# The Human Rights of Migrants







# The Human Rights of Migrants

# Offprint of *International Migration* Vol. 38 (6) Special Issue 3/2000

Editor: Reginald Appleyard

#### Copublished by:

International Organization for Migration (IOM)
United Nations





IOM is committed to the principle that humane and orderly migration benefits migrants and society. As an intergovernmental body, IOM acts with its partners in the international community to: assist in meeting the operational challenges of migration; advance understanding of migration issues; encourage social and economic development through migration; and uphold the human dignity and well-being of migrants.

International Organization for Migration 17 route des Morillons 1211 Geneva 19 Switzerland

Tel: +41.22.717 91 11 Fax: +41.22.798 61 50 E-mail: hg@iom.int

Internet: http://www.iom.int

Opinions expressed in the study are those of the authors and do not necessarily reflect the views of the International Organization for Migration or the United Nations.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publishers.

Copublished by the International Organization for Migration and the United Nations. © International Organization for Migration and the United Nations, 2001

ISBN-92-9068-098-9 (International Organization for Migration)

United Nations Publication Sales Number: E.01.III.S.1

## **The Human Rights of Migrants**

#### TABLE OF CONTENTS

Introduction	3
Human Rights of Migrants: Challenges of the New Decade  Patrick A. Taran	7
Protection of Migrants' Human Rights: Principles and Practice <b>Heikki S. Mattila</b>	53
The Role of the United Nations Special Rapporteur on the Human Rights of Migrants  Gabriela Rodriguez	73
Principles of Protection for Internally Displaced Persons  Erin D. Mooney	81
The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa  Jonathan Crush	103
Bibliography	135

	·

During the next decade, migration is likely to be a cutting-edge issue in international relations, economics and social order in many countries. Indeed, during the last few years news items on the impacts of migration have already moved from the back pages to the front pages of news media worldwide. Trafficking, remittances, the impact of migrants on employment and the spread of HIV/AIDS and crime, and polemic debates on multiculturalism, are now widely covered in policy debates, political speeches and negotiations, local town hall meetings and international conferences.

However, until quite recently, the treatment of individuals as migrants, immigrants and refugees had been little more than a footnote to many policy debates, governmental consultations and academic reviews. Perhaps only in the lurid news reports of deaths of migrants in trafficking, and migrant workers treated brutally in fields and sweatshops, was the painful dimension of commonplace denial of the rights and dignity of migrants made visible.

The discourse of international human rights has finally extended to migrants and migration. Rather quickly, government officials, policy-makers, NGO advocates, academic researchers and international agencies have begun to consider the human rights dimension of contemporary migration.

Under the Universal Declaration of Human Rights (created fifty years ago), human rights *are* universal (they apply everywhere), indivisible (political and civil rights cannot be separated from social and cultural rights); and inalienable (they cannot be denied to any human beings). However, their de facto extension to many vulnerable groups has been a long and difficult process, by no means complete. Migrants and indigenous persons, in particular, experience strong resistance to recognition of their human rights.

The 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families was a major step forward in identifying and attempting to protect the human rights of migrants. The Convention viewed migrants not simply as labourers or economic entities but as social entities, with families; recognized that by being non-nationals they were not always protected by the national legislation of receiving states; emphasized that all migrant workers, including the undocumented, have fundamental rights; called for an end to illegal

4

and clandestine movements; and the establishment of minimum standards of protection for migrant workers and members of their families.

In 1997, a Working Group of Experts was appointed by the UN Human Rights Commission to identify obstacles to the effective human rights of migrants and to provide recommendations for their resolution. As Heikki Mattila shows, the Working Group confirmed that migrants still suffer from relative powerlessness and need to be empowered through the strengthening of their rights. To this end, the Group called for more effort to speed up ratification of the 1990 Convention which had not come into force because only 16 of the required minimum 20 countries had acceded to the Convention. All the States Party to the Convention were primarily countries of origin of migrants.

Patrick Taran argues that this very slow progress, coupled with explicit disinterest in the instrument, symbolize a broader general resistance to recognition of the application of human rights standards to migrants, particularly undocumented migrants. He concurs with Cholewinski's view that provisions explicitly granting rights to illegal migrants are likely to hinder ratification by many countries, even though being rendered outside the applicability and protection of the law is contrary to the inalienability of human rights protection.

The "illegalization" of migrants has led to tendencies to associate migrants and migrations with crime and criminality, unemployment, disease and other social ills, even though research in Western countries shows that migrants tend to have lower per capita involvement in criminal activity than comparable control samples in native populations.

The recent appointment of a UN Special Rapporteur on the Human Rights of Migrants is a positive step in the journey towards full protection. In her article, the Special Rapporteur calls for wider dissemination of information in the fight against abuse and grave human rights violations with the objective of changing the negative approach made to migration in many host countries. The Special Rapporteur has identified trafficking as a major concern for all regions, especially trafficking in women and children, which is often incited by coercion, trickery and deceit.

Although internally displaced persons (IDPs) are technically not international migrants, the Guiding Principles on Internal Displacement, though not a treaty, is consistent with international human rights law and international humanitarian law. The Principles set down what protection should mean for IDPs. Their own government bears responsibility for meeting the protection and assistance needs of IDPs, of whom there are an estimated 22-25 million worldwide. Too often, declares Erin Mooney, they and other populations under threat are regarded by humanitarian organizations simply as objects of charity rather than rights-holders. However, as with recent developments in support for the human

rights of international migrants, including the 1990 Convention, the 1997 Working Party and two ILO Conventions related to migrant workers' rights, the Guiding Principles on Internal Displacement have increasingly gained international standing and recognition.

Treatment of foreigners and the nexus between racism, xenophobia and abuse of migrants and refugees has forcibly emerged on the agenda of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, to be held at Durban, South Africa, during September, 2001. The article by Jonathan Crush indicates that South Africa will be an appropriate location for delegates to observe the kinds of difficulties governments face in attempting to handle these polemic issues. South Africa prides itself on having one of the most progressive constitutions in the world. A Bill of Rights guarantees a host of political, cultural and socio-economic rights "to all who are resident in the country". Crush notes that while migrants from neighbouring countries enjoyed few rights and little legal protection during the apartheid era, human rights abuse has continued virtually unchecked under the new government.

He argues that South Africa was totally unprepared for the inevitable consequences of the fall of apartheid and reinsertion into global circuits of capital, commodities and people, with many persons in government and media giving priority to control over management, expulsion over admission, and exclusion over inclusion. As a result, immigration policy reform has stalled, with many persons claiming that legislation currently under consideration entrenches the potential for human rights abuse. Few in government, Crush argues, are openly supportive of migrant rights. The results of a series of surveys conducted by Crush and his colleagues certainly raise cause for concern. Not only do South Africans favour draconian approaches to regulating immigration, but 85 per cent of persons in one survey called for no right of freedom of speech or movement for unauthorized migrants, and 65 per cent said that they should not enjoy police or legal protection or access to services. Furthermore, reluctance to grant rights to refugees is uncomfortably close to responses given regarding illegal migrants.

Crush concludes that governments, NGOs and refugee organizations have a major task ahead to turn some latent sympathy for refugees into widespread support for genuine refugee protection. The public education challenge is to build a rights-based culture that includes all persons. His conclusion relating to South Africa, where for many years he has been conducting surveys and research, are almost certainly relevant to many, maybe all, countries, developing and developed.

There is still a dearth of solid data, research and analysis on the human rights of migrants. In recognition of the truism that "good policy requires good data", this volume has been compiled to make a contribution to discussion, and to encourage

further substantive research by offering an overview of current knowledge and activity in the field. It includes an overview of main trends, issues and actors; a regional perspective from southern Africa; a summary of applicable international standards; a model approach from work with IDPs; a brief review of the work of the Special Rapporteur; and a list of relevant books, articles and other recourses.

This publication is of particular relevance to the deliberations of delegates at the forthcoming World Conference at Durban, and useful background for the ongoing work of relevant UN mechanisms such as the Commission on Human Rights and several Special Rapporteurs whose concerns touch migrants. We also hope that it will stimulate more intensive research, documentation and analysis on the issues of human rights of migrants, refugees and other non-nationals.

Reginald Appleyard and Patrick Taran

### Human Rights of Migrants: Challenges of the New Decade

Patrick A. Taran\*

#### **ABSTRACT**

This review summarizes main trends, issues, debates, actors and initiatives regarding recognition and extension of protection of the human rights of migrants. Its premise is that the rule of law and universal notions of human rights are essential foundations for democratic society and social peace. Evidence demonstrates that violations of migrants' human rights are so widespread and commonplace that they are a defining feature of international migration today.

About 150 million persons live outside their countries; in many States, legal application of human rights norms to non-citizens is inadequate or seriously deficient, especially regarding irregular migrants. Extensive hostility against, abuse of and violence towards migrants and other non-nationals has become much more visible worldwide in recent years. Research, documentation and analysis of the character and extent of problems and of effective remedies remain minimal.

Resistance to recognition of migrants' rights is bound up in exploitation of migrants in marginal, low status, inadequately regulated or illegal sectors of economic activity. Unauthorized migrants are often treated as a reserve of flexible labour, outside the protection of labour safety, health, minimum wage and other standards, and easily deportable.

Evidence on globalization points to worsening migration pressures in many parts of the world. Processes integral to globalization have intensified disruptive effects of modernization and capitalist development, contributing to economic insecurity and displacement for many.

<sup>\*</sup> Senior Migration Specialist at the International Labour Office (ILO), Geneva, Switzerland.

Extension of principles in the Universal Declaration of Human Rights culminated in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. With little attention, progress in ratifications was very slow until two years ago. A global campaign revived attention; entry into force is likely in 2001. Comparative analysis notes that ILO migrant worker Conventions have generally achieved objectives but States have resisted adoption of any standards on treatment of non-nationals.

A counter-offensive against human rights as universal, indivisible and inalienable underlies resistance to extension of human rights protection to migrants. A parallel trend is deliberate association of migration and migrants with criminality.

Trafficking has emerged as a global theme contextualizing migration in a framework of combatting organized crime and criminality, subordinating human rights protections to control and anti-crime measures.

Intergovernmental cooperation on migration "management" is expanding rapidly, with functioning regional intergovernmental consultative processes in all regions, generally focused on strengthening inter-state cooperation in controlling and preventing irregular migration through improved border controls, information sharing, return agreements and other measures.

Efforts to defend human rights of migrants and combat xenophobia remain fragmented, limited in impact and starved of resources. Nonetheless, NGOs in all regions provide orientation, services and assistance to migrants, public education and advocating respect for migrants rights and dignity. Several international initiatives now highlight migrant protection concerns, notably the UN Special Rapporteur on Human Rights of Migrants, the Global Campaign promoting the 1990 UN Convention, UN General Assembly proclamation of International Migrants Day, the 2001 World Conference Against Racism and Xenophobia, anti-discrimination activity by ILO, and training by IOM.

Suggestions to governments emphasize the need to define comprehensive, coordinated migration policy and practice based on economic, social and development concerns rather than reactive control measures to ensure beneficial migration, social harmony, and dignified treatment of nationals and non-nationals. NGOs, businesses, trade unions, and religious groups are urged to advocate respect for international standards, professionalize services and capacities, take leadership in opposing xenophobic behaviour, and join international initiatives. Need for increased attention to migrants rights initiatives and inter-agency cooperation by international organizations is also noted.

#### INTRODUCTION

Migration and the "multiculturalization" of societies around the world are facts of history as well as increasingly predominant features of this contemporary age of globalization. Increasing migration, for positive and negative reasons, means that nearly all States have become or are becoming more multi-ethnic, multi-cultural, multi-racial, multi-religious, and multi-lingual. Addressing the reality of increasing diversity means finding political, legal, social and economic mechanisms to ensure mutual respect and to mediate relations across differences.

This review begins from the premise that the rule of law and respect for widely recognized notions of human rights are the essential foundation for democratic society and social peace. Respect for the basic human rights of all persons in each society offers an essential, accountable and equitable basis for addressing and resolving the differences, tensions, and potential conflicts that interaction among different persons and groups with different interests inevitably brings.

The review seeks to summarize main trends, issues, debates and initiatives currently conditioning the recognition and extension of protection of human rights of migrants. In order to act effectively to uphold the basic rights and dignity of migrants we need an accurate account of the conditions, issues and actors that shape this concern.

Addressing the human rights dimension of the experience of 150 million of the world's people – one in every 50 human beings – living outside their country of origin, as refugees, migrants or permanent immigrants is an awesome and sometimes intimidating task. Awesome because there is relatively little literature, support or sustained engagement in this arena. Intimidating because it is an unpopular issue, one for which concerned organizations garner few resources, and one which touches vested interests that would rather not see much light shed upon the issues.

Despite the lack of research, there is more than enough experiential and anecdotal evidence to state categorically that violations of migrants' human rights are so generalized, widespread and commonplace that they are a defining feature of international migration today.

To provide a global "tour d'horizon" on the human rights dimensions of migration, this article attempts to summarize main characteristics, conditions, issues and initiatives related to recognition of migrants' human rights worldwide in the following sections:

 Contemporary characteristics and trends regarding recognition of migrants' human rights.

- The extension of general principles and notions of universal human rights to all migrants.
- Contextual factors shaping migrants' rights questions.
- Main issues of contention regarding recognition of human rights of migrants.
- Initiatives, actors and character of activities promoting respect for migrants' rights.
- Some lines for responses and remedies to uphold migrants' human rights.

This review reflects an approach that attempts to acknowledge values underlying the analysis; values that are essentially those articulated in international human rights principles and instruments. In the author's experience, all analysis and discourse – notably in the field of migration – reflect sets of values, whether or not they are acknowledged. This author also acknowledges his engagement – and that of the institutions with which he is affiliated – in the promotion of human rights principles and instruments which indeed reflect these values. Nonetheless, the views expressed in this article are those of the author, and do not necessarily represent positions of the ILO.

#### TEN GENERAL TRENDS

- 1. Today, some 150 million persons live temporarily or permanently outside their countries of origin, of which 80-97 million are estimated to be migrant workers and members of their families (ILO, 1999: 4). In many countries, legal application of human rights norms to non-citizens is inadequate or seriously deficient, particularly as regards irregular migrants, those without authorization to enter or remain in the country.
- 2. Extensive hostility against and abuse of and violence towards migrants and other non-nationals has become much more visible worldwide in recent years. Lack of systemized documentation or research over time makes unclear the extent to which the apparent increase is due to the level of abuse or is partly a reflection of increased exposure and reporting.
- 3. Research, documentation and analysis of the character and extent of human rights problems regarding migrants and of effective remedies remain minimal. A telling indication is that, until very recently, the topic or area of *human rights of migrants* was simply not a category in most published bibliographies and research lists regarding migration.
- 4. A long and slow trend of extension to migrants of basic human rights principles elaborated in the Universal Declaration of Human Rights culminated a decade ago in the adoption of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. More recently, several NGO and UN initiatives have revived attention to these norms, notably by initiating a global campaign for ratification of this Convention. Appointment of a UN Special Rapporteur

- on Human Rights of Migrants has further focused attention on the application of human rights to migrants.
- 5. Discussion of migrants' human rights questions has become markedly more visible and "mainstream" over the last three to four years. Activity and advocacy by NGOs and human rights organizations has become much more evident, migrants rights having emerged as a formal topic on the agenda of many migration-related conferences and forums. News and communications media attention has also increased substantially.
- 6. However, a general counter-offensive has taken shape against human rights as being universal, indivisible and inalienable. In part, this challenge focuses on distinguishing between "realizable" political and civil rights versus economic, social and cultural rights characterized as costly, unsustainable and secondary. Explicit resistance to extension of human rights protection to migrants appears to be a feature of this counter-offensive. Ratification and entry into force of the 1990 Convention has been explicitly discouraged by some governments and other observers.
- 7. Parallel to resistance to application of human rights norms to all migrants is an attempt to make a deliberate association of migration and migrants with criminality. Migrants are commonly and deliberately associated in news media coverage, by politicians and in popular discourse with crime, trafficking, drugs, disease, AIDS and other social ills. Migrants themselves are criminalized, most dramatically through widespread characterization of irregular migrants as "illegals", implicitly placing them outside the scope and protection of the rule of law. More generally, migration is commonly characterized as problematic and threatening, particularly to national identity and security.
- 8. Trafficking has emerged as a global theme in addressing migration. The growth of trafficking in persons by organized criminal groups has meant a major increase in abuse of migrants by non-State actors, making it a compelling issue for human rights advocates as well as for law enforcement. However, the dominant approach by many States has been to contextualize migration in a framework of combating organized crime and criminality, subordinating extension of human rights protections to control of cross border movement and anti-crime measures. An outcome of this tendency has been the elaboration of two Protocols, one on combating trafficking in persons, the other on suppression of smuggling in migrants, accompanying the new International Convention Against Transnational Organized Crime. Both Protocols emphasize crime suppression and prevention measures in addressing irregular migration concerns; draft language on a number of basic human rights protections related to migrants and refugees proposed by some governments, international organizations and NGOs was not included.
- 9. Intergovernmental cooperation on migration "management" is increasing rapidly. There are now a number of functioning regional intergovernmental consultative processes, under such names as Puebla, Manila-APC, Dakar, Cairo, MIDSA, Central Asia and Caucuses, Mediterranean, and Lima.

- Several consultative mechanisms are now operational with permanent secretariats, such as the Intergovernmental Consultations for Europe, North America and Australia (IGC), the Budapest Process for Eastern and Central Europe, and the Asia Pacific Consultations (APC). Impetus for several of these mechanisms has been explicitly to address irregular migration. The agendas have correspondingly focused on discussion of migration control measures and on inter-state cooperation in monitoring migration, strengthening border controls, combating organized crime and returning migrants.
- 10. International and national efforts to defend human rights of migrants and combat xenophobia remain scattered, fragmented and relatively limited in impact. The few specific activities by the UN and other intergovernmental organizations remain resource-starved to the extent that they can respond little more than symbolically to expectations and mandates. While a number of active migrant and non-governmental organizations have emerged in Asia, the Americas and Europe, there is still little international coherency in civil society efforts.

# CONTEXTUAL FACTORS SHAPING MIGRANTS' RIGHTS CONSIDERATIONS

#### Causes of migration

Discussion of the human rights of migrants requires brief preliminary comment on the factors motivating migration. The question of identifying the causes of human displacement has three fundamental ramifications. First, a key concern is to recognize people who need *protection* from being forcibly returned to situations in which their lives, physical well-being or human dignity are threatened. Second is the challenge to identify root causes that compel migration in order to work to alleviate, overcome and eventually prevent them. Third is to ensure that truly voluntary migration can be facilitated and managed to the benefit of the individuals and States concerned.

The decisions made by individuals to uproot, leave their homes and homelands and migrate elsewhere, are based on a number of factors rather than one simple reason. Any discussion of motives for human migration must include consideration of political, economic, social and environmental factors that shape individuals decisions to leave.

Put another way, migration cannot be explained only as a rational choice by persons who assess the costs and benefits of relocating and choose the option most likely to fulfil their needs. Rather, account must also be made of macro factors that encourage, induce or often, compel migration. Many persons migrate in response to factors compelling them to move in order to survive and provide for the safety, dignity and well-being of themselves and their families.

