THE KEY ROLE OF INTERNATIONAL LABOUR STANDARDS IN DEFENDING RIGHTS OF NON-NATIONALS

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This paper addresses the applicability of International Labour Standards and jurisprudence to the protection of non-nationals world-wide. It outlines a number of general notions regarding their relevance, describes main features of relevant instruments and mechanisms, describes challenges to making this applicability more effective in the arena of human rights and policy debate, and poses several responses to address these challenges.

I. The Context of Applicability

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).[1] 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.

In fact, initiation of elaborating International Labour Standards predated the UDHR by thirty years. The notion of rights protection of non-nationals was established in 1919 in the Constitution of the International Labour Organization, which was contained in the Treaty of Versailles. While initial instruments delineating protection for migrant workers were adopted in the 1930s, contemporary concepts were elaborated into ILO Convention 97 on Migration for Employment in 1949, two years before adoption of the 1951 Convention on the Status of Refugees.

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.

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[1] 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.

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

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.

The human rights approach to protection of non-nationals has intrinsic value in and of itself. However, this approach does not exist alone but in the context of the rule of law as the foundation of governance. As noted recently by an African speaker, Diejomaoh, the application of fundamental rights at work "contributes directly to observance of peace, respect for Human Rights, the observance of democracy, the rule of law and social justice, all of which are the cardinal tenets of good governance."

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.

II. Basic Notions of International Norms regarding migrant workers

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

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

Several recent studies have reconfirmed that broad and extensive body of international law already exists applying to international migration, most of which directly affects treatment of non-nationals. ILO colleagues agree with a general conclusion that by-en-large, there exists sufficient normative basis for governance of migration and protection of non-nationals. The challenge is

one of implementation, not elaboration. The report of the Special Rapporteur on Rights of Non-Nationals more extensively described much of the relevant international jurisprudence.

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

Three Core Standards

Three complementary and sequential international standards provide the core definitions of rights of 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.[2]

The 1990 International Convention extended the legal framework for migration, treatment of migrants, and prevention of exploitation and irregular migration. The content of ILO Conventions 97 and 143 formed the basis for drafting the UN Convention, which expanded and

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

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.[3] 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 63 different States have now ratified one or more of these three complementary standards. The ILO Migration for Employment Convention No. 97 of 1949, is ratified by 42 countries, the ILO Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975 is ratified by 18 countries; and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ratified by 22 countries and signed by 11 others[4]. A number of countries have ratified two or all three of these instruments.

Elaboration of the 1990 Convention regarding migrant workers under UN rather than ILO auspices reflected pressures from a number of States interested, on the one hand, in expanding general notions of protection of wider rights of migrant workers. On the other hand, the deliberate choice to avoid ILO auspices for the new instrument reflected a perception on the part of some States that UN monitoring bodies tended to be less stringent than the ILO supervisory mechanisms in the field of labour. On the part of other States, there was clearly interest in avoiding the involvement of independent trade unions in following and contributing to the monitoring process of such an instrument. The ILO migrant workers instruments permit a worker organization from countries that have not ratified these Conventions to invoke their application in a State that has ratified.

Application of Labour Standards

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

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

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

work, which would contribute to identifying whether workers may be in situations of forced or compulsory labour.

The ILO has emphasized[5] the need to mobilize the entirety of its standard-setting, technical cooperation and research resources in all its areas of competence, to give particular attention to persons with special social needs, including migrant workers.

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

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

These principles are incorporated in the eight fundamental Conventions of the ILO[6]. These Conventions, and the Recommendations which accompany them, are applicable to all workers, without distinction of nationality, and in many cases regardless of migration status.

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

Application of the fundamental principles is being strengthened by recent international jurisprudence. A recent decision of the supervisory Committee on Freedom of Association of the ILO held[7] that Article 2 of Convention No. 87 recognizes the right of workers, without distinction whatsoever, to establish and join organizations of their own choosing without previous authorization. The Committee invited the Governing Body to request the Government to take into account the terms of Article 2 of Convention No. 87 according to which workers, without distinction whatsoever, have the right to join organizations of their own choosing.

