MIGRANTS' ACCESS TO HUMAN RIGHTS:
A ROAD STREWN WITH STONES:

Bimal Ghosh

1. Since the adoption of the Universal Declaration of Human Rights in 1948 and especially in the past few decades, the world has made significant strides towards protection of human rights. Yet, large numbers and different groups of people in various parts of the world continue to suffer from an inadequate access to these rights. Migrants, working or living in foreign lands as non-nationals, often find themselves in such situations. While all migrants are not equally disadvantaged and although the characteristics of different categories of migrants, including refugees, vary considerably, their lack of adequate access to human rights and their vulnerability to the abuse of such rights share at least a number of common causes.

SALIENCE OF THE ISSUE OF MIGRANTS' RIGHTS

2. Several considerations lend special significance to the issue of human rights of migrants. The first concerns the large number of people involved and the rate at which it is rising. Estimates by the United Nations suggest that the world's migrant stock is currently hovering around 168 million. The figure might well be as high as 185 million if account is taken of persons who became foreigners as a result of redrawing state borders following the break up of the former Soviet Union. At the same time, the annual flow, in absolute terms, is rising at an unprecedented pace. Today, every minute at least ten people are crossing borders around the globe, not including tourists, short-term visitors and others normally not counted as migrants.

3. A second consideration concerns the wider implications of the denial of the migrants' access to rights. While suppression of human rights, aside from being a human scourge, can be a source of domestic and even global tension, the danger is even greater when the victims are migrants. This is because of the resentment and hostility it causes in the migrants' countries of origin, triggering inter-state tension and conflicts. When these, in turn, suck in, or spill over into, neighbouring countries, regional peace and global stability are easily threatened.

4. Somewhat paradoxically, however, until recently and barring two specific groups of migrants, namely, refugees and migrant workers, little systematic attention has been given to issues of human rights in the specific context of migrants and the particular situations in which the various migrant groups may find themselves. This makes the inclusion of migrants' rights in the discussion on access to human rights particularly relevant and timely.

5. There is however a snag. The International Council's initiative raises the issue of people's access to rights on the prior or pre-emptive assumption that these rights are already recognised in law. The questions it asks about access are both important and valid, given that, under international treaty and most national laws, all citizens are generally entitled to certain basic rights, although in practice they may fail to access them. The situation of migrants or non-nationals is however somewhat different. This is for the simple reason that, for migrants or non-nationals, the rights or entitlements themselves are yet to receive full or unequivocal recognition in law. An analysis of migrants' inadequate access to rights must therefore logically start with a discussion of the latter.

INADEQUATE RECOGNITION OF MIGRANTS' RIGHTS IN INTERNATIONAL AND NATIONAL LAWS

6. Effective access to human rights is critically predicated on the recognition of the rights in law and practice. Where such recognition is lacking, inadequate or controversial, the issue of access to rights becomes problematic. This is precisely the case with migrants. In general, "all rights recognised in national constitutions have become the rights of citizens, whereas the rights of man have generally been delegated to international law (United Nations, 1998). As the following discussion will show, international law itself has not been sufficiently strong, coherent or explicit in upholding migrants' rights within the purview of rights of man/woman.

7. True, there is an impressive body of international human rights laws seemingly applicable to all human beings. These include, in addition to the Universal Declaration of Human Rights, (UDHR), 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both adopted in 1966, to give legal force to the rights specified in UDHR. The two covenants, together with the Declaration, confer the fundamental rights to which all individuals in any situation should be entitled. Other international human rights instruments of relevance to migrants include the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 and the International Convention on the Elimination of All Forms of Racial Discrimination, 1965.

8. However, although the provisions of international human rights oblige a state to ensure the enjoyment of the declared rights by "all individuals within its territory and subject to its jurisdiction", several gaps and ambiguities in them weaken the recognition of migrants' rights and consequently their access to these rights. For instance, in the Universal Declaration of Human Rights the absence of explicit recognition of the applicability of these rights to foreigners and "the absence of the word 'citizen' leaves the distinction between aliens' and citizen's rights vague, with considerable latitude for interpretation" (United Nations, 1998). While the ICCPR guarantees certain basic rights specifically to non-citizens, it does not cover the various special situations that migrants may face in the migration process. Indeed, the question as to whether there is a core of rights so fundamental that they must be respected by all states has been a subject of jurist debate and disagreement for a number of years (Schachter, 1991)[1].

---

[1] Aside from the latitude implicit in the states' obligation for "progressive realisation" of ICESCR rights, it is to be noted that the monitoring body of neither of the two Covenants has univocally held that non-nationals are to enjoy all social and economic rights equally with nationals, although any such differentiation must not be "unreasonable" or motivated by prejudice (Dent, 1998). "Research Paper on the Social and Economic Rights of

9. Not surprisingly, this lack of specificity regarding the migrants' entitlement to the core rights is also often reflected in national legislation. In many countries—for example, Algeria, Angola, Democratic Republic of Congo, Egypt, Ireland, Lebanon, United Republic of Tanzania (Zanzibar) and Togo—provisions on equality of treatment in the constitutions and national laws apply to nationals only (ILO, 1999).

