

JUNCTURE AND DEBATE

REFRAMING THE DEBATE ON MIGRATION AND DEVELOPMENT USING HUMAN RIGHTS

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“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” - Article 2, Universal Declaration of Human Rights, 1948.

“The debate about migration and development cannot and should not be disassociated from the human rights agenda. While current tendencies towards market flexibility and the reduction of labor standards affect all workers, around the world, migrant workers face the biggest risk and are subject to the most vulnerable social and labor conditions. In that context, the PGA seeks to promote the effective protection of economic, social and cultural rights of migrants and their families, applying the reference tools of the UNDP’s notion of ‘human development,’ and the ILO’s agenda of ‘decent work for all.’” People’s Global Action 2010.¹

At the closing session of the 2009 Global Forum on Migration & Development (GFMD) in Athens, Greece, the representative of the Mexican government announced that human rights would be a central theme of the 2010 Global Forum in Mexico. When the official themes were announced in early 2010, human rights were not among them. “Human rights” had been replaced by “human development” at the urging of the powerful states that comprise the Friends of the Forum.²

It is clear from the agendas of the previous three GFMD meetings

1 http://www.mfasia.org/index.php?option=com_content&view=article&id=189:2010-peoples-globalaction-on-migration-development&catid=33:peoples-global-action&Itemid=54

2. <http://www.gfmd.org/en/media-gallery/mexico-2010/mexico-2010-news/175-mexico-holds-second-round-ofpreparatory-meetings.html>

that the governments are not going to allow any serious discussion of human rights in their thematic framework.³ It is up to autonomous civil society, as represented by the Peoples Global Action on Migration, Development and Human Rights (PGA) to put human rights front and center in the discussion of migration and development policy in this important world meeting. In the PGA Conceptual Framework paper⁴ distributed in July 2010, the authors mention human rights, but only briefly. This paper takes up the authors' challenge to extend their analysis to develop a position on human rights for consideration at the PGA meeting in November and to be incorporated into the PGA presentation to the GFMD. This paper represents a first step in that process and needs development from various perspectives and experiences.⁵

HUMAN RIGHTS ARE UNIVERSAL AND PORTABLE; STATES ARE ACCOUNTABLE FOR THEIR PROMOTION AND PROTECTION

Background

Who are migrants? Migrants are human beings whose home countries present few or no decent options for personal and family survival or social mobility and who decide to move, many of them without authorization and across international borders. They do not lose their quality as humans with rights merely by crossing a border.

Who has human rights? International human rights are rights em-

3. <http://www.gfmd.org/en/gfmd-process/the-themes-discussed-at-successive-meetings.html>

4. Raul Delgado Wise, Humberto Marquez Covarrubias, Ruben Puentes "Reframing the Debate on Migration, Development, and Human Rights" 2010, PGA

5. This paper is not a manual for the use of human rights instruments and mechanisms for the defense of the rights of migratory workers. Such a project is beyond the scope of this paper and has been developed by other authors. NGOs and other civil society organizations have used international human rights norms to file complaints, petitions, and reports before the United Nations Human Rights Commission, with the International Labor Organization, in the Inter-American Commission and Court of Human Rights, before the European Court of Human Rights and the African Court of Peoples' and Human Rights, in the International Court of Justice in the Hague, the Special Rapporteurs of the United Nations and Inter-American Commissions, and before other bodies.

bodied in declarations and treaties (ratified by most of the nations of the world) and which belong to all people. It is absolutely clear that the United Nations, in approving the Universal Declaration of Human Rights in 1948, sought to establish a rights regime that transcended national citizenship. During World War 2 and the immediate post-war period millions of people had lost their homes and citizenship and were forced across borders into nations that had no interest in protecting them as human beings. The denaturalization and expulsion of Jews from the Nazi-occupied European states during the war, the 1948 partitions of India-Pakistan and Israel-Palestine, and the exodus of citizens from newly communist states of Eastern Europe were experiences very much in the mind of the United Nations delegates who approved the UDHR in December 1948.

