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HEALTHCARE FOR MIGRANT WORKERS: HUMAN RIGHTS' ASPECT

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"Often, we mistake stability, in terms of security and economic activity, to mean a country is doing well. We forget the third and important pillar: rule of law and respect for human rights".
Kofi Annan, UN Secretary-General 1997-2006

ABSTRACT
Labor migration in a modern world is regarded as a positive and beneficial phenomenon for the growth of economic well-being[1]. However, migrant workers often find themselves vulnerable and unprotected, especially when it comes to protecting their health. The aim of the article is to clarify the role of a human rights-based approach in protecting the migrant workers' health. The basis of the study constitutes: acts of international law, expert reports and research studies, case law, scientific literature on the problem. It was found a human rights-based approach is the most applicable in the light of this problem.

KEY WORDS: migrant workers, human rights, migration, right to health, international law

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INTRODUCTION

In 2015 it was a significant event in the development of mankind – the leaders of states around the world agreed on 17 new goals, the achievement of which has become crucial for the balanced and prudent development of present and future generations. Actually, these goals are called the Sustainable Development Goals or SDGs [1]. In fact, the idea of sustainable development has taken on the mainstreaming character and is now pervading almost all spheres of public life.

Labor migration has become one of the priority areas in the achievement of the SDGs, that is absolutely obvious and justified, because in the modern world people's mobility, regardless of the cause and scale, is no longer evaluated as "background context for development, or even worse, as a by-product of lack of development". Migration, including labor, is now regarded as "a core, cross-cutting issue and an important contributor to sustainable development" and migrant workers are a "key target group for the achievement of the SDGs" [2].

THE AIM

The aim of this article is to identify the challenges that migrant workers face in terms of their health care and to analyze current approaches to understanding the right to health of migrants seeking work outside their own country.

MATERIALS AND METHODS

International migration and human rights issues discussed in the article determine the choice of the following general philosophical and legal methods. Through the use of a dialectical approach and a historical method, we have been able to understand the patterns of formation and development of perceptions of the international community and states about migration and the protection of the rights of labor migrants. The formal legal method was used while studying legal documents, and comparative legal method enabled comparing different approaches to the protection of labor migrants` human rights that are embodied in different international human rights mechanisms.

The study is mainly based on international law (6 universal and regional instruments), interpretation and explanation of human rights' treaty bodies (Committee on Economic, Social and Economic Rights, UN Committee on Labor Migrants, UN Refugee Council), expert reports and research studies, case law (3 European Court of Human Rights judgements, advisory opinion of the Inter-Amer-

[1] Relevant methods of estimating labor migration in the world are not always able to take into account migrant workers who do not have the necessary documents or permits, i.e. undocumented migrant workers. In this regard, the issue of developing and improving existing data collection mechanisms for undocumented migrant workers is urgent.

ican Court of Human Rights, decision of the European Committee of Social Rights (Council of Europe), relevant scientific literature.

REVIEW AND DISCUSSIONS

The problem of people migrating worldwide in order to find better work and higher pay has been under the scrutiny of the international community since the beginning of the twentieth century, namely – since the creation of the International Labor Organization (ILO) in 1919, the priority area of which is the promotion of equality of working migrants. Thus, Migration for Employment Convention (Revised), 1949 (No. 97) [3] established the obligation of each ratifying State to provide for immigrants lawfully within its territory the same conditions that are no less favorable than that applied to its own nationals, without discrimination in respect of nationality, race, religion or sex (Art. 6). In its Art. 5 Convention pays particular attention to the protection of the health of migrant workers: states are under a duty to assert, that migrant workers and their families, who are allowed to accompany or join them, are in reasonable health state; states are also obliged to provide them with the necessary adequate medical care and appropriate hygienic conditions at the time of their departure, during the journey and after arrival at their destination.

State obligation to respect migrant workers` human rights is the main idea of the first provision of another ILO Convention, No. 143, adopted in 1973, that particularly prohibit abuses in the field of clandestine movements of migrants for employment and illegal employment of migrant [4]. This ILO Convention No. 143 further demonstrated the need for equal protection of all migrant workers, especially since that creation of this Convention was already based on established human rights standards.

