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Employers' Spokesperson Comments on the General Survey

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General Survey concerning the migrant workers instruments

Tuesday 31 May 15-18 hs and 18.30-21 hs if needed.

Essence of the Employers' interventions:

1. Make the business case on labour migration
2. Highlight the lack of relevance and need for an update of ILO migration instruments
3. Present specific comments to the General Survey

Introductory remarks

The Employers thank the Experts and the Office for preparing this General Survey on the migrant workers` instruments.

Employers regard migration overall positively – as a vehicle for balancing labour supply and demand, for sparking innovation, entrepreneurial opportunities and for transferring and spreading skills. Businesses are frequent and heavy users of national migration systems. Their experience with the practical workings of immigration laws, procedures, and policies, as well as knowledge of emerging market and staffing trends, can supply important information to governments and international organisations.

However, Employers` input is stifled by the current reality of governments "owning" the immigration space, despite the overwhelming majority of migrants being attached to the business community that needs them and hires them. In many countries the private sector has often been absent from consultation on migration policy.

Business and worker involvement in managing migration is an obvious, but neglected, need. This need not only needs to be met, but it also needs to be underpinned by focused and appropriate international labour standards. Too often, governments respond more to the perceptions that foreign workers pose health risks, threaten national security, undercut wages and job opportunities for native workers, and that migration is closely associated with unacceptable labour conditions and abuses. However, the demographic impetus for labour migration is clear.

Labour market needs and the migration policy interests of the private sector vary greatly across companies, industries, countries and regions. Employers of highly skilled migrants and those recruiting large numbers of low skilled workers have differing needs and challenges. Comprehensive and effective dialogue between governments and business is a prerequisite to managing an effective migration policy. In this regard, a concrete dialogue has recently started in the framework of the Global Forum on Migration and Development (GFMD), chaired this year by Bangladesh. The GFMD Business Mechanism, coordinated by the IOE and the WEF Global Agenda Council on migration, will engage in the discussion to contribute to more transparent, effective and efficient migration policies, which should take labour market needs into account. We therefore look forward to a comprehensive dialogue at the 2016 GFMD Summit in Dhaka in December.

The internal education system is the other major component. Since both migration and education are the routes through which future needs will be met they should be aligned and integrated. Yet this rarely occurs. International labour standards could usefully make the need for alignment a focus for ratifying governments. Currently they do not.

Let me now turn to specific comments on the instruments and the text of the General survey. I request your indulgence in advance since I will, on behalf of my Group, comment the Survey in detail.

The Employers note that C. 97 nowhere contains references to employers` and workers` organizations and their consultation on - or involvement in - the implementation of the Convention. In the view of the Employers, this is a clear shortcoming of the Convention which testifies to its largely outdated contents and approach. It is not surprising against this background that, as stated in para. 136, a number of employers` and workers` organizations indicated that they were barely or not at all consulted on the topic of labour migration or were not part of national commissions dealing with migration.

In **paras. 151 to 163**, the Employers noted that bilateral agreements regarding labour migration have significantly gained in importance in recent decades. In the Employers` view, bilateral agreements play an increasingly important role for countries in giving tailored, mutually beneficial responses to complex migration issues and should not just be seen as a means to implement the two Conventions

With regards to Chapter 4 on protection of migrant workers: Recruitment and labour mobility, the Employers consider Art. 5(a) as a case in point for the largely outdated contents of C. 97. Indeed, two medical examinations seem exaggerated and, as the Experts suggests, one would be fully sufficient. This, however, does not alter the fact that the wording of Art. 5(a) may give rise to misunderstanding as it suggests that normally two medical examinations, both at the time of departure and on arrival, would be appropriate. This wording conflicts with the need for transparency and clarity of obligations under the Convention and **cannot be remedied by a "corrective" interpretation by the Experts**. Incidentally, similarly outdated seems to be Art. 5(b) which refers to "… adequate medical attention and good hygienic conditions … during the journey …". There is the more general question whether there is nowadays a need at all for regulating in a Convention on migrant workers the medical attention and hygienic conditions of migrant workers in the context of migration. The Experts do not provide any examples on corresponding law and practice in this regard, suggesting that there is no such need. What rather seems of interest would be a provision that ensures that receiving countries do not prescribe unduly demanding health examinations under the pretext of avoiding risks for public health and funds, which as a result could hinder otherwise desirable migration for work.

Chapter 5 on Protection of migrant workers: Minimum standards also raises questions regarding the responsibilities of migrant workers:
- For instance, in **para. 294**, the Experts consider that criminalizing irregular entry or stay, and I quote "*may increase the vulnerability of migrant workers to violations of their basic human rights*". It stresses "*the particular importance of measures to combat stereotypes and prejudices of migrants as being more susceptible to crime or violence and to protect all migrant workers from racial discrimination and xenophobia**".*** The Employers, in principle, agree with this assessment. They would nevertheless also stress the share of responsibility that migrant workers bear where they deliberately and fully aware of the irregular or illegal circumstances and related risks choose to migrate. Migrant workers should respect the immigration rules of receiving countries and seek legal ways of migration. By doing so, they can help counter negative attitudes towards migrant workers and related racial discrimination against them.