Positive and negative factors compel migration. The ease of travel, widespread awareness of options and conditions in other lands, family and ethnic ties, opportunities — even requirements for international experience to advance in business, professions and careers — make migration more than just an option for many people. Indeed, this should be encouraged, and facilitated, in a globalizing world.

Among the factors that compel migration are (1) increasing armed violence, (2) ethnic and racial conflict, (3) features of globalization, (4) environmental degradation, (5) development-induced displacement, (6) denial of democracy, and (7) large-scale corruption (Taran, 1999). These causal factors condition the need for protection and assistance to persons who migrate as a result, and also require cooperation and collective action by States and international institutions to alleviate.

Complex situations make it difficult to distinguish a clear boundary between refugees and other migrants. While there should be no question that persons fleeing persecution are refugees, there is also a clear, internationally accepted definition in the UN Convention and Protocol on the Status of Refugees. However, the nature of military, political and economic conflict has changed greatly since the bipolar world of 50 years ago. Other factors besides direct persecution can threaten the safety, dignity and human rights of people, but there is no international standard to recognize and measure the protection needs for people fleeing generalized civil disorder, environmental devastation or economic collapse that threaten human survival.

An IOM discussion paper several years ago (1990) noted that it is less the absolute differences between countries that motivate most migration; rather, people tend to move only when their situation and that of their families falls below a critical threshold of tolerance, below which they no longer perceive possibilities of survival according to local norms of safety, dignity and wellbeing.

While perceptions of tolerable economic levels and conditions vary widely across different countries and communities, the most basic consideration is ability to survive above a local minimum standard of decency. At its essence, displacement today is in no small part the direct consequence of the breakdown or absence of sustainable community and the denial of human dignity.

#### **Exploitation of migration and migrants**

At the heart of the dilemma over recognition of migrants' human rights is their vulnerability to exploitation, especially in marginal, low status, inadequately regulated or illegalized sectors of economic activity. As observers in Asia have often noted, migrant labour fills the "three-D" jobs, dirty, dangerous and

difficult. Migrant labour has long been utilized in developed and underdeveloped economies as a low cost means of sustaining economic enterprises, and sometimes entire sectors that are only marginally viable or competitive. For example, migrant labour has been used in many countries to ensure low cost provision of agricultural produce, to provide domestic service, and to provide services in the "sex industry".

Migrants, especially those who are in irregular or unauthorized status, can be considered an ideal reserve of very flexible labour. Those without authorization for entry and or employment are at the margin of protection by labour workplace safety, health, minimum wage and other standards; they often are employed in sectors where such standards are non-existent, non-applicable or simply not respected or enforced.

Migrants and immigrants have often been perceived as able to work long hours for low pay and to have limited possibilities to demand benefits or other protections. Perspectives from the ILO and the International Confederation of Free Trade Unions (ICFTU) demonstrate that it is often very difficult to organize migrants and immigrants into unions or organizations to defend their interests and rights. When it is not considered illegal under national laws, organizing (especially of those without proper authorization to work) is easily intimidated and disrupted by the threat or actual practice of deportation (Linard, 1998). Given their lack of legal recognition or precarious status in host countries, migrants can often be hired without payment of benefits, payroll taxes and other costs, representing further savings to employers.

An especially important consideration for economic and political policy is that irregular migrants are perceived as being removable from the country when domestic unemployment rises and/or when rising political tensions prompt the targeting of scapegoats. For example, as reported in the *International Herald* Tribune and other media, immigration raids and internal enforcement against undocumented migrants in the US were virtually suspended early in 2000. At the same time as the US Immigration and Naturalization Service (INS) quietly suspended internal enforcement and deportations except at the borders, US economic chief Greenspan warned that the most significant threat to the US economy was inflation driven by wage increases. Implicit in Mr. Greenspan's message, and more explicit in comments by other US economic analysts, was a new conventional wisdom that potential wage increases can be countered by the employment of women, undocumented migrants and other reserve workers. News articles made explicit a national policy decision tying non-enforcement of immigration control to labour market and inflation control needs of the economy (International Herald Tribune, 4 October 2000). The effects of that policy also seem to have been well understood by some unions and undocumented workers. It was reported that undocumented workers in Chicago were able to expand unionization and negotiate agreements with employers to

demand warrants for any future enforcement actions and advise them in advance of any planned immigration enforcement raids (*International Herald Tribune*, March 2000).

#### Globalization

Very little conclusive data are available to precisely trace the relationship between globalization and migration. Until recently, the connection had been largely ignored in debates on the consequences of globalization. Perhaps the most comprehensive review so far is Peter Stalker's recent book published last year by the ILO, the Foreword to which notes:

The book is disturbing in its conclusion that the evidence so far available on the impact of globalization points to a likely worsening of migration pressures in many parts of the world. Peter Stalker finds that processes integral to globalization have intensified the disruptive effects of modernization and capitalist development. While acknowledging that this has been different from one country to another, "the general effect has been a crisis of economic security".

As Stalker's book and other sources note, several features of contemporary globalization are contributing to displacement and in some cases to limited re-employment or absorption either in domestic or foreign labour markets. Technological innovation and changes – mechanization, automation, computerization, and robotics – render huge productivity increases, but also render much human labour irrelevant to extraction, production and distribution of goods and many services.

Accelerated trade is replacing or undercutting domestic industrial and agricultural production with cheap imports at the expense of many jobs in those sectors. A ton of corn to Callao or ton of rice to Manila can now be delivered more cheaply than what local, small-scale labour-intensive production can achieve. It is argued that the efficiency of mechanized large-scale agribusiness lowers food costs, but growing a ton of corn occupied several farmers and labourers in Peru, and supported their families. Similarly with rice in the Philippines.

Structural Adjustment Programmes (SAPs) impose reductions in government spending, state budgets and state subsidies as well as significant reductions in government employment, including professionals, skilled and unskilled workers. Data seem to indicate that job creation by the private sector in many countries affected by SAPs has not matched numbers rendered unemployed by downsizing governments. In some countries, it has lagged behind and in others structural adjustment conditions include the termination of government subsidies or food price supports that indirectly support employment in agriculture, food processing and distribution.

Foreign direct investment (FDI) has been concentrated in economically advanced countries: nearly 98 per cent going to middle and upper income countries and only 2 per cent to the LDCs, which have the most need for job creation to make survival at home viable. Furthermore, much FDI is concentrated in capital intensive rather than labour intensive production ventures.

#### EXTENSION OF UNIVERSAL HUMAN RIGHTS

The 50th Anniversary of the Universal Declaration of Human Rights was recently celebrated worldwide. The central notion of human rights is "the implicit assertion that certain principles are true and valid for all peoples, in all societies, under all conditions of economic, political, ethnic and cultural life". Human rights are *universal* – they apply everywhere; *indivisible* – in the sense that political and civil rights cannot be separated from social and cultural rights; and, *inalienable* – they cannot be denied to any human being. This is the basis of the concept "human rights for all" articulated in the Universal Declaration.

Extension of the application of these universal human rights to vulnerable groups has been a long and difficult process. Two major covenants covering the broad definitions of political and civil rights, and economic, social and cultural rights, were adopted in the mid-1960s. Together with the Universal Declaration, these are often referred to as the "International Bill of Human Rights", universally applicable to all human beings. However, in practice, it became evident that the principles elaborated in the "Bill of Rights" instruments were not applied to a number of important groups. As a result, specific conventions explicitly extending those rights to victims of racial discrimination, women, children, and migrants were elaborated over the three decades, 1960 to 1990.

While the conventions regarding women, children and victims of racism and discrimination have been widely ratified, there has been strong resistance to recognition of the rights of major remaining vulnerable groups: migrants and indigenous peoples. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families is not yet in force, and until very recently ratifications were slow in coming. Progress is stalled on elaborating an instrument that recognizes rights, particularly collective rights, of indigenous peoples.

Positions taken by some governments at the World Conference on Human Rights in Vienna in 1993 signalled a challenge to several decades' progress in expansion and extension of human rights towards full universality, indivisibility and inalienability. Furthermore, new challenges are being raised over whether economic, social and cultural rights are indeed at the same level with, and indivisible from, civil and political rights. Again, migration and uprooted people provide a marker to this dilemma.

#### The 1990 International Convention on migrants' rights

The 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families has been characterized as one of the seven fundamental human rights instruments that define basic, universal human rights and ensure their explicit extension to vulnerable groups worldwide (United Nations, 2000). The others are the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention for the Elimination of Racism and Racial Discrimination (CERD), Convention Against Torture (CAT), Convention for the Elimination of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC).<sup>2</sup>

Seven points emphasize the importance of the 1990 Convention:

- Migrant workers are viewed as more than labourers or economic entities. They are social entities with families and, accordingly, have rights, including that of family reunification.
- The Convention recognizes that migrant workers and members of their families, being non-nationals residing in states of employment or in transit, are unprotected. Their rights are often not addressed by the national legislation of receiving states or by their own states of origin.
- It provides, for the first time, an international definition of migrant worker, categories of migrant workers, and members of their families. It also establishes international standards of treatment through the elaboration of the particular human rights of migrant workers and members of their families.
- Fundamental human rights are extended to all migrant workers, both documented and undocumented, with additional rights being recognized for documented migrant workers and their families, notably equality of treatment with nationals of states of employment in a number of legal, political, economic, social and cultural areas.
- The Convention seeks to play a role in preventing and eliminating the exploitation of all migrants, including an end to their illegal or clandestine movements and to irregular or undocumented situations.
- It attempts to establish minimum standards of protection for migrant workers and members of their families that are universally acknowledged. It serves as a tool to encourage those States lacking national standards to bring their legislation in closer harmony with recognized international standards.
- While the Convention specifically addresses migrant workers and members
  of their families, implementation of its provisions would provide a
  significant measure of protection for the basic rights of nearly all other
  migrants in vulnerable situations, notably those who are in irregular
  situations.

Ratification or accession by 20 states is required for this instrument to "enter into force", in other words, to become operative and part of international law. It may then be used as an authoritative standard of good practice, and thus may also exercise strong persuasive power over non-party States, even though they have not agreed to be bound by its standards. So far, 16 States have become States Party to the Convention. Other States have utilized provisions in the 1990 Convention as a guide to elaborating national migration laws. A notable example is Italy, which based much of its comprehensive new national migration law adopted in March 1998 on the provisions and standards of the 1990 Convention.

#### MAIN ISSUES TODAY

#### Lack of progress on adoption and implementation of standards

That only 16 governments have ratified or acceded to the 1990 International Convention on migrants rights in ten years has not been encouraging, even if the rate of ratification has increased in the last two years.<sup>3</sup> So far, all States Party to this Convention are primarily countries of origin of migrants. In a formal sense, the very slow progress in ratifications of the 1990 International Convention on migrants' rights, coupled with explicit disinterest in this instrument, symbolize a broader general resistance to recognition of application of human rights standards to migrants, particularly undocumented migrants.

Until recently, virtually no attention had been given to promoting this Convention, either by concerned institutions within the UN system or by governments which earlier had promoted and participated in its elaboration. Until the UN Center for Human Rights (now the Office of the UN High Commissioner for Human Rights) published its Fact Sheet number 24 on Rights of Migrant Workers in September 1996 which included the treaty text, the convention was only obtainable, often with difficulty, in the form of photocopies of the original 1990 General Assembly resolution. Until January 2001, there was not one person anywhere in the world, in any international organization, in any government, or any civil society group engaged with full-time responsibilities related to promoting this Convention. This contrasts sharply with the extensive numbers of staff, volunteers and collaborators mobilized by international secretariats that assured rapid entry into force of the Convention on the Rights of the Child, the Convention on Desertification and, most recently, the Convention Against Anti-Personnel Landmines. It can also be noted that in the last ten years there has been neither active promotion nor any new ratifications of the two ILO Conventions related to migrant workers' rights.

Beyond this lack of promotion, a degree of discouragement has been articulated, in particular by a number of governments. On a number of occasions over

the last decade, this author heard comments made both in formal statements in international and national meetings and in informal discussions by officials and diplomats representing European and other Western governments, that the 1990 Convention was:

- impractical and unrealizable as an international standard in part because it is too ambitious and detailed;
- irrelevant because no host State has expressed willingness to adopt it;
   and
- essentially "dead" given the absence of progress on ratification by states during the first eight years after adoption.

Discreet diplomatic pressure was reportedly exercised by some European governments on at least one European Union member state to dissuade any formal consideration of ratification of the 1990 Convention.<sup>4</sup> In an oral statement to the UN General Assembly in December 2000 during the discussion of a resolution on migrants human rights, one delegate suggested that the lack of progress on ratification made unjustifiable any further expenditure by the UN on publicity or promotion.<sup>5</sup>

Meanwhile, proposals have been made in various international for since the early 1990s for elaboration of guidelines or minimum standards explicitly less strict and specific than those of the 1990 Convention. Such minimum standards or guidelines would substitute the Convention's explicit standards by general, vague and non-enforceable "principles" instead of detailed and explicit standards with monitoring and enforcement mechanisms. Discussion is underway within the International Labour Organization (ILO) towards revising or replacing its two migrant worker rights conventions, possibly with what is termed a general "framework convention".

#### ILO survey of the migrant workers' conventions<sup>6</sup>

To date, the only official review of the status of international instruments related to protection of migrants rights is that reported by the International Labour Office (ILO) in 1999 regarding the situation and prospects for its two conventions relating to migrant workers' rights. Similarities of concern covered by the ILO Conventions suggest that issues raised regarding these instruments are also relevant to the 1990 Convention. The ILO Migration for Employment Convention (Revised), 1949 (No. 97), and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) were observed to have relatively low rates of ratification, 41 for the former and only 18 for the latter.

In 1996, an ILO Working Party on Policy regarding the Revision of Standards invited governments to report on the state of law and practice regarding these two instruments. Many countries responded to the survey, allowing the Working

Party to analyse a range of views from all regions. An extensive report on the survey results was presented to the 1999 International Labour Conference. Several governments replied that they did not plan to ratify either of the Conventions, and several countries had ratified one but had no plans to ratify the other. In analysing responses from governments, the ILO Working Party noted that the most common reasons cited for failure to ratify the Conventions were:

- only a small number of migrant workers in the territory;
- economic instability and high unemployment rates prompting governments to give preference to nationals over foreign labour;
- lack of the necessary infrastructure to apply the Conventions and high cost of implementing the instruments;
- government intervention required by these instruments was not considered the best approach;
- reluctance to enter into multilateral commitments in the area of policy on foreigners;
- complexity of a country's immigration legislation and practice as well as the fact that its legislation on this subject was constantly evolving;
- these (ILO) Conventions are no longer considered appropriate given the characteristics of contemporary international migration.

Some countries perceived considerable legal difficulties in application of the Conventions. In the case of Convention No. 97, the provisions most frequently cited by governments as a source of difficulties were Articles 6 (equality of treatment between foreign workers and national workers) and 8 (maintenance of residence rights in the event of incapacity for work). In the case of Convention No. 143, Articles 8 (protection in the event of loss of employment), 10 (equality of opportunity and treatment) and 14(a) (right of migrant workers to occupational mobility) created the most difficulties.

Based on the survey analysis, the Working Party reached several conclusions. Taking into account these difficulties, its first conclusion nonetheless upheld the value of these instruments:

On the whole the ILO instruments seem to have fulfilled their role in orienting national laws and regulations in certain areas, including the organization of migration flows. Generally speaking, countries tend to follow the provisions made by the instruments in broad terms, but less so when it comes to provisions calling for more specific commitments, in particular with regard to the protection of migrant workers.

Two other conclusions reached by the Working Party are also particularly relevant to the discussion of the 1990 International Convention. These conclusions highlighted that:

- ensuring equality of treatment between migrant workers and national workers as regards conditions of work, social security and access to social services does not raise any difficulties in principle;
- the methods by which States carry out their obligation, under Article 3 of Convention No. 143, to "suppress clandestine movements of migrants for employment and illegal employment of migrants", may in some circumstances constitute violations of the fundamental human rights of workers.

#### **Prospects for further ratifications**

It is particularly notable that a number of governments stated that ratification of one or both ILO Conventions was envisaged or being studied without, however, indicating a time frame. These included the governments of Argentina, Australia, Colombia, Croatia, India, Lithuania, Peru, Poland, Sweden, Syria and Yemen. For example, the government of Sweden was reported to be "again investigating the possibility of ratifying Convention No. 97 in the light of changes that have occurred in its legislation". The government of the Syrian Arab Republic stated that it had begun to take concrete steps to ratify these Conventions. Other countries, Albania, Brazil, Chile, Finland, Luxembourg and South Africa, reported that ratification was envisaged once appropriate legislation had been adopted. The Republic of Korea, Morocco, and Tajikistan requested ILO technical assistance, with a view to facilitating the process of ratification.

A review regarding the obstacles and prospects for ratification of the 1990 Convention by Shirley Hune of the University of California (Los Angeles) and Jan Niessen, now director of the Brussels based Migration Policy Group, emphasized that the 1990 Convention "had the misfortune of being adopted in a time of great economic, social and political instability", which they assessed was a major impediment to ratification. In a context of increasing unemployment, they noted that a relatively hostile climate towards foreigners, particularly migrant workers, made it much more difficult for governments of host countries to adopt standards promoting equitable treatment for migrant workers. Their review identified thirteen specific impediments to ratification, most of which coincide with the outcome of the ILO survey. They also identified lack of awareness and knowledge of the 1990 Convention; lack of priority for governments to address migration issues; misperception of the character of the Convention, particularly that it is seen as "an instrument for liberal immigration policies"; a perception that granting rights to immigrants will only attract more of them; and government views of the non-applicability of the Convention to their respective goals and policies on immigration.

The Hune-Niessen review noted that the comprehensiveness of the Convention, and the related issue of substantial financial costs to supervise and implement

its numerous provisions, also represent a deterrence for some states to ratify. Other reasons cited included the poor record of some states to adopt any international standards related to human rights, and the non-acceptance by some states of measures acknowledging the rights of all migrants, particularly those in irregular or "illegal" situations.

An additional review of obstacles to ratification of the 1990 Convention was included in the recent book on migrant workers in international human rights law written by Ryszard Cholewinski. He notes:

First, the ICMW (1990 Convention) is a complex and detailed instrument, and contains new wording, which in many cases departs from established human right language. Secondly, the recent proliferation of specific human rights conventions hardly facilitates the acceptance of the ICMW's sizeable text. Technical questions alone, therefore, may prevent many states from speedily accepting its provisions. Thirdly, the lack of publicity about the ICMW has also contributed to misconceptions about the purpose of the instrument (p.202).

Cholewinski suggested several substantive obstacles, in particular that "provisions explicitly granting rights to illegal migrants are likely to hinder ratification, despite the fact that the ultimate aim of this approach is to end irregular migration altogether". He noted that the continuing global economic uncertainty, deepening gulfs between poor and wealthy nations, and the growth of migrant populations of different racial and cultural backgrounds have reduced sympathy for their conditions in the developed countries. Nonetheless, he adds, for the developing nations, "the 'new wind of liberalism' sweeping the world endangers the already precarious situation of certain vulnerable groups, such as migrant workers and their families, by failing to cater for their fundamental needs". He concluded that the very low figure of ratifications to date "is a clear reflection that, for the moment at least, the political will required to protect migrant workers and their families is lacking".