10. A second weakness in the existing international legislation relates to dispersed and fragmentary nature of the provisions of international human rights laws that are of direct relevance to migrants and migration-related situations. Not only does this weaken the protection offered to the migrants, but it also makes it harder for them to take full advantage of the provisions or for the human rights activists to fight on their behalf for the rights.[2]

11. True, by clearly defining and specifically extending the basic human rights to all migrant workers and their families the 1990 UN Convention on All Migrant Workers and their Families (ICMW) has to some extent responded to both the deficiencies mentioned above.[3] Its limitations are also clear: it explicitly excludes from its scope a number of important groups of migrants and, as the discussion in the second part of this paper will show, fails to cover explicitly all situations of potential human rights abuse.

INTERNATIONAL PRINCIPLES AND PERFORMANCE AT HOME: A YAWNING GAP

12. The failure of a number of countries to ratify all the main international instruments of human rights or those specifically applicable to migrant workers is still another constraint impeding the migrants' full enjoyment of the rights enshrined in them. A striking case is that of the 1990 UN Convention on migrant workers (ICMW). Even after the lapse of some twelve years since its adoption it has been unable to secure the minimum twenty ratifications required to make it operational.[4] In many instances, the provisions in national laws thus fall short of the standards laid down in the international instruments of human rights laws. Finally, even when the instruments are duly ratified and the national laws are brought in line with the international standards, they are not in all cases effectively enforced. Experience also shows that the enforcement of these provisions does not always receive due consideration by the international monitoring mechanisms.[5]

13. The issue of non-ratification of existing standards and/or their inadequate enforcement is a serious one. There is a growing dichotomy between the states' expression of concern for the migrants' rights at the international level and their willingness and ability to do something about

---

Non-Nationals in Europe", European Council on Refugees and Exiles, (ECRE), London. However, the Committee on Economic and Social Rights has asserted that the non-nationals are entitled to enjoy the minimum core content of the rights guaranteed by the ICESCR (Craven, 1995). A different view is taken by some others (Lillich, 1984).

[2] UNCHR, 1999. Report of the Working Group of Inter-Governmental Experts on the Human Rights of Migrants, UN document R/CN4/1999/80, March 9).

[3] Other international human rights treaties, which extend explicitly these rights to specific vulnerable groups include the Convention for the Elimination of Discrimination Against Women (CEDAW), 1979, and the Convention on the Rights of the Child (CRC), 1989.

[4] As of October 2002, it had received nineteen ratifications and twelve signatures. A similar situation is reflected in he relatively low levels of ratifications of the various ILO conventions dealing with equality of treatment and other entitlements of migrant workers.

[5] The reasons for this include: lack of timely access to information, inadequate familiarity of the persons concerned with migration-related issues and time constraints resulting from heavy work programme. Also, as concerns ICESCR, the absence of a complaints mechanism has been cited as an important weakness in clarifying the rights through their application to specific cases. (Dent, 1998).

it "back home" (UNCHR, 1999; Bustamante, 2002). This leads to, and is reflected in a continuing tension between international laws to protect human rights everywhere and national laws where, as already noted, the primary concern is to protect and promote the rights and welfare of the citizens. Thus, unless specifically protected under national laws and practice, migrants as foreigners remain vulnerable *vis-à-vis* the nationals of the state.

MIGRANTS' VULNERABILITY AND OBSTACLES TO ACCESS

14. Migrants' vulnerability, a root cause of the migrants' inadequate access to human rights, can be external (or exogenous) or internal (or endogenous), but they often interact with each other, creating a vicious cycle. If, for example, an inadequate recognition of their rights in law or its ineffective enforcement in practice (as discussed above) act as an external obstacle to migrants' access to rights, it also generates *among them* a sense of insecurity and inferiority and circumscribes their *own ability* both as individuals and as a group to fight for the recognition and exercise of the rights. Such obstacles may be of a juridical nature (as discussed above) just as they could be economic, institutional or social, often working together and reinforcing one another.

Globalisation: An obstacle or a facilitator?

15. Globalisation has a mixed, indeed contradictory, impact on human rights of migrants. Clearly, the complex process of globalisation does not simply imply exchange of goods, services and capital in world markets at a gathering pace; it also entails a freer flow of information, ideas, and human values between peoples around the world. Recent dramatic progress in information technology, including the use of the internet, for instance, has certainly contributed to a heightened public awareness of the importance human rights just it has helped human rights organisations and activists to forge coalitions across countries and build an increasingly powerful network to promote and protect human rights for all, including migrants. The emerging signs of "globalisation of rights" stemming from "bottom up globalisation" should not be underrated (Bengoa, 1977).

16. Further, in an environment of close inter-penetration of markets and growing interdependence of nations, both migrant-sending and migrant–receiving countries normally share a common interest in ensuring that the migrants have access to at least some minimum human rights. Governments of sending countries, partly due to domestic political pressure, are stepping up their vigilance on how the immigrants are treated abroad in the receiving countries. Even in the absence of legal provisions to ensure respect of basic rights of migrants, the latter, too, generally recognise that serious denial of immigrants' human rights would strain inter-state relations and hurt their longer-term political and economic interest in a globalising world society.

