

# Globalization, Migration and Labour: Imperatives for a Rights Based Policy<sup>1</sup>

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*Migration has always been an essential component of economic development and social progress in many countries. Labour migration becomes one of the most important sources of regional integration, where regulation of labour migration is implemented at the regional level, for only such large integration unions that exploit the advantages of markets, resource bases and labour potentials amalgamation, can hold out against increasing competition within globalizing world. However, if migration is not regulated by adequate laws and rules, it carries a high risk to violate the rights of people participating in it and to create social tension. Today the discussion on migration represents contradiction between economic logic of globalization, on the one hand, and those moral values which are incarnated by human rights concept – on the other. The focus of such contradictions often concentrates on directly opposite views concerning the way migrants' rights protection, especially those who do not have legal status, and the ways of guaranteeing security and social stability if foreign citizens prove to be under protection of national legislation. Within everyday reality this contradiction puts migration in the centre of discussion concerning interaction of labour and capital, distribution of economic activities incomes, and how foreign working people and civil society can organize themselves in order to clearly formulate and protect their own rights.*

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[A]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

*Declaration of Philadelphia 1944.*<sup>2</sup>

History tells us that migration has been an essential constituent of economic development and social progress of many countries. Migration is making vast but often unrecognized contributions to economic development of most countries of the Commonwealth of Independent States (CIS), whether in providing labour power and skills for Kazakhstan

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<sup>2</sup> Declaration of Philadelphia concerning the Aims and Purposes of the International Labour Organization (ILO), Sections I(a) and II(a) respectively. The Declaration was adopted by the International Labour Conference in 1944 and incorporated as an annex into the revised ILO Constitution of 1946 (when the ILO also became the first specialized agency of the UN). For the Constitution and Declaration, see <http://www.ilo.org/public/english/about/iloconst.htm#pre>

and new Russia, opportunities for employment abroad and remittance income in Central Asia, the Caucasus, Moldova and the Ukraine.

Labour migration is becoming one of the most important keys to regional integration and development, whether among European States, in the Southern Africa Development 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 will be able to meet the competitive demands of a globalized world. This is true for the CIS as well.

However, unless regulated by appropriate laws and regulations, migration entails a high cost in violations of rights of individuals, in social disruption, in lost or reduced productivity, and lost opportunities for economic growth and development.

Migration today, and the contention over recognition of migrants' rights, represents a cutting edge of contention between the economic logic of globalization and the moral values embodied in human rights concepts and law. This contention is marked by acrimonious policy debate in countries North and South and in international conferences. At the heart of these debates are often opposing views regarding the extent to which human rights protections apply to migrants – especially those in irregular situations – as opposed to both security and social considerations relativizing or excluding foreigners from protection under national law.

In day to day reality, this contention makes migration a central and significant arena of dispute and redefinition in relations between labour and capital, in distribution of benefits deriving from economic activity, in the level of protection and regulation of conditions of employment and work, and in the extent working people – foreign workers in particular – and civil society can organize to articulate and defend their interests.

### **Role of Migrant Labour Today**

In the economic realm, migrant labour has become a key feature in meeting economic, labour market and productivity challenges in a globalized economy. Migration today 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, potentially increasing dynamism, innovation and mobility in work forces.

It is a global phenomena; no region and few countries are untouched. ILO has calculated that today, some 105 million foreigners are economically active, that is to say employed, self-employed or otherwise active in remunerative activity, across the world (ILO 2010). That is nearly half of the total 214 million people living outside their country of birth or citizenship as of the year 2010. The foreign born commonly represent 10 % of the work force in Western European countries. Proportions in a number of countries in Africa, Asia and the Americas are today similar or higher and some countries in the Gulf rely on foreign workers for 50 to even 90 % of their work forces.

Due to economic, demographic and technological changes, increasing numbers of jobs in industrialized economies cannot be filled by native-born workers. Ageing of native work forces combined with declining populations is an important factor. Latvia and Lithuania

have already seen reductions of population by nearly 10 % since 1989 – including working age adults. The native Russian work force is currently declining by some 750,000 workers per year, the consequence of more people reaching retirement age than young people entering the labour market. Fertility rates in Hungary, Italy, Spain, Russia, the Ukraine and elsewhere are well below replacement.<sup>3</sup>

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.

While migration is not a silver bullet solution to these challenges, it is certainly one of the necessary responses.

### **Challenges of Globalization**

Growing economic interdependence of states is a widely acknowledged component of globalization. Regarding the impact on migration, an ILO study said, *'The evidence points to a likely worsening of migration pressures in many parts of the world... Processes integral to globalization have intensified the disruptive effects of modernization and capitalist development... Many developing countries face serious social and economic dislocation associated with persistent poverty, growing unemployment, loss of traditional trading patterns, and what has been termed a 'growing crisis of economic security' (Stalker 2000).*

Accelerated trade is replacing or undercutting domestic industrial and agricultural production with cheap imports, but at the expense of many jobs in those sectors, in numerous developing countries. Meanwhile, data indicates that job creation by private sector in many countries affected by Structural Adjustment Programs has not matched the numbers rendered unemployed by downsizing governments.

As the ILO Director General Juan Somavia puts it, *if you look at globalization from the point of view of peoples' concerns, its single biggest failure is its inability to create jobs where people live.* In sum, migration pressures on the 'supply side' are increasing as possibilities for employment and economic survival at home disappear.

On the other side, demand for migrant labour is anything but declining. Rather, demographic trends and ageing work forces in many industrialized countries mean that immigration has become an increasingly important option to address changing labour force composition and needs and future economic and social security performance.