Therefore, international human rights treaties and declarations represent an international consensus to protect the rights of all persons irrespective of citizenship or location. As set forth in the Universal Declaration of Human Rights (UDHR), migrants are first and foremost human beings, included in the “everyone” of Article 2.⁶

“All human beings are born free and equal in dignity and rights “. – Article 1
 “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” - Article 2
 - *Universal Declaration of Human Rights*, 1948

Regional human rights treaties also uphold universality and portability of rights. The American Declaration of the Rights and Duties of Man states in its opening paragraphs “[T]he essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality” and at Article 17, “Every person has the right to be recognized everywhere as a person having rights and obli-

6. Universal Declaration of Human Rights, Article 2, G.A. Resolution 217A, 10 December 1948.

gations, and to enjoy the basic civil rights.”⁷ Similarly, the African Charter on Human and Peoples’ Rights and the European Convention for the Protection of Human Rights uphold the principle of universal rights.⁸

The principle of universality implies that states of origin, transit, and residence are all responsible for the protection of migrants’ human rights, including those that they possessed before they crossed a border and became “migrants”. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (“Migrant Workers Convention”) provides that “The present Convention shall apply during the entire migration process... which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity... as well as return to the State of origin or... habitual residence.” The MWC thereby includes responsibilities of sending states, transit states, and states of destination.

Relevant human rights provisions⁹

What are human rights? The International Covenant on Civil and Political Rights is very clear on state obligations to everyone to protect civil and political rights:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” - Article 2.1

7. The American Declaration was passed by the Organization of American States eight months before the UDHR was adopted by the United Nations.

8. “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religions, political or any other opinion, national and social origin, fortune, birth, or other status.” African Charter on Human and Peoples’ Rights, Art. 2; “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in... this Convention,” Art. 1, European Convention for the Protection of Human Rights and Fundamental Freedoms, (website)

9. In its first version, this paper will not include references to the regional human rights agreements in effect in Africa, the Americas, and Europe, but which also provide protection to migrant workers, refugees, and asylum seekers. Participants in the PGA preliminary meeting on human rights may wish to add regional documents.

The obligation of all states to cooperate towards the realization of the rights to economic and social development of “everyone” is clearly enunciated in the UDHR,

“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” – Article 22, UDHR

After the passage of the UDHR by the United Nations and the ratification of the Refugee Convention and the Genocide Convention, several decades passed before new treaties obligated nations to respect specific human rights. The principal human rights treaties are the International Covenant on Civil and Political Rights¹⁰ and the International Covenant on Economic, Social, and Cultural Rights.¹¹

The ICCPR protects civil and political rights, including the right to life, the prohibition against torture, the rights to liberty, privacy, and personal security, the right to due process and equality before the law, freedom of religion, freedom of expression, and the right to assembly (including joining trade unions), the right to political participation, the right to marry, to freedom from racial or other discrimination. The ICCPR also grants children the rights to protection, to a name, and a nationality.

The ICESCR guarantees that states will move towards the “progressive realization” of a wide range of economic and cultural rights.¹² Those rights include the right to work and to just and favorable conditions of work, including wages sufficient to provide a decent living, to rest and holidays with pay, to join and form unions, to social security, and to “an adequate standard of living... including adequate food, clothing, and housing.” The ICESCR also provides for “the widest possible pro-

10. The ICCPR “entered into force” (became binding and valid) on March 23, 1976. As of today, ___ countries have ratified the ICCPR

11. The ICESCR entered into force on Jan. 3, 1976. As of today ___ countries have ratified the ICESCR. The U.S. has signed but not ratified the ICESCR.

12. In contrast to the duties of states under the ICCPR which must guarantee civil and political rights, under the ICESCR states are obligated only to make progress towards the realization of economic, social, and cultural rights based on maximization of their available resources. I think they have to show they are making their best effort and assigning resources to make such progress. However all states are obligated to protect ESC rights through international assistance and cooperation. See Article 2.1

tection and assistance to the family,” to special protection for mothers and children, to the right to enjoy physical and mental health, the right to education, and the right to enjoy the benefits of culture and science.

Later international human rights treaties guarantee the rights of certain vulnerable groups (women, children, migrants), prohibit the use of torture, and protect against racial, gender & national origin discrimination. Other United Nations declarations and documents ratified by the International Labor Organization recognize the rights of workers, indigenous peoples, prisoners, and the right to development¹³.

