# HUMAN RIGHTS AND MIGRATION: THE MISSING LINK[1]

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ABSTRACT: Protection of migrants' human rights and effective management of migration (in the sense of ensuring that the movements are orderly and predictable and therefore more manageable) are closely interlinked. However, existing literature on migration and human rights, though voluminous, has hardly endeavoured to bring this nexus into sharper focus. Policy making in the two areas has also remained largely peripheral to each other. And, despite fledging signs of a change, coalition between human rights organisations and migrants' associations has continued to be weak.

The paper argues that the crucial nexus between human rights and migration constitutes the core of a commonalty of interests between those who are anxious to defend human rights and those concerned with better management of movement of people. Nation states have an abiding interest and inherent stake in protecting the basic rights of their own citizens even when they are abroad. This calls for close inter-state reciprocity and co-operation. Protecting these rights also helps nation states in fulfilling their obligations in other vital areas of their responsibility.

The paper concludes by suggesting that a better understanding of these inter-linkages could lay the basis for a rich and proactive common agenda to which the state, human rights organisations, and migrants' associations can all creatively contribute, while advancing, and remaining faithful to their own vocations. As well as bringing migrants' basic rights into the mainstream of the human rights movement, it would lend new vitality and dynamism to the movement itself.

[1] The paper draws on the author's previous publications, notably, *Elusive Protection, Uncertain lands: Migrants' Access to Human rights* (IOM, 2003); "A Road Strewn with Stones" (ICHRP, 2003, Versoix,, Switzerland); *Managing Migration: Time for a New International Regime¿* (2000. OUP, Oxford); and "Movements of People: The Search for a New International Regime" in *Issues in Global Governance* (1995, Commission on Global Governance, Kluwer Law, London/The Hague).

## INTRODUCTION

1. Nearly 200 million people are living outside their country of origin. If imagined as inhabitants of a single national territory, they would make it the world's fifth most populous state, surpassing the combined populations of Germany, France and the United Kingdom. While the potential risks of human rights violations are inherent almost in all stages of the migration process, some specific groups of the migrant population —low and unskilled workers, especially women, and those labouring in the underground economy, irregular and trafficked migrants, rejected asylum seekers, migrants as subjects of forcible return—are particularly vulnerable to such abuses. The brutality of many of these abuses frequently makes lurid headlines in newspapers and other mass media, and is now well documented.

2. And yet, the protection of migrants' rights has remained at the margins of the human rights system. International human rights law has not been sufficiently articulate and robust to defend their rights. And migration policy-making has continued mostly with little regard to human rights concerns. Nations are anxious to better manage the rising pressure of international migration. But the close interlinks between migration management and protection of human rights for all, including migrants, have not received the attention it deserves. Until recently, human rights organisations, too, have been less preoccupied with promotion and protection of human rights of migrants as a special group.

3. This paper probes into this "missing link", analyses its causes and conditions and argues for a heightened awareness of this linkage and foresees its proactive use as a policy instrument and operation tool for both protection of human rights and better management of international migration. It asserts that all the stakeholders involved have a common interest in this task.

## EXISTING HUMAN RIGHTS LAW IS NOT ROBUST ENOUGH

4. International law has traditionally focused on states as its main subjects. However, since the establishment of the United Nations and the adoption Universal Declaration of Human Rights a significant body of international law has emerged devoting attention to the rights of human beings as individuals. These instruments oblige a state to protect a set of basic human rights for "all individuals within its territory and subject to its jurisdiction". The snag however is that most of them fail to recognise explicitly their applicability to non-nationals as well. As a result, not infrequently migrants find themselves in a sort of juridical limbo. The International Covenant on Civil and Political Rights (ICCPR), somewhat exceptionally, guarantees certain basic rights *specifically* to non-citizens, but it does not cover the various special risks of human rights abuse to which migrants

are often exposed. Protection against racial and ethnic discrimination against minorities is particularly important for migrants who are almost always minorities in the host society. But, the protection provided by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to migrants becomes somewhat diluted as it allows "distinctions, exclusions, restrictions or preferences as between citizens and non-citizens."[2]

5. The Covenant on Economic, Social and Cultural Rights (ICESR) implicitly allows distinctions between nationals and foreigners under Article 4: "The State may subject such rights only to such limitations as are determined by law…and solely for the purpose of promoting the general welfare of a democratic society." Article 2, paragraph 3 states more explicitly, "…developing countries …may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals." Nor has the treaty monitoring body of the Covenant unequivocally upheld that non-nationals are to enjoy all social and economic rights equally with nationals, although such differentiation in treatment must not be "unreasonable "or based on prejudice."

6. The lack of specificity or ambiguity as regards migrants' entitlement to the fundamental rights is not the only problem. The fact that the provisions of international human rights law that are of special relevance are fragmentary and are widely dispersed (and not necessarily harmonious) makes it hard for migrants to take full advantage of them and for human rights activists to fight for these rights on their behalf. At the 1999 UNCHR working group meeting on migrants' human rights[3] I had proposed, and the group had agreed, that a compendium of all instruments of specific relevance to migrants—similar to the UN's two volume collection of all human rights treaties and texts—be published and eventually codified. Despite the widespread agreement on the usefulness of such a compendium, no action, as far as I know, has yet been taken on the proposal.

7. The lack of specificity regarding non-nationals' entitlement to the fundamental human rights in international human rights law is also reflected in national legislation. In a large number of countries—more than half of those included in a recent ILO survey—provisions in the constitutions and national laws against discrimination apply only to nationals.

