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LABOUR MIGRATION, GOVERNANCE and the RULE OF LAW

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I. LABOUR MIGRATION TODAY

Migration today, for Kazakhstan and for the world, is about labour. It is about development, about making the economy work, about producing goods and services and about employing people.

ILO estimates that some 105 million of the 214 million people living outside their countries of birth or citizenship in 2010 are economically active, engaged in the world of work.¹ This means most working-age adults in this global migrant population –including refugees-- taking into account the dependents of this working population.

International mobility of skills and labour is already making vast but unsung contributions to development measured by economic growth by providing skilled labour, new technological competencies, labour force to sustain otherwise unviable sectors or enterprises, not to mention labour for entire sectors of agriculture, construction and tourism.

In Kazakhstan migration already serves as an instrument to adjust the skills, age and sectoral composition of the national labour market. It is providing responses to new needs for skills and personnel resulting from technological advances, changes in market conditions and the industrial development programme this country is pursuing. It is migration that allows Kazakh agriculture to remain viable, to produce food and other products for the population and for export earnings

Economic contributions and the employment characteristics of migrants are central to labour markets and labour force composition, in more than 100 countries today. Foreign born workers now comprise about 10% of labour forces in Western European countries and around 15% in immigration countries of Australia, Canada and the USA.

No country, Kazakhstan in particular, can form or train the range and number of evolving skills and competencies needed to perform the ever more complex, inter-related work on its territory in a globalized economic context. The result is demand for specialized skills not available locally; rapid industrial development requires a host of new competencies, skills needs evolve more quickly than training systems, and displaced and older workers cannot always be retrained for new technologies and skills sets.

¹ ILO 2010. Towards a Rights Based Approach to Labour Migration; (Geneva, International Labour Office)

New evidence based on better forecasting suggests that the world is on the eve of far greater international labour mobility. Recent application of a new ILO forecasting methodology shows that China alone will face a deficit of 124 million workers in its labour force within 20 years. This is more than the entire total today of economically active migrants worldwide. The Japanese labour force will shrink 37% over the next 25 years.

While not the only solution, migration is already the sole response able to provide a major portion of workers and skills required for sustainable economic activity in a growing number of countries.

Labour/skills circulation regimes

Labour circulation has become a crucial and recognized key to regional integration and development, whether among the members of the European Union, in the East African Community or in South America's Mercosur. It is key in those areas precisely because it is regulated and harnessed in regional, interstate spaces of economic and social integration.

Only such spaces of larger markets, larger resource bases and larger labour forces are able to meet the competitive demands in a globalized world. Building larger 'common markets' means building economic, political and social cooperation. Migration is fundamental pillar for such cooperation. This means freer circulation of labour in larger markets to better link capital and labour, essential to obtain the most productive use of labour and capital.

No small states in any part of the world have the size of populations or economies to be competitive in globalized market conditions dominated by 'giant' countries –China, Japan, USA, now also Brazil and India, and regional cooperation regimes notably the European Union. None alone have the diversity and extent of skills necessary to fill employer needs and run rapidly evolving production or service industries. None alone have markets large enough to generate economies of scale in production, distribution or services.

Economic integration through freer circulation of resources, capital, goods, services, technology and people is advancing –to greater or lesser degree-- today in some eight other regional economic integration processes involving some 70 countries: Andean Pact (4 countries), Caribbean Community, East Africa Community-EAC (5), ECOWAS-Economic Community of West African States (14) MERCOSUR, (5+), SADC-Southern Africa Development Community (14). Other such spaces have been established but are less advanced operationally: ASEAN (7), CIS-Commonwealth of Independent States (12). As in the EU, freer/free circulation of labour and skills is required to advance "development" in all of these, with formal legal accords established on circulation and access to labour markets.

II. NEED FOR REGULATION AND LEGISLATION

History tells us that migration has been an essential ingredient of growth and development of many countries. However, unless regulated by appropriate laws and regulations, it entails a high cost in violations of rights of persons, in social disruption, in reduced productivity, and lost opportunities for economic growth and development.