- In **paras. 315 – 320**, the CEACR considers law and practice regarding Art 9(3) of C. 143 which reads, *"In case of expulsion of the worker or his family, the cost shall not be borne by them"*. In connection with this, the Experts differentiate between the actual costs of expulsion on the one hand, and the transport costs on the other. The Experts further make a differentiation to the effect that migrant workers who were in irregular situations for reasons which cannot be attributed to them should neither bear the costs of expulsion nor the costs of transport. However, migrant workers where the reasons for the irregular situation can be attributed to them may not have to pay for expulsion, but for transport. The Employers would like to express some doubt about these differentiations made by the CEACR which may not be unreasonable but for which they do not see any basis in the text of Art 9(3). Apart from that, given the variety of existing law and practice on this point which include also arrangements that charge migrant workers for the costs of expulsion (see para. 317), the Employers wonder if Art. 9(3) can still be considered as providing an adequate response. The strict no-cost-of–expulsion-for-the-migrant-worker rule in Art 9(3) seems to lack flexibility given the spectrum of possible real life situations.

***In* Chapter 6,** the Experts consider provisions in the four instruments, in particular C. 97 and 143, addressing equality of opportunity and treatment.The Employers, first of all, wish to stress that the two Conventions, as a rule, provide for equality of opportunity in certain respects between regular migrant workers and nationals, but not necessarily equality of treatment amongst all migrant workers within a country. Unfortunately, a number of statements in the report are ambiguous in this regard. We have two further comments on issues raised in this chapter:

- **Paras. 354 – 365** deal with the free choice of employment and its possible restrictions, as set out in Art 14(a) of C. 143. The Experts stress here that, according to this provision, any limitations must not exceed 2 years, but noted that the *"duration of restrictions on employment varied considerably among countries*". The Employers agree to the explanations made by the Experts but wonder if the 2-year restriction in Art. 14 (a) is really required to protect migrant workers. Obviously, the many diverse regulations regarding the duration of the restrictions, which seem to be motivated by the varying labour market needs of the receiving countries, show the need for flexibility on this point. It would seem sufficient that migrant workers receive clear information on the duration of restrictions on employment so that they can take this information into account before deciding whether to migrate to a particular country or not.

- In **para. 404**, the Experts, in the context of equality regarding exportability of pensions and other benefits abroad, noted that countries differ considerably on this point and that export of long-term benefits is most of the time regulated in bilateral or multilateral social security agreements which usually condition the granting of social security benefits on reciprocity. However, according to the Experts, *"the provisions of Conventions Nos 97 and 143 are not subject to reciprocity."* Given that reciprocity is a recognized principle in bilateral or multilateral agreements regarding social security, the question that in the view of the Employers arises is if C. 97 and 143 leave sufficient room for such multi-/bi-lateral agreements on social security based on reciprocity. This should be examined.

In **Chapter 7 - on Protection of migrant workers: Rights of employment, residence and return**, the Experts consider existing law and practice related to Art 8 of C. 143 which stipulates that, for a migrant worker who has resided legally in the territory of a country, "*the mere fact of the loss of his employment … shall not in itself imply the withdrawal of his authorization of residence or, as the case may be, work permit."* The Experts find that member States have reasonable flexibility in applying this provision. For instance, *"in the exceptional case where a residence permit is withdrawn because of serious misconduct of the migrant workers it would not be the loss of employment that would be the reason for loss of residency but the conduct of the workers"*. While the Employers appreciate the Experts` effort to interpret

Art. 8 in a way that takes into consideration existing law and practice, they feel that this provision is not as clear as would be desirable and may give rise to misunderstanding. Moreover, looking at the various national regulations on this point, as reported by the Experts, it seems that Art 8 does not reflect the spectrum of possible real life situations and the need for differentiated responses.

With regards to ***Chapter 8 on Monitoring, enforcement and access to justice,*** the Employers have the following comments:

- In para. 498, the Experts recall its previously expressed concern that *"a legislative requirement for public officials to report criminal offences may prevent migrant workers in an irregular situation from requesting assistance from essential public services filing complaints of violations of basic human rights and claiming rights from past employment;".* The Employers have difficulty in understanding the Experts`s concern. The interest of an irregular migrant worker in not being discovered cannot be considered as higher-ranking than the interest of the State in effective prosecution. While irregular migrant workers, too, should have the effective possibility to file complaints of violations of basic human rights and to claim rights from past employment, they cannot claim protection from being expelled because of their irregular migration status.

- In **para. 513**, the Experts note that in some countries migrant workers in irregular situations may be also subjected to the imposition of sanctions, instead of or in addition to their employer. It points out that the *"penalization of unlawful migration increases the vulnerability of migrant workers in an irregular situation still further"*. The Employers would not see any issue of compatibility with C. 143 here as the possibility of sanctions against illegal migrant workers is not addressed in this instrument. Moreover, the quoted national laws reflect the fact that in certain cases, the employer and the migrant worker may jointly be responsible for the illegal employment Migrant workers do not enjoy immunity against prosecution where the illegality of the employment can also be attributed to them.

