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FOREWORD BY HIS ROYAL HIGHNESS PRINCE CONSTANTIJN OF THE NETHERLANDS

As chairman of the Board of the Foundation "The Hague Process on Refugees and Migration" (THP), I am pleased to present you this booklet on "Human Rights and Migration: The Missing Link" by Bimal Ghosh, member of THPs advisory body, the Club of The Hague.

From its inception, THP has believed that it is essential to frame migration issues in a human rights perspective. Still, as several authors explain in their contributions to this booklet, the protection of migrants' rights has not received the attention it deserves everywhere. Therefore, this booklet is both a contribution aimed at addressing this subject, as well as a way to return to the essence of THP's work.

This booklet aims to go beyond the diagnostic, by also imagining what is needed. The author and commentators explore ways to respond to existing challenges, as is exemplified by Bimal Ghosh's plea for better co-operation between human rights and migrant organisations.

I hope this booklet will be of use to policy makers as well as the wider public in pointing to the potential for coherence between migration management and human rights protection. It stresses the intimate link between migration and human rights. It will be essential to explore this link further in the coming years. The Second Global Forum on Migration and Development, to be held in The Philippines in October 2008, provides a unique opportunity to initiate this exploration and to highlight the subsequent steps that should be taken.

Finally, the adopted focus on the protection of migrants' rights should also be a point of entry into a larger human rights agenda. I am convinced that including the protection of human rights of migrants in this agenda strengthens the inclusive character of all human rights and will lead to higher levels of human rights implementation overall.

THP welcomes any reaction or suggestion by the reader, as part of the wider debate on human rights and migration.

HRH Prince Constantijn of The Netherlands
Chairman of the Board of 'The Hague Process on Refugees and Migration' (THP)

HUMAN RIGHTS AND MIGRATION: THE MISSING LINK[1]

BIMAL GHOSH

ABSTRACT

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

This 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 the 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 assists Nation States in fulfilling their obligations in other vital areas of their responsibility.

This paper concludes by suggesting that a better understanding of these relationships could lay the basis for a rich and proactive

[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). An earlier version of the paper was used as a keynote address at the University of Chicago in October 2007.

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.

INTRODUCTION

1. Nearly 200 million people are currently 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 population of Germany, France and the United Kingdom. While the potential risk of human rights violations is inherent in almost 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. 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. Migration policy-making has, moreover, often continued with little regard to human rights concerns. Nations are anxious to manage the rising pressure of international migration better than they currently do. Yet, the close connections between migration management and protection of human rights for all, including migrants, have not received the attention they deserve. 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 relationship and foresees its pro-active use as a policy instrument and operational 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 Universal Declaration of Human Rights in 1948 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 explicitly recognise their applicability to non-nationals as well. As a result, migrants often 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. Yet, 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(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". Furthermore, the treaty monitoring body of the Covenant has never unequivocally upheld that non-nationals are to enjoy all social and economic rights equally with nationals, although any 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 difficult both for migrants to take full

[2] The Committee on Elimination of Racial Discrimination (CERD) 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.

advantage of these rights as well as for human rights activists to fight for these rights on their behalf. At the 1999 United Nations Commission on Human Rights (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[4]

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 – constitutional and other domestic legal provisions against discrimination only apply to nationals (ILO, 1999).

8. Admittedly, two important instruments - the 1951 UN Convention (and 1967 Protocol) Relating to the Status of Refugees (ICRSR) and the 1990 UN Convention on the Rights of All Migrant Workers and Members of Their Families (ICMW) - specifically address the issue of human rights of refugees and migrants, respectively. However, they too suffer from other weaknesses, including in particular serious protection gaps, which will be discussed shortly.

HIATUS BETWEEN INTERNATIONAL COMMITMENT AND PRACTICE AT HOME

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

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

[4] A sense of urgency seems to have led several non-governmental organisations, including Amnesty International, the European Council on Refugees and Exiles, the International Catholic Migration Commission, and The Hague Process on Refugees and Migration (THP), to take some tentative steps to meet this need. However, they fall far short of the wider scope and objectives of the proposal (comment: by now THP, while continuing to be a process, has also acquired an institutional identity of its own).

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 or implemented in national legislation, and subsequently enforced. Yet some 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 well be lost, especially if other priorities emerge in the interval. As will be discussed shortly, it took nearly 13 years before the minimum 20 ratifications were concluded to make the 1990 Convention on the Rights of All Migrant Workers and Members of their Families (ICMW) operational. Furthermore, 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 possess neither the necessary political will nor the financial and institutional capacity.