In the experience of the author, who also serves as Coordinator of the Global Campaign for Entry into Force of the 1990 Convention, the salient obstacles to wider ratification of this Convention appear to have been a general lack of awareness of it, an almost total lack of promotional efforts, and, fundamentally, a lack of political will by States to extend basic human rights protections to all migrants. However, as noted earlier, winds of change seem to be altering the earlier stagnation of this Convention. Since establishment of the Global Campaign in March 1998, the number of States Party has doubled and the number of signatories and others expressing commitment has quadrupled, a considerable shift from the record of the previous eight years. The 1990 Convention is now expected by most observers to enter into force during the year 2001.

#### "Illegalization" of migrants

The most basic manifestation of absence of respect for fundamental human rights of migrants may not be so much the lack of adoption or implementation of human rights standards for uprooted people as the denial in practice that such rights even exist or are applicable to some human beings. The sharpest manifestation of this is the now widespread categorization of persons as "illegal migrants". In a word, this categorization renders such human beings simply outside the applicability and protection of law, contrary to the inalienability of human rights protection. The imagery of this characterization is of persons with no legal status, no legal identity, no existence. The practice directly contradicts two fundamental human rights enshrined in the Universal Declaration of Human Rights: article six which states that every human being has a right to recognition before the law; and article seven that every person has right to due process. In the words of the Rapporteur of the International Conference on Migration and Crime held at Italy in 1996, "However, the term illegal migrant (or immigrant) implies a status of criminality ipso facto before any judicial determination of status. Moreover, it implies that an 'illegal' migrant is therefore a criminal. Thus, the term has to be avoided..." (Mueller, 1996).

The designation of persons as "illegal", and therefore denied both legal recognition and protection of their basic rights, is establishing legal and juridical precedents in many countries and internationally. In the view of some observers, if a major vulnerable group is de facto exempted from recognition of basic rights, it leaves open the door to measures further restricting or ignoring their rights. And once such a precedent is well established, it becomes much easier to extend such exemptions to other vulnerable, "undesirable" or unpopular groups, further undermining the *universality* of human rights protection.

This "illegalization" of migrants is the most dramatic manifestation of the resurgence of tendencies to associate migrants and migration with crime and criminality, unemployment, disease, and other social ills. Migrants, precisely because of their situation as non-nationals, and often their precarious status, make convenient scapegoats to explain problems of crime rates, deteriorating public health, lack of housing and so on, that usually result from domestic causes, including the lack of adequate government services. Even normally progressive governments are not immune to framing migration as a problematic phenomena requiring drastic measures: a press release in March, 2000 by the office of a Canadian government minister announced allocation of "\$3 million to Combat Migration Causing Development Problems in South Africa".

Ironically, research in several Western countries regarding the relationship between migrants and crime has shown that migrants and immigrants tend to

represent lower per-capita involvement in criminal activity than comparable control samples among native populations.

The first studies, conducted early in the twentieth century by the then American Institute of Criminology, at North-Western University, Chicago, clearly established (despite imperfect research methods, by modern standards) that immigrants were more law-abiding than native-born inhabitants in America. Post World War 2 studies were conducted in the 1960s by Franco Ferracuti. The results were equally clear: immigrants committed fewer crimes (in Europe) than their peers in countries of origin, or comparable groups of citizens in the host country. Several of the reports presented at this conference support such earlier findings as of today. While the reasons for such low immigrant crime rates have not been scientifically assessed, it may be surmised that three factors play a role:

- 1. the desire to succeed in the chosen new environment;
- 2. the availability of support groups of earlier and now settled immigrants from the same areas of immigration; and
- 3. the fear of deportation (Mueller, 1996).

However, migrants and immigrants were also shown to be disproportionately higher victims of crime. In both cases, researchers suggested that migrants/immigrants status as non-nationals tended to inhibit criminality because apprehension usually meant very serious and life-disruptive penalties not applying to nationals, namely deportation. On the other hand, migrants, especially those in irregular situations, are perceived as far less likely to denounce crimes to authorities and seek police protection, therefore making them easier prey for such crimes as theft, extortion, physical abuse, non-payment, etc.

Similarly, health data suggest that migrants are not usually primary vectors for transmission of communicable diseases. Perhaps most striking in this regard is recent data on AIDS transmission in several regions indicating that the absence of prevention measures in contexts of extensive and frequent cross border business, merchant and transportation worker travel and tourism – notably sex tourism – appear to be far more significant in spreading AIDS-HIV infection than movement of migrant workers or immigrants.

Providing a degree of basic human rights protections for all migrants could actually aid in crime reduction, both by encouraging migrants to seek police protection and to expose and denounce crime. Facilitation of access to health services by all migrants would also serve the interest of public health, by ensuring that persons present in a given country seek prevention and treatment of sickness or injury, rather than avoiding treatment out of fear and thus remaining at risk of affecting others.

#### Elaboration of a migration control framework

The reviews referred to above touch on what appears to be a solid trend adverse to wider recognition of human rights of migrants. The Hune-Niessen study identifies that "migratory movements are increasingly being examined from the perspective of security and stability within and between states. Large and unorderly movements and the settlement of migrant workers (new ethnic minorities as they are called in many Western European states) are perceived as undermining internal and external security and stability".

This perception of migration and its consequences appears to be widely shared among government policy makers in all regions. Intergovernmental cooperation on migration "management" has expanded very rapidly. Five years ago, only a few specialized regional intergovernmental fora addressing intergovernmental and international migration "management" existed in Europe, along with one among Central American national migration offices and one inter-regional entity, the InterGovernmental Consultations on Migration and Asylum (IGC), involving Western European and North American governments.

Today, there are regional intergovernmental consultative processes on migration management established and functioning in every region of the world. These include:

- The CIS Process, initiated in 1994 and consolidated at the International Conference on Refugees, Asylum and Migration in the Commonwealth of Independent States (CIS) held at Geneva in 1996.
- The Puebla Regional Consultations on Migration for Central America, North America and the Dominican Republic.
- The Asia-Pacific Consultations on Migration and Asylum (APC), and the related Manila Process which incorporate governments across those regions. An important event in development of Asian cooperation was the Bangkok Declaration of April, 1999 in which governments in the region adopted a commitment and framework to address irregular migration.
- The Dakar Process, for Central and Western Africa, established with the October 2000 consultation and resulting declaration in Dakar, Senegal.
- MIDSA, the Migration Dialogue for Southern Africa, which evolved out of the IMP International Migration Policy Course for (governments of) Southern Africa held at Pretoria in April 1999 and subsequent consultations organized by the International Organization for Migration and the Southern Africa Migration Project (SAMP).
- The Conference on Migration Policy in Central Asia, the Caucuses and Neighbouring States, held in Kyrghistan in May 2000, which established an ongoing follow-up process.

- The Lima Process for South America, established at a consultation held in Lima, Peru in 1999; it was explicitly initiated in view of the success of the Puebla process for Central America.

Efforts are also underway to establish a more formal migration policy network among States around the Mediterranean. Most of these established or emerging regional mechanisms are being assisted by IOM with organizational and logistical support; IOM serves formally or informally as secretariat for several of these.

Several specific entities operate in Europe as well as a number of specialized committees and agencies under the general framework of the European Union. In addition, the Council of Europe, which incorporates 41 member states from the Atlantic to the Urals, has a Working Group on Migration (CDMG) and an Expert Group on Integration and Community Relations, addressing intergovernmental concerns.

Several of these consultative mechanisms have permanent secretariats, such as the Intergovernmental Consultations for Europe, North America and Australia (IGC), the Budapest Process for Eastern and Central Europe, and the Asia Pacific Consultations.

NGOs and migrant groups have no access or dialogue to contribute to and participate in several of these international policy formulation and cooperation processes. The Puebla Consultations Process for Central and North America is a notable exception, in part due to a history of active regional NGO coordination and engagement, dialogue with governments, and advocacy, including specific requests to be consulted in regional structures, contacts, and operational cooperation. Funding for consultations and follow-up activities by most of these entities has been provided by western States; participating governments in all regions have made varying levels of contributions of time and resources.

A major impetus for the rapid emergence of many of these fora has been an explicit and generalized perception by governments that irregular migration has increased rapidly, is out of control and, for a number of countries, presents serious threats to national security and stability. Consequently, attention to topics of border control, intelligence cooperation, combating organized crime, cooperation in the return of migrants, information gathering and other concerns has dominated agendas. Conversely, human rights and social service considerations have been given little attention. Service organizations, NGOs and affected migrant groups have not had access to contribute in most of these emerging mechanisms, with the notable exception of the Puebla process for Central and North America.

Some level of formal or informal agreements for ongoing consultation and cooperation in specific areas are emerging in most of the mechanisms.

A number of bilateral accords have been achieved out of such increased intergovernmental consultation. Some make mandatory return of migrants to a country previously transited, some have been established on common visa spaces, the latter often modelled on the Schengen Accord adopted by a number of European States.

National immigration and border services of several Western countries are actively providing training, assistance and advice to counterpart agencies in other countries throughout the world. For example, the US Immigration and Naturalization Service (INS) has a mission office in Pretoria providing training to governments and assisting in organizing regional migration consultative processes for Southern Africa. However, migration management and border control systems and measures based on interests and experiences of developed industrialized countries may not be the only viable models for developing countries seeking to promote regional integration.

Over the last decade, measures have been put in place by States worldwide to place tighter controls or restrictions on cross border movements than previously existed. Imposition of requirements for visas has proliferated, not only by Western countries. Movements across borders in regions where intra-regional migration had been historically commonplace, such as Central America, Central Asia, and Southern Africa, are being increasingly subject to visa requirements and other controls. Some observers suggest that this tightening of restrictions is itself a significant causal factor in the dramatic increase in trafficking and smuggling of migrants.

Meanwhile, the emergence of two specific Protocols on trafficking and smuggling of migrants related to the new International Convention Against Transnational Organized Crime establishes legal instruments addressing migration in the context of crime suppression, prevention and punishment. While such measures are needed to combat the involvement of organized crime in trafficking of persons, there are serious risks if they are adopted and implemented outside a framework of parallel commitments to relevant human rights instruments. Without such commitments, adoption of these Protocols offers an opportunity for avoiding strong human rights protection standards in the field of migration by substitution of adoption of the Protocols as States response to migration challenges. The Convention and these two Optional Protocols were recently adopted by the UN General Assembly. Some 110 countries have already signed the Convention and some 80 signed one or both of the protocols. Adoption of these instruments without parallel adoption of the 1990 UN Convention and/or relevant ILO conventions would signal implicitly, if not de jure, elaboration of national legal regimes on migration that subordinate protections to restrictive controls on human mobility and strict enforcement concerns.

States in fact are confronted with a very complex set of circumstances in addressing migration. Elements and considerations can include:

National labour market demand for both skilled and unskilled migrants in formal and/or informal sectors; domestic unemployment; population density; impact of remittances; loss of skills ("brain drain"); temporary immigrations schemes, border control mechanisms; visa policies; exclusion and expulsion systems; return and reintegration schemes; naturalization policies; integration policies and structures; humanitarian aspects and human rights policies; refugee policies; family reunification; social, educations and medical structures; public information; migration information systems; national security considerations; foreign policy considerations; development aid policies linked to migration pressures from specific sending countries; cooperation and coordination with other States; association with other States under regional migration policies; cooperation with non-governmental and international institutions; et al. (Taran, 2000).

Migration thus affects the concerns of most branches of government, including ministries of Interior, Foreign Affairs, Labour/Employment, Health, Education, Housing, Welfare, and/or Social Affairs, and departments of Immigration, Refugee Services, Border Patrol, International Cooperation, Human Rights, Armed Forces, Public Security, National Police, Intelligence, among others. However, the elaboration of migration-related policies has been dominated in many countries by one or two ministries, usually interior or home affairs. There is still little intra-governmental consultation among other ministries or departments directly affected by migration, and even less effective cooperation and coordination.

National policy debates are often further shaped – or distorted – by the extent to which posing migration as a threat to internal stability or security is perceived as a compelling argument to obtain increased allocations of funds and other resources by concerned government agencies.

#### Dichotomization of human rights

Indivisibility of Rights vs Contemporary Protection Regimes. Many people are displaced today due to conditions that implicitly or explicitly constitute violations of their economic, social and cultural rights, both individual and collective. However, current international law has tended to recognize only victims of violations of certain political rights – refugees – as needing protection and assistance. Contrary to the notion of indivisibility, those victims facing denial of economic, social and cultural rights that often threaten their very survival, as communities as well as individuals, have no such recognition.

As an outcome of political and historical factors, an international refugee protection regime was set in place based on a definition of refugee contained in the 1951 Convention and 1967 Protocol on the Status of Refugees. For the purposes of these instruments, a refugee is defined as "a person, who is outside

his/her country of origin and, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is unable or unwilling to return".

This refugee regime is thus based on a definition which recognizes the seriousness of violations of political and civil rights, and the need for international protection of victims of such violations. The Refugee Charter of the Organization of African Unity and the Cartagena Declaration by States of the Americas expand further recognition of circumstances giving rise to protection needs, such as generalized violence and foreign intervention.

However, no such instrument nor protective measure exists for people who may be compelled to leave their homelands as a consequence of violations of economic, social and/or cultural rights, where victims perceive that survival in minimally acceptable conditions is at risk or impossible.

Repeated reiterations of the indivisibility of political and civil rights with economic, social and cultural rights have been made in international, intergovernmental fora, over the years. Yet in contrast to this general acknowledgement of indivisibility among rights, neither the seriousness of grave violations of economic, social and cultural rights nor the need for protection for victims are acknowledged in an international regime.

Conventional wisdom over the last two decades has been that opening a discussion of expanding or changing the refugee definition in the UN Convention would be counterproductive. Given the actions on the part of a considerable number of States to limit the scope of application of the refugee definition, such concerns remain well-founded. Nonetheless, it is becoming increasingly difficult to ignore the dichotomy between a regime that recognizes victims of violations of political and civil rights, and non-attention to the consequences of violations of economic, social and cultural rights. The displacement consequences of serious violations of economic, social and cultural rights, and the potential protection needs of some victims of such violations, should eventually compel an examination of possible measures to respond to those needs in an international context. While responses to such needs may not necessarily follow the models of the current international refugee protection system, the discussion cannot be avoided indefinitely within the context of an international human rights regime based on a notion of indivisibility and universality.

Some of the characterizations often made by governments, international agencies and even refugee advocates have tended to present a polarized perception to distinguish between "bona fide" refugees and other persons in migration. Characterizations of migrants perceived not to have asylum claims in accord with the Convention definition have all too often incorporated labels and terms such as "gate-crashers", "abusive claimants", opportunity seeking migrants,

economic migrants, etc. In the past, even official UNHCR pronouncements were not exempt from such characterizations.

These labels and terms implicitly dismiss any nuances or recognition of complexities of conditions and motivations for migration, and avoid any consideration whether some persons to which they are applied might have rights-based motivations for displacement. Such characterizations are not helpful in debating the wider questions of application of a human rights framework generally to migration and migrants. The sometimes appropriation of the term "protection" to refer to the specificity of provision of *protection* to refugees from refoulement under the terms of the 1951 Convention, also has sometimes obscured the broader application of this term in the field of migration to address the protection of the rights of all migrants.

The office of the UN High Commissioner for Refugees (UNHCR) has been giving increasing attention to the relationship between refugees, asylumseekers, and other migration, after, in its own admission, doing very little for a number of years. An internal UNHCR staff working group has, over the last year, thoroughly re-examined the relationships between migration and asylum and suggested new policy options. The working group produced an initial report in November, 2000, which has not yet been finalized for public distribution. The draft expresses a broad new perspective on the part of the institution, including very nuanced characterizations on the contradictions and realities of overlaps and mixed motivations among different migrating groups. The working group's output acknowledges and discusses many of the issues addressed in this article, and offers some challenging recommendations for the agency itself, for member governments and for other partners. It is anticipated that the conclusions and recommendations of the working group will be fed into the UNHCR Consultations currently being conducted with governments, NGOs and other partners worldwide.

*Protection versus Control.* Perhaps the fundamental challenge for the extension of human rights to migrants is the sharpening contention between basing an overall international approach to migration on a framework of control versus establishing a migration management framework in which human rights is a fundamental basis.

In addition to the generally control-focused agendas of some intergovernmental processes as described above, current international debates regarding refugee protection also illustrate this challenge. Some UNHCR documents explicitly describe a polarization between refugee protection and immigration control (UNHCR, 2000). Focusing on that polarity pre-defines the discussion in terms of control, law enforcement and particular perceptions of States' interests in these arenas. Such a focus often more specifically reflects the interests of certain administrative departments or units within State structures, which

find promoting a control-focused agenda as a useful vehicle to capture attention and budgetary resources. That focus almost inevitably subordinates both fundamental humanitarian and human rights considerations and economic and developmental concerns to a secondary and consequential role, rather than addressing the constellation of relevant considerations in a terminology or framework management of migration.

Unfortunately, the predominance given to migration control, particularly in Europe, is both root and reflection of the fundamental contemporary impediments to rationally and effectively addressing international migration. Migration, regular and irregular, has, does and will continue to exist as inexorably as economic forces in a globalized economy. The international community – sometimes reluctantly – acknowledges the need to manage and regulate movements of capital, goods, technology, services, information, etc., whether through formal means or "market mechanisms". It is evidently contradictory when this logic is not also applied to migration. Ironically, even Europe is now suddenly acknowledging both the need for (im)migration and the need for substantial efforts to regulate it.

Certain controls may well be a part of (im)migration regimes, but a control approach cannot be either their sole or primary determinants. To be effective and viable over time, migration policies must be built the other way around, based on long-term economic and social development considerations in the context of respect for international humanitarian and human rights norms. Control measures revert then to serve as one of the management mechanisms to implement and achieve longer-term goals in the context of phenomena that States have to deal with, no matter what.

#### Racism, xenophobia and discrimination

The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCRX), to take place in Durban in September 2001, has brought into focus the enormous dimensions of racism, discrimination and xenophobia reflected in treatment of migrants and implicit in denial of their human rights. The preparatory events for this conference in Europe and the Americas have already highlighted acknowledgement by governments in these regions that growing racist and xenophobic hostility directed at non-nationals, including migrants, refugees, asylum-seekers, displaced persons and other foreigners is serious denial of human rights, human dignity and security.

An increasing volume of documentation demonstrates that manifestations of anti-foreigner hostility include incitement to and actions of overt exclusion, hostility and violence against persons explicitly based on their perceived status as foreigners or non-nationals, as well as discrimination against foreigners in employment, housing, health care and other aspects of interaction in civil society.

Between 1991 and 1998, the ILO conducted a research project aimed at documenting and reducing discrimination in employment against migrant workers (ILO, 2000). The project was focused on a number of countries in Western Europe and North America, and its findings showed discrimination in access to employment to be a phenomenon of considerable and significant importance in all countries covered by the research (see Bovenkerk et al., 1995; Goldberg, Mourinho and Kulke, 1996; Colectivo, and Molina, 1996; Bendick, 1997; and Smeesters and Nayer, 1998). Overall net-discrimination rates of up to 35 per cent were not uncommon, meaning that in at least one out of three application procedures, migrants/minorities were discriminated against. As a consequence of the rigorous research methodology, discrimination rates uncovered by the project were assumed to be conservative estimates of what was happening in reality.