8. Admittedly, two important instruments —the 1951 UN Convention (and 1947 Protocol) Relating to the Status of Refugees (CRSR) and the 1990 UN Convention on All Migrant Workers and Their Families— specifically address the issue of human rights of refugees and migrants, respectively. But they, too, suffer from other weaknesses, including in particular serious protection gaps, which I would be discussing in a moment.

[2] The Committee on Elimination of Racial Discrimination (CCERD) has sought to remove this ambiguity by affirming that while the ICERD provides for differentiation between citizens and non-citizens, it must be construed so as to avoid undermining the basic prohibition of discrimination" (General Recommendation 30), CERD/C/64/misc11/rev. 3.

[3] Working Group of Intergovernmental Experts on Human Rights of Migrants, 1998-1999.

*What is law for?*

9. Law lays down the norms and principles, but they are of little value if they are they are not enforced and acted upon—unless of course you take the opposite view that law embodies the ideal which can never be reached but remains a source of inspiration.

10. Migrants cannot benefit from the protection provided in the international instruments unless they are ratified, incorporated in national laws, and enforced. But a number of countries have not yet ratified all the major international human rights instruments. Long delays in the ratification of an international instrument can make it less relevant, and the momentum for its effective enforcement may be lost, especially if other priorities emerge in the interval. As we will soon be discussing, it took nearly 13 years before the minimum 20 ratifications were concluded to make the 1990 Convention on All Migrant Workers and their Families (ICMW) operational. And ratification is only the first phase of implementation and enforcement. Even when the instruments are ratified and national laws are brought in line with the international standards, they are not always effectively enforced. The government may not have the needed political will or the financial and institutional capacity.

11. The cleavage between states' expression of concern for human rights, including for migrants, at the international level and the absence of their ability or willingness to do something about it back home—as reflected in non-ratification of existing standards or their inadequate enforcement—poses a serious problem. It creates a continuing tension between international law to protect human rights and national laws where the primary concern is the protection of the rights and interests of citizens.

## PROTECTION GAPS IN LAW AND PRACTICE

12. The ambiguities and deficiencies in existing international human rights instruments (that are applicable to all) are compounded by various additional protection gaps in relation to certain specific migrant groups or migration situations. Elsewhere, I have tried to identify a number of those groups and situations that are particularly susceptible to human rights abuse and often suffer from serious protection gaps. These are: migrants in an irregular situation and trafficked migrants; temporary and *ad hoc* refugees and those in refugee-like situations; rejected asylum seekers and those who are subject to forcible return; migrants during armed conflict; stateless persons due to territorial changes and internally

displaced persons and migrants in the wake of September 11 terrorist attacks. At least some of these uncovered protection needs gained visibility and urgency only in recent years, and could not have been foreseen at the time when the instruments were formulated and adopted.

13. These gaps could relate to normative principles (including their scope) and monitoring mechanisms at the global level or state practices, (including ratification, enforcement, and supervision) or both. Not infrequently these gaps are closely inter-related. If, for example, the normative principles are considered unsound, impracticable or out-of-date, the states are not likely to ratify or enforce them effectively. Enforcement may also be slack if law does not provide for a powerful monitoring mechanism. Time will not allow us to discuss the nature of vulnerability and the protection gaps in all these cases. But a quick look can be taken at two instruments--ICSR and ICMW; they were designed, as we already noted, to meet the specific needs of refugees and migrant workers, respectively; and yet they, too, suffer from various protection gaps.

*The Refugee Convention*

14. The 1951 Convention on refugees, crafted at the end of World War II mainly to meet the protection needs of refugees from communist regimes, does not cover several other individuals and, especially groups of individuals, although they too are in refugee-like situations and are in genuine need of protection. These include: victims of forced migration resulting from civil strife, armed conflicts, and generalised violence; massive violation of human and minority rights; and natural and man-made disasters.

15. Regional instruments, notably the OAU Convention in Africa and the Cartagena Declaration in Latin America (a non-binding declaration of intent) are wider in scope. Even so, not all of these victims of forced migration are adequately covered under these instruments. States in North America, Western Europe and Oceania have responded to these humanitarian emergencies on an *ad hoc* basis by creating various categories of temporary refugees. But in the absence of internationally agreed and harmonised norms, the protection remains unpredictable, insecure and fragile. There is considerable confusion and uncertainty especially as regards the basis of differentiation between the various categories (based on the criterion of duration of stay in, and the degree of attachment to the host country) and their corresponding rights.[4]

16. As regards application, although the 1951 Convention concerning refugees (CRSR) has been ratified by the vast majority of the UN member states, it is

[4] There is, for example, no agreement on the duration of time or more precisely at which point in time an asylum seeker awaiting a decision is to be considered "lawfully present" and not just physically present to enjoy the corresponding rights. Dent 1998.

certainly not free from application gaps. Uncertainties have arisen because political considerations have been allowed to intercede when applying the protection provisions to different refugee flows and also because of the exclusion of cases of persecution by non-state agents, and the denial of protection by resorting to interdiction of would-be asylum seekers on the high seas or elsewhere beyond territorial borders and by frequent recourse (at the discretion of the receiving government) to the safe country concept under various labels such as safe country of origin, safe country of first asylum and safe third country. Not only has the shift of emphasis towards safe conditions restricted the admission of some genuine refugees coming from countries deemed to be safe but has the effect also of diluting the principle of "volunariness" as a condition of refugees' return.