The International Convention on the Protection of the Rights of All Migrant Workers and their Families (“Migrant Workers Convention”) entered into force in 2003. The MWC places few obligations on sending states (to avoid double taxation of migrant earnings and to prevent excessive charges for exit documents or passports), emphasizing the obligations of transit and receiving states. After a global campaign for ratification by civil society organizations, however, the treaty has been ratified almost exclusively by migrant-sending states and by few of the states which receive migrant workers and where their rights are most at risk.¹⁴ The 2009 UNDP Human Development Report ranks countries by the Human Development Index (HDI) and charts which human rights treaties each country has ratified or signed. None of the top 43 HDI countries have ratified the Migrant Workers Convention.¹⁵ The MWC is useful to determine human rights violations committed against migrants by their home states and in countries of transit and destination, but few destination states are parties to the treaty.

13. Note that “declarations” such as the Declaration on the Right to Development are statements agreed to by the United Nations General Assembly, but do not have the legal force of ratified treaties.

14. Among the 41 countries which are MWC States Parties, are a few states which are primarily migrant-receiving including Argentina and Chile. Some MWC States Parties both send and receive migrants.

15. Countries 44 (Chile), 49 (Argentina), and 50 (Uruguay) follow. It is not after Montenegro (Country 65) that the list begins to include most of the countries which have signed or ratified the treaty. Below country 100 (Jamaica) around half the countries in the Medium and Low HDI lists have signed or ratified, presumably primarily sending states. Table F. “Selected conventions related to human rights and migration,” *Overcoming Barriers: Human mobility and development*, Human Development Report 2009, United Nations Development Program, <http://hdr.undp.org/en/reports/global/hdr2009/>

USING HUMAN RIGHTS TO EVALUATE THE CONDITIONS AND POLICIES WHICH PROMOTE EMIGRATION

“The world distribution of opportunities is extremely unequal. This inequality is a key driver of human movement and thus implies that movement has a huge potential for improving human development.... Our vision of development as promoting people’s freedom to live the lives they choose recognizes mobility as an essential component of that freedom.” - United Nations Development Program, *Overcoming Barriers: Human mobility and development*, Human Development Report, 2009

Background

Economic factors are not the sole factors influencing the decision to emigrate.¹⁶ However, the lack of opportunities for personal and economic development is a key motive for many migrants. The Declaration on the Right to Development is an interesting tool for the evaluation of conditions in migrants’ countries of origin.¹⁷ Approved by the UN General Assembly in 1986, the Declaration on the Right to Development contains articles supporting “an inalienable human right... to participate in, contribute to, and enjoy economic, social, cultural, and political development.”¹⁸ In 2008, the Global Migration Group stated,

“The deprivation of the human right to development is one of the causes of migration itself... A human rights approach which emphasizes State responsibility for the promotion of economic, social, cultural, civil and political rights ab initio may recast development policies in a way that

16. “what drives migration from Mexico and around the world [is]: deep inequalities, insecurity, and lack of opportunity.... Migration continues to be driven as well by the healthy human impulse to reunite families.” Oscar Chacon & Amy Shannon, “Migration and Development: Moving beyond NAFTA,” in *The Right to Stay Home*, Global Exchange, 2008, www.globalexchange.org/the-right-to-stay-home

17. It is important to keep in mind that the Declaration on the Right to Development is just that - a declaration of the U.N. General Assembly and not a treaty which has been ratified by individual governments.

18. Article 1.1

would reduce emigration caused by the inability of States to ensure the exercise of nationals of their right to development.”¹⁹

In 2009, the United Nations Development Program issued a major report that argues that migration is a product of the unequal distribution of opportunities for human development. The UNDP uses the “capabilities approach,” an analytical framework that promotes policies which would allow every person to fully develop his or her capabilities with appropriate access to education, resources, and an adequate standard of living.²⁰ This analysis does not emphasize the rights of individuals to make demands on the state; it makes broader, more general arguments for the promotion of global human welfare.²¹ However, through ratification of human rights instruments, states do take on obligations for which they can be held accountable - to promote and protect the human rights of all – civil, political, economic, social and cultural.²²