News media around the world have reported on the more virulent manifestations of xenophobia now rampant in many places. These include new or continuing brutal attacks on migrants and refugees and their residences in Argentina, France, Germany, South Africa, the US and many other countries. Other examples are recent gang attacks, widespread killings and mass expulsions of tens of thousands of African migrant workers from Libya, killings of Haitian migrant workers in the Dominican Republic, overt anti-foreigner manifestations in Japan and Korea, executions of migrant workers in the Middle East. The list is long.

The association of migrants, immigrants, refugees and displaced persons with crime and criminality, and utilization of terminology of illegality to characterize persons, are also seen as manifestations of xenophobic hostility. A major concern is the restricted or non-application of basic human and legal rights to non-nationals in laws and procedures of States. Such restrictions are usually accentuated for foreign nationals present without authorization to enter, remain or be employed in their territory, making them especially vulnerable to abuse, and unwilling or unable to seek protection from authorities when confronted with xenophobic violence.

A draft document prepared by a number of NGOs for the World Conference notes:

Tensions and manifestations of racism and xenophobia are fostered by severe economic inequalities and the marginalization of persons from access to basic economic and social conditions. Especially targeted are migrants, refugees, displaced persons, and non-nationals: those perceived to be outsiders or foreigners.

The growth of often-violent racism and xenophobia against migrants and refugees is fed by restrictive immigration policies; increasingly narrow interpretations of government obligations to protect refugees; the resulting reliance

by all categories of migrants on often clandestine means of entry; the resultant criminalization of so-called illegal migrants; the stigmatization of refugees as "bogus asylum-seekers"; and the scapegoating of migrants and refugees as criminals and the cause of unemployment (Migrant Rights International/NGO, 2001).

In many societies and States, a particular historical, cultural and sometimes racial identity continues to reign as an official and popular self-definition. However, in part a reflection of increased migration, virtually all countries today are or are becoming more multicultural, with rich diversities of racial and ethnic identities, cultures, languages, traditions, religious faiths, and national origins than classic national identities acknowledge. A promotion of "multiculturalism" – respect for the values and identities of others – is seen as one of the necessary components of changing attitudes and reducing expression of racist and xenophobic hostility against migrants, refugees and other nonnationals.

## Absence or denial of resources

At the global level, no international organization – UN, intergovernmental nor NGO – has full-time staff and corresponding resources allocated to monitoring and promoting protection of human rights of migrants in general. A striking manifestation of this is the situation faced by the UN Special Rapporteur on Human Rights of Migrants, who has only one half-time assistant, travel allocations for only one mission per year, and is offered no compensation other than coverage of travel expenses and per-diem while on official mission. Granted that this is also the situation faced by other Special Rapporteurs on thematic human rights issues, complementary attention to some of the other pressing international human rights dilemmas is provided through treaty bodies, specialized agencies and NGOs, which also have staff capacity and resources that do not exist for migrants rights concerns. This resource starvation, particularly accentuated for responses to migrants' human rights, is a sad commentary on the funding priorities of many UN member governments.

In a sad parallel, little funding has been made available from any public or private source for international NGO or IGO initiatives to promote standards, provide for staff, fund publications or communications, networking, or other activities specifically addressing human rights of migrants. The few organizations which have sought such funding from their donor bases, or from foundations in Western countries, have consistently been informed that human rights of migrants is not a priority and no funds can be made available. In 1998, the two main Scandinavian church agency funders for migration-related activities of the World Council of Churches indicated they would no longer provide funding for this area of activity. Over the last three years, more than twenty North American foundations and European funding agencies that

prominently support refugee, humanitarian and general human rights initiatives have turned down requests from the only international non-governmental organization focused on promotion of migrants' human rights; when a reason was given it was that funding this area of concern is not a priority or not possible.

Reasons for this appear to be complex, and not solely based on the political sensitivities raised by the topic of migrants' rights. An explicit tendency manifested in recent years by a large number of private foundation and other non-State donor agencies in industrialized countries is to increasingly concentrate funding on regional and local based initiatives, often within a select number of specific countries. This has resulted in less attention being given, both in internal agency structure and in grants, to supporting global or inter-regional initiatives.

The notable exception to this resource starvation is in the field of trafficking. Governments and international organizations are giving considerable attention to addressing trafficking: IOM, ILO and the OHCHR each have full time staff, have organized major conferences, and IOM, ILO and UNDP have million dollar regional programmes on trafficking. Governments and private donors have provided considerable funding to NGO initiatives addressing trafficking and provision of protection and services to victims of trafficking, especially in Asia and Europe, more recently also in the Americas. While this attention and support concretely contributes to extending awareness of human rights protection issues and needs, it is nonetheless a context where crime control, prevention and policing have generally taken precedence over a "standards" approach, which could define trafficking and law enforcement in a human rights context.

## Lack of documentation, research and analysis

Lack of attention to and resources for migrants' human rights also translates into a dearth of documentation on the incidence and character of abuse or denial of rights, a relative lack of credible data on the general conditions faced by migrants, and not a great deal of general research and literature on the topic. As noted in the introduction, a review of migration literature shows that, in many bibliographies, human rights of migrants is not even listed as a topic; when it is, the number of entries is small.

Lack of data also hampers an accurate assessment of the extent, nature and characteristics of abuse. The lack of research and documentation has contributed to lack of attention and resources allocated to respond. And to the extent that *good policy requires good data*, lack of information, research and analysis inhibits effective policy formulation and implementation by governments, international agencies and civil society actors.

# Tensions between globalization and protection of migrants

As noted above, several features of contemporary globalization are contributing to human displacement and to limited re-employment or absorption in domestic and foreign labour markets. Technological changes, while producing huge productivity increases, are also eliminating many jobs in extraction, production and distribution of goods and services.

In a world where movement across borders is increasingly controlled and restricted, displacement leads inevitably to increasing irregular migration. The propagation of images of uncontrolled movements and criminal migration produces demands for "law and order" regarding migration control that cannot be ignored by government officials responsible for migration policies.

Many observers have noted that globalization has led to increasing concentration of power and wealth in fewer hands, within countries and internationally. It appears less and less possible for national economic and social mechanisms – as they currently function – to adequately meet the needs of large sectors of populations in many countries. This increasing concentration of wealth is not leading to allocation of the resources necessary to administer, promote and defend human rights in local, national and global contexts.

It appears that reductions in allocations of resources to meet human needs and to uphold human rights may be associated with arguments and measures that relativize such rights, particularly economic, social and cultural rights. As far back as 1993, the positions taken by a number of governments at the World Conference on Human Rights signalled a strong and explicit challenge to the universality, indivisibility and inalienability of human rights. At that time, the most prominent basis cited for these challenges was cultural, historical and regional relativity of human rights. Perhaps ironically, those critiques asserted that human rights notions apply differently and to different degrees in different cultural and regional contexts; they are not fully "global".

In recent times, arguments are again being forcefully expressed that human rights are not indivisible, rather that civil and political rights should be differentiated from economic, social and cultural rights. This discourse asserts that the latter, in contrast to the former, can only be considered as ideals because they are both too costly and impractical to implement throughout the world. Furthermore, measures to extend and assure such rights require costly and extensive systems, such as welfare, food subsidies, extensive health, education and social service systems, jobs programmes, effective judicial systems, etc. Due to society-wide and large-scale needs, these systems generally require large tax revenues and management by the State. However, taxation today is often stridently characterized as an impediment to private investment,

development and economic growth, both in industrialized and developing countries.

A result of this trend to relativize human rights there appears to be a growing reluctance by a number of States to elaborate legislation which extends or underwrites human rights, especially economic or social rights. This appears to be especially so in the case for adoption of extensive and detailed standards covering a range of political, civil, economic and social rights such as those set out in the 1990 Convention on migrants' rights.

## ASPECTS AND CHARACTER OF ATTENTION

#### Main international initiatives

Global Campaign for Migrants' Rights. Recognizing that progress on human rights will be achieved only by broad cooperation among different sectors and different regions, an alliance of major intergovernmental and international non-governmental organizations came together in 1998 and launched the Global Campaign for entry into force of the 1990 International Convention on migrants' rights. The Campaign Steering Committee now includes 16 leading international bodies in human rights, labour, migration and church humanitarian fields, such as the International Labour Organization, the Office of the UN High Commissioner for Human Rights, Human Rights Watch, the Migrants Forum of Asia, the International Commission of Jurists and the International Catholic Migration Commission.

The campaign effort is premised on the need to inform, advocate and convince governments that ratification of the Convention is necessary. This can be achieved only by building awareness about the Convention with government officials, diplomats, politicians, NGOs and the public at large, nationally and internationally. Initial campaign priorities recognize that sending states have more immediate interest in ratification, just as it was not the states that mistreated prisoners that brought the Convention Against Torture into force. The campaign has already contributed to putting the migrants' rights Convention back on the agenda of a number of intergovernmental bodies. Since this campaign got underway in 1998, the number of ratifications and accessions has doubled to sixteen, and the number of additional signatories more than tripled to ten, more than in the previous eight years combined. As noted earlier, four more countries have recently announced that they are in the process of ratifying.

*UN Special Rapporteur on Human Rights of Migrants*. The symbolism alone of naming a UN Special Rapporteur on Human Rights of Migrants in 1999 was critical: mandating this Special Rapporteur for a period of three years acknow-

ledges that violations of migrants human rights are as serious as such mainline human rights concerns as torture, violence against women, racism and internally displaced persons, areas where other Special Rapporteurs have been focusing attention for some time.

The mandate and activities to date of the special rapporteur, Gabriela Rodriguez of Costa Rica, are described in her own article in this issue. Her mandate is extensive, taking into account functions of receiving information from all relevant sources, including migrants themselves, formulating recommendations to prevent and remedy violations of migrants' rights, promoting effective application of relevant international instruments, recommending actions and measures applicable at the national, regional and international levels, and taking into account a gender perspective. The challenges she faces in fulfilling this mandate are all the more daunting in the face of the minimal resources she has been allocated to date.

International Migrant's Day. On 4 December last year, the UN General Assembly officially proclaimed 18 December as International Migrant's Day! The initiative for this designation emerged some three years before among Filipino and Asian migrant organizations, including the Asia-Pacific International Migration network (APIM). The 18 December network began a campaign for official UN designation in late 1999 with support from Migrants Rights International and the Steering Committee for the Global Campaign on the migrants' rights convention. The Mexican delegation in Geneva included the proposal in a resolution adopted by the UN Human Rights Commission in April 2000; it then made its way to adoption by the General Assembly. The resolution invites UN member states, intergovernmental and non-governmental organizations to observe this day by disseminating information on human rights and fundamental freedoms of migrants, sharing experiences, and undertaking action to ensure the protection of migrants. It is expected that IMD will allow for acknowledgement and publicity of the contributions migrants make to the economies, cultures and well-being of both host and home countries worldwide. Local events were held in countries around the world on the first official IMD: officials of various governments and UN agencies issued statements, giving the initiative an initial impulse and visibility.

World Conference Against Racism and Discrimination. The 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance provides a unique opportunity to establish an international consensus and strategic programme of action to counter the discrimination, hostility and violence directed at migrants, refugees and other non-nationals living in countries not their own. Experience demonstrates that only a common international approach based on human rights law, humanitarian principles and universal respect for diversity can assure democracy and social peace in increasingly diverse societies. The arena of combating xenophobia and building

respect for non-nationals is an especially crucial agenda for this World Conference; attention to this aspect is currently being given increasing importance in the preparatory process. The UN Special Rapporteur on Human Rights of Migrants, the international NGO Working Group on Migration and Xenophobia, and the ILO are among international actors developing specific input on migration concerns for the Conference.

ILO Project on Combating Discrimination Against Migrant and Ethnic Minority Workers. Activity of the International Labour Office (ILO) on migration includes provision of assistance and technical cooperation to governments in elaboration of legislation, policy and administration, promotion and monitoring of its Convention standards on migrant workers, and programmes to extend protection of rights and dignity to especially vulnerable groups of migrants, such as domestic workers and victims of trafficking. In particular, ILO has conducted since 1991 a project to document and identify and promote remedies to discrimination in employment against migrant and ethnic minority workers. Initial activity concentrated on countries in North America and Western Europe. This effort is being expanded to address discrimination in other regions, and to develop an extensive compendium of "good practices" by governments, employers, worker organizations and others, to encourage wider elaboration and implementation of practical anti-discrimination activities and measures.

International Organization for Migration. While not actively advocating migrants' human rights as such, the International Organization for Migration (IOM) contributes through its programmes, policy development, and training and capacity building for governments. IOM legal staff and field officers make available to governments information on applicable international norms, policies and measures which contribute to protecting the basic rights and dignity of migrants. IOM has integrated concerns for protection of migrants in efforts to combat trafficking and in conducting information campaigns directed at potential migrants to raise awareness of risks. It also administers programmes providing assistance to migrant victims of trafficking and human rights abuse.

Civil Society. Much of the attention given to migrants, including towards protection of their rights and dignity in practice, has been (and is) given by the day-to-day work of local, national and regional non-governmental organizations. The one international survey of NGO activity in migration to date was conducted under the auspices of the UN Commission on Population and Development in 1997. This survey sought to identify the roles and activities of NGOs in implementing the recommendations on international migration adopted as Chapter X of the Programme of Action of the International Conference on Population and Development held in Cairo in 1994 (UN Commission on Population and Development, 1997). More than 100 NGOs reflecting activity in all regions of the world responded to an extensive questionnaire. The results demonstrated that NGOs in most countries of the world provide direct services

to migrants, some complementing their service activities with public education activities and policy advocacy with local and national government. Among the conclusions of the study was:

NGOs working in the field of international migration...provide a place for information, dialogue and cooperation between migrants (documented, undocumented and refugees), citizens, employers and government agencies in countries of origin and destination.

NGOs are involved in, among other activities: information services and orientation seminars to migrants in countries of origin; assistance in return and reintegration; in destination countries, assistance in housing, employment, health care, education, legal services, skills retraining, recognition of qualifications, etc; social, vocational and psychological counselling; addressing specific problems related to trafficking and sexual exploitation of migrants; facilitating dialogue, mediation and good relations between migrants and host country nationals; challenging racism and xenophobia; research and documentation on root causes of migration; training and public education activities, promotion of international standards and improved national legislation and policy; and cooperation with international agencies.

Examples of emerging regional NGO efforts particularly addressing migrants rights are:

- Asia is by far the most advanced, with a regional NGO migrant centre, several regional NGO organizations addressing migration and migrants rights, and a well established, functioning regional network of migrant organization setting its own agenda. The issues of migration are consistently central to the agendas of most NGO conferences in Asia. The Scalabrini Migration Center in the Philippines has produced a directory of migrant-concerned NGOs across the region, and the Asia Migrant Center together with the Migrant Forum in Asia produce a comprehensive Asia Migrant Yearbook with extensive attention to migrants rights issues as well as data on general migration conditions and NGO activity throughout the region.
- Europe has extensive networks addressing racism and xenophobia, such as "United Against Racism and Fascism" and sectoral activities related to migration (churches, some migrant networks), as well as a regional migrant organization (European Union Migrants Forum) funded by the EU to serve as a networking and lobby platform, focused mainly on EU issues. Today, there are literally hundreds of local migrant associations in countries across Europe. "United" produces a regularly updated directory of concerned NGOs.
- In Africa, the Southern Africa Migration Project (SAMP) has developed research-based networking and coordination among partners in a number

- of SADC (Southern Africa Development Community) countries. Church-related service organizations are active in many countries in the region.
- ARMIF, the Regional NGO Association on Forced Migration served as an active structure of national coalitions in Central America and Mexico during the 1990s; it catalyzed NGO engagement with the regional intergovernmental Puebla Process. A Civil Society Forum on Migration in Central and North America has now emerged; one is also being formed for South America.

Globally, there are only two organizations specifically focused on promotion of migrants' human rights: Migrants Rights International, with only two modestly-paid staff, and the 18 December "on-line network" with a portal website (www.december18.net) run by volunteers.

Six international non-governmental organizations have given specific attention, in some cases for many years, to promoting migrants human rights issues among their constituencies. These are the International Confederation of Free Trade Unions, the International Catholic Migration Commission, the International Movement Against Discrimination and Racism, Public Services International, the Women's International League for Peace and Freedom, and the World Council of Churches.

In the last three years, several major international human rights organizations have begun to expand previous concern with refugees and asylum-seekers to incorporate activity addressing migrants' human rights. Human Rights Watch conducted research and published a study on treatment of refugees and migrants in South Africa in 1997 (Human Rights Watch, 1997), and is currently conducting a major study of migrants' human rights in four Western European countries. Amnesty International and Amnesty USA have produced reports respectively documenting executions of migrants in the Middle East and abusive treatment of migrants in immigration detention.

Training Efforts. The integration of a human rights dimension into several emerging international governmental training initiatives is a recent and positive development. Perhaps exemplary is the development of the UN joint interagency International Migration Policy Programme (IMP) cosponsored by the UN Institute for Training and Research (UNITAR), the United Nations Population Fund (UNFPA) the International Organization for Migration (IOM) and the International Labour Organization (ILO), providing training, capacity building and networking for senior government migration managers in various regions of the world. Since its inception, the IMP programme has included attention to human rights of migrants and refugee protection as components in its programme to provide a comprehensive understanding of migration for government policy makers. Presentations and discussions on the applicability and implementation of human rights instruments and measures have featured

in all its regional migration policy conferences held in the Asia-Pacific region, for Central Asia, the Caucuses and Neighbouring States, for Eastern and Central Europe and in Southern Africa.<sup>11</sup>

IOM has increasingly integrated information on applicable human rights instruments and mechanisms in its numerous, regionally based training seminars for government officials. It has also initiated a project of providing training to its own staff on migrants' rights issues.

The Convention on the Rights of Migrants is one of the seven treaties covered in a series of subregional and national level workshops organized in 2000-2001 by a joint programme between the Office of the United Nations High Commissioner for Human Rights and the United Nations Development Programme. Entitled "Human Rights Strengthening", the workshops raise understanding of main treaty provisions, examine implications of ratification and inform governments of assistance available from the UN if they pursue ratification.

The Canadian Human Rights Foundation has organized several training seminars in Asia both for NGOs and government officials specifically on application of migrants' human rights. It recently co-produced with the Asia Migrant Centre, Ateneo Human Rights Centre and Asia Pacific Forum on Law and Development, a comprehensive *UN Road Map* (2000) to serve as a training manual and "guide for Asian NGOs to the international human rights system and other mechanisms".

Academia and Research. In recent years some academic research has finally begun to delve into questions of migrants' human rights. While this article does not pretend to represent a survey of the field, several salient initiatives are nonetheless noted. Published material by Richard Cholewinski, Shirley Hune and Jan Niessen has been referred to above. Helene Moussa of Canada has written extensively on migrants' rights and related topics of racism and xenophobia. Dissertations have been written by Syed Refaat Ahmed at Tufts University and by Amy Ilene Gurowitz at Cornell. Richard Perruchaud, Shyla Vohra and Heikki Mattila at IOM have produced excellent articles regarding application of human rights standards to migrants. The Asia-Pacific International Migration project and the Scalabrini Migration Centre in the Philippines have compiled considerable data. The Southern Africa Migration Project (SAMP) has sought to bring together leading academics in the region; several of their studies and reports focus on questions of migrants' rights and xenophobia; SAMP is also involved in organizing training workshops in the region.<sup>12</sup>

#### ACHIEVING MIGRANTS' RIGHTS

As noted earlier, this review is based on understandings that the rule of law and respect for universal notions of human rights are the essential foundation for

democracy and social peace. Law and human rights are proactive notions, requiring elaboration, implementation and monitoring to be effective in a changing and diverse world.