With regard to Chapter 9 on Difficulties in implementing the instruments, Employers agree with the Experts that genuine misconceptions are not obstacles to implementation. However, the existence of many misconceptions may be an indicator that the two instruments may not be as clear and relevant as would be desirable. Therefore, the appeal by the Experts in para. 562 to governments just "*to eliminate all legal and practical obstacles impeding the implementation of the instruments"* does not seem to address the real problem.

In terms of ***Prospects for ratification,*** the Employers noted the vague ratification prospects for both Conventions, as reflected in government responses. While many governments see obstacles to ratification in the form of non-compatible national law and practice, others simply do not seem to see a value added in ratification. Against this background, the Employers feel the Expert`s encouragement to ratify the two instruments is somewhat misplaced and non-responsive to existing realities. Rather than inviting governments to ratify and to apply the provisions of the Conventions, if need be with help from the Office, the Experts should have considered more meaningful alternative action, that is to say a revision of the instruments with a view to creating modern and attractive instruments.

Concluding remarks

Chair,

The Employers consider migration for work as a positive and beneficial feature of globalization when it takes place in a legal and orderly manner. The ongoing challenge is to manage migration in conditions that are acceptable for workers, employers and the societies in the participating countries. Illegal and clandestine migration as well as abuse and exploitation of migrant workers need to be eliminated as much as possible. Opportunities and responsibilities for doing so are shared amongst Governments, Employers but also migrant workers themselves.

The primary conclusion reached by the Employers group on this year's General Survey is that Conventions 97 and 143, overall no longer appear to provide adequate responses to the increasingly complex present and future migration challenges and need to be updated. To sum up the most significant shortcomings of the two instruments:

- The absence on provisions requiring a national policy on labour migration
- The absence, in C. 97, of requirements for consultation with the social partners
- The insufficient consideration of bilateral and multilateral agreements as an increasingly important form of regulation at international level on issues related to labour migration
- The lack of differentiation between temporary migration and migration for permanent settlement
- The insufficient reflection of the increasing role of private initiative labour migration, as opposed to state-sponsored migration
- The inadequate consideration of irregular labour migration given its strong increase in recent decades
- The lack of protection for women migrant workers
- The irrelevant regulations on health protection during migration in Art 5 of C. 97

The view that the two Conventions are largely outdated seems to be partly shared by the Experts, in particular in their General Survey of 1999, and is also in line with GB Cartier Working Party classification of these instruments under the category of "other instruments", that is instruments which are no longer fully up to date but remain relevant in certain respect.

The eroding relevance of the Conventions is furthermore reflected in their decreasing ratification: Since the last General Survey in 1999, only 8 new ratifications of C. 97 and only 5 ratifications of C. 143 have been registered. The latest ratification of C. 97 dates back to 2009, whereas the latest ratification of C. 143 occurred in 2007.

For all these reasons, the **Employers cannot support** the Experts proposal encouraging the ILO to undertake a comprehensive campaign to promote effective implementation and awareness of C97 and 143 and Recommendations 86 and 151. As we all know, both human and financial resources of the Office are limited. We therefore fail to see the added value of promoting the implementation and awareness of standards that are not fully up to date. This negatively impacts the credibility of the ILO vis-a-vis its members and the outside world. And this will also impede the ILO playing a meaningful role in the implementation of the Fair Migration Agenda and most importantly in the implementation of the 2030 Agenda for Sustainable Development.

The ILO should be more ambitious and make sure that it has to offer to its members fully up to date standards on international labour migration. As a way forward, Employers believe that the ILO Standards Review Mechanism ("SRM") Tripartite Working Group should undertake a comprehensive examination of these instruments. This would include an analysis of the relevance of the instruments in the light of present and anticipated regulation needs on migration for labour. This examination should also take into account

existing other forms of regulation at international level, in particular bilateral and multilateral agreements in the area of migration. In view of the increasing importance of this form of international regulation, it would seem appropriate that the ILO makes an inventory and analysis of existing relevant bilateral and multilateral agreements in order to be able to re-determine the scope for ILO standards vis-à-vis bilateral and multilateral agreements and to ensure that ILO standards are compatible with bilateral and multilateral agreements and both mutually complement each other.

Moreover, given that other ILO standards to some extent are also relevant to migrant workers, as highlighted by the Experts in many sections of the General Survey, the Employers suggest that a compendium of relevant provisions in ILO standards be prepared by the Office. This would enable a more comprehensive overview of pertinent provisions and may also be of help in revising, streamlining and consolidating standards on this topic. This may be done in the context of the review of the Conventions and Recommendations on migrant workers in the SRM TWG.

The Employers look forward to hearing the views of other constituents and trust that this discussion will help move towards consensus on the way forward on ILO standards on migration.

Thank you for your attention.

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