11. The schism between States' expression of concern for human rights, including 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 for all 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. A number of those groups and situations that are particularly susceptible to human rights abuse and often suffer from serious protection gaps have been identified elsewhere[5]. These are: (a) migrants in an irregular situation and trafficked migrants, (b) temporary and *ad hoc* refugees and those in

[5] See, for example, *Elusive protection, Uncertain Lands: Migrants' Access to Human Rights*, 2003 op.cit.

refugee-like situations, (c) rejected asylum seekers and those who are subject to forcible return, (d) migrants during armed conflict, (e) stateless persons due to territorial changes and internally displaced persons and (f) migrants in the wake of September 11th terrorist attacks. The visibility and urgency of the need for protection of some of these groups has only occurred 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 interrelated. If, for example, the normative principles are considered unsound, impracticable or out-of-date, States are unlikely to ratify or enforce them effectively. Enforcement may also be slack if law does not provide for a powerful monitoring mechanism. The limited length of this paper will not allow for a discussion of the nature of vulnerability and the protection gaps in all these cases. However, a brief appraisal of two instruments - ICSR and ICMW – seems essential to meet its purpose. These instruments were designed, as mentioned above, to meet the specific needs of refugees and migrant workers, respectively; and yet they, too, suffer from various protection gaps.

The Refugee Convention (CRSR)

14. The 1951 UN Convention Relating to the Status of Refugees, drafted at the end of World War II mainly to meet the protection needs of refugees from communist regimes, omits several other individuals, especially groups of individuals, although they too are in refugee-like situations and 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. Yet, in the absence of internationally agreed and harmonised norms, 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 criteria of duration of stay in, as well as the degree of attachment to, the host country) and their corresponding rights.[6]

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 certainly not free from application gaps. Uncertainties have arisen because political considerations have been allowed to intercede when applying the protection provisions to different groups of refugees (depending, for example, on their countries of origin) and also because of the exclusion of cases of persecution by non-state agents. The system has been further weakened by the denial of protection by resorting to the banning of aspirant asylum seekers on the high seas or elsewhere beyond territorial borders, uncertainty regarding the protection of refugees and asylum seekers rescued at sea, and 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 also has the effect of diluting the principle of "voluntariness" as a condition of a refugee's 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. Due to resource and other constraints the Office of the United Nations High Commissioner for Refugees (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,

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[6] 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 (J. Dent, 1998).

namely, *non-refoulement*.

18. Finally, as past experience in countries such as 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 remains too fragile and inadequate to cope with the task.

19. The Convention's enforcement gap also stems at least partially 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 the Rights of All Migrant Workers and Members of Their Families (ICMW)

20. A similar, and no less disappointing picture of protection gaps emerges as we look at the 1990 UN Convention on the Rights of All Migrant Workers and Members of Their Families (ICMW). From the normative standpoint, limitations arise not only due to certain groups of workers, such as trainees (who are used, not infrequently, as workers), seafarers and workers on off-shore installations, being 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 was unable to take full account of the significant changes in the panorama of labour migration that has taken place since its formulation and adoption. These changes include a rapidly increasing short-term labour migration, the growing importance of private agents and intermediaries vis-à-vis the role of the State in recruiting migrant workers, the feminisation of migrant labour, with large numbers of women being employed in the sex industry and domestic work, and the pressing need for states to balance control measures and those that facilitate orderly and lawful movement of labour migrants.

21. The application gaps are even more serious. By the middle of 2008 - after a lapse of some 16 years following the adoption of the UN General Assembly resolution (GA 45/158) to which the Convention

was attached - only 37 countries had ratified it, of which no signatory was a major migrant receiving industrial country; and 28 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 and of 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 human rights to irregular migrants who are perceived by these governments, as being on their territory not only unlawfully, but as also posing a possible 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 states. A real reason 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 explicitly granting a set of rights to irregular migrants at par 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. Further, given that the Convention urges States to curb irregular migration, some are afraid, as confirmed by an ILO survey, 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 lawful 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 workers 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 some doctors in the USA have recently argued - in the context of the controversy over irregular migrants' entitlement to chemotherapy under emergency medical aid - postponement of such therapy to irregular migrants could in many cases lead to an emergency situation 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 logical 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 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 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 effort 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 increase. As we have noted, several of the normative gaps in ICMW and ICRSR 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 Convention on the Law of Treaties (Vienna, 1969). Although Article 36 of the Convention requires that State Parties to abide by the treaties they have adhered to, Article 63 provides (the *clausula rebus sic stantibus* clause*)* that indicates 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

initially with a soft instrument such as a declaration or even a resolution by the most appropriate international body, and, depending on the support it eventually gathers, the soft instrument or part thereof could be the subject of a "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, doctrinal 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. It is through well-run organisations that they maintain vigilance over State behaviour. True, in Western Europe since the end of the Second World War 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 threaten 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.