Growing competition for highly educated specialists in expanding service sectors has resulted in a significant rise in skilled labour migration. Simultaneously, needs around the world to fill the so-called '3-D jobs' (dirty, dangerous and degrading) and thus maintain economic competitiveness through low labour costs produces a continuous demand for cheap and low-skilled migrant labour in many countries.

### **Stakes High for Future Cohesion, Economic Viability and Social Welfare**

To determine how important migration may be, ILO conducted a future simulation for Western Europe using its methodology to predict performance of social security systems, a method proven accurate over the previous ten years. The findings? If current trends re-

<sup>3</sup> For example, the UN Population Division World Population Report shows fertility rates in Spain at 1.29 in 2000–2005 and averaging slightly higher at 1.43 over the period 2005–2010.

main the same regarding population aging and decline, female participation in the work force, retirement age, low immigration, and modest advances in productivity, the standard of living in Western Europe measured by per capita income of gross domestic product will be 78 % of what it is today, 22 % lower (ILO 2004a: 37–38).

While migration is not the ‘silver bullet’ solution alone, it is clearly one important element among several macro-policy responses required to achieve a more positive outcome than this simulation indicates.

Migration will have major influence on economic performance, productivity and future well-being in Europe, as well as in Asia, North America and in the CIS region.

Today, migrant labour in both developed and developing countries largely fills ‘three-D’ jobs: Efforts to fill 3-D jobs and to acquire economic competitiveness at low cost produce a continuous demand for cheap and low-skilled migrant labour in numerous sectors of national economies. These sectors commonly include agriculture and food processing, construction, cleaning and maintenance, hotel and restaurant services, labour intensive assembly and manufacturing, the sex industry and others. In fact, immigrant labour has long been utilized in industrialized countries as a low cost means to sustain economic enterprises and sometimes, entire sectors of economic activity that are only marginally competitive and would not survive without cheap foreign labour.

Small and medium size companies and labour-intensive economic sectors do not have the option of relocating operations abroad. Responses include downgrading of manufacturing processes, deregulation, and flexibilization of employment, with increased emphasis on cost-cutting measures and subcontracting (Lean Lim 1998: 277). In a number of countries, these measures are expanding the number of jobs at the bottom of the employment scale. These jobs are simply not filled by national workers. Workers may not be available because of work force aging and numerical decline – the case in a growing number of European countries and the Russian Federation. Also, unemployed or otherwise available national workers are simply not willing to take such jobs, for reasons of low pay, degrading and dangerous conditions, and/or low status in those jobs and sectors.

The resulting demand for migrant workers provides a significant impetus to labour flows and facilitates the incorporation of undocumented migrants (Escobar Latapi 1997: 4). ILO research in Southern European countries demonstrates the extent to which ‘the migrants take jobs that the locals refuse. It is simply a matter of substitution’ (Reyneri 2001). One study noted, ‘We can conclude that migrants are in competition only with marginal sections of the national labour force ... when they are not sufficiently sustained by welfare provisions, in specific sectors, and/or in the less-developed areas inside these countries’ (*Ibid.*).

For the less qualified jobs, employers demand workers who will not exercise pressures on the salary structures. Given that, at least initially, immigrant workers will not challenge the relation between salary and the social status attached to specific occupations, contracting migrant workers avoids the economic risks – particularly structural inflation – that national workers induce when they demand salary increases.

ILO has estimated that, globally, some ten to twenty percent of international migrant workers are in irregular situations, without legal authorization or undocumented. An on-line database on irregular migration in the European Union provides detailed estimates indicating that migrants in irregular situations number between 2.8 and 6 million, giving a range of 11 % to 23 % of total stocks. 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 coincides with the fact that the 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.

### **(Mis)treatment of Migrants**

The corresponding treatment of migrant workers clearly contradicts internationally agreed human rights principles and specific international legal standards.

Treatment of migrants in general and migrant workers in particular is commonly characterized by abuse and violations of norms, both national where they apply to migrants, and international standards. As noted in the Conclusions on Migrant Workers of the 2004 International Labour Conference:

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. In a significant number of cases unemployment rates, job security and wages differ between regular migrant workers and national workers.

The pressures of higher unemployment rates among immigrants and ethnic minorities make them less susceptible to unionisation, especially in sectors of precarious employment with strong threats of dismissal for either organizing or simply complaining about absences of occupation safety and health protections and 'decent work' conditions. As the International Trade Union Confederation (ITUC) highlights, organizing migrants and immigrants into unions or organizations to defend their interests and rights is often extremely difficult as it is easily intimidated and disrupted by the threat or actual practice of dismissal and deportation (see, for example, Linard 1998).

### *Gender, Migration and Abuse*

A word on the gender dimensions is warranted. Women now comprise half of the total migrant worker population; that is as workers themselves, not dependents. Differential opportunities for legitimate employment affect men and women differently. Demand for migrant workers in receiving countries is defined by the labour market segmentation in these countries: opportunities are available for precisely these low-skilled jobs considered suitable for women. The feminisation of international labour migration, together with the fact that most job opportunities for women migrants are in unregulated sectors (agriculture, domestic work, sex industry) and the existence of sex-disaggregated labour markets contribute to the increase of discriminative labour markets in countries of destination. Female migrants are thus marginalized even further, they are more often left with no option but irregular migration, and exposed to worst forms of abuse.

### *Discrimination*

Equality of treatment and non-discrimination are fundamental premises for maintaining functional labour markets and viable labour relations. Equality of treatment and opportunity

are also essential to upholding social cohesion in societies characterized by increasing diversity of populations.

