobilité", in *Migrations et avenir*, CIEMI, Paris, Vol. 14, No. 79, January-February 2002.

cultural life." Human rights are *universal* - they apply everywhere; *indivisible* - political and civil rights cannot be separated from economic, social and cultural rights; and, *inalienable* - they cannot be denied to any human being. This is the concept of «human rights for all» articulated in the Universal Declaration of Human Rights (UDHR), which codified in a single instrument, norms common to major religious and historical traditions worldwide.

The universal principles of human rights implemented in the rule of law provide the foundation for effective governance—governance of nations, of community relations, and of international migration. This notion reflects historical experience that social cohesion and social peace can only be sustained under conditions of democratic rule, which in turn requires the accountability, the credibility, and the enforceability provided under rule of law.

Migrant Specific Instruments

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

- Equality of treatment and non-discrimination between regular migrant/immigrant workers and nationals in the realm of employment and work.
- Universal human rights apply to all migrants, regardless of status.
- 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 upheld in a recent Opinion issued by the Inter-American Court.²

This essential foundation for migration policy and good practice is laid out in the seven fundamental human rights instruments that define basic, universal human rights and ensure their explicit extension to vulnerable groups world-wide³ and in the 1998 ILO Declaration of Fundamental Principles and Rights at Work.

Three specific international instruments explicitly define the application of human and labour rights to migrant workers: ILO Convention 97 on Migration for Employment (of 1949), ILO Convention 143 on migrant workers (Supplementary Provisions) (of 1975), and the 1990 International Convention on the Protection of All Migrant Workers and Members of Their Families. These three instruments comprise an *international charter on migration*, providing together a broad and comprehensive framework covering most issues of treatment of migrants. These are not just instruments on rights, they contain provisions to encourage and guide intergovernmental consultation, information sharing and cooperation on nearly all aspects of international migration.

80 countries have ratified at least one of these three complementary conventions, including some 20 OSCE member countries. Another fourteen countries have signed the 1990 International

² Corte Interamericana de Derechos Humanos: *Condición Jurídica y Derechos de los Migrantes Indocumentados*. Opinion Consultativa OC-18/03 de 17 de Septiembre de 2003. In its conclusions, "The Court decides unanimously, that...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 en the State of employment. These rights are a consequence of the labor relationship."

³ Noted in the Report of the (UN) Secretary General on the Status of the UN Convention on migrants rights for the 55th Session of the UN General Assembly. Doc. A/55/205. July 2000

convention on migrant workers, a preliminary step to ratification that requires general compliance. A number of other States have legislation on migration inspired by and consistent with the normative principles in these instruments.

Several other international instruments provide specific normative standards relevant to shaping and guaranteeing effective migration regulation. 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*. 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 Council of Europe's instruments in the field of migration cover general human rights as well as more specific agreements relating to migrants and migrant workers. In particular, the European Convention on the Legal Status of Migrant Workers (1977) includes provisions relating to the main aspects of the legal status of migrant workers coming from contracting parties.

Legal dispositions are also being elaborated in both the EU and the Commonwealth of Independent States contexts. The Treaty Establishing the European Community (EC Treaty) provides for freedom of movement for workers from EU member states. The CIS is currently drafting a Convention on protection of migrant workers eventually applicable to its member countries.

Implementation

International standards and national legislation based on these norms do not themselves guarantee the structures and practices necessary to put into effect legal principles and norms. However, explicit, coherent policy and administration on migration remains lacking in many countries. This lacuna includes the lack of a legislative foundation, absence of a coherent policy, a dearth of competent administrative institutions, few practical measures, and often no coordination among the different branches of government and other stakeholders concerned.

However, there is an already large and growing body of practices putting into practical effect the basic normative principles on migration contained in these and other legal norms.

In the last five years, three global efforts have compiled a comprehensive set of international policy guidelines on managing migration. The Berne Initiative process initiated by the Swiss government and assisted by the International Organization for Migration (IOM) produced the International Agenda for Migration Management. The UN-established Global Commission on International Migration produced a wide-ranging set of recommendations. The International Labour Conference of 2004, comprising ministerial level representation from 178 countries, mandated a detailed Multilateral Framework on Labour Migration based on principles established in international standards⁴. This Framework offers guidance and good practice examples on virtually everything any government needs to know –and do— along with social partners to effectively and sustainably govern migration; And this for the mutual benefit of host and home countries and for migrants themselves.

⁴ ILO: ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration, Geneva, International Labour Office, 2006.

The OSCE commitments themselves, put together, coincide with and reinforce these global policy frameworks. An adequate foundation of normative standards and policy guidelines now exists. The challenge is adopting them at national levels and putting them into operation.

OSCE Commitments

This conference is intended to elaborate recommendations for follow-up to OSCE commitments related to migration; a considerable number have been elaborated since Helsinki in 1975. The largest number of commitments address ensuring protection of human rights of migrants and combating discrimination and xenophobia against them.

There is no alternative to achieving these commitments than obtaining wider ratification of the three migration specific legal instruments –as a starting point-- and their effective implementation. Indeed, some 20 OSCE member States have ratified one or more of these Conventions, and others are considering doing so. Those that have, including 11 members of the European Union, have generally seen gradual improvement of treatment of migrants over time.

A corollary is to expand international organization technical support and cooperation to member States to improve the implementation of standards, elaboration of appropriate policy, and dissemination, adaptation and implementation of effective practices. Here, both ILO and the OSCE have complementary roles to play.

All countries of origin also need to have in place policies, legislation and mechanisms that afford their citizens protection and support from abuses in the labour migration process. It is clear that protection of migrant workers' human and labour rights in the country of employment begins in the country of origin. The better prepared migrant workers are for work abroad, the more likely it is that they will be able to enjoy appropriate protection in the destination country and to know about their rights. In some instances, the national legislative measures of countries of origin can contribute greatly to the protection of their workers abroad.

As noted in the Thematic Report for the recent Council of Europe Ministerial Conference on migration⁵, this OSCE conference could urge that migration policy include the introduction of legislation both for the protection of migrant workers and to govern the regulatory and administrative processes of migration and migrant participation in labour markets and receiving societies. Further, national laws and regulations concerning labour migration and the protection of migrant workers should be guided by relevant international labour standards and other relevant international and regional instruments.

Such recommendations would give fitting sustenance to the existing OSCE commitments, and urge appropriate action both by members and by the Organization itself.

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⁵ Council of Europe. Thematic Report, 8th Conference of Ministers Responsible for Migration Affairs (Kiev 4-5 September 2008).