31. Both ICESCR (Article 8) and ILO Conventions No. 143 and No. 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 imposes restrictions on migrants' trade union rights, especially for taking office in unions. Some States make citizenship a condition for taking office in trade unions, or require that a proportion of the

members must be nationals. In others, trade union membership is bound to a condition of residence or of reciprocity. These restrictions, especially the requirement in the legislation of a good many countries that only citizens can be elected to official trade union positions, prevent migrant workers from playing an active role in defending their rights and interests, especially in sectors where they are a significant part of the workforce. And the fact that in times of workplace conflicts, discretionary powers for ordering expulsion on grounds of security or public order often rest with the administrative authorities makes the situation worse.

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. Yet, many of the low skilled, inadequately educated and poor migrants are unaware of the laws and their rights and duties. Nor do they have full information concerning the receiving country's judicial system, its 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 migrants' 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% 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 South Africans (Crush, 2001).

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 prices or increasing their social security burden, the social and political

environment can hardly be 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 situation becomes even more unpleasant 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" (United Nations, 1998). This adds to migrants' 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 anti-immigration parties and xenophobic groups hijack the whole issue of migration.

COALITION BUILDING: WHY SHOULD HUMAN RIGHTS ORGANISATIONS AND MIGRANTS ASSOCIATIONS WORK TOGETHER?

36. Protection of migrants' human rights and effective management of migration (in the sense of ensuring that the movements of people are orderly and predictable and therefore more manageable) –are closely interlinked. Human rights violations often lead to disruptive and unwanted migratory flows; 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 partially

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.

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, as it would similarly 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 wake of the Second World War migrants 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. Yet, 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 closer scrutiny.

40. A second reason is that, despite their insistence on indivisibility of fundamental human 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 doctrinal and narrow, almost insular, approach has led them to perceive the State more as an adversary; its behaviour and action 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 that 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 Human Rights Watch into the treatment of migrants and refugees in South Africa and a study of migrants' human rights in four West European countries. In the USA, 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[7] spelling out the human and labour rights abuses in the U.S. 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 U.S. Supreme Court decision in 2002 which defying international law stripped irregular immigrant workers of any remedies if they are illegally fired for union organising activity. Amnesty International, for its part, has investigated 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

7 Human Rights Watch , *Blood, Sweat and Fear,* 2005, New York

UNCHR inter-governmental expert group on the human rights of migrants. They have also been co-operating actively 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. Generally taking 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 more well known, they have tended to be increasingly involved in the protection of migrants as a vulnerable group.

45. There are of course potential risks for human rights organisations in overextending their agenda, especially if they become too deeply involved in fighting the litany of varied causes of human rights violations affecting different groups of population, including migrants. Highlighting specific cases and situations of human rights violations is one thing, fighting against their multiple causes is another. If human rights organisations also become 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 migrant-serving) associations often have various other interests and objectives increases the risk of detraction. There is also a practical consideration. Generally, human rights organisations 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 their limited resources and weaken their overall 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 one-sided. Migrants' associations (including migrant-serving organisations) may also 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. If the legitimacy of this role is also widely recognised within the country, migrants' associations would find it convenient to formalise inter-institutional, bilateral links with human rights organisations or though the national human rights organisation, if such a body exists. Yet, the situation is not always so simple or straightforward. Some service-oriented migrants' associations, which were not originally aimed at the explicit 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 arena, 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 perceived to be adversary, to the State, as this could hamper their co-operation 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 – it 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 (not counting tourists and others generally not defined as 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% of the United Nations 150 Member States were keen on lowering immigration. By 2002 it rose nearly 7 times to 40%, involving 193 member countries. These trends have since been accentuated by the terrorist attacks of 9/11 and the events that followed (United Nations, 2002).