17. Doubts have been expressed about the depth and authenticity of the willingness of the refugees to return arranged under the new policy stance. The return of Ugandan refugees who were in camps in Somalia and Zaire (now Democratic Republic of Congo) in the 1980s, the Somali refugees in Kenya in 1992 and the 2.5 million refugees in Tanzania and Zaire in 1994 are typical of cases of return under some form of duress. There UNHCR itself has been obliged to accept the doctrine of "imposed return" which, in essence, is a violation of the basic principles of refugee protection, namely, *non-refoulement*.

18. Finally, as past experience in countries like El Salvador, Guatemala and elsewhere shows, the existing mandate and arrangements under which the UNHCR is given a residual responsibility for post- return protection and integration of refugees remain too fragile and inadequate to cope with the task.

19. The Convention's enforcement gap also stems at least partly from its normative weakness. Although Article 35(2) of the Convention on refugees (CRSR) provides the basis for a periodic reporting system, it imposes no obligation to establish a formal and specific mechanism for inter-state scrutiny. In the absence of such a mechanism and a formal process of inter-state scrutiny—let alone a system of individual petitions—the enforcement arrangements have remained weak.

*The Convention on all migrant workers and their families*

20. A similar, and no less disappointing, picture of protection gaps emerges as we look at the 1990 UN Convention on migrant workers. From the normative standpoint, limitations arise not just because certain groups of workers such as trainees (who are used, not infrequently, as workers), seafarers and workers on off-shore installations are excluded or because the Convention allows states to limit the rights of specific groups of temporary labour migrants such as seasonal workers and project-tied workers. A more important reason is that the Convention fails to take full account of the significant changes in the panorama of labour

migration since the formulation and adoption of the Convention. These changes include: sharply increasing short-term labour migration; the growing importance of private agents and intermediaries vis-a-vis the role of the state in recruiting migrant workers; feminization of migrant labour, with large number of women being employed in sex industry and domestic work; and the pressing need for states to balance control measures and those that facilitate orderly movement of labour migrants and their protection.

21. The application gaps are even more serious. By the end of 2007—after a lapse of some 15 years following the adoption of the UN General Assembly resolution (GA 45/158) to which the Convention was attached—only 27 countries, none a major migrant receiving industrial country, had ratified it; and 27 others had signed, but were yet to ratify the instrument. Some analysts think that many of the reasons that are holding back states to do so—especially the bias against irregular immigrants and the reluctance to extend explicit protection to them—are also foreshadowing a likely weak enforcement of the Convention by states that have already ratified it. Why is this procrastination? I believe we can draw useful lessons by probing into the possible reasons.

22. First, the instrument explicitly guarantees a set of basic rights to irregular migrants; however, in many countries there is a built-in political and cultural bias against those whose presence in the country is in itself unlawful. Significantly, even some of the NGOs seem to be only or mainly concerned with those migrants who are in a regular situation. This reinforces the reluctance of many governments to accord these human rights to irregular migrants who, as they perceive, are on their territory not only unlawfully but could also be a source of social tension and easy recruits for the political opposition. These rights are however already guaranteed for all individuals, including at least implicitly for migrants, in the existing major international human rights treaties, all or many of which may already have been ratified by at least some of the same sates. A real consideration underlying the resistance to ratification seems to be the fear that this would encourage new inflows of irregular migrants, and their family members, including a diversion of the flows from the non-ratifying to the ratifying countries. These governments seem to believe that granting explicitly a set of rights to irregular migrants on a foot of equality with regular migrants, as the first 35 Articles of the Convention do, will give the wrong signal.

23. Some governments also think that equal treatment of regular and irregular migrants in the matter of social welfare benefits may have a depressive effect on the level of regular migrants' benefits and may thus backfire on them. Further, given that the Convention urges states to curb irregular migration, some are afraid, and a 1996 ILO survey confirmed the concern, that it increases the risk of human rights abuse in the course of such action. A feeling is also shared among several migrant-sending developing countries that the Convention fails to maintain a balance between control of irregular migration and measures to facilitate orderly labour migration.

24. Another important consideration for some governments concerns the strain the Convention would place on their financial and institutional resources if they were to ratify it. Countries suffering from unemployment and fiscal constrains are disinclined to grant foreign workers rights of equal access to economic, social and educational benefits; they wish to reserve the right to give preference to national over foreign workers This applies particularly to unemployment benefits, access to employment-creating public works schemes, housing and health services. Many of these rights are however included also in ICESCR, although ICMW goes into additional detail. Also, at least some of these benefits, for example, access to health services could be related to the basic right to life and physical security. As most recently, some doctors in the US argued—in the context of the controversy over irregular migrants' entitlement to chemo therapy under emergency medical aid— postponement of such therapy to irregular migrants could in many cases lead to an emergency situation soon because of the threat to life.

25. According to a recent UNESCO study, some states consider that since these rights are already covered under existing instruments, ICMW is superfluous. Somewhat paradoxically, some of the same states also think that the catalogue of rights granted to irregular migrants is too expansive. A rebuttal of this convoluted argument could well be: if these rights are already recognised, they cannot be too expansive; if they are not already recognised, they can't be superfluous!

26. The spectacular growth of the informal or underground economy, including sweatshops, also inhibits the ratification process as employers in the sector seek to benefit from cheap and docile irregular migrant labour. Aside from the pressure from the vested interests to maintain the *status quo,* many governments feel unable to guarantee even the most basic protection to irregular migrants working in remote places and hidden sweatshops due to staff and financial constraints. Some less affluent sending countries, in particular, would like to avoid incurring costs associated with the formal obligation under the Convention to implement measures such as maintaining vigilance and imposing sanctions on brokers and recruiters operating illegally. The increasing importance of private agencies and intermediaries, contrasted with the declining role of the state, makes this task even more onerous and costly.