However, discrimination plays an important role in maintaining – and justifying – stratification and segmentation in the labour market. It contributes and mutually reinforces attitudes that relegate or constrain certain identifiable groups to certain roles and strata in the work force.

Repeated, reinforced discrimination leads to depression, apathy, resignation, and marginalization. When people – and groups – are consistently denied employment opportunities, and when they are also confined to ghettos, provided inferior education or training opportunities, perceive law enforcement as providing little protection, and face discrimination in other aspects of community life, the combination adds up to a powerful recipe for exclusion, the antithesis of inclusion that is the fundamental notion of integration.

Unequal starting points or disadvantages, together with discriminatory behaviour, are the key reasons why migrant and ethnic minority workers face greater obstacles than the majority population.<sup>4</sup> In contrast to individual acts of discrimination, societal discrimination consists of arbitrary barriers against the advancement of minorities; the whole ‘system’ disfavors individuals because they are members of a certain group.

Compounding the challenge of discrimination are underlying ideological precepts of the definitions and identities of most nation-states around the world. Historically, these identities have often been constructed around mono-racial, mono-cultural, monolingual, and sometimes mono-religious definitions of belonging in nation-States.

The reality is increasingly diverse, and will inevitably become more so. A pronounced shift of understanding national identities is required. Diversity needs to be legitimized to respect and preserve the essences of identities that comprise that diversity, including those historical national identities.

### **Whose Security?**

The contradictions outlined above give rise to contradictions in the rhetoric and practice of States.

In a number of countries, migration is being simultaneously encouraged and combated. Distance between policy pronouncements and *de facto* arrangements reflects a major contemporary contradiction in States' practice. Despite the political rhetoric about illegal migration, some governments appear to tolerate irregular migration while they officially reinforce controls against ‘illegal’ migrant workers. The consequences are, on the one hand, a supply of cheap labour on their territories, while on the other hand, migrants are unable to organize in the workplace to defend their dignity and decent work conditions, and they are stigmatized and isolated from allies and support.

With too few options available for legal migration despite both strong demand for foreign workers and a high supply of willing migrants, irregular migration has become the only alternative. However, the placement of barriers between supply and demand establishes a lucrative ‘business’ opportunity for helping people arrange travel, obtain documents, cross borders and find jobs in destination countries despite border barriers.

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<sup>4</sup> Additional explanations for the high under- and unemployment of migrant and ethnic minority workers can be found in macro-economic developments, including the constant reduction of unskilled industrial manual labour. See Abella 1997: 9.

The flow of low-skilled migrants to more developed regions is channeled 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, migrants remain confined to jobs in unstructured or informal sectors, in irregular work and under exploitative conditions of employment (Abella 2002). In contrast, ILO research underlines that legal labour migration channels contribute to both reducing trafficking in children and women and the smuggling of migrants.

Restrictions on freedom of movement combined with absence of enforcement of health and safety protections and inability to ensure payment of wages according to minimum standards 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. The absence of labour inspection, particularly in sectors such as agriculture, construction, domestic service, sex-work and others where migrants are concentrated, facilitates the space in which forced or compulsory labour can thrive.

At the level of domestic politics and national government administration, promoting an agenda of migration control has become a viable vehicle to capture political attention and budgetary resources. Pursued to the detriment of other considerations, that focus has subordinated fundamental humanitarian and human rights considerations as well as economic and developmental factors to secondary roles.

In a growing number of countries, migration management responsibilities have been shifted from labour ministries to interior or home affairs ministries, thus transforming contexts for policy elaboration and implementation from that of labour market regulation to that of policing and national security.

Despite the vast extent that migration is about work, this shift separates administration of an increasingly sizable portion of the work force from the institution of the State most directly concerned with labour market regulation, conditions of work, industrial relations, and social security.

Reference to social dialogue – consultation with social partners – is absent in many national as well as international migration policy initiatives. ‘Management’ of an increasingly large and important sector of the working class outside normative protections, outside social dialogue and outside labour market institutions contributes to accelerated deregulation of labour markets as well as to deterioration of relations between labour, employers and the State overall.

The policy dilemmas in the economic and administrative realm are reinforced in the political discourse and ideological frameworks advanced in host States regarding irregular migrants. 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 irregular migration with crime, arms, drug trafficking and terrorism, and discussion of draconian measures to ‘combat illegal migration’. Social stigmatization and outright violence is encouraged by the language of illegality and by military terms – as if ‘illegal migrants’ were an enemy in warlike confrontation.

The terminology of *illegal migrant* or *illegal alien* explicitly associates migration with crime, as does placing immigration control in the same category as crime, arms and drug control. While the term ‘illegal migration’ is more ambiguous, the ease by which language of illegal migration is transposed to ‘illegal migrants’ and the manifest association of both

these terms with criminality make these terms vehicles to convey – indeed encourage – the antithesis of acceptance and respect. Language conveys values explicitly and implicitly. The generalized rise of hostility and violence against non-nationals – migrants, refugees, immigrants, even sometimes, foreign students and tourists – is not simply coincidental to the generalized use of these terms.

Legally and semantically, the term *illegal migrant* is an oxymoron – a contradiction – from any reading of human rights values. It contradicts the spirit, if not directly violates the letter, of the Universal Declaration of Human Rights, which clearly establishes in Article Six that every **person** has the right to recognition before the law, and in Article 7, that every person has the right to equality of treatment before the law.