A human rights paradigm can illuminate the responsibility of sending states. In states with high levels of emigration, official rhetoric expresses regret for the “brain drain,” skills exodus, and for the exploitation of its nationals abroad. However, some sending states consider large-scale emigration as a positive factor that promotes national security. Migrant remittances alleviate the impact of under-employment and lack of development that might otherwise destabilize states. State willingness to slow or end emigration would depend on development of an economic model that would help sending states wean off their addiction to remittances. According to Stephen Castles,

19. Global Migration Group, *International Migration and Human Rights: Challenges and Opportunities on the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights*, 2008, http://www.globalmigrationgroup.org/pdf/Int_Migration_Human_Rights.pdf

20. The “capabilities approach” was first theorized and popularized by the Nobel-Prize-winning economist Amartya Sen and the philosopher Martha Nussbaum. United Nations Development Program, *Overcoming Barriers: Human mobility and development*, Human Development Report, 2009, “This concept... the capabilities approach... has been at the core of our thinking since the first Human Development Report in 1990, and is as relevant as ever to the design of effective policies to combat poverty and deprivation.” At p. 14

21. Martha Nussbaum, “Twentieth Anniversary Reflections: Human Capabilities and Human Rights,” *Harvard Human Rights Law Journal*, Vol. 20 (Spring 2007)

22. ICCPR, ICESCR

“Many less-developed countries have identified labor export as important in reducing unemployment, improving the balance of payments, securing skills and investment capital, and stimulating development. In some cases, the export of discontent and reduction of political tension also become goals. Migration can become a substitute for development rather than a contribution to it.”²³

Certainly not all residents of developing countries suffering from economic, social, environmental or cultural human rights deprivations choose to leave. Many stay and participate in political opposition movements and advocate for respect for rights; others may resign themselves to difficult situations, while still more may sink into poverty and despair.

It is simpler to draw the connections between human rights violations in states of origin and the flight of refugees escaping repression or persecution. Like refugees, “economic migrants” are also fleeing situations in which states have failed to protect their human rights.²⁴ Solutions for refugee crises are sought in ameliorating the situations in their home countries; the solution to the problem of unauthorized migration may be found in the obligations of sending countries to respect and promote the human rights of the sector of their population that is “at risk” of unauthorized migration. Furthermore, the basic treaties obligate all states, through international cooperation, to protect the economic, social, and cultural rights of all persons.

Using human rights to evaluate policies and hold sending states accountable

What human rights norms can be used as a measure of a state’s obligation to promote development and an adequate standard of living for its citizens – in other words, to allow persons “the right to stay home”?

23. Stephen Castles, “The Factors that Make and Unmake Migration Policies,” *International Migration Review*, Vol. 38, No. 3, 2004; at p. 860

24. Susan Gzesh, *Redefining Forced Migration...*

1) The Universal Declaration of Human Rights²⁵, which all member states of the United Nations are obliged to follow, contains the basic guarantee of economic, social, and cultural rights:

- “Everyone as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” – Article 22
- Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” - Article 25

2) The International Covenant of Economic Social and Cultural Rights, a treaty signed and ratified by 160 countries:

- “Each State Party ... undertakes to take steps, individually and through international assistance and cooperation, 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...” - Article 2, International Covenant on Economic, Social, and Cultural Rights, 1976

Enumerated rights protected by the ICESCR include:

- the right to work, to just and favorable conditions of work, to form and join trade unions – Articles 6, 7, 8
- the right of everyone to an adequate standard of living, including adequate food, clothing and housing – Article 11

25. Universal Declaration of Human Rights, adopted by the UN General Assembly, December 10, 1948.

- the right of everyone to the “highest attainable standard of physical and mental health” – Article 12; and
- the right of everyone to education – Article 13

3) The International Covenant on Civil and Political Rights (ICCPR), ratified by 164 countries, the ICCPR obligates each States Party to protect the civil and political rights of “all individuals within its territory” – Article 2.1

Where the civil and political rights of many citizens are violated by the state, nondemocratic governments promote economic and social policies that ignore the interests of those sectors, creating conditions in which emigration becomes a survival option and the sole opportunity for social mobility. The oft-quoted saying by Nobel Prize-winning economist Amartya Sen that there are no famines in democracies is an illustration of the principle that an open political process is likely to benefit the economic well-being of the most people. Thus violations of civil and political rights in sending countries are often among the causes of emigration.