## HOW DO WE MEET THE PROTECTION GAPS: MORE LAWS OR BETTER ENFORCEMENT?

27. There is an on–going debate on whether or not there should be new international instruments on human rights in general and for migrants in particular. Some are of the opinion that, given the proliferation of both "hard " and "soft" law instruments on human rights, including for special groups in the past few decades, it is wiser to concentrate on better enforcement of the existing standards, and extending them, if needed, rather than trying to create new standards. Others

strongly argue that as societies evolve and new issues and situations arise, and human rights values evolve, new standards will continue to be needed.

28. There is an element of truth in both these views. If existing standards are not widely ratified or effectively enforced, it detracts from the credibility of the standard-setting process and could undermine the whole system. It is also true that adoption of new standards is a time-consuming process; it entails efforts and costs. On the other hand, it cannot be denied that with rapid economic, political and technological changes affecting the global human society, the need for new and complementary standards will, as in the past, continue to be needed. As we have noted, several of the normative gaps in ICMW and ICSRS are due to the fact that the risks of abuse could not have been clearly foreseen. The ILO's long experience in standard-setting shows that with time some instruments could become out-of-date or obsolete, and may have to be amended, revised or replaced by new ones. The principle is also recognised in the Law of Treaties (Vienna, 1960). Although Article 36 of the Law requires the state parties to stick to the treaties they have adhered to, it also contains under Article 63 the clause (*clausula rebus sic stantibus)* indicating that when circumstances radically change and a new situation arises, compliance with the treaty may no longer be automatic.

29. This implies that our stance on the issue should be a flexible one. Some normative protection gaps could be met by extending the scope of the existing instruments through amendments or additions of Protocols. Circumspection is also needed to decide on the form any new instrument should take. For instance, it may be expedient to start with a soft instrument such as a Declaration or even a resolution by the most appropriate international body as an initial step, and, depending on the support it eventually gathers, the soft instrument or part thereof could be the subject of "hard" instrument. Alternatively, following the long-standing ILO practice, the essential principles on which there is already a broad consensus could be covered in a hard instrument, and the details spelled out in an accompanying soft instrument. A flexible approach, adapted to the specific protection need and situation, is likely to be more successful than a rigid, doctrinaire approach

## LAW ALONE CANNOT GUARANTEE ENJOYMENT OF RIGHTS: SURROUNDING CONDITIONS MATTER

30. A body of sound human rights law and its effective enforcement are essential, but not a sufficient condition for migrants to have full access to their human rights. Several surrounding conditions often impinge on them, helping or hindering the process. Migrants, organisational strength and capacity to act are one of them. In a modern democracy, government policies and priorities are shaped by competing collective demands and the organised pressures of interest groups.

And it is through well-run organisations that they keep vigilance over state behaviour. True, in Western Europe since the end of World War II many of the traditional restrictions on foreigners' associations have been removed. However, the old principle that foreigners' associations can be suppressed in times of emergency and that foreigners can be deported if they threatened public order (*ordre public*) still holds. "Public order" is however hardly defined in precise terms, and this leaves a wide latitude for interpretation, enhancing the feeling of insecurity of migrants, especially those without a permanent resident status and holds them back from actively participating in associations to defend their rights. In times of workplace conflicts, discretionary powers for ordering expulsion on grounds of security or public order often rest with the administrative authorities. This constitutes a real barrier to the exercise of trade union rights by migrant workers.

31. Both ICESR (Article 8) and ILO Conventions nos. 143 and 97 (revised) guarantee equality of opportunity and treatment in relation to trade union rights. However, under the UN Declaration on the Human Rights of Individuals Who Are Non-nationals migrants in a regular situation are entitled to join trade unions, but without the right to form them. In reality national legislation in a significant number of countries impose restrictions on migrants' trade union rights, especially for taking office in unions. Some sates make citizenship a condition of for taking office in trade unions; or require that a proportion of the members must be nationals.

32. We cannot fully benefit from our rights even if guaranteed by law or fight for them unless we are aware of what they are. But many of the low-skilled, less educated and poor migrants are unaware of the laws and their rights and duties; nor do they have full information of the judicial system and of the social services and institutions concerned with migrant's rights and welfare. The situation is often worsened when they are victims of social exclusion resulting from residential segregation in less favoured urban areas with declining quality of teaching in schools and social services, as has happened in France.

33. An overarching obstacle to migrnats' full enjoyment to their basic rights lies in widespread behavioural and cultural bias against foreigners both among the public and government officials in the host society, including those engaged in law enforcement services. The bias against foreigners could be due to a lack of awareness and knowledge of the human rights provisions in national laws and their implications. South Africa has one of the most progressive and inclusive constitutions, guaranteeing basic rights and freedoms to everyone living within its jurisdiction But a recent survey showed that only 55 per cent of the respondents had heard of their country's Bill of Rights and over half of those surveyed thought that the rights guaranteed by the constitution were only for the South Africans.

34. The situation is worse when the absence of the public awareness of migrants' rights is paralleled or aggravated by a negative perception of migration

and its effects on local employment, income, housing and social services. If the perception takes hold that migrants are taking away jobs from the locals, pushing up housing and consumer pries or increasing their social security burden, the social and political environment can be hardly conducive to migrants' full access to their rights. To cite again the example of South Africa, recent surveys in that country showed that large numbers of South Africans, both black and white, clearly disagreed with their own Bill of Rights. For migrant rights to be respected and enjoyed, a conducive cultural environment must prevail in the host society.