The author's experience, and that of many of the institutions cited above, suggest a number of specific lines of activity necessary for the further elaboration and implementation of migrants' human rights in particular. The overall approach begins with inclusion of protections for human rights need in the laws governing countries, and in the discourse and practice of all State and non-State actors.

More specific recommendations can be grouped by those suggested for governments, those directed at social partner and civil society actors, and a few points regarding international organizations. Most of these suggestions have already been articulated in policies and recommendations of international conferences and by international organizations. Indeed, a comprehensive, viable and still very relevant global programme of action on migration was articulated and agreed to by nearly all governments of the world at the 1994 International Conference on Population and Development at Cairo, in Chapter X on International Migration of the Programme of Action adopted.<sup>13</sup>

A comprehensive national policy and practice is required of all governments to manage migration, combat discrimination and ensure dignified treatment of both nationals and non-nationals. Only a few main lines are suggested here:

- 1. Adopt and implement main applicable international standards as a necessary framework for effective policy and administration. Key instruments include:
  - The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
  - The UN Convention on the Elimination of Racial Discrimination.
  - ILO Convention 111 on Discrimination and ILO Conventions 97 and 143 related to migrant workers.
- 2. Elaborate comprehensive national anti-discrimination legislation, including provisions to prohibit direct and indirect discrimination on grounds of actual or presumed nationality or national origin (as well as other grounds), and to assure effective judicial, administrative and other remedies for non-citizens.
- 3. Establish or improve an inter-agency consultative mechanism to facilitate coordination and coherent activity among all concerned government ministries and agencies, and incorporating expertise of international organizations, social partners and concerned NGOs.
- 4. Where non-existent, establish a national independent human rights/antidiscrimination monitoring body with independent capacity to monitor implementation of laws and seek remedies to cases of violations.

- 5. Elaborate a national Strategy and Plan of Action addressing migration, discrimination and integration, with specific designation of responsibilities for implementation of its component aspects as applicable to government entities, employers, trade unions and other organizations.
- 6. Address through such a plan of action or other means, promoting respect for diversity and multiculturalism, combating negative stereotypes and misinformation regarding foreigners, promoting anti- discrimination measures at all levels, discouraging discriminatory treatment by authorities, responding to needs and issues related to employment, labour, health care, education, housing, police protection, social protection and social security, social benefits, gender equality, access to supply of goods and services and to public places, as well as family reunion, residency and citizenship, etc.

Recommendations directed at *social partners and civil society actors* recognize a complementarily and possible cooperation with government measures in a number of areas.

- 1. Advocacy for national adherence to basic international human rights standards, for elaboration of anti-discrimination legislation and for appropriate practices remains an appropriate responsibility for civil society organizations in most countries. Given wide ratification of UN and ILO anti-discrimination instruments, emphasis is needed on ratification of the 1990 International Convention on migrants' rights. Establishment of national committees or coalitions where they do not already exist are essential mechanisms to take up promoting the Convention as well as efforts to "roll back xenophobia".
- 2. Business, trade union, religious, civil society and community leaders and organizations, politicians and political parties, parliamentarians, as well as by sports, arts and cultural personalities, need to speak out publicly, take leadership and promote initiatives to promote respect for diversity, condemn xenophobic attitudes and actions, discourage discrimination and support equality of opportunity.
- 3. Elaborate and implement national employer, trade union, NGO strategies and programmes to explicitly sanction xenophobic behaviour, monitor conditions, and support and encourage government and non-government measures and remedies at all levels, in dialogue and cooperation with local and national government to the extent possible.
- 4. Provision of direct services, attention to and support for migrants by employers, trade unions, and NGOs is an essential component of solidarity.
- 5. Develop institutions and personnel focused on and capable of professionally carrying out these activities, and promote attention by the broader civil society, particularly through public institutions national human rights bodies, legal and judicial fora, parliamentary bodies and members as well as church-based institutions and NGOs.

6. Support, link with and engage in the several international initiatives mentioned earlier, including the Global Campaign, the Special Rapporteur, the World Conference Against Racism and Xenophobia, and celebration of International Migrants Day.

*International institutions* can do more to support, facilitate and resource this process.

- 1. Dialogue and coordination among international agencies on migration, including specifically related to protection of migrants, is essential, but minimal at present. Creation of fora for regular consultation is imperative; initiatives such as the International Migration Policy Programme offer possibilities.
- 2. A standards-based approach needs to be more adequately incorporated in policies and activities of international agencies, particularly in the assistance and cooperation they provide to governments.
- 3. Consultation and cooperation between international institutions and NGOs is especially imperative in this arena, where some NGOs have accumulated far more experience and expertise.

Advancing the protection of migrants' human rights requires common approaches, strategies, coordination, and the ability to mobilize human resources. Officials and institutions of governments, international organizations, civil society organizations and migrant groups all have roles to play and contributions to make. Various initiatives noted above demonstrate that dialogue and cooperation is possible and viable among governmental, international and civil society actors. All this and more will be required to generate alternative solutions, influence the course of events and contribute to the elaboration of national policies.

#### **NOTES**

- 1. The main principles elaborated in these instruments that are especially important for migrants and other non-nationals are outlined in Heikki Mattila's article "Setting principles and building capacities", in this special issue of *International Migration*.
- 2. Texts and status of ratifications of these conventions are available on the website of the Office of the UN High Commissioner for Human Rights, at: www.unhchr.ch.
- 3. As of February 2001, the 16 States Party to the Convention are Azerbaijan, Bolivia, Bosnia-Herzegovina, Cape Verde, Colombia, Egypt, Ghana, Guinea, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka and Uganda and Uruguay. Ten other states, Bangladesh, Chile, Guatemala, Guinea-Bissau, Paraguay,

Sao Tomé and Principe, Tajikistan, and Turkey have signed the Convention, the first step towards ratification. Algeria, Ecuador, El Salvador and Indonesia have announced in international fora that they are in the process of adopting the Convention.

- 4. Interview with Anne-Marie Dupré, Director of Refugee and Migrant Services of the Italian Federation of Protestant Churches, March 2000.
- 5. Reported orally to the author by staff of an international agency observer mission to the UN.
- 6. This section draws extensively from the ILO report (1999) cited above.
- 7. Ratifying the UN Migrant Workers Convention: Current Difficulties and Prospects was published in the Netherlands Quarterly of Human Rights and in the Asia Migrant magazine, both in 1994.
- 8. Office of the Minister of Foreign Affairs of Canada, 15 March 2000, Ottawa.
- 9. Texts of this Convention and its two Protocols are available at: http://www/odccp.org/crime cicp convention.html#final.
- 10. See Global Campaign website, at: www.mirgantsrights.org.
- 11. See IMP website: www.unimp.org.
- 12. See SAMP website: www.queensu.ca/samp and article by SAMP Director Jonathan Crush in this issue.
- 13. International Conference on Population and Development: *Program of Action*, "Chapter X on International Migration", Cairo 1994, available on UNFPA website.

#### REFERENCES

Asia Migrant Centre et al.

2000 Promoting and Protecting the Rights of Migrant Workers: A UN Road Map, Canadian Human Rights Foundation, Montreal.

Bendick, Jr., M.

1997 Discrimination Against Racial/Ethnic Minorities in Access to Employment in the United States: Empirical Findings from Situation Testing, ILO, Geneva.

Bovenkerk, F., M. Gras, and D. Ramsoedh

1995 Discrimination Against Migrant Workers and Ethnic Minorities in Access to Employment in the Netherlands, ILO, Geneva.

Cholewinski, R

1997 Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment, Clarendon Press, Oxford.

Colectivo, I.O.E

"Discrimination against Moroccan workers in access to employment", in I.O.E. Colectivo, and R.P. Molina (Eds), *Labour Market Discrimination Against Migrant Workers in Spain*, ILO, Geneva.

Goldberg, A., and D. Mourinho

"Empirical proof of discrimination against foreign workers in labour market access", in A. Goldberg, D. Mourinho, and U. Kulke (Eds), *Labour Market Discrimination Against Foreign Workers in Germany*, ILO, Geneva.

Human Rights Watch

1997 Prohibited Persons: Refugees, Asylum Seekers and Migrants in South Africa, New York.

International Herald Tribune

2000 March.

2000 "US farmers are forced to rely on illegal labor", 4 October.

International Labour Office

1999 *Migrant Workers*, International Labour Conference 87<sup>th</sup> Session, Geneva, Report III: 4.

International Labour Organization

2000 "Challenging discrimination in employment: a summary of research and a compendium of measures", paper prepared by ILO, October.

International Organization for Migration

1990 Background Paper, International Migration Seminar, Geneva.

Linard, A.

1998 *Migration and Globalisation – The New Slaves*, International Confederation of Free Trade Unions, July, Brussels.

Migrants Rights International/NGO Working Group on Migration and Xenophobia 2000 Migration, Refugees and Xenophobia: Elements for a Program of Action,

Mueller, G.O.W. (Ed.)

1996 *The General Report*, Standing Rapporteur, International Conference on Migration Crime, Courmayeur, 7-9 October, Italy.

February, available at www.migrantwatch.org or www.december18.net.

Smeesters, B., and A. Nayer (Eds)

1996 La discrimination à l'accès à l'emploi en raison de l'origine étrangère: le cas de la Belgique, ILO, Geneva.

Stalker, P.

2000 Workers Without Frontiers, International Labour Organization, Geneva.

Taran, P.

1999 "Seven causes of migration in the age of globalization", International Migration Policy Course, available at: www.december18.net, Geneva.

2000 *The IMP Migration Reference Manual*, International Migration Policy Program, Geneva and Bishkok/Lake Issykul, Section 9, "National Migration Policies and Structures".

UN Commission of Population and Development

1997 Activities of Intergovernmental and Non-governmental Organizations in the Area of International Migration: Report of the Secretary General, UN document E/CN.99/1997/5, New York.

**United Nations** 

2001 Report of the (UN) Secretary General on the Status of the UN Convention on Migrants Rights, for the 55th Session of the UN General Assembly, July, Doc. A/55/205.

United Nations High Commissioner for Refugees

2000 "Reconciling migration control and refugee protection in the European Union: a UNHCR perspective", discussion paper, UNHCR, Geneva.

# DROITS DE L'HOMME DES MIGRANTS: LES DEFIS DE LA NOUVELLE DECENNIE

Cet article passe brièvement en revue les tendances, les questions, les débats, les initiatives et les acteurs principaux en ce qui concerne la reconnaissance et l'extension de la protection des droits de l'homme des migrants. Le postulat de base est que la règle du droit et les notions universelles de droits de l'homme sont des fondements essentiels de toute société démocratique comme de la paix sociale. Les faits démontrent malheureusement que les violations des droits de l'homme des migrants sont si largement répandues et sont devenues à ce point monnaie courante qu'elles sont désormais un trait caractéristique de la migration internationale contemporaine.

Environ 150 millions de personnes vivent hors de leurs pays d'origine. L'on peut voir que dans de nombreux Etats, l'application légale aux non-citoyens des normes relatives aux droits de l'homme est inadéquate ou sérieusement insuffisante, surtout lorsqu'il s'agit de migrants irréguliers. Depuis quelques années, l'hostilité manifestée à l'égard des migrants et autres non-nationaux, les abus et les violences dont ils font l'objet sont beaucoup plus notoires partout dans le monde. Les recherches, la documentation et l'analyse du caractère et de l'étendue des problèmes rencontrés et des remèdes efficaces qui sont parfois proposés restent minimales.

La résistance à laquelle se heurte la reconnaissance des droits des migrants tient à la volonté d'exploitation de ceux-ci dans des secteurs marginaux, mal considérés, insuffisamment réglementés ou illégaux de l'activité économique. Les migrants non autorisés sont fréquemment traités comme une main-d'œuvre flexible ou de réserve, à laquelle les normes de protection en matière de sécurité, de santé, de salaire minimum et autres ne sont pas applicables, et que l'on peut facilement renvoyer chez elle.

Vu sous l'angle de la mondialisation, on constate une aggravation des pressions migratoires dans de nombreuses régions du monde. Les processus inhérents à la mondialisation ont eu pour résultat d'intensifier les effets néfastes de la modernisation et du développement capitaliste, entraînant ainsi l'insécurité économique et l'exil de bon nombre de personnes.

L'extension des principes de la Déclaration universelle des droits de l'homme a culminé avec la Convention internationale de 1990 sur la protection des droits de tous les travailleurs migrants et des membres de leurs familles. Cette convention n'ayant suscité que peu d'attention, la progression des ratifications a été très lente jusqu'il y a deux ans. Une campagne mondiale a suscité un regain d'intérêt et l'on peut à présent espérer son entrée en vigueur pour 2001. Une analyse comparative révèle que les conventions de l'OIT consacrées aux travailleurs migrants ont généralement atteint leurs objectifs, mais que les Etats

se sont opposés à l'adoption de toute norme concernant le traitement des nonnationaux.

Une contre offensive axée sur le déni du caractère universel, indivisible et inaliénable des droits de l'homme est à la base de la résistance qui s'exerce face à la volonté d'extension aux migrants de la protection offerte par les droits de l'homme. Il existe encore une tendance parallèle, à savoir l'association délibérée de la migration et des migrants avec la criminalité.

La traite des êtres humains est apparue comme un thème mondial contextualisant la migration dans un cadre de lutte contre le crime organisé et la criminalité, ce qui a pour effet de subordonner la protection des droits de l'homme aux mesures anti-criminalité.

La coopération intergouvernementale en matière de "gestion" des migrations se développe rapidement, avec l'apparition dans toutes les régions du monde de processus consultatifs intergouvernementaux de portée régionale, généralement axés sur le renforcement de la coopération entre Etats au niveau du contrôle et de la prévention de la migration irrégulière par l'amélioration des contrôles aux frontières, l'échange d'informations, les accords en matière de retour et autres mesures.

Les efforts déployés pour défendre les droits de l'homme des migrants et combattre la xénophobie restent dispersés, limités en termes d'impact et lourdement handicapés par le manque de moyens. Néanmoins, les ONG partout dans le monde offrent leurs conseils et leurs services aux migrants et leur viennent en aide en leur offrant une éducation publique et en défendant le respect de leurs droits et de leur dignité. Plusieurs initiatives internationales mettent à présent en lumière les problèmes de protection des migrants, à savoir principalement la création d'un poste de Rapporteur spécial des Nations Unies sur les droits de l'homme des migrants, la campagne mondiale de promotion pour la ratification de la Convention des Nations Unies de 1990, la proclamation par l'Assemblée générale des Nations Unies de la Journée internationale des migrants, la Conférence mondiale de 2001 contre le racisme, la xénophobie et la discrimination, organisée par l'OIT, et la formation assurée par l'OIM.

Les suggestions faites aux gouvernements soulignent la nécessité de définir une politique et des pratiques globales et coordonnées dans le domaine de la migration, basées sur des préoccupations économiques, sociales et de développement plus que sur des mesures de contrôle prises à titre de réaction, le but étant d'instaurer un régime migratoire bénéfique, l'harmonie sociale et le traitement digne des nationaux comme des non-nationaux. Les ONG, les entreprises, les syndicats et les groupements religieux sont incités à prôner le respect des normes internationales, à professionnaliser les services offerts, à mener la lutte contre les attitudes xénophobes et à se rallier aux initiatives

internationales. On note également le besoin d'une attention accrue pour les initiatives consacrées aux droits des migrants et pour la coopération entre organisations internationales.

# DERECHOS HUMANOS DE LOS MIGRANTES: LOS DESAFÍOS QUE TRAE CONSIGO EL NUEVO DECENIO

Este artículo resume las principales tendencias, cuestiones, debates, actores e iniciativas con relación al reconocimiento y extensión de la protección de los derechos humanos de los migrantes. Su premisa es que el imperio de la ley y las nociones universales de derechos humanos son los cimientos esenciales de una sociedad democrática y de la paz social. Se ha demostrado que las violaciones de los derechos humanos están tan difundidas y son tan comunes que caracterizan la migración internacional de hoy.

Alrededor de 150 millones de personas viven fuera de sus países; en muchos Estados, la aplicación jurídica de las normas de derechos humanos a los extranjeros es inadecuada o tiene serias carencias, especialmente en relación a los migrantes irregulares. La hostilidad difundida, el abuso y violencia hacia migrantes y otros extranjeros se ha hecho más visible en los últimos años a nivel mundial. La investigación, documentación y análisis de las características y del alcance de los problemas y de los remedios efectivos siguen siendo ínfimos.

Al no querer reconocer los derechos de los migrantes se da lugar a su explotación en sectores de la actividad económica marginales, de bajo nivel, poco reglamentados o ilegales. Los migrantes ilegales a menudo son tratados como una reserva de mano de obra flexible, sin beneficiar de la protección de la seguridad del empleo, de asistencia de la salud, de un sueldo mínimo y de otras normas, y también pueden ser fácilmente deportados.

Es un hecho que la globalización está empeorando las presiones migratorias en distintas partes del mundo. Los procesos que acompañan la globalización han intensificado los efectos perturbadores de la modernización y el desarrollo capitalista, contribuyendo a la inseguridad económica y al desplazamiento de muchos.

La extensión de los principios de la Declaración Universal de los Derechos Humanos culminó en 1990 con la Convención Internacional sobre la Protección de los Derechos de todos los Trabajadores Migratorios y sus Familiares. Hasta hace dos años se prestó poca atención a esta Convención por lo cual el proceso de ratificación era sumamente lento. Una campaña a nivel mundial reavivó la atención; es probable que dicho Convenio entre en vigor en 2001.

El análisis comparativo demuestra que las convenciones de la OIT para los trabajadores migrantes, generalmente han conseguido sus objetivos pero que los Estados se resisten a adoptar normas sobre el trato que se ha de dar a los extranjeros.

La contraofensiva contra los derechos humanos que son universales, indivisibles e inalienables está subyacente en la resistencia a extender la protección de derechos humanos a los migrantes. Una tendencia paralela es la asociación deliberada de la migración y de los migrantes con la delincuencia.

El tráfico de personas ha surgido como un tema mundial que confina la migración en el marco de la lucha contra el crimen organizado y la delincuencia, subordinando la protección de derechos humanos a medidas de control y de lucha contra la delincuencia.

La cooperación intergubernamental sobre la "gestión de la migración" está aumentando raudamente y dando lugar a procesos de consulta intergubernamentales regionales en todos los continentes, generalmente centrados en consolidar la cooperación entre Estados, en controlar y prevenir la migración irregular a través de mayores controles fronterizos, en el intercambio de información, y en acuerdos de retorno y en otras medidas.