Contradictions pitting an amalgam of restriction and control measures against a rights-based approach to regulating migration are further reflected in international political developments. The adoption and growing number of ratifications of two Protocols, one on Combating Trafficking in Persons, the other to suppress smuggling of migrants, of the International Convention Against Transnational Organized Crime puts dealing with migration in a context of crime suppression, prevention and punishment. Both of these protocols focus on suppression and prevention measures to confront two particular aspects of irregular migration (trafficking, smuggling). However, human rights protections are subordinate aspects, and essential only provide certain protection for victims of trafficking.

### *Security versus Rights?*

A growing assault on the universality of international principles of human rights has evolved over the last decade; it is now particularly focused on migration and the treatment of non-nationals.

Newly articulated ideological and political arguments specifically challenge the applicability of human rights law and principles to migrants and other non-nationals. On the one hand, post-September 11 doctrines advance the notion that the extent and nature of threats to national and State security posed by ‘international terrorism’ justify – even require – restrictions on human, civil and judicial rights of migrants in Western democracies as well as elsewhere.

The criminalization of migrants and the securitization of States conveniently dehumanizes foreigners, removing the imperative of recognizing and protecting their human rights and precluding solidarity and equality of treatment. Doing so ensures that a significant portion of workforces remain in docile, unprotected and inferior status.

Arguing for securitization of States is also effective in mobilizing public support for repressive measures – impeding in particular access of foreign workers and their families to legal defence, social services and ability to organize to defend their interests and participation in host societies.

### *Relativizing Rights*

Proposals relativizing human and labour rights have emerged in the arena of international migration. A ‘utilitarian consequentialist’ approach argues for an explicit trade-off of lowered application of rights and unequal treatment for non-national workers in exchange for increased opportunities for employment in potential host countries.<sup>5</sup> In this approach,

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<sup>5</sup> An elaboration of this approach appears in Ruhs and Chang 2004.



rights are commodified as negotiable bundles that may be traded, sold or renounced in exchange for economic benefits in form of access to labour markets. This approach is explicitly based on the premise that certain bundles of rights can be forfeited or traded to 'earn' access in temporary and otherwise limited circumstances to employment in developed country labour markets. It also suggests that trade-offs can be negotiated with organizations representing native workers to address their economic and political concerns.

These arguments coincide with continuing calls and initiatives to determine 'minimum' or 'core' rights applying to migrants. Such initiatives have been articulated for in a draft resolution circulated (but not adopted) at the UN Commission on Human Rights in 1997, in proposals emanating from senior officials of IOM, from EU and Council of Europe forums, in academic circles, and proposals to revise ILO Conventions and in discussions around the Global Forum on Migration and Development. Proposals for delineation of 'minimum rights' appeared to have intensified with increased ratifications and entry into force of the 1990 International Convention on protection of migrants' rights. A clear risk in this approach is establishment of a set of guidelines or principles that are much more general, vague and unenforceable in contrast to the explicit standards and supervisory mechanisms of the ILO Conventions and 1990 International Convention on migrant workers.

### **A Rights-Based Approach**

A rights-based approach to migration is placement of universal human rights norms defined by the relevant international instruments as central premises of national migration legislation, policy and practice founded on the rule of law. Application of these norms is conditioned by historical, economic, social and cultural factors.

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 cultural life'. Human rights are *universal* – they apply everywhere; *indivisible* – in the sense that political and civil rights cannot be separated from social and cultural rights; and, *inalienable* – they cannot be denied to any human being. This is the basis of 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.

A corollary notion is that universal principles of human rights implemented in the rule of law provide the foundation for governance – governance of nations, community relations and 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.

While not a binding legal instrument in itself, the UDHR has subsequently been adopted or formally endorsed by nearly all the World's nation-States. It has acquired the legal status of customary international law – generally universally applicable as a legal norm.

Two major International Covenants elaborated the principles of the Universal Declaration into binding normative standards on political and civil rights, and economic, social and cultural rights in the 1960s.<sup>6</sup> Specific conventions explicitly extending

<sup>6</sup> International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

the ‘universal’ rights to victims of racial discrimination, women, children, and migrants were elaborated over the three decades from 1960 to 1990: 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 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (CMR).<sup>7</sup> These seven instruments were characterized as the seven fundamental human rights instruments that define basic, universal human rights and ensure their explicit extension to vulnerable groups worldwide.<sup>8</sup>

Three fundamental notions characterize the protections in existing 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.
- 3) The broad array of international labour 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.

### *International Labour Standards*

Some principles and rights at work that derive from the ILO Constitution and that have been expressed in the eight ILO Conventions<sup>9</sup> are deemed to be fundamental for the protection of human rights for all workers, including migrant workers, by the ILO and its member States. 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: par. 2).

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 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 relevant. ILO social security standards define personal scope of coverage irrespective of nationality, almost all contain similar clauses on equality of treatment between nationals and foreign workers in the host

<sup>7</sup> 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 URL: [www.ohchr.org](http://www.ohchr.org).

<sup>8</sup> Noted in the Report of the (UN) Secretary General on the Status of the UN Convention on migrants rights for the 55<sup>th</sup> Session of the UN General Assembly. Doc. A/55/205. July 2000.

<sup>9</sup> C87 Freedom of Association and Protection of the Right to Organize Convention (1948); C98 Right to Organise and Collective Bargaining Convention (1949); C29 Forced Labour Convention (1930); C105 Abolition of Forced Labour Convention (1957); C100 Equal Remuneration Convention (1951); C111 Discrimination (Employment and Occupation) Convention (1958); C138 Minimum Age Convention (1973); C182 Worst Forms of Child Labour Convention (1999).

country, and the majority also contains special non-discrimination clauses.<sup>10</sup> The ILO also adopted several complementary standards that deal specifically with the protection of migrant workers' social security rights.<sup>11</sup>

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 Committee of Experts on the Application of Conventions and Recommendations 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.<sup>12</sup> The ILO Convention on Discrimination in Employment and Occupation (No. 111) of 1958 has been frequently referred to in upholding equality of treatment and non-discrimination for migrant workers and workers of immigrant origin; an example is cited below.