35. The scenario become even more ugly when the prejudice against foreigners turns into anti-immigrant feeling and xenophobic slogans and these are injected into the political agenda. Parties across the political spectrum, including the party in power, may then find themselves on the defensive and react to the situation by "demanding or implementing more stringent anti-immigrant measures."[5] This adds to migrnats' vulnerability and feeling of insecurity and makes it harder for them to access their rights. An effective answer to this is the timely initiation of pro-active measures, including systematic dissemination of objective information on migration and migrants' rights, and the rationale underlying them before the whole issue of migration is high jacked by the anti- immigrant parties and xenophobic groups.

## COALITION BUILDING: WHY SHOULD HUMAN RIGHTS ORGANISATIONS AND MIGRANTS ASSOCIATIONS COALESCE?

36. Protection of migrants' human rights and effective management of migration (in the sense of ensuring that the movements are orderly and predictable and therefore more manageable) –are closely interlinked. Human rights violation often lead to disruptive and unwanted migratory flows; and when the movements are disruptive and unwanted (as most disruptive flows are) the risk of further violation of human rights is much greater. Moreover, when this happens, management of migration becomes more difficult and costly, in both human and financial terms.

37. This crucial nexus constitutes the core of a commonalty of interests between those who are anxious to defend human rights and those concerned with better management of migration. Regrettably, existing literature on migration and human rights, though voluminous, has run parallel to each other, hardly endeavouring to bring this nexus into sharper focus and discern its policy implications. The lacuna at least partly explains why policy makers, too, have been less alive to the importance of protection of human rights as an essential condition of sound migration management, with the result that policies in the two areas have remained largely peripheral to each other.

[5] United Nations 1998.

38. What is, at first sight, even more surprising is that the human rights organisations and migrant associations too have, at least until most recently, kept a certain distance from each other. One would normally expect that activist human rights groups would be more responsive to the vulnerability of migrants just as it would be normal for migrants and their associations to turn to the human rights organisations and mobilise their support to protect and promote their own human rights. If this has not happened, one would like to know *why*.

39. There are several possible explanations. [In the 19th century when western organisations actively campaigned against slavery and slave trade, a western creation, they knew, and were painfully alive to the sufferings and inhumanity associated with slavery. In the wake of the Second World War they struggled for refugee protection as they witnessed at close range, and often with considerable political concern and ideological emotion, the plight of the refugees trying to escape from oppressive communist regimes. But until a few years ago, they were less familiar with the vulnerability of contemporary migrants, especially trafficked migrants and other similar victims. Human trafficking is not new. However, it is only in the past few years, that the nature and extent of the brutality often suffered by trafficked and illegal migrants have come under spotlight.

40. A second reason is that, despite their insistence on indivisibility of basic rights, modern western human rights groups' policies have shown a tilt towards civil and political rights, Given that the focus of international human rights law is on state responsibilities, they concentrated on government action and civil and political rights. It was thus easier for them to embrace within their agenda refugees as victims of political persecution than migrants in general.

41. Concurrently, the development of two parallel systems of rights— employment-related rights and human rights—may also have distracted the attention of human rights organisations away from migrants. Labour migrants are the most important component of the migrant population, and until the adoption of the ICMW in 1990 their protection had been sought mainly through international labour conventions of the ILO and its tripartite system, involving governments, organised labour, and industry. This too partly explains why migrants have traditionally received less attention from human rights groups.

42. A third reason, related to the second, concerns western human rights organisations' traditional anxiety to hold on to the moral high ground, avoid dilution of their mandate and demonstrate their "purity of intention." This has induced them to follow a narrowly focussed approach to human rights protection. Convinced of the primacy of human rights as an ethical concept, they have steadfastly pursued their unitary goal. This doctrinaire and narrow, almost insular, approach has led them to perceive the state more as an adversary; its behaviour and action have to be watched, and attacked if it failed to protect human rights. They have remained cautious, if not reluctant, about enlarging their agenda to include the interests of special groups such as migrants and being actively involved (or seen

to be involved) in migrant associations' welfare and assistance programmes. This has been so, despite the fact many of these programmes deal with the causes of abuse of human rights, and indeed some include specific human rights activities. The coalition between human rights organisations and migrants associations has consequently remained weak. Recently, however, there have been fledging signs of a change.

43. Indicative of this change are the investigations by Hunan Rights Watch into the treatment of migrants and refugees in South Africa and a study of migrant's human rights in four West European countries. In the US, it has reported on the conditions of non-citizens who were secretly arrested and incarcerated following the 9/11 attacks. In 2005 it published a detailed report[6] spelling out the human and labour rights abuses in the US meat and poultry processing industry. Although concerned with all workers in the industry, it highlighted how immigrant workers, especially those in an irregular situation, were exposed to fear and greater risks of workers' rights abuse. It made special mention of the US Supreme Court decision in 2002 which defying international law stripped irregular immigrant workers of any remedies if they are illegally fired for union organizing activity. Amnesty International, for its part, has investigated into the execution of migrants in the Middle East and Amnesty USA into abusive treatment meted out to migrants in detention. Further, some national human rights associations provided valuable inputs to the work of the 1999 UNCHR expert group on the human rights of migrants. They have also been actively cooperating with migrants' associations and other NGOs in several of the global initiatives such as The Global Campaign for Migrants' Rights set up in 1998. In general, however, the mainstream western human rights organisations' traditional preference for acting autonomously has continued.