17. Globalisation also has its downside. Economic globalisation and market penetration are creating rapid structural changes in the world economy. Some analysts believe that these changes are leading to a growing unmet demand for low-wage and low-skilled workers in advanced industrial societies, and a rising emigration pressure among the unemployed and unskilled workers in poor countries, fuelling international migration at the lower end of the labour force.[6] While the overarching and deterministic theories underlying these approaches have limitations, there is little doubt that globalisation, including increased competition in the world market, rapid technological change and the decline of the organised manufacturing sector, has contributed to

---

[6] The main two theories are dual market theory and the world systems theory. Although there are important differences between their approaches, both believe that structural changes in the world economy constantly create in advanced industrial societies an unmet demand for low-skilled labour, which is met by workers from poorer countries.

an unprecedented expansion of the informal sector or the underground economy almost everywhere, including the industrial countries.[7] Less competitive industries, marginal firms and many family enterprises with low productivity strive to survive in this sector with the help of cheap, docile and often irregular, immigrant workers, while avoiding taxes.

18. These firms and micro-enterprises in the informal sector generally remain outside the purview of the existing national social and labour laws; and even when they come within the scope of these laws, verification and enforcement often go by default due to staff and financial constraints of the government services concerned (Ghosh, 1998). The situation excludes the possibility of any careful or systematic detection of human rights abuses, and the immigrant workers, especially those without a legal status, are, as further discussed in the next part of this paper, remain extremely vulnerable to violation of human rights.

Migrants' organisational weakness

19. Organisational weakness is another important factor constraining migrants' access to their human rights. In today's world, collective institutional pressure often shapes government policies and priorities: it also holds a key to public vigilance over enjoyment and protection of citizens' rights. However, migrants are handicapped in exercising such pressure, given that in many countries there are important restrictions on non-nationals forming their own associations for political purposes.

20. True, in the period following the Second World War, in several countries, as in Belgium and France, the traditional restrictions on foreigners' associations have been removed. Further, in countries like the Netherlands and Sweden, government financial assistance is made available to regular immigrants' organisations as part of the integration policy, and, as will be discussed below, the situation, in terms of both numbers and effectiveness of such associations, has been evolving fast.

21. Nevertheless, the old principle that foreigners' associations can be suppressed in times of emergency and that foreigners can be deported if they threatened public order remains valid. More important, since 'public order' is hardly defined in precise terms, interpretations could vary, leaving migrants in somewhat precarious and uncertain situations. The consequent feeling of insecurity tends to hold back many migrants, especially those who are without permanent resident status, from actively participating in associations to assert and defend their rights (Report of the UNHRC working group, 1999).

Ignorance of rights, spatial segregation and social exclusion

22. Low-skilled, less educated migrants, most of whom are also poor, are often unaware of human rights laws and practices in general. Nor do they always have, prior to their departure or even after their arrival, full information about their entitlements in the host country and of its social institutions and judicial system concerned with migrants' rights and welfare. While this serves as a serious obstacle to the enjoyment of their rights, the situation is worsened when they are also victims of exclusion as a result of residential segregation in less favoured urban areas. This causes difficulties in enjoying many of the social and economic rights including access to public health,

---

[7] For example, the underground economy currently accounts for sixteen per cent the EU's total GDP, compared to a mere five per cent in 1970. Between ten and twenty million workers, mostly though not exclusively, irregular immigrants, are working in this sector. Some respectable companies including fashion houses are now taking advantage of the situation through sub-contracting arrangements (European Commission, cited in *The Financial Times*, April 8, 1998; Ghosh 1998).

education and employment, difficulties which tend to be inherited by the second and even third generation migrants.

Behavioural and cultural constraints

23. A most serious and, often deep-seated, obstacle is a behavioural or cultural bias both among the public and the government officials in the receiving society, including those engaged in law enforcement services, against foreigners in general and groups of specific ethnic or national origins, in particular. Not surprisingly, they often face severe discrimination in access to employment as was revealed by the findings of a survey carried out in 1990-98 in Belgium, Germany, the Netherlands, Spain and the United States.[8] Populist anti-immigration slogans and xenophobic propaganda lead to, and thrive on, hostile stereotyping and scapegoating of migrants for economic and social problems. When these become endemic, even clear legal guarantees against discrimination, racial prejudices and xenophobic bias against foreigners have little practical effect.

24. Indeed, in most countries, including those with legal guarantees against discrimination, a degree of such prejudice does seem to exist. South Africa, for example, has one of the most progressive and inclusive constitutions that guarantees basic rights and freedoms to everyone living within its territory.[9] However, recent surveys showed that large numbers of South Africans, both black and white, clearly disagree with their own Bill of Rights (Crush, 2001). Legal recognition of rights and guarantees against discrimination is a necessary but not a sufficient condition for the actual enjoyment of the rights by migrants. For the rights to be respected and enjoyed, a conducive cultural climate must also exist in the society.

Prejudice in the receiving society and the missing pro-active stance

25. The prejudice against foreigners could be a reflection of, and is often aggravated by (a) a negative perception of migration and its effects on local employment, incomes, housing and social services and (b) a lack of general awareness or knowledge of the human rights provisions and their implications. To take again the example of South Africa, a recent survey showed only fifty-five per cent of respondents had heard of the 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).

26. Recent experiences in a several western European countries such as Austria, Denmark and France have shown that once the negative perception of migration, including fears about cultural erosion and joblessness, take hold and the anti-migration issues are injected into the political agenda, parties across the political spectrum, including those in power, find themselves on the defensive and react to the situation "by demanding or implementing more stringent anti-immigrant policies" (United Nations, 1998). This adds to the migrants' vulnerability and feeling of insecurity, making it harder for them to access their rights. An important lesson to be drawn from the situation is that the success of a rights-based approach to migration depends largely on timely initiation of pro-active measures, including systematic dissemination of objective information on migrants' rights and their contribution to the receiving country, before the migration issue is politically hijacked by those opposed to it.