Enumerated rights protected by the ICCPR include:

- the right to freedom of opinion and expression – Art. 19;
- the right to freedom of religion and religious practice – Art. 18;
- the right to liberty of movement within the country – Art. 12;
- the right to leave any country and re-enter one’s own country – Art. 12
- the right to take part in public affairs and to vote – Art. 25
- the right to assembly and freedom of association – Art. 21, 22
- the right to form and join unions for the protection of workers’ interests – Art. 22
- the right to be free from discrimination of any kind in the exercise of the ICCPR rights – Art. 2;
- the right to recognition as a person before the law and to equality before the law – Art. 16 & 26;
- the right to due process prior to any deprivation of liberty or property – Art.9, 10, & 11

4) The Convention on the Rights of the Child²⁸ obligates states to assure that:

- the child should grow up in a family environment, in an atmosphere of happiness, love, and understanding – Preamble
- the child should not be separated from her or his parents against his/her will – Article 9

5) The Migrant Workers Convention

- applies “during the entire migration process... [including] preparation for migration, [and] departure,” (Art. 1); and
- obligates sending states to protect all migrants and their families (a migrant is “a person who is to be engaged...in a remunerated activity in a State of which he or she is not a national,” (Art. 2.1).

It is clear that the MWC places sending states under obligations to their citizens before and after they migrate. The MWC guarantees that all migrants and their families;

- are entitled to “effective protection by the State against violence, injury, threats and intimidation, whether by public officials or by private individuals, groups, or institutions” – Art. 16.2 (This provision may apply to threats against families in the country of origin by smuggling networks attempting to collect fees or force migrants abroad to continue working.)
- are free to leave their State of origin – Article 8.1. (This provision implies a prohibition on excessive passport charges or bribes extracted for work contracts.)
- have the right to enter or remain in their State of origin – Art. 8.2; and
- have the right to information from their own State about their rights in their States of transit and employment – Art. 33.

The MWC implies that States of origin are obliged to provide consular protection by establishing migrants’ (and their families’) right to consular protection and assistance in Art. 23.

USING HUMAN RIGHTS TO ESTABLISH THE ACCOUNTABILITY OF STATES OF TRANSIT FOR THE RIGHTS OF MIGRANTS

Background

“Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.” - Migrant Workers Convention, Article 16.1

The recent massacre of 72 Latin American migrants at the Rancho San Fernando in northern Mexico is a stark reminder that states of transit are rarely held to account for the welfare and human rights of migrants who cross their territory. Unauthorized migrants in transit are vulnerable to extortion by government employees, smugglers, and thieves; to kidnapping for ransom, rape, labor exploitation, summary imprisonment, summary deportation, denial of access to protection by law enforcement, inhumane conditions of detention, and physical abuse.

As transits, these migrants lack even the community support afforded to unauthorized migrants by their compatriots and allies in their countries of settlement. Transit migrants remain largely dependent on over-worked and over-whelmed human rights defenders from religious organizations, NGOs, and activists to provide them orientation, shelter, protection, food, and medical care. These brave advocates also become the voice of transit migrants to complain about the violations of their human rights. Many governments of transit states are entirely negligent regarding their duty to protect migrants in transit.

Relevant human rights instruments

The tasks of migrants and their advocates are to use the international human rights instruments to hold transit States accountable for the human rights of migrants who pass through their territory and to hold states of origin accountable for the human rights of their population abroad. Under the relevant agreements – and especially under the Migrant Workers Convention – one can make an argument for a Responsibility to Protect on the part of transit states. The duties of States of origin

can be found in the instruments that constitute and protect consular protection functions.

International Covenant on Civil and Political Rights

The ICCPR obligates States Parties to “respect and ensure” the rights of “all individuals within its territory and subject to its jurisdiction.... without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Art. 2

The enumerated rights relevant to problems of migrants in transit would include:

- The right to life – Art. 6;
- The right to be free from torture – Art. 7;
- The right to be free from slavery or servitude – Art. 8;
- To not be subjected to arbitrary arrest or detention without due process of law – Art. 9;
- The right to be treated “with humanity and respect for the inherent dignity of the human person” if detained – Art. 10;
- To leave any country – Art. 12;
- (if lawfully present) To full due process in expulsion proceedings – Art. 13;
- To recognition as a person before the law and to equality before the law without discrimination, particularly regardless of national origin or other status– Art. 16 & 26; and;
- To due process in any criminal proceeding – Art. 14 & 15