44. In the developing countries, too, the situation has been largely the same. Taking generally a cue from their western counterparts mainstream human rights groups have remained somewhat distant from the migrant population. However, as in the West, there are signs of a change, although for a somewhat different reason. In the face of the overwhelming problems of poverty and economic distress in many of these countries they have been impelled to include economic and social issues in their advocacy and thus remain relevant. There has been a growing recognition that these problems seriously constrain vulnerable groups' access to their human, especially civil and political, rights. As the scope of their advocacy role has widened, and the sufferings of migrants in foreign lands have become better known, they have tended to be involved increasingly in the protection of migrants as a vulnerable group.

45. There are of course potential risks for human rights organisations in over extending their agenda, especially if they become too deeply involved in fighting

[6] *Blood, Sweat and Fear* 2005.

the litany of varied causes of human rights violations affecting different groups of population, including migrants. Spot lighting specific cases and situations of human rights violations is one thing, fighting against their multiple causes is another. If human rights organisations become too actively engaged in the latter, there could indeed be a risk of a dilution of their mandate or at least a shift in their main focus of attention. They could even be blamed for politicising the human rights issue. The fact that migrants' (and migrants-serving) associations often have various other interests and objectives enhances this risk of detraction. There is also a practical consideration. Human rights organisations in general have limited financial and human resources. Enlargement of their core agenda to include the varied problems and issues of migrants ( and other vulnerable groups) could place an additional strain on these limited resources and weaken their over-all institutional capacity to act and deliver in the main area of human rights.

46. On the other hand, there is little doubt that by forging closer alliance with migrants and their associations, human rights organisations can have additional outreach and visibility and also gain in its vitality and dynamism. It is equally clear that by building coalitions and mutual alliances both human rights organisations and migrants associations could be more effective in protecting and promoting human rights of migrants. The challenge before the human rights organisations is to derive the benefits of such collaboration while avoiding the potential pitfalls—a matter of striking the right balance between a rigid, insular approach and an overextended one.

47. The problem of coalition building is of course not a one-sided one. Migrants' associations, (including migrant-serving organisations), too, may have their own predicaments and constraints. In countries where migrant associations are well established, with specific mandates and programmes for protecting migrants' human rights, the case for coalition building with human rights organisations is clear. And if the legitimacy of this role is also widely recognized within the country, migrants' associations would find it convenient to formalize inter-institutional links with human rights organisations bilaterally or though the national human rights organisation, if such a body exists. But the situation is not always so simple or straightforward. Some service-oriented migrants' associations which did not start out explicitly for the protection of human rights may be hesitant to launch a human rights programme because of the political sensitivity surrounding the issue in the country or its limited institutional capacity or both. Some of them may however decide to move gradually into the human rights area, as was found, notably in the Asian region. They may then consider it more expedient to benefit from guidance and support from human rights organisations, but under a less formal arrangement.

48. Lastly, some migrant organisations, concerned with welfare and assistance, may not wish to directly undertake human rights activities; some may be particularly anxious to avoid taking a stance that might be adversary, or per-

ceived to be adversary to the state, as this could hamper their cooperation with public authorities in other areas of their activity. In such cases, inter-institutional links may have to remain limited, though these could still be used under a broader umbrella to build public support for equality and tolerance and for raising migrants' awareness of their rights.

49. Flexible alliances between these various types of organisations sometimes have been quite successful in advancing migrants' human rights through the establishment of joint programmes and projects and, more often, joint campaigns at the national level, as is found in Japan. At the regional level, too, significant progress has been made in forging such alliances as illustrated by the Asian Migrant Center, and the Migrant Forum in Asia, the European Union Migrants Forum and the European Council on Refugees and Exiles in Europe and the South African Migration Project in Africa.

50. In a nutshell, there is considerable scope for strengthening inter-institutional links or coalition between human rights organisations and migrant associations. However, there is no fixed or ideal model for building such coalition. Much depends on the nature, standing and strength, and other institutional characteristics not only of the human rights organisations but also of the migrant associations and the country specific situation.

## THE CHALLENGE FOR THE STATE

*What should be the role of the state in managing the rising tide of migration and how does protection of human rights fit into it?*

51. International migration is one of the biggest challenges of the 21st century—may have become a cliché, but it is truer than ever. Human mobility, in terms of the number of persons involved and the intensity of the movements, has never been as high as it is today. At a minimum, between 19 and 20 migrants are crossing borders every minute in the world today. Many more are in the queue, willing and anxious to move. Paradoxically, we are also living in a time when more and more countries, both rich and poor, inadequately equipped to constructively manage these flows, are becoming less and less willing to admit new migrants. In 1976 only 6 per cent of the United Nations 150 member states were keen on lowering immigration. By 2002 it rose nearly 7 times to 40 per cent, involving 193 member countries. These trends have since been accentuated by the terrorist attacks of 9/11 and the events that followed.

52. The consequent mismatch is placing a heavy strain on the world migration system, carrying with it enormous human, social, economic and political costs. Existing policies are mostly reactive and inward-looking, with a focus on

unilateral immigration control rather than on migration management through cooperative action. They are proving inadequate to address the new challenges and opportunities that international migration presents today. Worse still, often they are producing perverse results. More and more people are now crossing borders in defiance of existing national laws and practices. In the US, for example, the number of irregular migrants is hovering around 12 million; unless the trend is arrested, the ratio between irregular and regular immigrants may soon be 1:1. Some 2.4 million men, women and children are estimated to be victims of human trafficking; and at least 20 per cent of all forced labour is the outcome of such trafficking.[7] Worldwide between 30 and 40 billion US dollars are being sucked into it every year. Loss of precious human life—be it on the Mediterranean sea or at the US-Mexico border or elsewhere—has become a daily occurrence. Tensions between, and often within, nations are rising.