---

[8] ILO: Draft Manual on Achieving Equality for Migrant and Ethnic Minority Workers, 1998, Geneva.
[9] Only two sets of rights that are expressly reserved to citizens: (a) the right to vote and (b) the right to engage freely in trade, occupation and profession.

Inadequate dialogue and participation

27. An overarching problem both compounding and looming large behind many of these obstacles is the inadequate dialogue between the migrants and the host society, including its authorities. Migrants and their families, even when not victims of hostility, can painfully suffer from loneliness and exclusion in relation to the host society. Such exclusion causes a sense of frustration among the migrants, often leading over time to alienation and resentment towards the receiving country. Not only does the situation inhibit an active participatory social process based on mutual understanding between the migrants and the local population but it creates an undercurrent of tension and a social environment which is hardly conducive to migrants' access to their rights.

ENHANCED VULNERABILITY OF MIGRANTS IN SPECIAL SITUATIONS

28. Access to human rights is particularly difficult, and the risks of human rights abuse much higher for certain migrants groups or when they are in situations that are inherently prone to human rights abuse. Only a few of these can be briefly discussed within this limited space.

Migrants in an irregular situation

29. If, for the reasons already discussed, even those foreigners who are legally present in the receiving state, cannot fully enjoy the rights recognised in law, it is not difficult to see why those with an irregular status would be in a far worse situation. Certain instruments such as the 1990 UN Convention (ICMW) and the ILO Migrant Workers' Convention, 1975 (no.143) do provide for certain basic rights to which irregular migrant workers are entitled. In practice, they are handicapped to benefit from them. One main reason is a built-in political and cultural bias against them — which is often much deeper than the prejudice against regular migrants. Irregular migrants may be perceived as a challenge to national sovereignty; a source of social tension and increased crimes or easy recruits of the political opposition. Indeed, the reluctance of some states to recognise the rights of irregular immigrants has been cited as one of the causes of the low rate of ratification of the UN Convention (ICMW) (Cholewinski, 1997). Further, since both the UN and ILO Conventions urge the states to curb irregular migration, there is, as confirmed by a 1996 ILO survey, a real risk of human rights abuse occurring in the process of state action.

30. Nor are other existing international instruments sufficiently robust to protect irregular migrants. For example, the UN Declaration on Human Rights of Individuals Who are not Nationals of the Country in which They Live (1985) recognises the right of any state to establish differences between nationals and aliens, leaving the possibility open to make discrimination especially against those aliens who do not have a legal status in the receiving state. For its part, the Law of Aliens, mainly customary laws, largely ignores the status of irregular migrants.

Migrants as victims of human trafficking

31. The horrid tales of human rights abuse of trafficked migrants, including forced prostitution of women and child abuse, are now well documented.[10] Many of them die on the way, some are abandoned in inhospitable places and some others, on arrival in the destination country, are used

---

[10] Gathering information from the field regarding the conditions of trafficked women, the Global Survival Network reports that "the women are controlled by various mechanisms: isolating strategies to deprive them of heir personal freedom, refusal to provide legal and medical assistance, withholding their pay, physical intimidation and dependency on drugs and alcohol" cited in IOM, 2000. See also Ghosh, 1988.

virtually as slave labour. They are often consigned to semi-exclusion in sweatshops, brothels and other similar sites; have little cash or outside contacts and may not even speak the local language. They may also be fearful of approaching the local authorities because of their irregular status in the country. The situation completely rules out any possibility of their enjoying even the most basic human rights.

32. Until recently, international and national legislation had been far from adequate either to prevent the rights abuse, or to give protection to the victims. The fact that at least some of these crimes are often perpetrated outside the territorial limits of a single country posed another problem. This is because legislation in few countries, with such exceptions as Switzerland and Austria, fully covered offences committed outside the national territory.[11] More recently, a number of countries have enacted specific legislation to deal with human trafficking or has tightened up existing legislation. Concurrently, at the global level, two specific Protocols on trafficking and smuggling of migrants as part of the new International Convention Against Transnational Organised Crime, 2000, have established a set of legal standards dealing with suppression, prevention and punishment related to these activities. The combined effect of these national and international measures can be expected to discourage migrant trafficking and the human rights abuse that it invariably entails.

33. However, these initiatives are mostly of a reactive and punitive nature. Unless parallel policy and normative initiatives are taken to complement these punitive measures and a pro-active global regime for migration management is put in place, the root causes of human trafficking can hardly be eradicated.[12] Human rights activists, including women's groups, are also concerned that these new measures target on the perpetrators of trafficking without giving adequate attention to protection for the victims.[13]

Irregular migrants and rejected asylum seekers under forcible return

34. Enjoyment of basic human rights becomes highly problematic for those irregular migrants and rejected asylum seekers who are under expulsion order. As already mentioned, the concepts of *ordre public* and national security, and of the general welfare of the community can be interpreted very widely permitting the state to circumvent its obligation to avoid arbitrary deportation of non-nationals, especially since (unlike for recognised refugees and legally employed migrant workers) the state has no positive obligations for irregular migrants and rejected asylum seekers in this respect. True, under the 1990 UN Convention (ICMW), which extends certain rights to *all* migrant workers, expulsion may only be in pursuance of a decision in keeping with the law, and the person shall have a reasonable opportunity before or after departure to settle any claim for wages. Yet, the convention, as noted, is not yet operational, nor does it cover all migrants or all specific situations and practices related to expulsion (Noll, 2000).