52. This growing mismatch is deeply troubling. It places a heavy strain on the world migration system, carrying with it enormous human,

social, economic and political costs. The two powerful conflicting trends creating the mismatch need to be brought into a dynamic harmony. Regrettably, existing migration policies do little to achieve this. They are mostly reactive and inward looking, with a focus on unilateral immigration control rather than on migration management through co-operative 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. One need not look far for examples. 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 current trend is halted or slowed, for every new regular immigrant there could well be another entering the US territory through an irregular channel. Some 2.4 million men, women and children are estimated to be victims of human trafficking, and at least 20% of all forced labour is the outcome of such trafficking (ILO, 2005). 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 USA-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 interstate co-operation and becomes orderly and predictable, it can be immensely beneficial. The resultant gains can be shared by all nations, both sending and receiving, though in varying degrees, and the migrants themselves. 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 global 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]. Even a modest relaxation of the

[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

restrictions on the movement of labour - a temporary admission of poor country workers numbering not more than 3% 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 3% 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. World Bank, 2006).

55. These estimates are of course incomplete in the sense that they do not take into account fully the costs or negative externalities of migration or its distributional effects between and within countries; nor are all of their underlying assumptions necessarily valid. Nonetheless, they are 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. They facilitate interchange of ideas, innovations, and values, leading to flourishing cultures and enrichment of the human society. By ensuring orderliness in movement of people they sustain, and 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 co-operative management of international migration.[9] The new arrangement would help avoid the knee-jerk reaction of receiving countries to the rising emigration pressure and seek to turn the growing migration mismatch into a system of dynamic harmony. To achieve this, a two-fold approach is necessary. It would aim at reducing pressures for irregular, disorderly and forced migration from labour-surplus sending countries;

RWP0 2029, July 2002. pp.19-20.

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

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 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 discerned the configuration of the new regime (dubbed New International Regime for Orderly Movement of People-NIROMP) and discussed in some detail its various specific features as well as 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. Modern States are accustomed to developing new forms and areas of inter-State cooperation when they face such trans-national challenges as they have so often 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 harmonised global framework. Otherwise, they would run the risk of following conflicting policy paths creating tensions between regions and adding to global instability. They would be stumbling, rather than building, blocs.

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

61. Given the main theme of this paper, I would focus only on one of the salient features of the proposed regime, namely the 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 a violation generates disorderly, unpredictable and often massive movements of people across borders, creating inter-State tensions and conflicts and involving 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 violations of human rights, creating a vicious circle.

62. The merits of placing human rights of migrants within a wider and harmonised international regime of orderly movement of people as I have just outlined are now being gradually, if somewhat belatedly, recognized 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. These are hopeful signs. But we still have a long way to go. There are at least three powerful considerations that are useful to bear in mind in pursuing this goal. They underscore the reasons 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 to manage migration. 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 World 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 the very least an ethical obligation on the State to adhere to the provisions contained in them. Despite some continuing differences amongst 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 co-operative framework established by the United Nations, some have argued, as has Guy Goodwin-Gill, that States have a collective duty to protect the persons moving across borders.

65. A new approach 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 recognised at a global or "post-national" level. Going further, some others, such as 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 Nation States.

66. 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 co-operate in solving problems and maintaining peace and stability, including orderliness in the movement of people, and advancing economic progress through friendly relations among them.

67. These responsibilities are largely interrelated. We have, for example, already noted that gross violations of human rights could trigger disorderly and disruptive movements across borders on a cumulative basis and generate interstate 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 authorise armed intervention in Iraq. The relevant Security Council Resolution (No. 687) noted that gross violations 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. Is it not surprising that a dictum that guided international action during a crisis receives scant attention from governments and policy makers in normal times?

68. Turning 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%, are involved on a significant scale in the simultaneous sending and receiving of migrants.

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 interstate "tit-for-tat" retaliation would make it unable to protect the rights and welfare of its own citizens. Clearly, the positive interstate 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

69. The conclusion from the aforementioned discussion is clear, but it deserves repeating. Protection of human rights and sound management of international migration are closely related. 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 for all, Nation State's individual and collective responsibility in other vital areas such as maintaining global peace and stability, along with its own citizen-centric interest makes it incumbent on it to protect and promote migrants' human rights.

70. 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. In 2005, the United Nations Secretary-General hailed human rights as the third pillar of the organisation alongside world development and security. If this vision is to take hold, it needs to embrace and uphold this common endeavour of protecting migrants' human rights as an integral part of its core concerns.