This applicability has also been explicitly upheld in an international court, the Inter-American Court of Human Rights in an Opinion issued in 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 in the State of employment. These rights are a consequence of the labor relationship'.<sup>13</sup>

### **Migrant Specific Instruments**

The ILO Migration for Employment Convention of 1949 (No. 97) establishes 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. The ILO Migrant Workers (Supplementary Provisions) Convention of 1975 (No. 143) established norms to reduce exploitation and trafficking of migrants while insuring protections for irregular migrants, and to facilitate integration of regular migrants in host societies.

The content of ILO Conventions 97 and 143 formed the basis for drafting the 1990 International Convention on migrant workers, which expanded and extended recognition of economic, social, cultural and civil rights of migrant workers rights.<sup>14</sup>

<sup>10</sup> Social Security (Minimum Standards) Convention No. 102 (1952); Employment Injury Benefits Convention No. 121 (1964); Invalidity, Old-Age and Survivors' Benefits Convention No. 128 (1967); Medical and Sickness Benefits Convention No. 130 (1969); Employment Promotion and Protection against Unemployment Convention No. 168 (1988); and Maternity Protection Convention No. 183 (2000).

<sup>11</sup> Equality of Treatment (Accident Compensation) Convention No. 19 (1925); Equality of Treatment (Social Security) Convention No. 118 (1962); Maintenance of Social Security Rights Convention No. 157 (1982).

<sup>12</sup> See Fifth Edition of the 'Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (2006).

<sup>13</sup> Corte Interamericana de Derechos Humanos: *Condición Jurídica y Derechos de los Migrantes Indocumentados*. Opinión Consultativa OC-18/03 de 17 de Septiembre de 2003, solicitada por los Estados Unidos de Mexico.

<sup>14</sup> Texts and related information available respectively at URL: [www.ilo.org/ilolex](http://www.ilo.org/ilolex) and [www.unhchr.ch](http://www.unhchr.ch).

Together, the two ILO conventions on migration and the 1990 International Convention comprise an *international charter on migration* providing a broad normative framework covering treatment of migrants and inter-State cooperation on regulating migration.

Eight points describe the importance of these three Conventions:

1. They establish comprehensive ‘values-based’ definitions and legal bases for national policy and practice regarding non-national migrant workers and their family members. They thus serve as tools to encourage States to establish or improve national legislation in harmony with international standards.

2. They lay out 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.*

3. The 1990 International Convention further establishes that migrant workers are more than labourers or economic entities; they are social entities with families and accordingly have rights. 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.

4. ILO Convention 143 and the 1990 Convention include provisions intended to prevent and eliminate exploitation of migrants, thus reinforcing the ‘decent work’ agenda defined by International Labour Standards, nearly all of which apply explicitly or implicitly to all migrant workers.

5. ILO Convention 143 and the 1990 Convention explicitly address unauthorized or clandestine movements of migrant workers, and call for resolving irregular or undocumented situations, in particular through international cooperation.

6. These Conventions resolve 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 undocumented or unauthorized migrant workers.

7. While the three Conventions address migrant workers, implementation of their provisions would provide a significant measure of protection for other migrants in vulnerable situations, such as victims of trafficking.

8. 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.

84 different States have ratified one or more of these three complementary standards as of April 2010.<sup>15</sup> 11 member States of the European Union have ratified one or both ILO conventions.<sup>16</sup>

In the CIS region, Armenia, Azerbaijan, Kirghiz Republic and Moldova have ratified one or more of these three instruments; Tajikistan is the first to have ratified all three. With 14 additional signatories to the UN Convention (signing is a preliminary step to ratification), it can be anticipated that more than 90 States will have adopted some level of international standards as the basis of national law and policy within the next couple

<sup>15</sup> 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 45 countries and signed by 14 others. A number of States have ratified both of the ILO Conventions; several have ratified one or both ILO Conventions plus the 1990 International Convention.

<sup>16</sup> Belgium, France, Germany, Italy, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, and the United Kingdom.

of years. This is a high proportion of the 120 to 130 countries for which migration is an important feature, whether as origin, destination and/or transit countries.

Entry into force in 2003 of the 1990 Convention allowed it to be cited as an authoritative standard, and thus it is today exercising persuasive power over non-party States as well, even though they have not agreed to be bound by its standards. While most States Party to this Convention are primarily countries of origin of migrants, several ratifying States are destination countries (Argentina, Chile, Libya) and others such as Mexico, Nigeria and Senegal have large migrant and immigrant populations on their territories, meaning substantial responsibilities for domestic implementation.

Other States have utilized provisions in the 1990 Convention as a guide to elaborating national migration laws. Recent legal studies have concluded that existing national law in Belgium, Portugal, Spain and other countries is almost entirely in conformity with the main provisions of the 1990 Convention, meaning few legal hurdles to ratification (Foblets, Vanheule, and Loones 2003).

Nonetheless, the slow progress in ratifications of the 1990 International Convention on migrants' rights and of the ILO Conventions in the last decade symbolize a broader political resistance to recognition of application of human rights standards to migrants, particularly undocumented migrants.