---

[11] Article 23 of the Swiss Aliens Law provides one of the broadest definitions of the crime by stipulating that any person "who in Switzerland *or abroad* facilitates or helps to prepare an illegal entry or exit or an illegal stay is punished". The Austrian legislation (Article 80 of the Aliens Law) is also quite wide in geographical scope; it defines trafficking as "facilitating illegal entry or exit of an alien, irrespective of whether it occurs before or after the crossing of the border or during the foreigner's stay in the country".

[12] For information on the configuration of such a global regime, see Ghosh (ed.) (2000), *Managing Migration: Time for a New International Regime?* .

[13] The distinctions made in the two recent Protocols between trafficking (involving gross violation of human rights) and 'simple' smuggling of migrants can also be questioned. In practice the two often overlap**.** This is because in some (though not all) cases traffickers' operations may very well start at the stage of illegal crossing (or smuggling) across borders as part of an overall strategy just as smuggling may, and often does, involve a degree of mistreatment of migrants**.**

35. The risks of human rights abuse are particularly high at the stages of localisation and detention of the potential returnees, as they are prior to and during the return journey. As several recent incidents in Western Europe have shown, in its anxiety to repatriate the potential returnees the returning state may be inclined to use force or harsh and inhuman treatment to overcome actual or anticipated resistance by the returnee.[14] Admittedly, under existing human rights laws the state is debarred from exercising its discretionary power in an arbitrary or abusive way and a reasonable degree of proportionality must exist between the means employed and the (legitimate) goals to be reached. Once more, explicit normative guidance is not available to cover all potential situations of rights abuse; and even when guidance is available in international human rights laws, it is not necessarily followed.

36. Problems of human rights abuse also arise in the post-return stage. In the absence of any international legal or institutional arrangements for their post-return protection, rejected asylum-seekers remain vulnerable to human rights abuse in cases of, for example, continuing political instability and civil strife in the home country (Ghosh, 1998). As things stand now, there is an important vacuum in international legal and institutional arrangements to deal with this situation involving rejected asylum-seekers.

Refugees and asylum-seekers in unprotected situations

37. Refugees and genuine asylum-seekers are supposed to enjoy their basic rights under human rights and refugee laws. Yet recent experiences have shown that due to gaps and ambiguities in laws or their restrictive application or both, they may fail to enjoy their rights. First, the 1951 UN Convention on the Status of Refugees and its Protocol of 1967, which provide the widely accepted definition of refugees, do not cover several other individuals or groups who are also in genuine need of protection at least on a temporary basis. These include victims of forced migration resulting from civil strife, armed conflicts, and generalised violence, massive violation of human and minority rights disturbing public order and natural and man-made disasters.[15]

38. States in North America, Western Europe and Oceania have responded to some these humanitarian emergencies on an *ad hoc* basis by creating a wide variety of special categories of temporary refugees.[16] In the absence of a set of internationally agreed and harmonised norms, the protection for these categories remains unpredictable, insecure and fragile, as was poignantly revealed, for example, during the Bosnia crisis.

39. The pressure of large numbers of asylum-seekers and the perceived threat of more arrivals have led most industrial countries to use rigid interpretation and restrictive application of the provisions of existing international and national refugee protection laws. Many states in Western Europe are insisting on the presentation of valid travel documents by asylum-seekers as a pre-condition for considering the asylum application. There could also be many cases where a genuine asylum seeker, haunted by the fear of persecution in a hostile political climate, may be unable to secure all the travel documents and complete the necessary formalities before fleeing the country.

---

[14] For instance, in 1998, three separate incidents involved deaths from suffocation of irregular immigrants during attempts at their forcible deportation by the governments concerned. (Noll, 2000).

[15] Even under the regional instruments with wider scope, notably the OAU Convention in Africa and the Cartagena Declaration in Latin America (a non-binding declaration of intent) all these victims of forced migration are not adequately covered. Also, individuals recognised under the regional agreements may be considered illegal if they move to states which are not a party to the regional arrangements.

[16] *De facto* refugees, humanitarian cases, B-status refugees and so forth.

40. Uncertainties have arisen not just because political considerations have been allowed to intercede (as in the case of Salvadoran refugees) in applying the protection provisions but also because of the exclusion of cases of persecution by non-state agents; interdiction or interception of would be asylum-seekers on the high seas, and frequent use (at the discretion of the government) of safe country concept under various labels (e.g. "safe country of origin", "safe first country of asylum" and "safe third country"). The shift of policy emphasis towards *safe conditions* have not only restricted the admission of some of the genuine refugees, but has had a wider effect of diluting the principle of "voluntariness" as a condition of return for refugees In a restrictive political climate, worsened by resource constraints, UNHCR has been obliged to embrace the doctrine of "imposed return" which in essence violates one of the basic principles of refugee protection, namely *non-refoulement* (Chimney,1999; Ghosh, 2000).