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COMMENTARY[10] BY EXPERTS FROM '*THE HAGUE PROCESS ON REFUGEES AND MIGRATION*'

Cees Flinterman:

Bimal Ghosh paper makes a more than convincing argument that the protection of human rights and the sound management of international migration closely intersect, and that, therefore, among other priorities, human rights organisations and migration associations should establish close alliances. His call reflects the inherently inclusive character of all human rights, as already emphasised by the Universal Declaration of Human Rights and the close connections between international peace and security, social and economic development and the promotion and protection of human rights; the three pillars of the United Nations system and in that way of the international public and legal order.

The question may be raised as to what steps may, and indeed should, be taken in order to implement the perspective of a full realisation of migrants rights, thereby substantiating the notion that migrants rights are human rights. A first modest step, already proposed by Bimal Ghosh in 1999, is to prepare a compendium of all provisions in existing international and regional human rights instruments which are specifically relevant for migrants; some such compendia already exist, but they could be further refined, updated and elaborated.

Another step could be to urge States to accede to the International Convention on the Rights of All Migrant Workers and Members of Their Families. It is true that this Convention is suffering from some basic shortcomings, but it would be important to have States accede to this Convention addressing such shortcomings by means of reservations. Given time, these reservations may be withdrawn in light of the interpretations handed down by the Committee on Migrant Workers (CMW), the supervisory body of the Convention.

A third step could be to call on all existing United Nations treaty bodies to give particular and specific attention to the rights of migrants

[10] Comments have been put in the order that corresponds best with the content of Bimal Ghosh's paper.

in the framework of their examination of State reports and of the drafting of general comments or recommendations. A case in point is the preparation by the Committee on the Elimination of Discrimination Against Women (CEDAW) of a general recommendation on female migrants in which it has sought the close co-operation of CMW. This may result in the adoption of a detailed joint general recommendation highlighting the gender aspects of migration flows around the world.

A fourth step which is of particular relevance to human rights and migrations organisations, is to call on them to assist individual migrants or groups of migrants who allege that their human rights have been violated, to submit their cases, after exhaustion of all local remedies, to regional or international (quasi-) judicial tribunals or organs, such as the regional human rights courts and the United Nations treaty bodies that are mandated to examine individual complaints. The case law of these tribunals and organs in other human rights areas has proven to be an important trigger in bringing about amendments and improvements of domestic laws and policies. A similar effect may occur in the area of the promotion and protection of the human rights of migrants.

One could, of course, think of many more steps that could be taken to fulfill the call by Bimal Ghosh. What is needed, however, is a common, comprehensive and proactive agenda to which States, human rights organisations and migrants associations can all creatively contribute, as Bimal Ghosh himself suggests. His paper provides for a solid basis for such an agenda. His call should not go unheeded, since we are, as Mary Robinson aptly phrased it, all custodians of human rights.

Cees Flinterman
August 2008

Morten Kjaerum:

Moving forward demands a sound diagnostic of where we stand. Bimal Ghosh's effort is in that respect a particularly comprehensive and convincing one. A few points and directions can be added as we seek to enhance our capacity to uphold human rights of migrants.

In the field of human rights and migration as in others, the hiatus between international commitment and practice is indisputably real. Yet, we ought to maintain our confidence in existing instruments, and uphold our shared responsibility to bring attention to the duties and agenda they set out. One example is indeed the General Recommendation XXX (1/10/2004) on *Discrimination against non-citizens* of the UN Committee on the Elimination of Racial Discrimination. These recommendations recall the responsibilities of States parties to the Convention. Besides measures of a general nature, they cover policy areas that are critical in the present context: protection against hate speech and racial violence, access to citizenship, administration of justice, expulsion and deportation of non-citizens, economic, social and cultural rights.[11] Such recommendations and others need to filter down and inform the actual practices of governments and be fully seized by the larger human rights community. The fact that some national courts recently referred to these principles in judicial decisions signals positive developments. More targeted tools are also emerging, providing an adapted frame to prevent and sanction human rights abuses linked to migration. The 2000 Palermo Protocols on Trafficking and Smuggling,[12] and the OHCHR's rights-based policy guidance, issued in 2002[13] are key instruments to respond to the issues

[11] General Recommendation XXX (1/10/2004) on *Discrimination against non-citizens*, UN Committee on the Elimination of Racial Discrimination (CERD): http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument.