Rights and social protection carry costs, an implication which confronts the logic of globalized economic competition. Opposition to wider ratification of this Convention reflects pressures to restrict rights and corresponding labour costs of a now internationalised reserve army of labour in order to ensure that it remains cheap, docile, temporary and easily removable when not needed.

However, the absence of protection of human rights and the denial of social protection for a part of society carries enormous costs for economic progress and social cohesion for societies as a whole – whether individual nation states or wider in the context of wider international relations today.

### **Elements for a Policy Agenda**

Governance of phenomena that affect economic performance, industrial relations and social cohesion requires a foundation in the rule of law to ensure credibility, accountability and enforceability. Nonetheless, international legal standards provide only a basic grounding for policy and practical measures necessary both to protect migrants and regulate migration.

As the ILO puts it, 'A rights-based international regime for managing migration rests on a framework of principles of good governance developed and implemented by the international community that are acceptable to all and can serve as the basis for cooperative multilateral action. Existing international Conventions defining the rights of migrant workers provide many of the needed principles, but a sound framework would have to include principles on how to organize more orderly forms of migration that benefit all' (Executive Summary: ILO 2004a: Report VI).

Regulation is required to manage capital-labour relations in general and specific features such as labour migration. Market forces alone do not and cannot provide adequate, workable regulation of what is by definition a complex, international phenomenon highly subject to exploitation and conflict.

International dialogue on migration has increasingly focused in recent years in identifying common approaches among States in regulating what is by definition a phenomena requiring international cooperation. Nearly two decades ago, delegates of some 160 countries agreed upon a comprehensive common agenda in the chapter on migration of the Plan of Action adopted by the 1994 International Conference on Population and Development (ICPD) in Cairo. More recently, regional migration dialogues, the Berne Initiative's International Agenda for Migration Management (IAMM), and the Global Commission on International Migration<sup>17</sup> continued elaborating common approaches.

A vital contribution was the adoption of Conclusions and a *Plan of Action on migrant workers* at the 2004 International Labour Conference in Geneva (ILO 2004b). Those Conclusions outline a comprehensive approach to regulating labour migration from a rights based approach in the context of labour market and employment considerations. Especially significant is the fact that they were adopted unanimously by ministerial level government representatives together with the leadership of trade union and employer federations from 177 ILO member countries. Equally important is the existence of a normative system, institutional structure, organizational competence, and constituent engagement in ILO behind this Plan of Action to see to its effective implementation. Following this Plan of Action, ILO subsequently elaborated a comprehensive Multilateral policy Framework for Labour Migration from a rights' based approach that takes into account labour market concerns and sovereignty of States (ILO 2006).

Elaboration of an explicit national migration policy and/or plan of action is a highly useful and increasingly common step by governments to articulate a deliberate approach to migration governance. In Central Asia, the Kirghiz Republic has developed five-year plans on Employment and Migration, and Kazakhstan has established a formal national migration policy following extensive internal and international consultations; it is preparing comprehensive labour migration legislation.

As described in the ILO Multilateral Framework on labour migration and other models, essential elements for a migration policy agenda include:

1) A standards-based foundation for comprehensive national migration policies and practices.

*Migration policy and practice can only be viable and effective when they are based on a firm foundation of legal norms, and thus operate under the rule of law.*

As noted above, the three instruments comprising an *international charter on migration* provide the normative framework and specific model legislative language required for national law, in turn the basis for national policy. The point of establishing legal rights and legislative policy standards is to ensure social legitimacy and accountability, only guaranteed by a foundation in the rule of law.

2) An informed and transparent migration policy and administration.

Immigration practice must respond to measured, legitimate needs, taking into account domestic labour concerns as well. Such a system must rely on regular *labour market assessments* to identify and respond to current and emerging needs for workers, high and low skilled. Policy and practice will need to address such areas as awareness raising, supervision of recruitment, labour administration, training of public service and law enforcement officials, recognition of educational equivalencies, provision of social and

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<sup>17</sup> See final report of the GCIM at URL: [www.gcim.org/en/finalreport.html](http://www.gcim.org/en/finalreport.html).

health services, labour inspection, rights restoration and recovery for victims of trafficking, and other areas.

3) Institutional mechanisms for dialogue, consultation and cooperation.

Migration policy can only be credible, viable and sustainable to the extent it takes into account the interests, concerns and experience of the most-directly affected stakeholders. Key stakeholders are the social partners: the employers and worker organizations. Labour ministries need to have a key role. Consultation and policy-making must also take into account the numerous other concerned ministries and agencies within government as well as civil society bodies and certainly migrants themselves.

4) Enforcement of minimum national employment conditions norms in all sectors of activity.

Preventing exploitation of migrants, criminalizing abuse of persons that facilitates trafficking, and discouraging irregular employment requires enforcement of clear national minimum standards for protection of workers, national and migrant, in employment. ILO Conventions on occupational safety and health, against forced labour, and on discrimination provide minimum international norms for national legislation. A necessary complement is *monitoring and inspection* in such areas as agriculture, construction, domestic work, the sex industry and other sectors of 'irregular' employment, to prevent exploitation, to detect forced labour, and to ensure minimal *decent work* conditions for all.

5) Gender sensitive migration measures.

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

6) A Plan of Action against discrimination and xenophobia.

Discrimination and xenophobic hostility against migrants are serious challenges to governance and social cohesion in every region of the world. ILO research found pervasive discrimination against regular immigrant workers – unlawful discrimination – across Western Europe (see Cediey and Feroni 2007; Attström 2008). The 2001 World Conference in Durban articulated a major component of national policy on migration by defining a comprehensive and viable model plan of action specifically to combat discrimination and xenophobia against migrants at national, regional and global levels, based on common experience from different regions.<sup>18</sup> A specific national plan of action on racism and xenophobia is essential today to achieving and sustaining social cohesion.