41. Refugees returning to areas of conflict often remain exposed to human rights abuse. Although, unlike in the case of rejected asylum seekers, UNHCR has been given a residual responsibility for protection and reintegration of refugees. The mandate is fragile and as recent experiences in El Salvador and Guatemala have demonstrated, UNHCR's institutional capacity remains far too limited to cope with the formidable problems that often arise.

Migrants in the wake of September 11

42. In the wake of the terrorist attacks of September 11, many countries, especially in the West, have restricted freedoms and civil liberties as part of their anti-terrorist campaign. Most of these measures apply to all, but migrants, including long-tern foreign residents and even those who are naturalised citizens, are among the worst sufferers.[17]

43. In the United States, new laws and administrative measures give wider powers to the government to carry out arrest on suspicion, detention without trial and enforced deportation. Despite denials of racial profiling, Arabs from the Middle East and North Africa and even Arab-Americans have come under close scrutiny, as reflected in the FBI's systematic interviewing of 5,000 persons of Arab descent. Unofficial reports suggested that some 1,200 non-citizens were secretly arrested and incarcerated. Similar incursions on civil liberties in general but affecting non-nationals in particular, have become discernible in most west European countries including Great Britain, Germany, Italy and Spain as well as in the EU itself. This new, security-sensitive environment constrains unavoidably the enjoyment by migrants of their basic rights.

OVERCOMING THE OBSTACLES: RESPONSE FROM MIGRANTS, CIVIL SOCIETY AND HUMAN RIGHTS INSTITUTIONS

44. This paper does not seek to provide an exhaustive blueprint of the measures that all different actors can jointly and/or individually take to enhance migrants' access to human rights[18]. Rather, in keeping with the thrust of the ICHRP initiative, it briefly discusses what role the migrants and their associations, together with the civil society actors and the human rights institutions, are playing to overcome the various constraints discussed in the paper, and then moves on to outline

---

[17] See, in this connection, ICHRP, 2002, *Human Rights after September 11*, Geneva.

[18] Some useful, though dispersed, suggestions for this purpose are available in the Programme of Action (chapter X) of the 1994 Cairo Conference on Population and Development; the report of the Working Group of Intergovernmental Experts on the Human Rights of Migrants (1999); the Report of the UN High Commissioner for Human Rights (May 2000); the Report of the World Conference Against Racism, Racial Discrimination , Xenophobia and Related Intolerance, 2001; and elsewhere. See also IOM/United Nations, *The Human Rights of Migrants*, in particular, Patrick Taran, "Human rights of Migrants: Challenges of the New Decade", 2000, Geneva, pp 7-46.

broad strategies that the human rights institutions might follow to enhance the impact of their advocacy work.

45. Since the early 1990s, especially in the past few years, migrants have taken energetic steps, alongside a variety of NGOs, to overcome their traditional organisational weaknesses, and have achieved some positive results. A relatively relaxed attitude of Western governments towards foreigners' freedom of association and expansion of democracy in several parts of the world clearly helped the process. Networking and close co-operation between migrants' own associations and various civil society actors have also been a key factor.

46. A survey carried out in 1997 concluded that a variety of NGOs "provide a place for information, dialogue and co-operation between migrants (documented, undocumented and refugees) citizens, employers and government agencies in countries of origin and destination."[19] Traditionally, migrants' associations and migrant-serving NGOs have been concerned with service activities to promote migrants' welfare and integration in the destination country, assist in their return and help develop local projects in their communities of origin. Increasingly, however, they have also become involved in policy advocacy, serving useful channels of communication and consultation with local and national authorities on migration–related issues, including migrants' rights. Indeed, fifty-nine per cent of the NGOs that participated in the 1997 survey reported that they had programmes to ensure protection of migrants and their families against racism, ethnocentrism and xenophobia and fifty-eight per cent conducted activities to fight discrimination.

47. At the regional level, especially in Asia and Europe, migrant-serving NGOs have developed extensive networks for mutual support and information sharing aimed at promoting migrants' rights and welfare. For example, the Asia Migrant Centre, jointly with the Migrant Forum in Asia, has been networking with more than twenty associations in eleven Asian countries on migration-related issues, including migrants' rights. In Europe, aside from the European Union Migrants Forum and the European Council on Refugees and Exiles, both supported by the EU, there are well-developed networks bringing together numerous local migrants' associations to deal with migration-related issues, as exemplified by "United Against Racism and Fascism." In Africa, networking for research on migration issues, including migrants' human rights, is being developed by the South African Migration Project. In Central America, to fight against racism national coalitions are being fostered by a regional organisation on forced migration mainly to fight racism.

48. At the international level, several initiatives, such as the Migrants' Rights International and The December 18 Initiative (an online network), both of which focus on promotion of migrants' rights have been able to bring together, formally or informally, a significant number of organisations for advocacy work, despite their resource constraints. The NGOs have been a powerful driving force in promoting the cause of migrants' rights in the United Nations Commission on Human Rights. They provided valuable inputs to the work of the UNCHR working group on the human rights of migrants. Formal approval of the groups' recommendations concerning, *inter alia*, the appointment of a special UN Rapporteur on human rights of migrants and proclaiming December 18 as the International Migrant's Day has helped in bringing the issue of migrants' human rights into the mainstream of global discussion on human rights. The Global Campaign for Migrants' Rights, set up in 1998 by a group of international NGOs and inter-governmental bodies, has made a singular effort, with some success, in advancing the ratification of the 1990 UN Convention (ICMW).