53. If, under a contrasting scenario, migration is properly managed through inter-state cooperation and becomes orderly and predictable, it can be immensely beneficial. And the resultant gains can be shared by all nations, both sending and receiving, though in varying degrees. To illustrate, an estimate made in 1984 by Hamilton and Whalley showed the efficiency gains from removal of barriers to labour mobility across countries could double the word income. More recently, a recent analysis by Dan Rodrik showed that since wages for similarly qualified workers in developed and developing countries differ sharply –by a factor of 10 or more as against a difference for commodities and financial assets that rarely exceed a ratio of 1:2—the gains from openness in migration could be enormous, roughly 25 times larger than the gains from liberalisation of movement of goods and capital.[8] And even a modest relaxation of the restrictions on the movement of labour –a temporary admission of poor country workers numbering not more than 3 per cent of rich countries' labour force-- could yield a benefit of US $300 billion for the developing world.

54. Likewise, the World Bank estimates that a rise in emigration from developing countries equal to three per cent of the labour force of high income countries (as in Dani Rodrik's hypothesis) could lead to a global output gain of US $356 billion by 2025. This is about twice the global gain from full merchandise trade liberalisation, (using the same model and similar assumptions). Of the increase of US $356 billion in global real income those in developing countries would gain $143 billion and their migrants US$162 billion, (adjusted for differences in purchasing power between the high income and developing countries).[9]

[7] ILO 2005.

[8] Rodrik estimated that even a modest relaxation of the restrictions on the movement of workers— temporary admission of poor country workers numbering no more than 3 per cent of rich countries' labour force--- could yield a benefit of $ 200 billion for the developing world. 'Feasible Globalizations', Kennedy School of Government, Working paper Series RWP0 2029, July 2002. pp.19-20.

[9] World Bank 2006.

55. These estimates are of course incomplete in the sense that they do not take into account the costs or negative externalities of migration or its distributional effects within countries. But they are nonetheless indicative of the significant economic benefits that the world can reap from an orderly and properly managed system of migration. The positive effects from orderly and freer movements of course go far beyond the purely economic gains. They facilitate interchange of ideas, innovations, and values, leading to flourishing cultures and enrichment of the human society. They contribute to global peace and stability.

56. To avoid the consequences of the rising mismatch in the world migration system, and reap the enormous benefits that a regime of orderly and predictable migration can offer, nations need to get together and agree on a new, multilateral framework for cooperative management of international migration.[10] The new arrangement would help avoid receiving countries' knee-jerk reaction to the rising emigration pressure and seek to bring the growing migration mismatch into a dynamic and sustainable harmony. To achieve this, it would follow a twofold approach. It would help reduce pressures for irregular and disorderly migration from labour-surplus sending countries; it would at the same time allow increased opportunities for legal entry of new migrants, consistent with the receiving countries' labour market, social security and demographic needs and their over-all absorptive capacity.

57. Based on the principle of regulated openness, the regime, more specifically, would:

- help rich countries meet their real labour market, social security, and related demographic needs through increased and orderly intakes of immigrants and through more effective integration policies and fuller use of immigrants' human resources;
- encourage and actively help less affluent sending countries in the South to reduce pressures for disorderly migration through broad-based development, combining job creation and economic growth, alongside a fair distribution of income;
- ensure better coherence between migration policies and those in other related fields such as trade, aid and investment and the environment in both groups of countries; and
- ensure better protection of human and labour rights on both ethical grounds and as an essential condition of effective migration management.

58. It would embrace and complement, but not supplant, the two existing migration sub-regimes---the one governing refugee flows (embodied in the 1951 United Nations Convention and its 1967 Protocol) and the other regulating movement of natural persons as service providers (or Mode 4 under the WTO General Agreement on Trade in Services--the GATS). It would also serve as a pro-active

[10] For a more detailed discussion of the subject see Bimal Ghosh (Ed) Managing *Migration: Time for a New International Regime? (*2000) Oxford, Oxford University Press. 1-26; 220-247.

counterpart of the 2000 International Protocols on human smuggling and trafficking and run parallel to the global rules governing movement of goods, services and capital, but be distinct from them.

59. Elsewhere I have discussed in some detail the various specific features of the new regime (dubbed New International Regime for Orderly Movement of People-NIROMP) and the conditions of its sustainability and success. I have argued that common and complementary interests of rich and poor countries, especially in terms of predictability and orderliness of human movements and the consequent international and domestic stability and economic gains, will provide the common good, regarded under the regime theory as one of the cornerstones of a sustainable global regime. As in international trade, constructive bargaining and trade-offs on diverging interests will make every participating country a net gainer, adding to the common good.

60. I have also argued that far from being an intrusion on national sovereignty the new regime would constitute a freely negotiated inter-state arrangement of convenience, leading to an enrichment of state sovereignty and enhancement of its capacity to deal with migration as a global or trans-national issue as it has always done since the days of Westphalia, 1864. In order to be viable, the proposed arrangement must be planned and developed on a global basis, using a combination of top-down and bottom-up processes of consultations. This is because contemporary migration is predominantly a global process—a concomitant feature of globalisation. It does not stop at the frontiers of specific regions or sub-regions if it ever did. Regional and sub-regional arrangements could be complementary to the global initiative and serve as building blocs, but only within a harmonized global framework. Otherwise, they would run the risk of following conflicting policy paths creating tensions between regions and adding to global instability.