7) Linking migration and development in policy and practice.

Migration has long been and continues to generate significant contributions to both development and social progress and welfare in home and host countries alike. However, such contributions will certainly be enhanced by a broad array of policy measures ranging from reducing costs and constraints on transfer of migrant remittances to providing accessible mechanisms for regular migration to validating qualifications of migrants as well as recognition of the employment and economic contributions all labour migrants make.

8) International cooperation.

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<sup>18</sup> Main elements were established in the *Declaration and Program of Action* adopted at the World Conference Against Racism and Xenophobia (WCAR) in Durban in 2001, which included 40 paragraphs on treatment of migrant workers, refugees and other non-nationals. The full text is available at URL: [www.unhcr.ch/pdf/Durban.pdf](http://www.unhcr.ch/pdf/Durban.pdf). See also [www.unhcr.ch/html/racism/00-migra.html](http://www.unhcr.ch/html/racism/00-migra.html) for related documents and links.

Formalized mechanisms of regular dialogue and cooperation among States – including participation of concerned stakeholders – are essential in all regions. Of particular note are expanding legal and operational regimes for freer circulation of labour/persons across regional economic integration initiatives in several world regions, including the Andean Community and Mercosur in South America and the East Africa Community and the Economic Community of West African States (ECOWAS), the European Union, as well as the Commonwealth of Independent States.

### **A Shared Responsibility**

Promotion of the rule of law, good governance and social cohesion are shared responsibilities among all stakeholders: government, employers, trade unions, civil society and migrants themselves. Social partners – in concert with migrant associations – have key moral and political leadership roles to play in mobilizing societies and governments to ensure implementation of a rights-based framework for international migration.

Key stakeholders are the social partners: the employers and businesses that provide employment and the trade unions – worker organizations – representing the interests of workers, both migrants and nationals.

A shift of major importance is the evolution of trade union attitudes from ignoring migration – or expressing hostility towards irregular migrants – to taking stands of solidarity with migrant workers regardless of status.<sup>19</sup> Major policy shifts followed by extensive organizing drives among migrant workers have taken place over the last decade by mainstream trade unions and national confederations across Europe as well as in Africa, the Americas and Asia. National labour confederations and/or sectoral unions in Argentina, Belgium, Canada, France, Germany, Ireland, Italy, Korea, Mauritius, Mexico, the Netherlands, Portugal, Spain, Sweden, South Africa, the UK and the USA – among others – have full-time national staff for migrant worker organizing and anti-discrimination issues; all are active in policy advocacy for improved protection of rights and decent work conditions for migrants. The main global and regional trade union confederations have issued calls for ratification of the 1990 Convention and the ILO conventions on migrant workers.<sup>20</sup>

Civil society organizations (CSOs) have been active in promoting protection of rights of migrants as well as good governance in many countries. Most CSOs concerned with migration issues are nationally based and focused; regional formations have emerged in Asia, Central America and Europe. In the last five years major human rights monitoring organizations – International Federation of Human Rights, Amnesty International, Human Rights Watch – have given substantial attention to migrants rights.<sup>21</sup>

### **Act of the Crisis**

The global financial crisis has evolved into a deepening global employment crisis. This employment crisis also has a huge impact on labour mobility and labour migration, both in itself and in perceptions of migration and migrants. This impact and these perceptions only intensify the pressures on and challenges for ‘getting it right’ on migration policy.

<sup>19</sup> For a global overview of trade union views and activities, see ILO 2002.

<sup>20</sup> See website of International Trade Union Confederation (ITUC) at URL: [www.ituc-csi.org](http://www.ituc-csi.org). Some 200 articles and items posted relate to trade unions and migrant workers; search by key word *migrants*.

<sup>21</sup> For ample information on evolving civil society activity worldwide on migrants' rights and around International Migrants Day, see December 18 network website at URL: [www.december18.net](http://www.december18.net).



It is often said that migrants – like other ethnic minority workers – are the last hired and first fired. This is certainly the case today as a consequence of the global economic and financial crisis.

The global crisis has led to a serious slowdown in world economic activity. Nowhere has this been more evident to many people than in their jobs and their earnings. Enterprises in many countries including the Russian Federation are not hiring new staff; major lay-offs continue unabated. Some companies are resorting to short-time arrangements, such as reduced hours and pay for personnel remaining on the payroll or putting workers on part-time employment or unpaid leave. A review of the impact and recovery from previous economic crises suggests that return to pre-crisis employment levels may take four to five years.

According to the 2009 Global Employment Trends report (GET) issued by the ILO, a dramatic increase has already taken place in the number of people sent into the ranks of the unemployed, becoming working poor or being put in vulnerable employment. Depending on the effectiveness of recovery efforts, the GET report estimates an increase in global unemployment in 2009 compared to 2007 by 50 million.

Migrants tend to be among the workers most hit by economic downturns for several reasons. Migrant labour is often used as a cyclical buffer, like other macroeconomic policies aimed at maximizing growth and minimizing unemployment. For migrants, this means they are often the last to be hired and the first to be fired and their employment relationships are frequently non-standard, and in poorly regulated sectors or activities.

In times of economic insecurity migrants easily become scapegoats; xenophobic sentiments and discrimination against migrant workers rise. This alone presents one of the most formidable challenges for social peace and cohesion, and therefore for governance, in hard times.