As to the United Nations level, in 1990 International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) was adopted, which together with the ILO Conventions No. 47 and No. 143, mentioned above, constitutes the *international charter on migration*. ICRMW provides a broad understanding of the term "migrant worker", meaning a person who will be engaged, is engaged in, or has been engaged in remunerated activities in a country of which he or she is not a national. In this case, ICRMW distinguishes between the *regular migrant workers* (so-called "documented" migrants), who are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements, to which that State is a party, and *irregular migrants,* who don`t comply with these conditions (have either entered the country of employment without authorization, or have not been entitled to stay, reside and work in that country, or have an expired permit or visa, or have tourist visas, but they are engaged in remunerated activities in the country and so on). Both regular and irregular migrants enjoy all the rights, provided for in Part III of the ICRMW, which is essentially consonant with widely recognized human rights catalogue, but at the same time, irregular migrant workers are excluded from the scope of rights grouped under Part IV of the ICRMW that are primarily social-economic. For instance, with regard to healthcare Part III of ICRMW (Article 28) guarantees all migrant workers, irrespective of their legal status of residence or employment, the right to receive urgent medical assistance if their life or health are under threat.

According to Part IV of the ICRMW only regular migrant workers have: the right to social and health services (Article 45); freedom to leave the country freely without prejudice to future return (Article 38); freedom to form associations and trade unions (Article 40); the right to participate in the public and political life of the country of employment (Article 41); the right to consultation from public bodies of local communities (Article 42); access to housing (Article 43); the right to protection of the unity of the family life (Art. 44) and others. It seems that the inability of these migrant workers to enjoy their rights poses risks to their right to health. Once European Court of Human Rights (ECtHR), known for its evolutionary interpretation of human rights, in the interstate case Cyprus v. Turkey (2001)[2] [4] noted that sometimes "the authorities of a Contracting State put an individual's life at risk through the denial of health care, which they have undertaken to make available to the population generally" (para. 219). In this connection, the Court notes that paragraph 1 of Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) obliges states not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

There is almost 20 years' discussion among experts and human rights` treaty bodies about the expanding the range of rights for irregular migrant workers and about more decisive overcoming the discrimination and inequality treatment of States. The texts of international agreements on the migrant workers` status indicate that the "employment states" are the main actors in establishing the rules and determining the status of migrant workers, and that is why these "undocumented" migrant workers are placed in a potentially vulnerable light [7; 258]. They usually find themselves in situation of a "legal limbo": as human beings they are bearers of human rights, but they have limited access to enjoying of rights and remedies [7; 258]. Such situation often combined with a feeling of uncertainty that further transforms into a feeling of real danger and restriction of freedom. Moreover, often the motives for labor migration – searching for better jobs and higher wages are reinforced by other reasons that make this displacement truly forced. For instance, one of the key reasons for the labor migration of Ukrainians abroad during the last 5 years is annexation of Crimea, occupation of some regions

[2] This case concerned the issues of internal displacement as a result of military occupation of Cyprus by Turkey and armed conflict.

of Donetsk and Luhansk regions, armed conflict there and providing of anti-terrorist operation at the contact line.

Freedom from fear, freedom from want and freedom to live in dignity are the basic elements that underpin current understanding of human security. But it becomes more obvious that in the global era, promotion of human security with traditional public policies and concepts of national, military and state security are no longer effective [7; 253]. And here the human rights-based approach "may come in handy": it says that each state has three levels of positive obligations towards all human beings within its` jurisdictions – obligations to respect, obligations to protect and obligations to fulfill [8, 9]. What is the right to health from this prospect? What positive obligations do states bear in the sphere of health care? What labor migrants can count on from the point of view of human rights` positive obligations as a whole and as to the health in particular?

It is well-known that according to the Constitution of the World Health Organization, "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" [10]. In terms of a human rights-based approach, this definition is non-informative. Today it is customary to consider one`s health not only as a desire for well-being, but also as a human right that is structurally composed of freedoms and rights (for rights bearers – natural and legal persons), as well as obligations – for obligation bearers (states and non-state actors). Everyone has the freedom to control his or her health and body, including sexual and reproductive freedom, freedom from intervention (from torture, unfair medical treatment and experimentation); at the same time, the entitlements include the right to a system of health protection, which provides equality of opportunity for people to enjoy the highest attainable level of health [11]. One should note, there are a number of human health issues as to which the regulative potential of law is limited.

After all, no country in the world can be obliged to achieve any certain result, because of objective reasons that impact on fulfilling state`s obligations, regardless of its good faith and will. [12, p. 74]. Any state can hardly promise to protect a person from any illness, to guarantee a perfect health, but it is obliged to respect the right of every person to health and to protect it against the interference of other private and state actors. Nor should we underestimate the fact that social health policy is more dependent on, and should be adequate to, the economy, but at the same time ignoring social problems can lead to significant economic losses in the future. [13; p. 49]. In this connection, according to Art. 2 (par. 1) of the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) all states undertake steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. At the same time, par. 2 of Art. 2 allows "developing countries, with due regard to human rights and their national economy" to "determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals".