---

[19] See, in this connection, UN (ECOSOC), Follow-up Actions to the Recommendations of the International Conference on Population and Development: Activities of Intergovernmental and Non-governmental organisations in the area of international migration, E/CN.9/1997/5 10 January 1997 pp.10-18.

49. As for the human rights entities, until recently, the major international organisations had focused attention on refugees and asylum-seekers rather than on migrants in general. However in recent years, their concern has extended to all groups of migrants. Indicative of this trend are the reports prepared by Amnesty International on execution of migrants in the Middle East and by Amnesty USA on abusive treatment of treatment of migrants in detention. Other examples include the investigations by Human Rights Watch on treatment of migrants and refugees in South Africa in 1997; and a study of migrants' human rights in four Western European countries. In the United States, Human Rights Watch reported on the conditions of the secretly arrested and incarcerated non-citizens following the September 11 attacks. Human rights organisations also joined hands with migrants' associations and other NGOs in several of the global initiatives mentioned above, although in general they seemed to have a preference to operate autonomously.

MOVING FORWARD: STRATEGIES FOR HUMAN RIGHTS GROUPS

50. The nation state generally recognises the importance of human rights both as an ethical objective *per se* and as a factor in international relations. At the same time, it cherishes its prerogatives of sovereignty. The state's concern for human rights in general and for non-nationals in particular constantly vies with its own political, strategic and commercial interests. This, as already discussed, gives rise to a cleavage between the declaration of principles or even formal commitments by governments at the international level and their actual performance at home.

51. Against this background, what should be the strategy of human rights organisations that are anxious to secure migrants' increased access to their human rights? A self-contained, holistic approach to human rights, stubbornly seeking to hold the states accountable to (still fragile) international standards, is unlikely to be the most effective to achieve the end. Indeed, the pursuit of such an approach will probably make the local human rights activists even more isolated and enfeebled than they actually are or need to be. A much more effective (rights-based) approach would be to pursue the objective by placing migrants' human rights in a broader context — more precisely, by convincing the governments that promotion and protection of migrants' rights, besides being of high ethical importance, are *also* very much in line with their national interest and the welfare of their citizens.

52. At least two powerful arguments that can be used to underpin this approach. The first concerns the changing configuration of migration as a global process. As a recent ILO survey showed, more and more countries are now becoming increasingly involved in *both* emigration and immigration.[20] This has an important implication on state attitude to migrants' rights. The state has a basic, internally driven and widely accepted, obligation to protect the rights and welfare of its own citizens even when they are in another state as migrants. It cannot effectively meet this obligation except through inter-state co-operation based on reciprocity. This requires the 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.[21] The state, when convinced that it has a direct national stake in protecting (im/)migrants' access to their rights, is more likely to improve its domestic performance and take its international commitment more seriously in this regard.

53. The second argument rests on the states' common interest in ensuring orderliness of movements of people across countries. It is well recognised that the denial or abuse of human rights in origin

---

[20] An ILO survey, made in 1994, showed that out of the ninety-eight countries significantly involved in migration, twenty-four countries, or roughly a quarter, were both major sending/emigration and major/receiving countries at the same time. ILO/IOM/UNHCR, *Migrants, Refugees and International Co-operation*, Geneva, 1994.

[21] Obviously, such reciprocity between states can best be guaranteed within a multilateral framework.

countries is one of the principal causes of disorderly and disruptive movements of people. Experience has also shown that when the movements are disorderly and especially when they are irregular, and unwanted (as disorderly movements often are), the risk is greater for further violation of human rights in countries of transit and destination. When this happens, management of migration becomes more difficult and expensive; it also entails heavy social and human costs and may even threaten regional and international stability. Protection of human rights, including those of migrants, is thus an essential inter-locking element in making the international migration system more orderly and manageable. Therefore, if governments are interested in better management of international migration, they must also take active measures to protect human rights, including those of migrants.[22]

54. The broad-based approach to migrants' human rights as suggested above brings into focus the importance of coalition building. As noted, in several instances, human rights groups have moved in this direction, yielding encouraging results. Yet broadening the coalition is not without risks. It is conceivable that the involvement of numerous groups with divergent, even conflicting, interests in migration, could dilute the issue of migrants' human rights or weaken the focus of the human rights approach. However, this should not necessarily be the case. Much, no doubt, depends on the exact configuration and methods of operation of the coalition, and, at the national level, also on the country-specific situation. There is no fixed or ideal model for such coalition. It can take different forms and they can conveniently co-exist in the same country, each playing a valuable role. In some cases, as between the national human rights commission and the migrants associations in the country, the links should preferably be fully institutionalised and firmly established to achieve the best results. In some other situations, the coalition may be more flexible and take variable forms, depending on the specific issues. For example, when the purpose is to build public support for equality and tolerance or launching a campaign against discrimination and xenophobia a broad and flexible coalition comprising community and business leaders, trade unions, political parties, and various other NGOS might be more expedient.