Data compiled by ILO confirmed the impact on migrant workers:

Migrants and persons of foreign origin are hard hit, they are disproportionately among those already laid off or rendered unemployed. Those migrants remaining employed are often affected by reductions in pay, working time, and worsening working conditions.

Migrant workers have less access to social safety net support. This is especially true for migrants in irregular situations.

However, many migrant workers are not returning home, unless forcibly expelled. This is the case even when they are being offered financial incentives to voluntarily depart. Simply put, conditions at home are even worse. While there may be opportunities for some kind of work in host countries, there are simply none at all at home. The return of migrant workers from Europe or the USA to home countries is a rare exception, and reflects the fact that, atypically, situations in their home countries may be significantly less deteriorated than generally.

Migrant workers are thus compelled to take whatever work they can find. They may accept even more substandard pay and abusive conditions than before. This fact presents an immediate policy challenges for governance and for stabilization of labour markets and working conditions.

Scapegoating of migrants and xenophobic violence against foreigners are on the rise throughout the world. These are expressed in increased murders and lynchings of migrants in some countries, in generalized expressions of anti-foreigner sentiment, in hostile political discourse, and in calls for exclusion of migrants from access to labour markets and emergency social protection benefits, and more generally in incidents of conflict between foreigners and 'nationals'.

Many countries reduced quotas or intake of foreign workers; some embarked on deliberate policies of exclusion and expulsion of migrant workers.

Migrant remittances home declined in 2008 and 2009.

The further deteriorated situations in home countries make whatever remittances migrants can send an even more crucial lifeline for their families and local communities.

What employment opportunities existed earlier for those remaining at home are also evaporating, meaning even fewer options for persons coming back from abroad. This also makes the return of migrant workers potentially a greater threat to labour market stability and ultimately, social stability at home.

However, it is incontestable that, given long term labour market, demographic and technological trends, immigrant labour and skills will be as essential for recovery from the crisis as they already became to productivity and economic progress – in Russia, Kazakhstan as well as elsewhere – in recent years.

### **Call for Action**

It is clear that, given enormous economic and political interest in inaction, change in policy will only come about when significant political and social pressure is generated for adoption of a 'rights-based approach' and deliberate regulatory policy by governments.

Common approaches, strategies, coordination, and the ability to mobilize human resources are needed to defend rights and dignity of migrants – non-nationals – and to advance proper and sustainable regulation of migration in the context of today's globalized world. An agenda of 'next steps' includes:

#### *Establishing a Rights-Based Policy Approach*

1. Ratification and effective implementation by CIS countries of ILO Conventions 97 and 143 on Migrant Workers, ILO Convention 111 on Discrimination, and the 1990 International Convention on protection of rights of migrant workers.

2. Establishing – where they do not exist – national consultative mechanisms on labor migration among social partners (representative national employer and worker organizations) and relevant government entities.

3. Elaboration of a national migration policy framework and strategy for implementation .

4. Expanding and consolidating CIS legislation and policy support on labor mobility across the region.

5. Encouraging cooperation by government with employer organizations and trade unions to elaborate and implement policy as well as ensuring adoption of relevant national legislation.

6. Support should also extend to organizing and affiliation of migrant workers.

7. Explicitly avoiding scapegoating of migrants, particularly by preventing forced expulsions or repatriations of migrant workers that implicitly or explicitly target migrant workers as responsible for jobs loss and rising unemployment.

8. Emphatically repressing racist violence and xenophobia against foreigners, and prosecuting perpetrators of violent acts.

9. Increasing capacity of labour inspection to monitor sectors and workplaces where migrant workers are concentrated, to shore up decent treatment in the face of pressures to increase exploitation.

### Discrimination

10. Particular attention needs to be focused on supporting and advocating the implementation of an effective agenda to prevent discrimination and ensure social cohesion. An action agenda was mandated in the Declaration and Program of Action of the Durban World Conference against Racism and Xenophobia.

Core elements include:

- an explicit legal foundation based on relevant international standards;
- outlawing racist and xenophobic discrimination, behaviour and action;
- administrative measures to ensure full implementation of legislation and accountability for all government officials;
- consolidation of independent national human rights/anti-discrimination institutions with powers to address discrimination against non-citizens;
- teaching and speaking respect for diversity and multicultural interaction;
- emphasizing positive images of diversity and migration in communications media.

### Conclusion

Today, in the context of globalization accompanied by a rise in inequalities in distribution of wealth and exclusion of entire populations from economic and social well-being, greater emphasis is needed on advancing rights-based approaches. These are fundamental to ensuring the primacy of the rule of law, extension and consolidation of democracy, and greater equity in the distribution of material means for well-being and social cohesion.

Migration is a central arena for expression of values in law, policy and practice. Advancing a rights-based framework for protection of migrants and regulation of migration is thus imperative. This requires advocacy and action in promotion of human rights law, international labour standards, humanitarian principles and respect for diversity. These are the guarantors of democracy and social peace.

A primary step is obtaining States' adherence to relevant international human rights standards, particularly the two ILO migrant worker Conventions and the 1990 International Convention on migrants rights. Complementary steps are to address labour market needs, ensure *decent work* opportunities for all, combat discrimination and promote integration.

Promotion of the rule of law and respect for diversity are shared responsibilities among all stakeholders: government, employers, trade unions, civil society and migrants themselves. Social partners – in concert with migrant associations – have key moral and political leadership roles to play in mobilizing societies and governments to ensure implementation of a rights-based framework for international migration.

Progress is encouraging, but the challenges remain huge.

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