The prohibition of discrimination in the enjoyment of human rights is one of the basic principles of the human rights-based approach and is a direct and inclusive duty of any state. In its Advisory Opinion on the "Juridical Condition and Rights of Undocumented Migrants", the Inter-American Court of Human Rights (IACHR) stated unequivocally that the principle of equality and non-discrimination has entered the domain of *jus cogens*, since the whole system of "national and international law is based on this principle" (para. 101) [14]. As IACHR mentions, "the situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by de jure (inequalities between nationals and aliens in the laws) and de facto (structural inequalities) situations" (para. 112) [14]. Regarding the latter, it should be noted that states can often be constrained in their efforts to overcome discrimination by the fact that society discriminates against a particular group, which is quite often the case with migrant workers. This can be enhanced by cultural prejudices, ethnic rivalries and xenophobia, violence of distinct forms, personal insecurity [14]. However, this means that the state should be more deliberate about the implementation of the principle of non-discrimination in the horizontal dimension, i.e. between private actors [15; p. 23].

Art. 12 of ICESCR proclaims the right to the highest attainable standard of physical and mental health for all without limitation. The same approach is enshrined in the 1981 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the 1989 UN Convention on the Rights of the Child (CRC). On the same ground the European system of protection of social rights is based, namely, the European Social Charter of 1996 (revised) (ESC). The European Committee of Social Rights (ECSR), which monitors fulfilling the provisions of ESC by states by adjudicating collective complaints, found in one of the cases the lack of access to medical assistance for children of "undocumented" migrants as a violation of social, economic and social rights of children and young people, that are protected by means of Article 17 of ESC [16].

As the UN Committee on Economic, Social and Cultural Rights (UN CESCR) explained, Art. 12 ICESCR obliges states to ensure that all migrant workers and their families, regardless of their migration status, have effective access to primary care, as well as to preventive, curative and palliative care services[11], as far as such care is urgent to preserve their life or to avoid irreparable harm to their health; here the CESCR addresses the issues of immunization of migrant children against major infectious diseases, as well as the access of women-migrant workers to safe reproductive health and abortion services, where they are at risk or after being raped, and to emergency obstetric care [11].

Consolidating all abovementioned and taking into account human rights` -based approach, in the field of health

care the state is obliged : 1) *to respect*, which requires states to refrain from direct or indirect interference with the right to health (to refrain from denying or limiting access to health-care services; withholding, censoring or misrepresenting health information and violating the right to privacy (e.g. of persons living with HIV / AIDS); 2) *to protect* – to pass legislation or take other reasonable measures in order to ensure private individuals` right to health in interfered with: for example, preventing women from being subjected to harmful practices or establishing liability for forcing them to do so (prohibition of female genital mutilation); to guarantee people's access to information and services related to health, including environmental protection; and to provide medical assistance to persons with disabilities, with their free and informed consent [17]; this duty also means to control the marketing of medical equipment and medicines by individuals; states also should prevent third parties from violating the right to health in other countries, as well as exercise human rights due diligence when negotiating international or multilateral agreements with other states, that means assessing their potential impact on human rights and taking measures to prevent them 3) *to fulfil the right to health* – to adopt appropriate legislative , administrative, budgetary, judicial and other measures to fully assure one`s the right to health [17].

Within the ECtHR case law there are several prominent judgements which found states failing to fulfill a positive obligation to ban slavery and forced labor (Article 4 ECHR). One of the first such is *Siliadin v France (2006)*[20]. In this case, a 15-year-old African migrant who arrived in France on a tourist visa and worked as unpaid servant, actually became a "house slave". The ECtHR has decided that States have positive obligations to adopt criminal-law provisions that penalize of forced labor and to apply these criminal sanctions to violators (para. 89). In case of *Chowdury and others v. Greece (2017)* [21] ECtHR awarded to applicants — a group Bangladesh agricultural irregular migrant workers – a just satisfaction of EUR 588,000. The applicants, who protested against the non-payment of their wages for a considerable period of time, were injured by the employer's armed guards. The ECtHR found of the applicants in the situation of vulnerability, taking into account their undocumented status and the risk of being arrested, detained and expelled. The fear of not receiving pay was compounded by a greater feeling of threat – a threat to life, since the applicants worked under the supervision of armed guards. The ECtHR found Greece to fail to fulfil its positive obligations under that provision, namely the obligations to prevent the impugned situation of human trafficking, to protect the victims, to conduct an effective investigation of the offences and to punish those responsible for the trafficking (par. 128).

Human rights treaty bodies, as well as non-governmental organizations in their reviews and reports repeatedly noted the discriminatory treatment towards migrant workers while providing health services: collecting excessive charges from irregular migrants for medical services, practices of demanding immediate payment, or paying for services before providing them [18].