The economic processes of industrialization required normative regulation to provide protection for persons engaged in work, to provide employment and occupation for the adult population, to ensure social protection, and to facilitate dialogue between the main economic actors in society: employers and workers, because of their contending interests and needs.

In this country as elsewhere, migrant skills and labour power are in demand in all levels of skills, educational qualifications and labour power needs. However, a large portion of migrant labour in Kazakhstan fills needs for cheap and low skilled labour in agriculture. Jobs nationals are not available for, and usually reluctant to take. Demands for migrant workers provide a significant impetus to labour flows and facilitate incorporation of unauthorized migrants.

Here as elsewhere, standards to protect are weak, and or where enforcement of existing standards is lax or non-existent. Migrant workers face lacunae of real protection of health and safety. Data show that foreign workers experience occupational injury and death rates twice as high as for nationals. More generally, employment for many is associated with 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.

Competitive pressures provide a huge incentive for seeking and hiring labour compelled to accept lowered standards and more precarious and ‘flexible’ employment, here and elsewhere.

On the supply side, a large and continuous availability of labour is assured by what may be the biggest failing of globalization: its inability to create decent employment in countries with growing and youthful populations. Generally high unemployment rates, lack of formal jobs and absence of decent working conditions in many less development countries assure a high supply of labour and skills compelled to look elsewhere for sustenance and employment.

Migrants in irregular situations are even more vulnerable to exploitation and abuse. The presence of unauthorized migrants seems all too often tolerated by authorities in certain circumstances – such as in sectors or areas where national workers are unavailable, or to sustain enterprises or economic activity that would otherwise disappear if prevailing wages had to be paid and decent work conditions enforced. The appeal of recruiting migrants in irregular situations is that it can impede upward pressures on or indeed push down local wages and protections. The absence of legal recognition raises the exploitability and lowers the costs of migrant labour. In some cases this arguably allows marginally competitive 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 legal entry in destination countries. Once they are in the host country, these migrants remain confined to jobs in unstructured or informal sectors, in irregular work and under exploitative conditions of employment. In contrast, ILO research underlines that legal labour migration channels contribute to both reducing trafficking and the smuggling of migrants.

Discrimination plays an important role in maintaining –and justifying—stratification and segmentation in the labour market. Compounding the challenges of discrimination and integration are identities of nation-states constructed around mono-racial, mono-cultural, monolingual, and mono-religious definitions of belonging.

III. THE RULE OF LAW

Historical experience shows that regulation providing protection for migrant workers –indeed any workers-- cannot be left 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, marginalization and social exclusion of migrant and immigrant origin populations, fear of loss of jobs blamed on immigration, increasing anti-immigrant sentiments and, ultimately, communal violence.

The World of Work is an almost universal domain of power relations between people, requiring regulation and, in particular, legal protections for the rights and dignity of those at risk of abuse and exploitation. 3 billion of the world's population of 6 billion are directly involved the major part of their waking hours in work, whether formal or informal, making this domain a direct concern of governance and protection. Work is the basis of access to 'wealth' for most people, thus the economic means to realization, however modestly, of economic, social and cultural rights as well as to exercise of civil and political rights. Rights to work and at work are furthermore a question of economic survival for most non-citizens, and conversely a key dimension of exclusion and exploitation for those with minimal or non-existent protections under laws of host countries.

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 Organization participate in the standard-setting process of the other, to ensure both continuity and mutual reinforcement.

In fact, initiation of ILO and International Labour Standards predated the establishment of the UN by nearly thirty years. The notion of rights protection of workers and specifically of non-national foreign workers was established in 1919 in the Constitution of the International Labour Organization, which was part of the Treaty of Versailles.

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 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).² 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.

From very early, the international community of States recognized need to elaborate specific regulatory standards for governance of labour migration and protection of migrant workers. The first international conference on labour migration took place in 1923, in Italy. The first

² For a more detailed discussion, see: L. Swepston. *"The Universal Declaration of Human Rights and ILO Standards; a comparative analysis on the occasion of the 50th Anniversary of the Declaration's adoption.* ILO. Geneva 1998.