## PROTECTION OF HUMAN RIGHTS AS AN ESSENTIAL INTER-LOCKING ELEMENT IN A WORLD SYSTEM OF ORDERLY MIGRATION

61. Given the main theme of to-day's conference, I would focus only on one of the salient features of the proposed regime —namely, protection of human rights. As we have already discussed, there is a basic and direct contradiction between gross violation of human rights and orderly movement of people. Such violation generates disorderly, unpredictable and often massive movement of people across borders, creating inter-state tensions and conflicts and sucking in neighbouring countries as we have already seen in the Balkans, in Central Africa, the Horn of Africa and now in Sudan. This in turn can easily lead to further violation of human rights, creating a vicious circle.

62. The merits of placing human rights of migrants within a wider and harmonized international regime of orderly movement of people are now being gradually recognised and echoed by international organisations. For example, the proposals submitted to the 2004 International Labour conference stressed that:

> [A] rights based international regime for managing migration must rest 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…*a sound framework would have to include principles on how to organise more orderly form of migration that benefit all.* (Italics added).

63. There are at least three powerful considerations that explain why nation states have a vital stake and an abiding obligation in protecting the human rights of migrants as an important part of such a multilaterally harmonized arrangement. They make the nation state more as an ally rather than an adversary in the fight to protect the human rights of migrants.

64. First, the significant development of international human rights law since the end of the Second War has imposed a new ethical and indeed legal obligation on the nation state to protect these rights for all on its territory. These instruments were developed by the states themselves. Thus, even non-binding and non-ratified instruments place at least an ethical obligation on the state to adhere to the provisions contained in them. And, despite some continuing differences among jurists, most of them agree on the concept of a set of universal human rights applicable to all, including non-nationals. Based on these instruments and the collective obligations of states embedded in the cooperative framework established by the United Nations, some have argued, as has Guy Godwin-Gill, that states have a collective duty to protect the persons moving across borders.

65. A new trend of thought is set to reinforce these ethical and legal considerations. Against the backdrop of the growing attention to human rights and the rapidly rising importance of international migration in a globalising world, some sociologists have argued that migrants have acquired a legal status that transcends state citizenship and needs to be recognized at a global or "post-national" level. Going further, some others, like Rainer Baubock, have maintained that given the dynamics of economic globalisation a new transnational citizenship with accompanying rights is both necessary and inevitable. Indeed, one can see the beginning of such trends, albeit at a regional level and still timid, in the concept of EU citizenship with their rights and obligations, distinct from those applicable to nationals of individual member states.

63. A second consideration that underlines the state's responsibility in protecting migrants' human rights stems from, and is closely linked to its sovereign prerogatives and basic obligations in other areas. States under general international law are required to cooperate in solving problems and maintaining peace

and stability, including orderliness in the movement of people, and advancing economic progress through friendly relations among them.

64. These responsibilities are largely inter-related. We have noted, for example, that gross violation of human rights could trigger disorderly and disruptive movements across borders on a cumulative basis and generate inter-state tensions and conflicts, threatening regional and international peace and stability. The state's responsibility for maintaining international peace and stability cannot therefore be divorced from its duty to protect human rights and ensure orderliness in movement of people. Significantly, in 1991 it is this linkage that provided the main justification for the United Nations to authorize armed intervention in Iraq. The relevant Security Council resolution (no. 687) noted that gross violation of human rights by the Iraqi regime was generating massive refugee outflows which in turn were seriously threatening regional stability and that the situation therefore called for collective intervention under chapter VII of the UN Charter. Isn't it surprising that a dictum that guided international action during the crisis receives scant attention from governments and policy makers in normal times?

65. Let me now turn to the third important consideration which is both pragmatic and basic to the nation state's obligation to its own citizens even when they are in another state as migrants. More and more states—according to a recent ILO survey, nearly 25 per cent of them—are involved on a significant scale in both sending and receiving migrants at the same time. This requires a state to treat non-nationals working or living within its own territory in the same manner as it would like its own nationals to be treated abroad. If it does not, the ensuing inter-state "tit for tat" retaliation would make it unable to protect the rights and welfare of its own citizens. Clearly, the positive inter-sate reciprocity for protecting migrants' rights can be best guaranteed within a multilateral framework. When convinced that it has a direct, citizen-centric stake in protecting the rights of non-nationals, the state is more likely to improve its domestic performance and take its international commitments on human rights more seriously.

## CONCLUSION

65. The conclusion from the discussion above is clear, but it bears repetition. Protection of human rights and sound management of international migration closely intersect with each other. Those who are concerned with the protection of human rights and those involved in better management of migration share a common interest. This underscores the importance of closer alliances between human rights organisations and migrant associations. The state, too, has a direct stake in the matter. In addition to its abiding ethical duty and legal obligation to protect human rights of all, nation state's individual and collective responsibility in other vital areas such as maintaining global peace and stabil-

ity, along with its own citizen-centric interest make it incumbent on the state to protect and promote migrants' human rights.

66. Viewed from this perspective, the state, human rights bodies and migrant associations would seem to share a common interest in defending the human rights of migrants. A growing awareness of this commonalty of interests should bring them closer together and pave the way for many new and innovative forms of mutual co-operation. Over time, this could lay the basis for a common, proactive agenda to which the state, human rights organisations, and migrants associations can all creatively contribute, while advancing and remaining faithful to their own vocations.

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