[12] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: ttp://www2.ohchr.org/english/law/protocoltraffic.htm.
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime http://www2.ohchr.org/English/law/organizedcrime.htm.

[13] Recommended Principles and Guidelines on Human Rights and Human

faced by the most vulnerable.

These developments back the case for a principled *and* pragmatic approach, further exploring the gaps, but also the potential of existing International Human Rights Law. Yet, surrounding conditions are no doubt critical to advance effective implementation.

One can reasonably hope that the fledging signs of progress outlined by Bimal Ghosh – notably in linking human rights and migrants associations - will find further confirmation. In this endeavor National Human Rights Institutions (NHRIs) may be in a position to play an instrumental role. In fact, they already do in multiple ways and on various fronts - building on their unique pluralistic character.[14] They are instrumental by pushing nationally and internationally for the ratification of and subsequently compliance with human rights instruments; by constructively advising and holding governments accountable; by monitoring all forms of discrimination, and raising public awareness; by promoting a human rights culture and empowering all through advocacy, education and training; by acting as central mediators and watchdogs when levels of protection and safeguards for non-citizens are fundamentally questioned, as evidenced in the aftermath of the September 11th attacks.

Experience shows that the expertise of NHRIs has made it increasingly difficult for States to sideline their position. Priority was recently placed on their work to bring fundamental rights of migrants into the mainstream and attendant responsibilities were mapped out.[15] These institutions are increasingly positioning themselves as key bridge-builders of that "missing-link" between migration and human rights,[16] although a wider community of stakeholders ought to take up and

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Trafficking, Office of the High Commissioner for Human Rights, 2002. http://www.ohchr.org/Documents/Publications/Traffickingen.pdf.

[14] Principles relating to the Status of National Institutions (The Paris Principles). Adopted by General Assembly resolution 48/134 of 20 December 1993 See www.ohchr.org/english/law/parisprinciples.htm.

[15] See the Santa Cruz Declaration, Eighth International Conference for National Human Rights Institutions: http://www.nhri.net/?PID=360.

[16] See also the most recent *Rabat Declaration on Migration and Human Rights* , Third Arab-European NHRIs' Dialogue on Migration and Human Rights, May 6th -8th 2008 Rabat- Morocco.

shoulder such a responsibility if we are to succeed.

While we strive to design a global governance regime for migration to be experienced out of choice and in safe conditions, an urgent need remains to tackle the most immediate protection gaps. Issues of exploitation, trafficking and abuses experienced by migrants – increasingly documented worldwide – systematically put to the test our capacity to work across borders and develop pragmatic covenants, as, and among, governments, human rights institutions and migrants' organisations. Here again NHRIs have demonstrated added-value as an international network in handling cases of human trafficking, backing states' efforts to prosecute traffickers or supporting individual complaints and circulating and exchanging relevant information. Their strength is derived from a presence in both sending and receiving countries, as well as countries of transit (even at a time where these distinctions also become hard to sustain).

The new configurations of international migration call for enhanced capacity to anticipate trends and shield ourselves from short-sighted and restrictive responses. Careful examination of the many new and emerging challenges is becoming increasingly important. These include the portability of socio-economic rights and benefits, political participation of non-citizens, or the design of human-rights-based inclusion policies, notably in cities welcoming growing diversity and numbers of non-citizens.[17]

Bimal Ghosh's article convincingly demonstrates the inherent compatibility and connection between respecting human rights and managing migration by means of ensuring security in the international framework. The 2002 Declaration of The Hague on the Future of Refugee and Migration Policy still provides a strong framework for these discussions.[18] Further evidence will come with stronger interaction and links between the spheres of research, advocacy and

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[17] Report of the THP-DHIR International Workshop: Towards an inclusive approach to citizenship: local covenants for non-discrimination and equal opportunities in access to employment, Copenhagen, Denmark, October 2006 http://www.thehagueprocess.org/Activities/THP-Activities-and-Key-Documents.aspx?p=41.

[18] *Declaration of The Hague on the Future of Refugee and Migration Policy*, 2002 (see notably Principle 5 on *Mobility* and *Security)*. Available online: www.thehagueprocess.org.

policy-making. Ultimately, further acknowledgement can also be sought from the fact that *migrants' rights* are *human rights*. For that very reason, the degree to which these rights are upheld is also a barometer of human rights implementation at large and an agenda of reference to bring the latter forward in our societies.