Convention on migrant workers was drafted in the 1930s. That instrument became the basis for ILO Convention 97 on Migration for Employment in 1949, two years before adoption of the 1951 Convention on the Status of Refugees.

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 of the national human rights monitoring bodies of European and other western countries.

IV. FUNDAMENTAL INTERNATIONAL NORMS ON MIGRATION

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.
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.

Three Core Standards

Three complementary and sequential international standards provide the core definitions of rights of non-nationals. 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.³

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.⁴ Since this campaign was initiated, ratifications and signatures have tripled.

These three Conventions together provide a comprehensive "values-based" definition and legal basis for national policy and practice regarding non-national migrant workers and their family members. In the context of current international discussions towards formulating common approaches to "managing international migration", we note that the content of these three 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 83 different States have now ratified one or more of these three complementary standards, including Kyrgyzstan and Tajikistan as well as Turkey, Armenia and Azerbaijan. The ILO Migration for Employment Convention No. 97 of 1949, is ratified by 49 countries, the ILO Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975 is ratified by 23 countries; and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ratified by 44 countries and signed by 14 others⁵. A number of countries have ratified two or all three of these instruments.

V. 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

³ For a more detailed discussion of rights recognized for irregular workers in this Convention, see: Taran & Geronimi, "Globalization, Migration and Rights, Protection is Paramount." ILO; Perspectives on Migration No. 3, ILO, Geneva 2002, pages 13-16.

⁴ See Global Campaign website at: www.migrantsrights.org.

⁵ Texts and related information available respectively on the ILO website, at www.ilo.org/ilolex , and on that of the Office of the UN High Commissioner for Human Rights, www.unhchr.ch.

expanding a market for 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.

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—including Kazakhstan-- 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 ILO⁶. 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.

Application of these fundamental principles to migrants has been strengthened by international jurisprudence. For example, the Inter-American Court of Human Rights issued a sweeping opinion in 2003 which reinforced the application of international labour standards to non-national workers, particularly those in irregular status.⁷

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 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.⁸

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 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.

⁸ 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."

VI. WHAT IS AT STAKE?

In this context, what is at stake here today?

The very future of your country, its development, its prosperity, the welfare of the people here, and Kazakhstan's place in the world.

I will return in the next session to comments on the draft legislation we are addressing here today. But may I suggest that this process is an integral foundation to the challenges for Kazakhstan of properly addressing migration—labour and skills mobility.

1. *Setting the standards-based approach to migration, in national law and practice, to regulate migration and treatment of non-nationals.*
2. *Establish fairness and equality of treatment in law, to protect migrant –and national—workers, and to have common and accountable means for cooperation and development.*
3. *Engaging with main stakeholders, notably the social partners –the employers, public and private, who hire workers, and with trade unions, the worker organizations who represent workers at all levels, whether nationals or foreigners*
4. *Of course, the different concerned branches of government have to be involved, particularly those addressing labour, employment, the economy as well as interior administration and international relations.*

These are the inescapably necessary foundations for:

5. *Consolidation of institutional mechanisms for policy formulation and administration of labour migration, particularly in the ministries responsible for labour and employment*
6. *Putting in place informed and transparent labour migration systems to meet measured, legitimate labour needs –in context of a vision for integration and development*
7. *Enforcing minimum employment conditions standards in all sectors of activity, to suppress abuse of workers and reduce incentives for recruitment of irregular migrants.*
8. *Extending social protection, specifically social security coverage, to migrant workers*
9. *Enacting and implementing a plan of action against discrimination and xenophobia.*

All of these will be needed to

10. **Obtain the contribution of labour and skills mobility to the economic development and employment agenda.**

Therefore, these concerns all need to be addressed in legislation which is the foundation of national governance under the rule of law.

Congratulations on the progress achieved so far, well reflected in the content and participation of this important event today!

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A few References

Useful websites

ILO International Migration Program (MIGRANT):

<http://www.ilo.org/migrant/index.htm>

Building and Wood-Workers International (BWI) (Good section on migrant workers)

<http://www.bwint.org/default.asp?Issue=Migrant workers and posted workers&Language=EN>

Public Services International (PSI)

<http://www.world-psi.org/> See migration page

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