The Migratory Workers Convention

Many States Parties to the MWC are states of transit. The treaty offers the following protections with respect to mistreatment by officials, smugglers, and other persons seeking to exploit vulnerable migrants in transit –

- “Effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private

- individuals, groups or institutions,” Article 16.2; [emphasis added]
- The right to liberty and security of person – Article 16.1;
 - The right to life - Article 9;
 - To be free from to torture or cruel, inhuman or degrading treatment or punishment. - Article 10;
 - To be free from slavery, servitude, or forced labor – Article 11;
 - That verification of identity by authorities be carried out according to legal procedures – Article 16.3; and to not have identity or migration documents or passports, destroyed or illegally taken – Article 21;
 - To not be subjected to arbitrary arrest or detention – Article 16.4;
 - To be informed of the right to consular access and to communication with consular authorities – Article 16.7;
 - To due process if detained and to compensation if subjected to unlawful arrests or detention – Article 16.9;
 - When detained to be treated with “humanity and respect for the inherent dignity of the human person and their cultural identity,” to be held separately from convicted persons, etc. – Article 17;
 - To not be subjected to collective expulsion – Article 22

The Migratory Workers Convention implies an affirmative duty on sending state governments to their nationals abroad, stating at Article 23 that:

“Migrant workers and members of their families shall have the right to recourse to the protection and assistance of consular or diplomatic authorities of their State of Origin... whenever the rights recognized in the present convention are impaired. In particular, in case of expulsion, the person concerned... shall be informed of this right without delay...” Art. 23.

The Vienna Convention on Consular Protection of 1963

The obligations of States to provide consular services and the right of access for detained persons appear in international law in the Vienna Convention on Consular Relations of 1963.²⁶ Further obligations of States to their citizens abroad may be found in national legislation or bilateral agreements. Article 5 of the Vienna Convention defines

26. Vienna Convention on Consular Relations of 1963, entered into force March 19, 1967, as of 2010, 174 nations have ratified it; <http://untreaty.un.org/cod/avl/ha/vccr/vccr.html>

among consular functions (and thus implying an obligation on the part of sending States):

- “(a) defending in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;...
- (e) helping and assisting nationals, both individual and corporate, of the Sending state;...
- (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests.

Article 35 provides for access by detained nationals to the consular authorities of their home State, guaranteeing communication between consular staff and nationals. The Convention also guarantees that a detained person must be notified of his/her right to request that the consular authorities of his/her State be notified of his/her detention or arrest. However, the persons must consent to the consular notification. Consular authorities are also guaranteed the right to visit detained persons.

Using human rights to establish the duty of States of destination and settlement to protect the human rights of migrants

Based on the principle of universality explained above, States of destination are obligated to respect the human rights of migrants on the basis of equality with their own citizens with certain limited exceptions. Almost all rights recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and other important human rights treaties are granted to “Everyone,” “All children,” “All,” “Men and women,” etc.

Thus, all rights guaranteed under the basic human rights instruments (ICCPR, ICESCR, Convention on the Rights of the Child, Con-

vention for the Elimination of all Forms of Discrimination Against Women) are supposed to be guaranteed to citizen and noncitizen alike. Of particular importance is the International Convention on the Elimination of all Forms of Racial Discrimination (the CERD), as many of the human rights violations suffered by migrants world-wide are based in racism and xenophobia.

The Migrant Workers Convention is explicit in the guarantee of a whole range of rights under the basic principle of equality of treatment with nationals to all migrants— as a “person before the law,” labor and trade union rights, access to education and emergency health care, due process in criminal proceedings, etc.²⁷ Documented migrants (“in a Regular Situation”) have even more protections – to freedom of movement and choice of residence to re-entry after an absence, to participate in public affairs and vote (if allowed by national legislation), to access to all public services on the principle of equality with nationals, etc.²⁸ However, so few migrant-receiving countries have become States Parties to the Migrant Workers Convention, that its guarantees remain aspirational rather than enforceable.