Los empeños para defender los derechos humanos de los migrantes y luchar contra la xenofobia siguen siendo fragmentarios, limitados en su impacto y carecen de recursos. Ello no obstante, las ONG en todas las regiones ofrecen orientación, servicios de asistencia a migrantes, educación pública y velan por el respeto de los derechos y dignidad de los migrantes. Varias iniciativas internacionales ahora ponen de relieve las preocupaciones de protección de los migrantes, especialmente el nombramiento de la Relatora especial de las Naciones Unidas sobre derechos humanos de los migrantes, la Campaña Mundial para promover la Convención de las Naciones Unidas de 1990, la proclamación por las Asamblea General de las Naciones Unidas del Día Internacional del Migrante, la Conferencia Mundial de 2001 de Lucha contra el Racismo y la Xenofobia, las actividades antidiscriminatorias de la OIT, y la capacitación que ofrece la OIM.

Entre las sugerencias formuladas a los gobiernos se pone de relieve la necesidad de definir una política y práctica globales, coordinadas en materia de migración y basadas en cuestiones económicas, sociales y de desarrollo, en lugar de medidas reaccionarias de control a fin de asegurar los aspectos benéficos de la migración, la armonía social y el trato digno de nacionales y extranjeros. Se ha exhortado a las ONG, empresas, sindicatos y grupos religiosos a velar por el respeto de las normas internacionales, a profesionalizar

sus servicios y competencias, a desempeñar papeles preponderantes a la hora de oponerse a un comportamiento xenófobo, y a adherir a iniciativas internacionales. También se ha puesto de relieve la necesidad de que las organizaciones internacionales concedan mayor atención a las iniciativas de derechos de los migrantes y a la cooperación interinstitucional.

	·

# Protection of Migrants' Human Rights: Principles and Practice<sup>1</sup>

Heikki S. Mattila\*

### **ABSTRACT**

In principle, migrants enjoy the protection of international law. Key human rights instruments oblige the States Parties to extend their protection to all human beings. Such important treaties as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights have been ratified by more than 140 states, but many political, social or economic obstacles seem to stand in the way of offering those rights to migrants.

In an attempt to bridge this protection gap, the more specifically targeted International Convention on the Protection of All Migrant Workers and Members of their Families was created and adopted by the United Nations in 1990. This treaty is not yet in force, but the number of States Parties is increasing towards the required 20.

In the past few years the human rights machinery of the United Nations has increased its attention towards migrants' human rights, appointing in 1999 the Special Rapporteur on the Human Rights of Migrants. Governments, as the acceding parties to international human rights instruments, remain the principal actors as guardians of the human rights of all individuals residing in their territories.

Receiving countries are in a key position in the protection of the migrants that they host. However, active defence of migrants' rights is politically difficult in many countries where anti-immigrant factions are influential.

Trafficking in migrants is one example of the complexity faced by states in formulating their migration policies. On the one hand, trafficking has made governments increasingly act together and combine both enforcement and

<sup>\*</sup> International Organization for Migration (IOM), Geneva, Switzerland.

protection. On the other, trafficking, with its easily acceptable human rights concerns, is often separated from the more migration-related human smuggling. The latter is a more contentious issue, related also to unofficial interests in utilizing cheap undocumented immigrant labour.

#### INTRODUCTION

Along with increased attention being given by the international community to human rights issues in general is the specific issue of migrants' rights. This is due, in part, to active reporting in the media of gross human rights violations in the context of migratory phenomena, such as trafficking (in particular in women and children), and the extensive use of undocumented migrant labour in the informal economy.

Economic factors predominate in motivating international migration. Lack of opportunities for work or education in the country of origin; demand for immigrant labour in receiving countries; and the possibility of improving the economic situation of their family through remittances, collectively explain why about 100 million of the globally estimated 150 million international migrants are migrant workers or their family members.

Although skilled migrants are in great demand, notably those with experience in information technology, most migrants are offered jobs that require little training or skills. Garment and textile, agriculture, construction, food processing and packing industries are employing migrants all over the world, legally and illegally. As global liberalization of trade exposes enterprises to globalized competition, pressures increase to lower costs. Companies are increasingly moving their production, or subcontract, activities in the informal sector to places where legal requirements of pay and working conditions are not followed. Because undocumented workers have practically no bargaining power, their employers can pay lower wages and offer no job security or safety in the workplace. In extreme cases, migrants are kept in dangerous and unhealthy workshops as virtual slaves and prisoners. Examples of such situations can be found on all continents.

Trafficking and smuggling in migrants can include a variety of severe violations of basic human rights, ranging from limitations of personal freedom, physical and mental abuse, violence, threats and economic exploitation.

In principle, migrants enjoy the protection of international law. The most important human rights treaties have been widely ratified and extend protection to all human beings. States are, in principle, committed to extend protection to migrants but, for a number of reasons, fail to do so. This gap is not covered by instruments that specifically focus on migrants' rights, such as ILO Conventions

No. 97 and No. 143, and in particular the United Nations 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which have not been ratified by many states and cannot, even in theory, provide much support or protection.

Although migration policies are increasingly formulated at international levels, individual states, as parties of international human rights treaties, remain the main guardians responsible for migrants' human rights. During the past few years, migrant-sending countries and international governmental and non-governmental organizations have paid growing attention to migrants' human rights.

## HUMAN RIGHTS IN INTERNATIONAL LAW<sup>2</sup>

The basic document of the modern international human rights regime is the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948. Its thirty articles cover a wide range of human rights, including the following:

- right to life, liberty and security of person (Art. 3);
- prohibition of slavery or servitude (Art. 4);
- prohibition of torture or inhuman or degrading treatment or punishment (Art. 5);
- right to be presumed innocent until proven guilty and prohibition of retroactive penal legislation (Art. 11);
- right to respect for private and family life, home and correspondence (Art. 12);
- right to leave any country and to return to one's own country (Art. 13);
- right to freedom of thought, conscience and religion (Art. 18); and
- right to freedom of expression (Art. 19).

Other rights included in the Declaration are the right to recognition and equality before the law, public hearing before tribunals, prohibition of arbitrary arrests, detention or exile. The Declaration also cites the right to nationality, the right to marry and found a family, the right to work and social security, and the right to education.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966 in an attempt to put the rights listed in the Universal Declaration into legal instruments which, unlike the Declaration, are binding. As both instruments have clauses obliging the State Parties to guarantee the rights to all persons within their jurisdiction, their application is not restricted to nationals of the ratifying states. All migrants, including irregular ones, are

entitled to the protection of these instruments, in particular the ICCPR. For ICESCR, some qualifications are provided for the gradual granting of rights. For example, Article 2(3) of the ICESCR provides developing countries the right to determine the extent to which they would guarantee economic rights recognized in the Covenant to non-nationals.

The two covenants have been widely ratified: in December 2000 the Covenant on Civil and Political Rights by 147 states, and the Covenant on Economic Social and Cultural Rights by 143 states. The Universal Declaration, the ICCPR and ICESCR together form the International Bill of Human Rights.

Among other international instruments that address specific issues in the protection of migrants' human rights are the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), adopted in 1965, which condemns discrimination based on race, colour, descent, national or ethnic origin, and provides a list of rights that State Parties should, through their national laws, guarantee to all without discrimination. The International Convention on the Rights of the Child (1989) and the Convention on the Elimination of All Forms of Discrimination against Women (1979) are similarly committed to the principle of non-discrimination.

The Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1984) promotes the prohibition of torture and the infliction of other degrading treatment, and extends the principle of non-refoulement to apply to all cases where there are reasons to believe that a person would be tortured if returned to his or her own country.

The application of each of the above-mentioned six international covenants is monitored by an expert Committee that is part of the human rights machinery of the United Nations, administered by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Geneva. The Committee receives reports from governments of the State Parties of the conventions. Also, NGOs of these states have the opportunity to share information and views with these treaty bodies. Based on their assessment of the information that they receive, the treaty bodies issue recommendations to the reporting states for measures to develop protection of human rights.

Many regional human rights instruments also contain provisions which apply to all individuals, both nationals and non-nationals, within the states. Such regional treaties include the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the African Charter on Human and Peoples' Rights (1981) and the American Convention on Human Rights (1969).

At the regional level, and on the basis of regional instruments, human rights tribunals such as the European Court of Human Rights and the Inter-American

Court of Human Rights review appeals concerning individual cases raised in attempts to obtain correction to alleged violations of human rights.

## INSTRUMENTS ON MIGRANTS' RIGHTS

The term "migrant" is generally thought to imply a migrant worker or an economic migrant. "Migrant worker" has been defined as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national.<sup>3</sup> In the 1951 Geneva Convention and the 1967 Protocol Relating to the Status of Refugees, refugees are defined as persons, who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion", have been forced to leave their country. In addition to individuals fulfilling this definition, millions of persons who have been forced to leave their country due to internal strife, warfare, or man-made disaster, are stated to be "of concern" (as indicated on the website of the organization) to the United Nation High Commissioner for Refugees (UNHCR). Along with other relief agencies, UNHCR is also concerned with internally displaced persons (IDPs) who, having stayed within the borders of their country, formally do not fulfil the criteria set out in the 1951 Geneva Convention. The global figure of IDPs has been estimated at 25 to 30 million.

Today, the categorization between migrant and refugee is becoming increasingly problematic and less clear-cut, as poverty, economic and social deprivation, religious and political rule or discrimination of women push many persons to leave their countries. Although actual protection of refugees is extended to a significantly larger group than the legal definition of refugee would imply, refugees, on the other hand, are outside the scope of the international instruments focusing on the rights of migrants.

Basic rights concerning migrants are the rights to leave any country and the right to return to one's own country. These rights are older principles in international law than the current human rights regime, but are also stated in Article 13 of the Universal Declaration and in ICCPR in Article 12. The problem with the right to leave a country is that there is no corollary right to enter another country. On the contrary, one of the most recognized principles of state sovereignty is the right of states to decide on conditions of entry. However, irregular immigrants, although violating the rules set by the receiving country concerning entry, do not fall outside the protection obligation set on the host country in the two covenants of the International Bill of Human Rights.

In addition to the general human rights instruments covering all individuals such as the Universal Declaration, a number of international instruments deal

specifically with migrants' rights. The International Labour Organization (ILO) has initiated international labour standards for the benefit of migrants. The principal instruments in this regard are the Migration for Employment Convention of 1949 (No. 97) and the Migrant Workers Convention of 1975 (No. 143). The first focuses on recruitment and working conditions of migrant workers and establishes the equality of treatment principle among nationals and non-nationals. This is a fundamental principle underlying the ILO's work in promoting standards for work and labour market.

The more recent convention is, *inter alia*, aimed at the protection of irregular migrants; it also obliges State Parties to take all necessary measures to suppress illegal migration and to pursue the organizers of illegal movements. It also takes further the principle of equality of treatment and lays down the obligation to respect the fundamental human rights of all migrant workers.

The most noteworthy international instrument focusing on migrants' rights is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the United Nations General Assembly in 1990. The adoption of this instrument was an attempt to restate and reaffirm the basic human rights in other instuments, discussed above, and to bring them together in one instrument specifically applicable to migrants.

Although the Convention defines various categories of migrant workers, it affirms in Article 7 that the basic human rights enumerated in the Convention shall be applied to all without any distinction. Although reference is made to irregular workers, the Convention lists a comprehensive set of civil, political, economic, social and cultural rights applicable to all migrant workers and their families regardless of their status.

Besides the promotion of equal entitlement to basic human rights of both regular and irregular migrants, the Convention (Part IV) grants additional rights to regular migrants. These include the right to liberty of movement within the territory of the host State (Art. 39), and the right to form associations and trade unions (Art. 40). This section also applies the principle of equal treatment with nationals for documented migrant workers and their families in areas such as education, housing or social services.

Indeed, although the Convention aims to grant the same basic human rights to all migrants, including the undocumented, one of its major goals is to promote legal migration and call upon State Parties to take measures against the illegal entry and illegal employment of migrant workers. Sanctions against persons who organize irregular movements, and against employers of undocumented workers, are recommended in Article 68.

Adopted in 1990, the Convention has still not entered into force because the required 20 ratifications have not been reached. The number of ratifications and accessions was 15 in December 2000 with ten signatory States moving in various speeds towards ratification.<sup>4</sup> Many traditional migrant receiving states had earlier indicated that they do not intend to ratify the instrument because some rights, in their view, are covered by other human rights instruments, which are equally applicable to migrants as to all other individuals. Also, recognition of irregular migrants' rights undoubtedly keeps states from ratifying the large (93 articles) instrument. In 1998, a global campaign for ratification of the 1990 convention was launched by a group of international organizations.

#### RECENT ACTIVITIES AND INSTITUTIONS

# Working group of intergovernmental experts on the human rights of migrants

The task of pointing out noteworthy issues on migrants' rights was carried out by the Working Group of Intergovernmental Experts on the Human Rights of Migrants, appointed by the United Nations Human Rights Commission in its 53rd session in 1997. The five member group was required to study the worldwide situation concerning migrants' human rights, to identify obstacles to the effective protection of these rights, and to provide recommendations. Led by Mexican Professor Jorge Bustamante, The Group's final report was presented to the Commission at its 55th session in spring, 1999.

The Working Group's report and recommendations strongly put forward the view that migrants, inherently outsiders in the host society, suffer from relative powerlessness, which makes them a vulnerable group. The Group recommended adopting the wording used by the High Commissioner in her speech in 1997<sup>5</sup> that migrants need to be *empowered* through strengthening the protection of their human rights.

Having studied the work of the UN human rights system, the Working Group concluded that, despite the fact that migrants in principle enjoy the rights enumerated in the Universal Declaration and other human rights instruments, the monitoring system provided by the treaty bodies cannot devote much time to safeguarding the rights of migrants. Therefore, two of their main recommendations were, (1) more effort should be taken to speed up ratification of the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in order to bring into force an instrument especially concentrating on migrants' rights; and (2) a specialized mechanism for follow-up of the protection of migrants' rights should be created in connection with the United Nations Human Rights Commission, preferably by the creation of a position of Special Rapporteur.<sup>6</sup>

In its report (UN, 1999a), the Working Group also presented a list of what it found to be obstacles to the effective and full protection of the human rights of migrants. The obstacles were grouped under institutional, social and economic.

One basic *institutional obstacle* was "the absence, non-application or non-recognition of the universal standards and norms in national law which explicitly recognize and extend to migrants basic human rights". The report noted that while numerous countries have incorporated international human rights standards in their domestic legal systems, they have restricted their application to citizens and nationals. Another major institutional shortcoming was failure to ratify international instruments specifically dealing with migrants' rights, such as the ILO Conventions 97 and 143, and the UN 1990 Convention. The Working Group also emphasized the vulnerability of migrants because of the lack or weakness of their own associations, which some states consider as hostile and threats against public order. Other institutional obstacles were abuse of human rights in connection with expulsions, and insufficient training of law enforcement officials in the field of human rights.

Under *social obstacles*, the Group included social exclusion as a result of residential segregation and concentration of migrants' housing in less favoured urban areas. This caused disadvantages in access to public education, health care and employment, situations easily inherited by their offspring. More serious was the active and hostile categorization, stereotyping, scapegoating of migrants for domestic social and economic problems as well as xenophobia and racism.

Under *economic obstacles*, the Group identified discrimination in access to employment as an important obstacle to their integration into the host society. If employed, there was a tendency for migrants to be working in jobs at the low end of the labour market, often described as 3D (dirty, degrading and dangerous), thus contributing to the ethnic segmentation of the labour market. This is linked directly to the growing informal sector which employs many undocumented migrants who are exploited in a number of ways.

The Working Group identified three groups of migrants likely to be especially subjected to degrading treatment, often on the borderlines of legal and illegal sectors: women and children, especially those put to work in prostitution and pornography; domestic workers because of their isolation which leads to conditions of long working hours, poor remuneration, and lack of access to social security; and farm and seasonal workers who were especially vulnerable because of their low education, short-term employment, isolated and hazardous working conditions and lack of protection because of protectionist policies which favour agro-business.

The Working Group's extensive recommendations addressed various obstacles established in its report. It urged states to ratify relevant instruments of

international law, enact national laws according to the principles given by the international instruments, including family re-unification and revising rules on acquisition of nationality, but also extend human rights standards to irregular migrants in the informal economy. States were also prompted to promote migrants' right of association, raise positive awareness on migrants' contributions to the economy, and inform authorities on the human rights of migrants. On the economic side, states were urged to assess their labour market needs in order to adjust legal intakes, adopt punitive measures for employers of irregular migrants, and advance national and international anti-trafficking legislation in cooperation with sending, transit and receiving countries. The recommendations are listed in the Appendix (page 68).

Many of the issues pointed out by the Working Group have been advanced, and there has also been a general tendency to bring migrants' rights more to the fore. Some progress has been made within organizations dealing with human rights: UN human rights structures, related international law and non-governmental organizations.

Action against abusive forms of irregular migration such as human trafficking has led to increased law enforcement against traffickers, active awareness raising and other preventive dissemination of information, and launching of support services to migrants and victims of trafficking. Although many of these activities are not introduced as measures advancing human rights, most of them have a direct positive effect on migrants' safety and protection.

# Special Rapporteur

One of the main recommendations of the Working Group was to create a specific monitoring mechanism within the UN's human rights system to follow-up and develop protection of migrants' human rights. This was supported by the Human Rights Commission at its 1999 session, and in August 1999 led to the appointment of the Special Rapporteur for a three year period.

According to the brief terms of reference for the Special Rapporteur, defined in the Resolution 99/44 of the Human Rights Commission, his/her tasks are:

- (a) to request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families;
- (b) to formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants, wherever they may occur;
- (c) to promote the effective application of relevant international norms and standards on the issue;
- (d) to recommend actions and measures applicable at the national, regional and international levels to eliminate violations of the human rights of migrants; and

(e) to take into account a gender perspective when requesting and analysing information, as well as to give special attention to the occurrence of multiple discrimination and violence against migrant women.

The Special Rapporteur prepares yearly reports to the UN Human Rights Commission, based on her country visits and dialogue with governments and other instances.<sup>8</sup> Another task of the Rapporteur is to reply to urgent appeals concerning concrete situations. In addition, the Special Rapporteur is expected to cooperate with the preparatory committee of the coming World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, to be arranged during Autumn 2001.

# Campaign for the ratification of the 1990 Convention

In 1998, a group of international NGOs and intergovernmental organizations launched a global campaign to influence governments to ratify the 1990 UN Convention on the Protection of Rights of Migrants Workers and Members of Their Families. The campaign is led mainly by regional and national NGOs.<sup>9</sup>

Increased activity regarding migrants' rights seems to coincide with a revived flow of new ratifications and accessions to the 1990 Convention, bringing it slowly but steadily towards "entry into force". At December 1997 only nine States Parties had acceded to the convention; in January 2001 the number had increased to 15. Eleven additional states have signed the treaty, with several proceeding with the ratification process. Entry into force, which should be achieved in the not too distant future, entails, within six months, the creation of a new treaty body, Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, as provided in the Article 72 of the Convention.

One recent reminder was the proclamation of the UN General Assembly, in November 2000, of December 18 as the International Migrant's Day. In the resolution, UN member states were invited to observe the day by disseminating information on the human rights of migrants, sharing of experiences and designing action for their protection. The 1990 Convention has also been highlighted in the preparatory process of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, to be arranged in South Africa in the autumn of 2001.