Morten Kjaerum
May 2008

Khalid Koser:

Bimal Ghosh's careful analysis of the links between migrants' human rights and the effective management of international migration is an important contribution to a debate that is gradually taking shape. It is timely, as countries around the world reform their labour migration policy frameworks and the second meeting of the Global Forum on Migration and Development gears up. It also has the advantage of being written from a 'non-aligned' position – Ghosh has enormous policy experience and an impressive academic profile, but it is important that he has written this paper as an independent commentator.

For me the paper has three hallmarks. Firstly, it strikes a sensible balance between the need to strengthen the normative framework and the need to focus on implementing existing laws. I do not believe that sufficient international law currently exists to protect all migrants in all situations – the ambiguous status of the migrant workers recently displaced in South Africa is a case in point, and the uncertain status of migrants displaced across borders by the effects of climate change will be another. Protection gaps still exist, and an articulation of the existing law, helpful though that will be, will not fill these gaps. At the same time Ghosh is right to emphasise the need to develop political will and technical capacity to implement the existing normative framework.

Secondly, I think the paper makes a very plausible case for the link between protecting migrant rights and developing effective migration management. Migrant rights should not be considered a 'luxury' or an 'afterthought' in migration policy. They are an integral component for reducing irregular migration and making migration work for receiving and sending countries alike. It is just a shame that we have had to resort to such instrumental arguments to convince certain policy-makers, rather than simply being able to emphasise that all migrants have human rights.

Finally, I appreciated Ghosh's careful reasoning for closer alliances between human rights organisations and migrant associations, and his reflections on what approach such alliances should adopt. I sense in the

paper a frustration with the polarisation of the recent debate on migration and migrants rights, which I share. Migration is rarely a 'win-win-win' phenomenon, but nor is it entirely negative. What is required is a reasonable debate, statistics that inform rather than alarm, and a full understanding of the diversity of migration.

Khalid Koser
August 2008

Theo van Boven:

Bimal Ghosh' paper *Human Rights and Migration; The Missing Link* is telling and lucid in many ways, in particular insofar as the paper exposes gaps in law, policies and practices. The status of migrants is indeed seriously underrated in domestic and international human rights law; policy makers tend to ignore the human rights dimensions of migration.

An illustration of this can be found in the recent human rights strategy paper entitled *Towards a dignified human existence* launched in November 2007 by the Dutch Minister for Foreign Affairs as a basis for a renewed and invigorated foreign policy. This human rights strategy is comprehensive in the display of its scope and ambitious in outlining objectives and targets, but it is silent on the rights of migrants and refugees. In this regard it may be argued that migrants and refugees do not fall within the classical and natural ambit of foreign policy and that law and policy with respect to these persons belong to the domain of justice, interior and labour departments. Such an argument fails to appreciate the connection between the external and internal dimensions of migrant and refugee policies. The link is missing in the minds of human rights policy makers and in their actual policy endeavours. The link is also missing in the minds of the population at large who increasingly consider migrants and refugees as hostile elements rather than fellow human beings in search of a dignified human existence. There are several benchmarks for testing the viability and credibility of domestic and foreign human rights policies in their interaction and interrelationships. One major benchmark is the extent to which there is recognition of the legitimate rights of migrants and refugees as fellow human beings who, like all other persons, are entitled to enjoy the rights enshrined in the Universal Declaration of Human Rights.

A commendable orientation and approach is offered in a report of the Dutch Advisory Council on International Affairs entitled *Migration and Development Co-operation: Coherence between two policy areas* (No. 43, June 2005). The report strikes a clear balance and link between policies of development co-operation and migration and classifies the main causes of forced migration under two dimensions: the security dimension (conflicts and human rights violations) and the

economic dimension (internal/domestic and external/international causes of poverty). Policy efforts should therefore concentrate on improving the security situation of people, which, as experience shows, would have a positive effect on migration trends. The report also duly notes that - quite obviously but often overlooked - policies aiming at preventing or halting human rights violations, in the civil, political, economic, social and cultural fields, also removes an important cause of forced migration. Migration policies can help promoting development and a strong case can be made for arriving at the conclusion that restrictive migration policies have an adverse effect on development.