In this regard, implementation of national policies of encouraging the health professionals working with vulnerable groups is urgent. It may mean promotion of specific trainings and exercises on anti-discrimination rules, creation of mechanisms for evaluating health care professionals in the context of equal treatment of all patients (e.g. medical questionnaires) assuring patients that responding to questionnaires will not harm further treatment [19; p. 89].

Quantitative and qualitative researches fix the major challenges and threats faced by migrants, especially undocumented migrants, as to their right to health: they are usually excluded from public health systems and cannot afford medical insurance. For example, ICRMW does not provide for irregular migrant workers access to national health programs (Art. 45); migrants have difficulties in accessing to health information and available services; often information is not properly provided by the state (ICRMW also provides that access to public information of irregular migrant workers is limited); female domestic workers are particularly vulnerable to sexual abuse and violence; dangerous, unecological and unhealthy working conditions; migrant workers may be more at risk of sexual intercourse, thus contributing to the rapid spread of sexually transmitted diseases; migrant workers are more vulnerable to such cruel practices as human trafficking, forced labor, slavery, as a result of which they are physically abused and ill-treated, and face threats to their reproductive health (sexually transmitted diseases, unwanted pregnancies, dangerous abortions) [11].

A serious obstacle to getting proper medical assistance by undocumented migrant workers is their fear of being reported about to immigration authorities by health workers or employers. Some countries have implemented specific policies that *in certain circumstances* protect such migrant workers from deportation when they seeking medical care: if proper treatment is not guaranteed in the country of origin (Austria, Belgium, Greece, Italy, Norway); if it is demonstrated the serious harm to health, if service is not provided (Luxembourg); in case of pregnancy, when a temporary authorization for medical assistance should be provided (France, the Netherlands); emergency aid in the case of threat to life (Norway); in case of progressively developing diseases (Hungary) [22]. Language and cultural barriers as well as the political climate in the country are also recognized as barriers to the implementation of migrant workers' rights [23].

But it is exactly workplaces, where migrant workers are more often exposed to various health threats. Migrant workers, especially irregular ones in most cases are engaged in so called *"3d" jobs* – dirty, dangerous and demanding jobs. Migrant workers are often at risk of performing work without adequate training or protective equipment, and are not able to challenge dangerous working conditions, and that increases the risks of injuries, occupational diseases and deaths at work. For example, agriculture is dangerous sphere because of high temperatures and toxic effects of pesticides; construction and hotel business are physically exhausting [23].

It seems that the only way out in this case is human rights-

based approach. As IACHR rightly notes, the "labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition. The right to work, whether regulated at the national or international level, is a protective system for workers; that is, it regulates the rights and obligations of the employee and the employer, regardless of any other consideration of an economic and social nature. A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination." [14]. That means that every person, regardless of status, should be protected in the meaning of security of workplace and conditions by all accessible remedies.

It worth to mention, that promoting a safe working environment for migrant workers, eliminating of modern slavery and human trafficking, the worst forms of child labor, including the recruitment and use of child soldiers, are goals that have taken their place in the 2025 Sustainable Development Agenda. Incidentally, the latter, as well as much of what has been stated in the text above, raises the issue of non-state actors' obligations in the field of human rights, and business corporations are on the first place here. Human rights due diligence of business is a common standard of expected behavior for all enterprises, wherever they operate and regardless of their size. It is important to understand that these obligations exist irrespectively of the ability and/or willingness of states to fulfill their human rights obligations, but does not diminish the role of states` obligations; human rights responsibility is also separate from the obligation to comply with national laws and regulations protecting human rights [25]. In August 2019, 181 CEOs of the world (Amazon, Apple, Google, Mastercard) made a joint commitment to sustainable practices, including investing in their employees, providing them with honest remuneration and caring for their rights and the rights of stakeholders, i.e. others on which they have some influence. Particularly, they decided to pay much more attention to working conditions and protection of workers from discriminative treatment [26].

CONCLUSIONS

The major challenges facing by migrant workers in the modern world require new approaches to public policy. This particularly concerns their health care. Despite an extensive system of international human rights instruments, discriminatory practices and treatment of migrant workers are still widespread in the world. It is mostly agreed within the expert and scientific community that human rights-based approach is able to counter these threats.

There are also an unequivocal understanding that natural and inalienable human rights must be accessible to migrant workers and protected by their states of residence, that complies with current perceptions of the positive obligations of states in the sphere of human rights. Often, the health care of migrants is directly dependent on the access to enjoyment of human rights (the right to access to information, the right to freedom of association, the right to freedom of movement) or the degree of protection of freedoms (freedom from torture and torture, freedom from forced labor). The more dangerous link is opposite, when health insecurity and lack of access to medical care results in the loss of life, that is the biggest value ever.

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