# Challenges to fill the protection gap

At a more concrete level, an urgent need for protection measures has been identified, including for the improved protection of migrant women. The feminization of migration, together with the economic pressures of globalization, seem to have led to the exploitation of the "comparative advantages of

women's disadvantages" (Lim, 1998). Many studies show that for immigrant women, shortcomings such as lack of language skills, low level of formal education, discrimination faced as women and as immigrants, and their temporary or undocumented status, have led a cumulative effect which has exposed them to abuse.

A research project carried out in 1999 jointly by the International Organization for Migration (IOM) and the United Nations Research and Training Institute for the Advancement of Women (INSTRAW) on the dynamics and effects of women's temporary labour migration from Sri Lanka and Bangladesh to the Middle East, produced many interesting viewpoints on women's migration. While labour migration gave access to earnings and empowerment in economic, social and family contexts, the gains too often came with a cost. In addition to sacrificed family life, a large number of women were mistreated through physical or verbal abuses, restricted in their freedom of movement or in contacts with family, and not paid agreed salaries.

The recommendations of the IOM/INSTRAW project included a comprehensive list of measures to make women's migration more orderly and safe and to empower them against abuse. Sending and receiving governments were urged to work together, and recommended, *inter alia*, to arrange pre-migration training, make available assistance of consular officials and provide health care and support networks in the destination countries. Governments were also urged to adhere to relevant international legal instruments concerning the human rights of women and migrants, to set up mechanisms to monitor both the conditions of migrant women and the agencies that recruit women for labour migration, and to set up reintegration programmes for returning migrant women (INSTRAW and IOM, 1999).

Intergovernmental cooperation for developing comprehensive migration policies is of utmost importance. Many regional consultation processes on migration issues have been created, especially directed at understanding and attempting to resolve irregular migration and trafficking. Both the Special Rapporteur and the earlier Working Group referred to these regional new institutions as important fora for advancing migrants' rights.

At the global level, the new UN Convention against Organized Transnational Crime and its concomitant Protocols on human Trafficking, and on Smuggling, were adopted by the UN General Assembly in late 2000. Adoption of the trafficking and smuggling protocols added new items to the short list of global codes on international population flows: the 1951 refugee convention and the 1990 convention on migrants' rights. The two protocols are important instruments in combining preventive action, law enforcement and remedial and protection measures. While these components contribute to protection of the trafficked migrant, the "test" will come with their implementation. Trafficking,

an extremely complex phenomenon, has led migration policy makers to formulate wide ranging approaches that seek to synthetize enforcement and protection. A similar comprehensive approach characterizes the new trafficking law approved during October 2000 in the US.

Despite these comprehensive approaches, the making of national migration policies is a delicate balancing act between the views of those representing often segregated and mutually conflicting interests of immigration control, integration of immigrants, humanitarian policies, and a variety of economic actors. Employers, trade unions, humanitarian advocacy groups, neighbouring states, the international community, the migrants themselves, all attempt to influence national policies. Because migration is such a complex field with many contradicting pressures, it is difficult to form and articulate a coherent policy. Populist parties usually offset the complex reality with simplistic and biased demagogy.

The many interests also lead to the splitting and sectorizing of migration policies. One example is the split between trafficking and smuggling of migrants. Trafficking is a gross violation of human rights and a safe and undisputed target for active enforcement and protection, especially when women and children are the victims. Trafficking is nowadays usually separated (the two mentioned protocols being the main example) from smuggling which (although very often an element in the trafficking of migrants and, as such, involving mistreatment of migrants) is for the most part seen as illegal immigration and fought against with bold border enforcement. However, many receiving countries have an ambiguous relationship with illegal immigration: it is fought against at borders but undocumented immigrant labour, which can be a cheap factor of production and beneficial for competitiveness, is tolerated to some extent and regularized according to labour market needs. Regularization programmes, of course, also aim to improve the working and living conditions of undocumented migrant workers and their families.

In the dialogue between migrant sending and receiving countries, if it occurs, sending countries are interested in both receiving remittances and in protecting their expatriate citizens, whilst receiving countries wish to control illegal entry, but acknowledge that imported labour, legal and illegal, is needed to retain economic growth. In receiving countries with strong and vocal anti-immigrant movements, official defence of migrants and migration to service economic growth is difficult to achieve. In countries with a growing informal sector, support mechanisms for immigrants need to be built in cooperation between sending and receiving countries, often with financial assistance from the latter.

Migration policies are increasingly formulated in international fora, regionally and globally. In the European Union, the aim is to create one Community policy common to all Member States. However, governments, as parties of the

international human rights instruments, remain mainly responsible as guardians of the protection of human rights. To fill gaps in migrants' protection, the obligations of the widely ratified human rights instruments to extend the protection to migrants need to be made better known among States along with measures specifically directed to migrants.

The regional processes provide important fora for governments and organizations to combine efforts in promoting orderly migration. Cooperation is needed to reduce pressures to emigrate because of poverty and lack of opportunity. Poverty with its various manifestations, many of them shortcomings of political, economic and social rights as listed in ICCPR and ICESCR, is a violation of many human rights. Therefore, long-term cooperation and assistance for the creation of jobs, opportunities for education for all, and avenues for women to gain equal opportunities and independence, are needed to curb the increase in irregular migrants who are especially vulnerable to human rights violations, and thus make the "option to remain in one's own country a viable one for all", as stated in the Plan of Action issued in the International Conference on Population and Development, held at Cairo in 1994.

#### **NOTES**

- 1. An updated version of a basic review paper of human rights law and migrants' rights, titled "Principles of protection of migrants' human rights", written by the author for an IOM seminar Consular Protection and Assistance: Exchange of Experiences held in Guatemala City on 29-30 July 1999.
- 2. This, and the following section of the article, which review migrants' rights in international human rights instruments, rely heavily on an IOM paper, "Identifying core rights of concern to migrants", by R. Perruchoud and S. Vohra, and its later extended version (September 2000), "Legal standards for the protection of migrant workers", by R Perruchoud.
- 3. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 2.
- 4. In December 2000, the 15 states parties of the Convention were: Azerbaijan, Bolivia, Bosnia and Herzegovina, Cape Verde, Colombia, Egypt, Ghana, Guinea, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka and Uganda.
- 5. The concept of migrants' empowerment was taken from a speech by the High Commissioner, Mary Robinson, delivered at Oxford in 1997.
- 6. At the moment, the UN Human Rights Commission receives at each yearly session around 30 geographically or thematically focused reports delivered by appointed Special Rapporteurs or Independent Experts.
- 7. On the other hand, in some states, for example, the Netherlands and some Nordic countries, part of their integration policy relating to documented immigrants is to render financial assistance to immigrants' organizations. This is seen as a way of

- organizing dialogue between migrant communities and governments, and facilitating the peaceful development of migrants' living conditions.
- 8. The Special Rapporteur, Ms Gabriela Rodriquez, has contributed an article to the present issue, "The Role of the United Nations Special Rapporteur on the Human Rights of Migrants".
- 9. See, Asian Migration Yearbook, 2000.
- 10. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and respectively Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The Convention and the protocols can be found on the following website: www.uncjin.org/Documents/documents.html# Convention.

#### BIBLIOGRAPHY

Böhning, W.R.

1988 "The protection of migrant workers and international labour standards", *International Migration*, 26(2): 133.

International Labour Office

1999 *Migrant Workers*, Report for the 87<sup>th</sup> Session of the International Labour Conference.

Lim, L.L.

1998 The Analysis of Factors Generating International Migration, UN ACC Task Force on Basic Social Services for All Working Group on International Migration Paper No. IV/3, ILO, Geneva.

Perruchoud, R.

2000 "Legal standards for the protection of migrant workers", paper presented at a seminar in Costa Rica, September 2000.

Perruchoud, R., and S. Vohra

1996 "IOM and the effective respect for migrants' rights", IOM paper prepared for a round table on effective respect for the rights and dignity of migrants: new needs and responses, February 1996, Ferney-Voltaire, France.

1998 "Identifying core rights of concern to migrants", IOM background paper at a seminar on Human Rights and Migrants, April 1998, Crystal City, Virginia.

Taran, P.A.

2000 "Status and prospects for the UN Convention on migrants' rights", European Journal of Migration and Law, Nijmegen, Netherlands.

**United Nations** 

1993 Human Rights. A Compilation of International Instruments, vol. I.

United Nations Centre for Human Rights, Geneva

Human Rights Fact Sheet No. 24 (undated).

United Nations/ECOSOC/Commission on Human Rights

1997 Working paper prepared by Mr Jorge A. Bustamante (Chairman/Rapporteur of the working group of intergovernmental experts on the human rights of migrants) on the vulnerability of migrants as subjects of human rights.

- 1999a Report of the Working Group of Intergovernmental Experts on the Human Rights of Migrants, document E/CN.4/1999/80.
- 1999b Report to the Economic and Social Council on the Fifty-Fifth Session of the Commission, agenda item 21 (b): document E/CN.4/1999/L.11/Add.4.
- United Nations International Research and Training Institute for the Advancement of Women (INSTRAW) and International Organization for Migration (IOM)
  - 1999 Report of the Expert Group Meeting on Temporary Labour Migration of Women, INSTRAW, Santo Domingo, Dominican Republic.
- Zegers De Beijl, R.
  - "Combating discrimination against migrant workers: international standards, national legislation and voluntary measures the need for a multi-pronged strategy", paper prepared for the seminar on Immigration, Racism and Racial Discrimination, Centre for Human Rights, Geneva.

### **APPENDIX**

# RECOMMENDATIONS OF THE WORKING GROUP OF INTERGOVERNMENTAL EXPERTS ON THE HUMAN RIGHTS OF MIGRANTS

Listed and summarized from the report of the working group (UN Document E/CN.4/1999/80 of 9 March 1999).

The comprehensive list of *recommendations* presented by the Intergovernmental Working Group mirrors the shortcomings identified as obstacles for protection of human rights. The following list covers all the recommendations:

- The need to "urge" states to ratify the key instruments dealing with migrants' human rights: the UN 1990 Convention on the Protection of Migrants Rights and Members of Their Families, and the two ILO conventions, nos. 97 and 143.
- Because of the dispersive and fragmentary nature of international human rights law, especially in relation to migrants rights, the need for the preparation of a compendium of provisions applicable to migrants under the relevant instruments of international law.
- States which have already included international human rights standards into their national legislation were urged to adopt specific laws explicitly enacting the extension of the basic rights to migrants, thus reaffirming and articulating the actual coverage of international human rights instruments.
- Inclusion of the right to family reunification in national legislation as a basic right of migrants.
- In order to enhance the integration of migrants, a favourable re-examination of the conditions and modalities relating to the acquisition of nationality of the host countries.
- Parallel to measures leading to increased ratification of the mentioned instruments, current and future regional and bilateral arrangements on migration should be utilized for advancing protection of migrants, not however substituting but complementing the ratification of the 1990 Convention.
- Governments of host countries were urged to share reports on alleged violations of migrants' human rights with consular representatives, and to ensure for all migrants the right of assistance, in accordance with the Vienna Convention on Consular Relations.

## Recommendations concerning social obstacles

- Promotion of migrants' right of association, notably as a means of overcoming their vulnerability, and the participation of migrants in trade

unions and in maintaining continuing dialogue with the political leaders and governmental agencies.

- As a measure to combat xenophobia, the host country should actively promote and disseminate information about the contributions made by migrants to the economy and society of their host countries; and encourage mass media to disseminate information on migrants in an unbiased manner.
- Training government, policy making and law enforcement staff at all levels regarding the existence, applicability, implementation and enforcement of human rights standards, and also the provision of advocates and counsellors within the migrant community to promote self help.
- Designation by the United Nations of an International Day of the Migrant in order to highlight and promote the human rights of migrants; with a suggestion to consider 18 December, because the 1990 UN Convention was adopted by the UN General Assembly on 18 December 1990.
- Inclusion of a specific item on migrants as victims of racism and discrimination in the agenda of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

#### Recommendations to overcome economic obstacles

- Encourage states to extend human rights standards to the informal economy, and provide assistance to enterprises to improve their economic capacity.
- As a response to growing demand for migrant labour, including irregular migrants, resulting from a scarcity of local labour or of specific skills, states were urged to make a more realistic assessment of their labour market needs, to adjust (raise) the intake of regular migrants in order to better correspond to the real need of the labour market.
- The adoption of punitive measures against the employers of irregular migrants and those exploiting forced labour in slavery-like practices.
- The updating of international anti-trafficking instruments with special emphasis on necessary assistance to victims; special support in this context to the work of the Ad hoc committee on the elaboration of a convention against transnational organized crime; and that states should be urged to develop legislation against traffickers.
- The drawing of a distinction between trafficking and irregular migration, notably in the treatment of victims.
- Close cooperation between sending, transit and receiving countries tackling the problems of trafficking.
- Inclusion of a specific item on migrants as victims of racism and discrimination in the agenda of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

70 Mattila

#### PROTECTION DES DROITS DE L'HOMME DES MIGRANTS: PRINCIPES ET PRATIQUE

En principe, les migrants sont sous la protection du droit international. Les instruments clés dans le domaine des droits de l'homme font obligation aux Etats parties d'étendre leur protection à tous les êtres humains. Des traités aussi importants que le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels ont été ratifiés par plus de 140 Etats, mais il semble que de nombreux obstacles politiques, sociaux ou économiques empêchent les migrants de jouir des même droits.

Par souci de combler ce vide, la Convention internationale sur la protection de tous les travailleurs migrants et des membres de leurs familles, plus précisément ciblée, a été créée et adoptée par l'Organisation des Nations Unies en 1990. Ce traité n'est pas encore en vigueur, mais le nombre d'Etats parties se rapproche des 20 Etats signataires requis.

Ces dernières années, la "machinerie" des droits de l'homme des Nations Unies a prêté davantage d'attention aux droits de l'homme des migrants, en désignant en 1999 une rapporteuse spéciale sur les droits de l'homme des migrants. Les gouvernements, à qui il appartient d'adhérer ou non aux instruments internationaux relatifs aux droits de l'homme, restent les principaux acteurs en tant que gardiens des droits de l'homme de toutes les personnes humaines résidant sur leur territoire.

Les pays d'accueil de migrants ont un rôle clé à jouer en ce qui concerne la protection des migrants qu'ils accueillent sur leur sol. Une défense active des droits des migrants s'avère toutefois difficile, politiquement parlant, dans les nombreux pays où les factions hostiles à l'immigration sont influentes.

La traite des migrants est un exemple de la complexité avec laquelle les Etats doivent composer dans la formulation de leur politique migratoire. D'une part, la traite amène les gouvernements à coopérer sans cesse davantage et à combiner à la fois l'application de la loi et la protection des victimes. D'autre part, une distinction nette est souvent faite entre la traite, que les gouvernements considèrent sans peine comme un thème relevant des droits de l'homme, et l'introduction clandestine de migrants, une problématique qui a davantage à voir avec la migration. Il s'agit en effet d'une question plus litigieuse, qui touche également aux intérêts non officiels de l'utilisation d'une main d'œuvre immigrée sans papiers et à bon marché.

# PROTECCIÓN DE LOS DERECHOS HUMANOS DE LOS MIGRANTES: PRINCIPIOS Y PRÁCTICA

En principio, los migrantes gozan de la protección del derecho internacional. Los instrumentos de derechos humanos clave obligan a los Estados Partes a extender su protección a todos los seres humanos. Tratados tan importantes como el Convenio Internacional sobre Derechos Civiles y Políticos y el Convenio Internacional sobre Derechos Económicos, Sociales y Culturales han sido ratificados por más de 140 Estados pero subsisten muchos obstáculos políticos, sociales o económicos para ofrecer estos derechos a los migrantes.

En un intento por colmar esta brecha en la protección, las Naciones Unidas elaboraron y adoptaron en 1990 el Convenio Internacional sobre la Protección de todos los Trabajadores Migratorios y sus Familiares. Este tratado todavía no ha entrado en vigor, pero el número de Estados Partes ya se acerca a los 20 requeridos.

Los últimos años la maquinaria de derechos humanos de las Naciones Unidas ha concentrado mayor atención en los derechos humanos de los migrantes, nombrando en 1999 a un relator especial sobre derechos humanos de los migrantes. Los gobiernos, como partes que acceden a los instrumentos internacionales de derechos humanos, son los principales actores y han de velar por los derechos humanos de todas las personas que residen en sus territorios.

Los países de acogida están en una situación clave en lo que atañe a la situación de los migrantes que acogen. No obstante, la defensa activa de los derechos de los migrantes, es políticamente difícil en muchos países donde los grupos anti-inmigrantes tienen gran influencia.

El tráfico de migrantes es un ejemplo de la complejidad con que se enfrentan los Estados a la hora de formular sus políticas migratorias. Por un lado, el tráfico de personas ha llevado a los gobiernos a actuar con mayor frecuencia de manera conjunta y a combinar la aplicación de la ley y la protección de los migrantes. Por otro lado, el tráfico de personas que da lugar a preocupaciones de derechos humanos fácilmente aceptables, se aborda separadamente de la introducción clandestina de seres humanos que está más relacionada con la migración. Ésta última es una cuestión contenciosa, relacionada con los intereses no oficiales de utilizar mano de obra inmigrante indocumentada barata.

	·

# The Role of the United Nations Special Rapporteur on the Human Rights of Migrants<sup>1</sup>

Gabriela Rodriguez\*

#### **ABSTRACT**

The position of Special Rapporteur on the Human Rights of Migrants was established in 1999 by the Commission on Human Rights.

During the short period since her appointment, the Special Rapporteur has directed her attention to examining ways and means to overcome obstacles impeding the full and effective protection of the human rights of migrants, and also examining difficulties for the return of migrants who are undocumented or in irregular situations.

This schedule has involved visits to governments and the dissemination of information on the legal framework and aspects of the mandate designed to explain the complexity of migration.

The Special Rapporteur calls for increased efforts to ensure success of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, to be held in Durban, South Africa, in 2001. She also encourages those governments which have not yet ratified the International Convention to take the necessary steps.

At its fifty-fifth session, the Commission on Human Rights adopted resolution 1999/44, under which it decided to appoint a Special Rapporteur on the Human Rights of Migrants for a three-year period. On 6 August 1999, after consultation with the members of the Bureau, I was appointed by the Chairperson of the Commission on Human Rights. One of the tasks established by the Commission was that I examine ways and means to overcome obstacles impeding the full

<sup>\*</sup> Special Rapporteur on the Human Rights of Migrants.

and effective protection of the human rights of migrants. Another task was that I examine difficulties for the return of migrants who are undocumented or in an irregular situation. The Resolution (1999/44) also required the Special Rapporteur to formulate strategies and make recommendations for the promotion and implementation of policies to protect the human rights of migrants, and to establish the criteria on which those policies should be based.

As Special Rapporteur, I am entitled to request and receive information from all relevant sources, including migrants, on violations of the human rights of migrants and their families; to promote the effective application of relevant international norms and standards on the issue; and to recommend actions and measures applicable at national, regional and international levels to eliminate violations of the human rights of migrants. In this connection I have invited governments and NGOs to cooperate with the mandate and to transmit to me any information they consider useful for the mandate.

In compliance with the resolution, I report annually to the Commission on Human Rights on my activities as Special Rapporteur, including visits to countries during the year, as well as on communications and urgent appeals sent to governments during the period under review.