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

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

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

The Inter-American Court of Human Rights issued a sweeping opinion on 17 September 2003 which clearly reinforces the application of international labour standards to non-national workers, particularly those in irregular status.[8]

> 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.[9]

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 en the State of employment. These rights are a consequence of the labor relationship."

Supervision and Enforcement of ILS

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

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

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[8] Corte Interamericana de Derechos Humanos. *Condición Jurídica y Derechos de los Migrantes Indocumentados* Opinion Consultativa OC-18/03 de 17 de Septiembre de 2003, solicitada por los Estados Unidos de Mexico.

[9] As reported by Beth Lyons, (USA) National Employment Law Project, September 28, 2003

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

Challenges to effective implementation

The following ten points sum up major impediments to the full and effective application of human and labour rights to non-nationals, particular in the work place world.

1. The world of work is a major focus of contention on the applicability and extent of implementation of human rights, even the rule of law. Notions and practices of deregulation and informalization limit the practical application and enforcement of rights protections at work. Deregulation effectively removes application of legal protections and corresponding enforcement.

2. Informalization of work and the rise of homework makes far more difficult any meaningful inspection and enforcement of labour standards where they may exist. Research in Europe and elsewhere has highlighted that investor interest in higher capital returns from informal activity not subject to employment standards or regulation has encouraged shifts of capital and employment creation towards informal sector activity, where employment itself is clandestine or 'illegal,' and largely invisible as well as unreachable by current labour standards inspection and enforcement. Irregular migrants are preferred workers due to their vulnerability and their inability to organize, protest, denounce or call in regulatory inspection.

3. Phenomena associated with globalization have hightened economic competition, increased cost pressures on business, and have resulted in increasing concentration of control over resources and wealth. These features, combined with formal deregulation, exert strong downward pressures on wages and working conditions. In industrialized countries, informalization, growth of dual labour markets and demographic trends combine to expand demands for cheap labour that national workers are unavailable for. Ensuring that economic activity remains competitive in global markets requires that this labour supply be cheap and docile. Competition for capital also requires reducing State expenditures and thus taxes –especially in periods of economic stagnation. Making this cheap labour supply expendable and removable when not needed by denying legal status effectively reduces costs for State and private social welfare.

4. In a growing number of countries, migration management responsibilities are being shifted from labour ministries to interior or home affairs ministries, thus transforming contexts for policy elaboration and implementation from that of labour market regulation to that of policing and national security. Pursued to the detriment of other considerations, this shifted focus subordinates fundamental human and labour rights considerations as well as economic and developmental factors to secondary roles. Despite the vast extent that migration is about work, this shift separates administration of an increasingly sizable portion of the work force away from the institution of the State concerned with labour market regulation and conditions of work.

5. Policy dilemmas in the economic and administrative realm are reinforced in the political discourse and ideological frameworks advanced in host States regarding migrants—non-national workers. The utility of their presence –in irregular and exploited situations— represents a challenge to normative and ideological values of most industrialized countries inasmuch as these persons are denied legal and social protection. A predominant response is banal association of migration with crime, arms, drug trafficking and terrorism, and discussion of draconian measures

to “combat illegal migration”. Social stigmatisation and outright violence is encouraged by the language of illegality and by military terms – as if ‘illegal migrants’ were an enemy in warlike confrontation.

6. Meanwhile, the main arenas of international and inter-governmental discussion and policy-elaboration function outside the United Nations system. Inter-governmental organizing on migration 'management' developed rapidly over the last decade. Regional inter-governmental consultative processes incorporating States operate in most world regions, known by names as Puebla, Bangkok, Dakar, Cairo, MIDSA (Migration International Dialogue for Southern Africa), 5 + 5 Mediterranean, and Lima dialogues. Several have permanent secretariats, such as the Intergovernmental Consultations for Europe, North America and Australia (IGC), the Budapest Process for Eastern and Central Europe, and the Asia Pacific Consultations. The intergovernmental International Organization for Migration serves as secretariat for most of the others. Most of these arenas do not admit access by civil society organizations, with the notable exception of the Puebla process for North and Central America, where effective advocacy opened doors for NGO participation. At the global level, the Berne Initiative was launched two years ago as an explicitly inter-governmental consultation process; relevant civil society organizations have only begun to be invited to recent consultations. The new global commission on international migration has been deliberately set up as an “independent” inter-State initiative outside the UN system.