STRATEGY IN THE WAKE OF THE SEPTEMBER 11 ATTACKS

55. After the horrendous terrorist attacks in the US and more recently elsewhere, no one can seriously question the legitimacy of the governments' increasing concern for security. In many countries this has meant encroachments on citizens and foreigners' rights, often turning the presumption of a person's innocence on its head. Yet people, by and large, seem to have accepted these losses of liberty as the price to be paid for the most basic freedom — security of life. Clearly, in this new climate dominated by security concern, aggressive advocacy for human rights cannot be expected to have an easy sailing, more so, given the involvement of foreigners in most of the recent attacks.

56. Does this mean that the human rights activists should be in the retreat? Most definitely not. The new situation once more brings into focus the need for placing the issue of migrants' rights in a wider context just as it underscores anew the importance of pro-active coalition building. A major part of their work should lie in sensitising the government and the public on why the concern for security needs to be balanced and harmonised with the protection of human rights of migrants, and in discerning the ways in which this can be achieved. Among the major considerations that could bolster this approach are the following (Ghosh, 2001).

---

[22] Conversely, those concerned with human rights of migrants would do well to pursue their objective in the wider context of orderly migration. This makes a strong argument for human rights groups and migrant-serving associations to forge alliances and work closely together.

57. First, the fight against terrorism is not a fight against immigrants. All migrants are not terrorists; nor are all terrorists migrants. Second, improved border and immigration control does not necessarily mean a more restrictive and repressive immigration policy. The present weaknesses in border and immigration control, as revealed by the September 11 attacks, are at least partly a reflection of faulty immigration policy; repression or harassment of immigrants is not a substitute for new policy initiatives.[23] Third, the real value of every security measure that impinges on human rights — unfair arrest, detention without trial, forced expulsion — must be assessed and then weighed against its current and future cost in terms of economic benefits sacrificed and human freedoms foregone.

58. Security measures that are suppressive of openness and basic human rights of foreigners cannot but rebound negatively on the receiving country as a whole, eroding respect for human rights and values associated with an open society. Once foregone these cannot be easily regained. The situation foreshadows another potential danger. Lack of democracy and respect for human rights are recognised as contributors to political and social frustration, terrorism and religious fundamentalism. Should increasing security concern lead western democracies to unduly suppress civil liberties and human rights of immigrants in their own societies they could inspire opportunistic attacks on human rights by repressive regimes — not only in migrant-sending countries but around the world. Opposition groups, striving for human rights and democracy, are likely to be the worst victims, as has already started happening in several countries of Central Asia, North Africa and the Middle East. Should this drive the opposition groups to take up arms, the situation can only lead to violent civil conflicts and widespread infringement of human rights.

---

[23] Significantly, in the United States, the outgoing INS commissioner, James Ziglar, remarked in an October 2002 speech that the United States "needs to find a way" to satisfy growing labour demand so that the INS could "focus on the bad guys coming across, not on the flow of people who just want to get into the country to work".

BIBLIOGRAPHICAL REFERENCES

Bustamante, J.A. (2002). *International Migration Review,* 36/2.

Cholewinski, R. (1997). *Migrant Workers in International Human Rights law: Their Protection in Countries of Employment*, Oxford , Clarendon Press.

Bengoa, J.(1997). The Relationship between the Enjoyment of Human Rights, in particular Economic, Social and Cultural Rights, and Income Distribution. UNCHR document E/CN.4/Sub.2/1997/9.

Craven, M. (1995) *The International Covenant on Economic, Social and Cultural Rights: A perspective on its Development.*

Crush, J. (2001). "The Dark Side of Democracy: Migration Xenophobia and Human Rights in South Africa", in *The Human Rights of Migrants*, IOM/United Nations

Dent, J, (1998). "Research Paper on the Social and Economic Rights of Non-nationals in Europe", London, European Council on Refugees and Exiles (ECRE)

Ghosh, B. (1998). *Huddled masses and Uncertain Shores,* The Hague and Cambridge. M. A. USA, Kluwer Law International L.

Ghosh, B. (2000) (ed.). *Return Migration: Journey of Hope or Despair*? Geneva, IOM/United Nations

Ghosh, B. (ed.) (2000). *Managing Migration: Time for a New International Regime?* Oxford, England, Oxford University Press.

Ghosh, B. (2001). " Don't Immigration be a Victim of Terror", Brussels, *The Wall Street Journal.*

ICHRP (2002. *Human Rights after September 11*, Geneva.

ILO, (1999). *Migrant Workers*, Geneva

ILO/IOM/UNHCR. (1994). *Migrants, Refugees and International Co-operation*, Geneva

International Commission of Jurists. (1999). *The Review: Globalisation, Human Rights and the Rule of Law,* 61.

IOM. (2000). *Migrant Trafficking and Human Smuggling in Europe*, Geneva.

Lillich, R. (1984). *The Human Rights of Aliens in Contemporary International Law.*

Noll (2000). "Protecting the Dignity and Human Rights of Different Categories of Returnees" in B. Ghosh (ed.). *Return Migration: Journey of Hope or Despair*, Geneva, IOM/United Nations.

Schachter, O. (1991). *International Law in Theory and Practice.*

Taran, P. (2001). "Human Rights of Migrants: Challenges of the New Decade", *The Human Rights of Migrants.* op.cit.

United Nations. (1998). *International Migration Policies*, New York, Population Division.

United Nations, Commission on Human Rights (1999) Report of the Working Group of Inter-Governmental Experts on the Human Rights of Migrants, Geneva, document E/CN.4/1999/80.