A further observation may be made in respect of migrants, refugees and asylum seekers as victims of racism, racial discrimination, xenophobia and related forms of intolerance. The World Conference against Racism (Durban, 31st August – 8th September 2001) spoke in its concluding Declaration and Programme of Action in strong terms against manifestations and acts of racism, racial discrimination and xenophobia against vulnerable targets, including migrants, refugees and asylum seekers, and the stereotypes applied to them. These words were expressed on the eve of 9/11 and the ensuing dramatic trends and developments, often encapsulated in the term "the war on terror". The 9/11 syndrome rendered added weight to the concerns expressed at Durban on the emergence of increased negative stereotyping, hostile acts and violence against persons, groups and communities because of their religious beliefs and their ethnic or racial origin, notably also migrants, refugees and asylum seekers. They often become the targets of investigations and harassment with the resulting effect, regardless of whether it is intended, of being associated with terrorism and thereby made the object of stigmatisation. It is this link that must be dismissed as *unfair, unhealthy* and above all *unjust.*

Theo C. van Boven
May 2008

Stefanie Grant:

There is now a growing recognition that protection of migrants rights is an essential element of policies to manage migration, and that rights abuses 'reduce – sometimes even nullify – migrants' ability to do decent work, support themselves and their families, live a life in which their personal rights are respected, and contribute generally to the development of their home and their host societies'.[19] Bimal Ghosh cogently sets out the arguments.

At the Brussels meeting of the Global Forum on Migration and Development, States recognised that fundamental rights 'apply to all human beings', that migration is linked to lack of development and that it may be driven by poverty, economic and social disparities, human rights deficits and climatic 'degradation'. They noted that the 'mismatch' between legal migration channels and pressures for labour migration encourages irregular migration, and that irregular migrants are more vulnerable to abuse.[20]

In discussing migrants' protection in Manila, two issues should have priority.

The first is to recognise the existence and the protection needs of migrants who are forced to leave their homes as a result of climate change. Perhaps because the scale of forced climate migration is not yet known, it has been largely ignored in international migration discussions. Yet global warming is already reversing development in some regions - through rises in air and sea temperatures, and extreme weather systems leading to drought, flooding, changing patterns of agriculture, food shortages, and new patterns of disease. These climate-driven processes and events will undermine human security in some of the poorest states, with some low lying island states becoming uninhabitable, or even extinct, creating a long term protection need for their citizens in other states. Elsewhere, the cumulative effects of climate change are likely to precipitate population movements, leading to internal displacement within states and migration across national

[19] *Migration and Development: A Human Rights Approach*, High Commissioner for Human Rights, 2006, #100.

[20] Global Forum on Migration and Development, Summary Report of first meeting, Brussels, July 2007.

borders.

At present, no institution is responsible for documenting, let alone protecting, this group of forced migrants. International law does not protect their status within other countries, or – most importantly – give them a right to enter another state, even where their own state has become uninhabitable. [21]

A second priority is to reach a better practical understanding of the ways in which existing human rights law protects *all* migrants, taking account – for example - of recent rulings by the International Court of Justice and the Inter American Court of Human Rights, which confirm that all migrants are entitled to consular protection,[22] enjoy equal employment rights, and that their children have equal access to nationality. [23] The Council of Europe's Parliamentary Assembly has identified the minimum civil, political, economic and social rights to be enjoyed by irregular migrants in the 27 Member States; its Committee of Ministers has adopted Guidelines to protect migrants during forced removal; and the European Committee on the Prevention of Torture has drawn up standards to protect immigration detainees in police stations, prisons, and airports. [24]

The Manila meeting offers an opportunity for states to recognise the existence of forced climate migrants as a vulnerable group, which the international community has a duty to protect. It is also an opportunity to develop a better understanding of the ways in which human rights law already protects *all* migrants.

Stefanie Grant
April 2008

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21 See generally *Migration and Climate Change*, IOM Migration Series, no. 31, 2008.

22 *Avena & Other Mexican Nationals* (Mexico v United States of America), ICJ, 2004, No. 128.

23 *Legal Status and Rights of Undocumented Migrants*, Advisory Opinion 2003; Yean and Bosico v Dominican Republic, IACtHR, 2005.

24 See Resolution 1509 (2006), *Human Rights of Irregular Migrants; Twenty Guidelines on Forced Return*, CM(2005)40 final, May 2005; European Committee for the Prevention of Torture: The CPT Standards, Part IV: Foreign Nationals Detained under Aliens Legislation; 7th General Report [CPT/Inf (97) 10].