Despite the principles of equality proclaimed in the human rights treaties, there has been an alarming increase in the willingness of states to tolerate – or themselves initiate – discrimination in all areas of life against migrants and their families. It is beyond the scope of this paper to list all human rights in all treaties under which migrants should – but do not – enjoy equality of protection. This is true with respect to labor rights, access to healthcare and education, to basic human services, to housing, to employment, and to fair treatment before the courts and by law enforcement. There is also an increasing and alarming tendency to criminalize irregular immigration status itself.

The basic human rights treaties do allow States to limit certain political rights to citizens,²⁹ allow developing countries to determine whether they will guarantee the economic rights of “non-nationals,”³⁰ require States to permit freedom of movement within the national territory only

27. Migrant Workers Convention, Art. 8 - 35

28. Migrant Workers Convention, Art. 36-56.

29. ICCPR Article 25 describes the rights of “citizens” (rather than “persons,” the term used throughout the treaty) to participate in public affairs and to vote.

30. ICESCR Article 2.3

to “Everyone lawfully within the territory,”³¹ and explicitly permit the expulsion of aliens under certain due process guarantees.³²

The children of migrants are frequent victims of human rights violations, whether born in the country of their parents’ settlement or not. In most countries, enforcement of immigration laws has been upheld over principles of family unity or child protection recognized in human rights instruments³³; thousands of “mixed” families have suffered international separation when one or more parents are deported.

In countries that guarantee *ius solis* citizenship, some children of migrants have been unfairly denied access to what is their legal right. In other *ius solis* countries, antiimmigrant forces are pressing for the modification or abolition of citizenship rights for certain populations. Children have the human right to “acquire a nationality,” but international human rights do not guarantee them citizenship (either at birth or through naturalization) of the country where they were born.³⁴

Countries are also restricting prior legal regimes which allowed regularization of unauthorized migrants. A recent trend towards opening naturalization to the children of migrants seems to be going in reverse as nativist groups gain political power. There is no global standard or human rights agreement on the obligation of states to offer citizenship to migrants or their children or even grandchildren.

HUMAN RIGHTS OF DIASPORA POPULATIONS

The right to return to one’s country is guaranteed in several of the basic human rights treaties, “No one shall be arbitrarily deprived of the right to enter his own country,” ICCPR 12.3 “Everyone has the right... to return to his country,” UDHR Art. 13.2

31. ICCPR Article 12.1

32. ICCPR Article 13; however, the Refugee Convention bars states from returning individuals to any territory where their “life or freedom may be threatened on account of race, national origin, religion, political opinion, or membership in a particular social group” Art. 33 Convention and Protocol Relating to the Status of Refugees.

33Convention on the Rights of the Child, Article 9; ICESCR “The widest possible protection should be accorded to the family,” Article 10.

34Convention on the Rights of the Child, Article 7; ICCPR Article 24.3; Migrant Workers Convention Article 29 (“right to a nationality”)

In a globalizing world of transnational communities, and the reliance of many economies on migrant remittances, the right of migrants to participate in the politics of their countries of origin has received increased attention. Some countries have experimented with diaspora voting, while many more attempt to encourage investment and/or return. Other countries have questionable policies – or no policy at all – for the reintegration of returning migrants particularly those nationals who return after serving terms of imprisonment abroad.

The international human rights regime has paid scant attention to the particular rights questions of diasporas and returning migrants beyond the right of return cited above. The Migratory Workers Convention guarantees only to migrants and their families who are “Documented or in a Regular Situation” limited political rights in their State of origin – i.e. the right to “participate in the public affairs of their State of origin and to vote and to be elected at elections of that State in accordance with its legislation,” obliging the state to facilitate the exercise of these rights “as appropriate and in accordance with their legislation.” Art. 41

Clearly the questions of diaspora rights and the conditions of return (whether voluntary or through deportation) are deserving of analysis and attention.

CONCLUSION

As stated in the Introduction, it is the task of autonomous civil society, as represented in the Global Forum on Migration and Development by the Peoples Global Action on Migration, Development and Human Rights (PGA) to put human rights front and center in the discussion of migration and development policy in this important world meeting.

The author hopes that this paper will be taken as the first step in that process, to be extended and enriched by the contributions of many voices, advocates, academics, trade union representatives, and – most importantly – by migrants themselves.