7. Nonetheless, in the experience of this author, who served until early 2002 as Coordinator of the Global Campaign for Entry into Force of the 1990 Convention, the most salient obstacle to wider ratification and application of relevant international instruments remains the lack of political will by States to extend basic human and labour rights protections to migrants.

8. Efforts to promote awareness and ratification of the 1990 International Convention and the complementary ILO Conventions remain minimal scattered, fragmented and limited in impact. Only recently have major human rights monitoring organizations --Human Rights Watch, Amnesty International, etc.—begun to give attention to migrants rights. With the notable exception of a concerted effort around the Durban World Conference Against Racism and Xenophobia (WCAR) and some campaigning for the 1990 Convention, the center of gravity of CSO discourse and advocacy remains denunciation of conditions and government action or inaction that underlie lack of protection of human rights of migrants.

9. IGO activity remains minimal and ambivalent in promoting application to migrants of the very standards and principles these organizations were established to elaborate and uphold.

10. Other than some national and international trade union centres that link ILO and international conventions in efforts to defend non-nationals workers, many concerned Civil Society Organizations (CSOs) –and the Global Campaign-- avoid addressing “labour” standards in advocacy for protection of non-nationals.

III. Responses to advance human rights protections for non-nationals

CSOs in concert with IGOs have fundamental roles to play in providing moral, political, and practical leadership in assuring a rights-based approach to international migration, thus to protection of non-nationals. This role is necessarily expressed through a profile of solidarity and

advocacy built on work with migrants and their concerns in explicit association with promotion of international standards and the values they derive from.

Neither CSOs nor IGOs have the independent capacity, credibility or socio-political base necessary to achieve implementation of a rights-based 'regime' to ensure protection of non-nationals. They must work together to orient, convince and pressure States to do 'the right thing' for all migrants.

Work in local communities is undeniably the necessary operational focus for constituent-based organizations. However, the lack of coordination and 'concertation' denies these efforts the visibility and effectiveness required to wrest the political and organizational initiative from State and other interests for whom social protection of migrants represents unacceptable economic costs and political constraints.

Much more than sparse campaigns will be necessary to defend and advance protection of rights and dignity of migrants –non-nationals-- in the context of today's globalized world, with its polarized accumulation of wealth and power and increasing exclusions. Common approaches, strategies, coordination, and the ability to mobilize human resources are needed. All this is required to generate alternative solutions, influence the course of events, contribute to the elaboration of national policies, and so on. And it won't happen spontaneously.

What is needed:

1. Bridge the divide by acknowledging the complementarity of international labour standards as an integral component of an international human rights approach to recognition and protection if rights of non-nationals.

2. Strengthen this complementarity by explicit joint promotion of ratification and application of the ILO and UN Conventions on protection of rights of migrant workers.

3. Encourage and facilitate cooperation between concerned civil society sectors and organizations, and trade union organizations in promotion of application of migrant worker standards.

4. Strengthen common approaches and common actions between CSOs and the key standards-based International Organizations. This means not only OHCHR, ILO, UNHCR and the Office of the United Nations Secretary General, but also activity with the relevant bodies of the African Union, the Council of Europe, the European Union and the Organization of American States.

5. Identify relevant forums for access and advocacy:
   --regional migration dialogue processes
   --international migration discussions
   --the International Labour Conference in 2004, where migrant workers will be the subject of the General Discussion.

6. In articulating international dialogue, networking and activity on rights of non-nationals, ensure participation of the 'social partner' organizations, especially trade unions.

Advancing the international rights-based framework that assures protection of migrants' human rights in the practice of States and societies requires promotion of human rights law, applicable

international labour standards, humanitarian principles and respect for diversity as guarantors of democracy and social peace. Civil society organizations and international organizations –in concert with migrant associations—have key moral and political leadership roles to play in mobilizing societies and governments to ensure implementation of this framework.

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