In September 2000, I visited Canada, the first UN member country to invite me, following the Commission's resolution in which governments were encouraged to extend invitations to the Special Rapporteur in order to cooperate with the mandate established by the Commission. In this connection, I would like to emphasize, as others Special Rapporteurs have done, that visits are the only means by which I can make myself familiar with the situation in a given country and report to the Commission with a wide overview of the situation. However, I also recognize that such visits cannot replace any investigation that should be carried out by judicial authorities. It is crucial to continue collaboration with the governments of the countries I visit to analyse the extent to which recommendations are implemented.

My second report to the Commission during April 2001 will contain detailed information on the legal framework and aspects of the mandate which will help understand the complexity of migration. The Report will also address a series of issues relating to my mandate. In this connection, it is important that governments be encouraged to ratify the 1990 International Convention, thus providing a comprehensive instrument to fully protect the rights of migrant workers and their families.

I welcome the work being carried out by the International Steering Committee of the Global Campaign for the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. I committed myself to urge governments to ratify the Convention and

to cooperate with the work of the International Steering Committee. I have attended some of its meetings and have regularly informed its members of the activities carried out under the mandate on the human rights of migrants to promote the ratification of this important instrument. Declarations and proclamations are normative and do not impose legal obligations, but covenants and conventions, such as the 1990 Convention, include norms that are legally binding upon the States that ratify them. Only five more ratifications are needed to see the 1990 Convention enter into force. Let us give that "final push" in order to strengthen the protection that migrant workers need.

I have also actively participated in the proclamation of International Migrants Day, the 18 of December, and in the celebration of its declaration by the General Assembly of the High Commissioner on Human Rights. I have issued several statements welcoming this General Assembly action. Our statement urged countries to give the "final push" that will ensure the entry into force of the 1990 International Convention. We described the abuse of the human rights of the 97 million migrant workers and their family members around the world, as a major international problem.

What is the main focus regarding the mandate entrusted to me by the Commission on Human Rights in addressing the question of the human rights of migrants? Despite the contributions they make in host countries, migrants are often subject to the most horrendous treatment because they are foreigners or because they happen to be in precarious situations. The international community's growing interest in human rights issues has meant that migrants' rights have begun to receive special attention. Interest shown by sectors of civil society has been brought to the attention of the general public around the world by the news media. News services tend to highlight the problems of trafficking in persons, particularly women and children, and the widespread abuse of undocumented workers in the informal economy.

In this connection we have to continue fighting against abuse and grave human rights violations. Every day the media conveys terrible human rights violations that affect individuals who live in countries of which they are not nationals. Migration occurs for a variety of reasons, including poverty, civil conflicts and insecurity or persecution for reasons of race, ethnic origin, religion, language or political views. States whose citizens migrate for these reasons share these problems with states that receive large numbers of migrants. Human rights violations hypothetically arise for the receiving or "desired" State that rejects inflows of migrants. Such violations occur insofar as the national populations cannot be contained within their home countries. A common outcome of this phenomenon is that people become undocumented cross-border migrants. Although everyone has the right, in accordance with the basic international human rights instruments, to leave the country of origin and to re-enter it, the right to enter the territory of another state is limited to its sovereignty and to the

existent specific bilateral or multilateral agreements in this matter. However, once the person is admitted, he/she must be treated according to the standards applied to all persons living under the same territory independent of their origin, language, gender or religion.

Estimates of the different categories of migrants suggest that between 120 and 130 million persons are outside their countries of origin. Women and children account for more than half the refugees and internally displaced persons, their proportion is also increasing in the case of the other categories of migrants, including migrant workers.

It is time to recognize the tremendous contributions migrants make not only in their host countries but also in their countries of origin. This information has to be spread among civil society with a view to changing the negative approach made to migration in many host countries. Both regular and irregular migration should be addressed in a comprehensive and balanced manner, considering its causes and effects, both positive and negative, not only in countries of origin but also in countries of transit and destination.

With this change of approach, we could help avoid a large number of actions against migrants which involve racism and xenophobia, just one issue affecting migrants in host countries. We must also consider migration from a comprehensive analysis which addresses economic, security and political causes. Migration, and in particular irregular migration, is closely related to the issue of development.

We should also focus our efforts on preparatory work for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance to take place from 31 August to 7 September in Durban, South Africa. In this connection, the mandate on human rights of migrants is playing a very active role. I have participated in several preparatory meetings and expert seminars in Santiago de Chile, Addis Ababa, and plan to participate in regional seminars to be held in Dakar and Teheran. At these meetings, I have attempted to bring the issue of migration to the table and have made appropriate observations and recommendations so that it would be one of the key issues for discussion in Durban.

Thousands of migrants who have been forced to leave their countries due to violence, poverty or natural disasters are often discriminated against because of their racial, ethnic or national characteristics. Due to the vulnerable situation in which migrants are placed in countries of transit and reception when faced with violent or non-violent manifestations and acts of racism and xenophobia, the international community must adopt effective and concrete measures to promote and protect the human rights of migrants, irrespective of their migratory situations. I am encouraged that a number of countries have approached the

mandate for expert advice on ways and means to avoid *incipient* acts of racism and xenophobia against migrant populations in their countries.

In view of the importance of the World Conference, the question of trafficking which affects a large number of migrants around the globe should not be forgotten. Trafficking is a major concern in all regions. The primary victims are women and children. Trafficking often involves the involuntary movement of persons within countries and across boundaries, incited by coercion, trickery or deceit. Sometimes trafficking is a result of limited social and economic opportunities available to the trafficked persons and their families. Trafficking and irregular migration also occur because of the absence of avenues for legal migration. States should therefore identify and address poverty, unemployment, political and social oppression and social exclusion, as a first step towards eliminating potential human rights violations such as the trafficking and smuggling of migrants, especially of women and children. At the same time, we should also recognize the positive aspects of migration. In many sectors such as agriculture, migrants are major contributors, an aspect which needs to be made visible in those countries where this phenomenon takes place. Similarly, the need for the migrant labour force by countries should be underlined. Civil society, especially NGOs and academic institutions, need to promote the state's efforts to create occasions for educating against discrimination on grounds of race, xenophobia and intolerance against immigrants. Governments need to recognize the relevance of the problem and its dimension.

Many migrant populations suffer from structural discrimination manifested in different ways of exclusion and limited labour insertion opportunities, and I call on countries that have not ratified the Convention to take the necessary steps. The instrument is of great importance for providing protection of all national migrant workers overseas against vulnerability of potential abuses, contemporary forms of slavery, trafficking and smuggling.

I would especially draw the attention of all governments to the question of migrant women. It is absolutely necessary to establish policies that guarantee their integration into all sectors and to abolish the spaces open to discrimination and abuse. Measures must be taken to guarantee migrants' full enjoyment of rights in all sectors. Migrant women are often doubly vulnerable for being women and for being migrants.

I would like to take this opportunity to thank the large number of non-governmental organizations, academic institutions, governments and individuals who are supporting us, from all parts of the world, to address the various issues concerning migration and the protection of the human rights of all migrants.

### NOTE

1. This article contains the Special Rapporteur's first analysis of developments since her appointment in 1999.

# LE ROLE DE LA RAPPORTEUSE SPECIALE DES NATIONS UNIES SUR LES DROITS DE L'HOMME DES MIGRANTS

Le poste de Rapporteur spécial sur les droits de l'homme des migrants a été créé en 1999 par la Commission des droits de l'homme.

Dans la courte période qui s'est écoulée depuis sa nomination, la Rapporteuse spéciale s'est surtout consacrée à l'examen des moyens devant permettre de surmonter les obstacles auxquels se heurte la protection pleine et efficace des droits de l'homme des migrants, et aussi à l'examen des difficultés rencontrées à l'occasion du rapatriement des migrants sans papiers ou en situation irrégulière.

Il s'est agi notamment de rendre visite aux gouvernements et de diffuser des informations sur le cadre juridique et les aspects du mandat mis au point pour expliquer la complexité du phénomène migratoire.

La Rapporteuse spéciale appelle à une intensification des efforts en vue d'assurer le succès de la Conférence mondiale contre le racisme, la discrimination raciale, la xénophobie et l'intolérance qui y est associée, devant se tenir à Durban en Afrique du Sud, en 2001. Elle encourage aussi les gouvernements qui n'ont pas encore ratifié la convention internationale à prendre des mesures dans ce sens.

# LA FUNCIÓN DEL RELATOR ESPECIAL DE LAS NACIONES UNIDAS SOBRE DERECHOS HUMANOS DE LOS MIGRANTES

La Comisión de Derechos Humanos creó, en 1999, el puesto de Relator Especial sobre Derechos Humanos de los Migrantes.

Durante el corto periodo transcurrido desde su nombramiento, la Relatora especial ha concentrado su atención en examinar medios y maneras de sobreponerse a obstáculos que impiden la protección plena y efectiva de los derechos humanos de los migrantes, y también en examinar las dificultades para el retorno de los migrantes indocumentados o en situación irregular.

En ese empeño, ha realizado visitas a gobiernos y se ha difundido información sobre el marco jurídico y los aspectos del mandato destinado a explicar la complejidad de la migración.

La Relatora especial exhorta a que se realicen mayores esfuerzos para asegurar el éxito de la Conferencia Mundial contra el Racismo, la Discriminación Racial, la Xenofobia y la Intolerancia Conexa, que se celebrará en Durban (Sudáfrica) en 2001. También alienta a todos los gobiernos que todavía no han ratificado la Convención Internacional a adoptar las medidas necesarias con ese fin.

	·

# Principles of Protection for Internally Displaced Persons

Erin D. Mooney\*

#### **ABSTRACT**

For forced migrants who have not left their country but are internally displaced persons, human rights law provides an important framework through which to analyse and address their plight. Two principal reasons underpin this assertion.

First, owing to the compelling need: human rights violations cut across all phases of internal displacement, causing its occurrence, characterizing the conditions of physical insecurity and material deprivation in which the internally displaced often find themselves, and impeding equitable and lasting solutions.

Second, as internally displaced persons remain within the territory of their state, refugee law does not apply and, instead, human rights law provides the fundamental basis for addressing their plight.

In addition to human rights law, other standards of international law are also relevant, namely international humanitarian law when displacement occurs in situations of armed conflict and refugee law by analogy.

Drawing on these three standards of international law, Guiding Principles on Internal Displacement have been developed which set out what protection should mean for internally displaced persons in all phases of displacement. This article traces the origins and provides an overview of the content of the Guiding Principles, the text of which is reproduced in full in the Appendix.

<sup>\*</sup> Special Assistant to the Representative of the United Nations Secretary-General on Internally Displaced Persons; and Human Rights Officer, United Nations High Commissioner for Human Rights, Geneva.

#### INTRODUCTION

Among the many persons "on the move" in the world today, internally displaced persons are in particular need of greater human rights protection. Worldwide, some 22 to 25 million persons have been displaced within their own country by armed conflict, internal strife and communal tensions circumstances which are commonly characterized by serious violations of human rights. Displacement, by its very nature, generally exposes its victims to still further violations of human rights. Uprooted from their homes and property, separated from their community and often even family support networks, and cut off from their resource base, displaced persons frequently become even more vulnerable upon flight. Many do not manage to escape the violent circumstances uprooting them and remain caught in the midst of armed conflict and at serious risk, for instance to armed attack, physical assault, sexual violence and forced conscription. Those who do escape the hostilities may find areas of refuge to nonetheless be hostile environments of a different sort, where they are suspected of association with the "enemy" and targeted on that basis, or suffer other stigmatization and discrimination. In many cases, internally displaced persons are deprived of adequate shelter, food and medical care as well as denied equal access to education and opportunities for income generation. Moreover, the persistence of human rights problems in areas of potential return or resettlement will obstruct equitable and lasting solutions to their plight.

With human rights concerns cutting across all phases of internal displacement - from its cause, to the conditions of displacement, to the search for solutions - international human rights law naturally provides an appropriate and useful framework through which to analyse and address the plight of the internally displaced. Even more compelling than the circumstantial basis for taking such an approach, however, are the conceptual grounds for doing so. Unlike refugees who, by definition, have fled across a border and have an established international legal and institutional regime to turn to for protection and assistance, internally displaced persons remain within national territory and consequently it is their own government that bears primary responsibility for meeting their protection and assistance needs. Human rights law sets out the obligations of states to ensure the survival, well-being and dignity of all persons subject to their territorial jurisdiction. Its coverage thus necessarily encompasses the internally displaced. The rights and guarantees to which internally displaced persons were entitled before they fled, by virtue of being human beings and citizens or habitual residents of a particular state, remain intact and are simply carried over – in essence carried with them – when they are compelled to flee.

While international human rights law is of fundamental importance for the protection of internally displaced persons, other bodies of international law also have much to offer. When internal displacement occurs in situations of armed

conflict, whether inter-state or non-international in character, international humanitarian law also comes into effect. Though many provisions of international humanitarian law reflect and reinforce protection provided for under human rights law, because a number of human rights guarantees may be significantly limited or even derogated in situations of armed conflict, the protection provided for by humanitarian law in these circumstances is particularly important. Moreover, whereas human rights law is generally binding only on state agents, international humanitarian law applies not only to states but also to insurgent groups and other non-state authorities engaged in conflict. In addition, though refugee law is not applicable to the situation of internally displaced persons, it nonetheless is instructive in pointing to principles pertinent to the protection needs of uprooted persons, which are not specifically addressed by human rights law. A particularly important example of this is the principle of *non-refoulement*, providing protection against forced return to a situation where the individual's physical security is at risk.

The legal basis for the protection of internally displaced persons thus extends beyond the relevance and reach of international human rights law to also draw upon international humanitarian law and refugee law. Accordingly, when the Representative of the Secretary-General on Internally Displaced Persons was requested by the Commission on Human Rights in 1992 to study the extent to which international law met the basic needs of the internally displaced, he adopted a holistic approach that took into account not only international human rights law but also international humanitarian law as well as refugee law by analogy. Several years of study working with a team of international legal experts in these three branches of law, together with representatives of the United Nations Centre for Human Rights (now Office of the High Commissioner for Human Rights), the International Committee of the Red Cross (ICRC) and the United Nations High Commissioner for Refugees, culminated in an elaborate two-part *Compilation and Analysis of Legal Norms* pertaining to internally displaced persons (United Nations, 1995 and 1998).

This study determined that while existing law provides substantial coverage for the internally displaced, there nonetheless are significant areas in which it fails to provide sufficient legal protection on account of a number of gaps and grey areas in the law. The areas of insufficient legal protection for the internally displaced fall into two categories. The first concerns gaps that arise out of a lack of explicit norms addressing identifiable needs. Such normative gaps arise in the absence, for instance, of an express right not to be arbitrarily displaced, as well as of a right to restitution of or compensation for property lost as a consequence of displacement during situations of armed conflict, and of a right to personal documentation (which, like property, also often is lost or confiscated during displacement). The second category of insufficient coverage concerns those cases where a general norm exists but a corollary provision addressing specifically a need of the internally displaced has not been articulated

which would ensure application of the general norm so as to address this need. For example, while there is a general human right guaranteeing freedom of movement, for internally displaced there is no express guarantee against forcible return to dangerous areas within their own countries comparable with the principle in refugee law of *non-refoulement*. In addition, there were found to be applicability gaps where a legal norm is not applicable in all circumstances. Such serious gaps could arise in situations falling below the threshold of application of humanitarian law and when restriction or even derogation of a number of human rights may be allowed. Finally, what were termed "ratification gaps" in the legal protection of the internally displaced arise in states that have not ratified key human rights treaties and/or humanitarian law instruments.

The study concluded that "[w]here the analysis shows that the needs of internally displaced persons are insufficiently protected by existing international law, it is important to restate general principles of protection in more specific detail and to address clear protection gaps in a future international instrument" (United Nations, 1995, para. 413). Its findings and recommendations proved sufficiently compelling to lead the Commission on Human Rights as well as the General Assembly to request the Representative to develop an appropriate normative framework for the internally displaced. The *Guiding Principles on Internal Displacement* (text reproduced in Appendix, page 89) were drafted to fill this lacuna

The Principles bring together in one document the many norms applicable to the internally displaced, which heretofore were dispersed and diffused in a panoply of different instruments and therefore not easily accessible nor sufficiently understood. The thirty principles consolidate in one concise document the key rights and guarantees relevant to all phases of internal displacement; providing protection from arbitrary displacement, protection and assistance during displacement, and during return or resettlement and reintegration.

For the purposes of the Principles, internally displaced persons are:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

The term "internally displaced person" does not confer any special legal status in the same way as does determination as a "refugee" (Kälin, 2000: 2). This is not necessary after all, as unlike refugees, internally displaced persons are still able, at least in principle, to avail themselves of the protection of their own country. Principle 1 affirms that they are to "enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country" and "shall not be discriminated against in the enjoyment of any rights

and freedoms on the ground that they are displaced". At the same time, it must be stated that the principle of equality does not preclude the undertaking of special measures to ensure implementation of general norms in a way so as to address the particular needs of internally displaced persons.

Indeed, the Principles provide for special measures to be taken to address the particular needs and vulnerabilities of certain groups of persons among them, especially internally displaced women and children, who in any given situation typically constitute the vast majority of internally displaced persons. As a general principle, Principle 4 provides that "[c]ertain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs". A number of principles elaborate on protection for these special needs. For instance, the Principles call for the involvement of women in the planning and management of relocation (Principle 7) and in the planning and distribution of humanitarian supplies (Principle 18). They provide for protection from genderspecific violence, forced prostitution, sale into marriage, sexual exploitation, and forced labour of children or their military recruitment (Principles 11 and 13). Furthermore, they require special efforts to be made to ensure the full and equal participation of women and girls in educational and training programmes (Principle 23).

Although not a binding document like a treaty, the Guiding Principles reflect and are consistent with international human rights law and international humanitarian law which is binding. The legal basis of each of the Principles is detailed in the Compilation and Analysis and clearly summarized in the Annotations to them (Kälin, 2000). It also finds clear reflection in the formulation of the Principles themselves, which are modelled on, and in some cases cite verbatim, the text of the provisions from human rights and humanitarian law treaties from which they are drawn. This is especially the case where the Principles expressly restate, and thereby reinforce, general norms before tailoring application of these to the specific needs and circumstances of the internally displaced. For example, after recalling that every human being has the right to liberty and security of person and that no one shall be subjected to arbitrary detention, Principle 12 specifies that to give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp unless, in exceptional circumstances, this is absolutely necessary and lasts no longer than required. Similarly, Principle 14 affirming the right to liberty of movement and freedom to choose his or her residence, specifies that for internally displaced persons this entails a right to move freely in and out of camps and settlements. Regarding the right to respect of family life, Principle 17 provides that in situations of internal displacement, family members who wish to remain together shall be allowed to do so and that families separated by displacement should be reunited as quickly as possible.

Principle 20, after setting forth that every human being has the right to recognition before the law, states that internally displaced persons must be issued documents necessary to enjoy their rights.

This last example also shows how the Principles address very practical needs of displaced persons, such as to replace documentation lost or confiscated during displacement, in terms of rights. The rights-based approach of the Principles is of particular significance in relation to the provisions regarding basic humanitarian assistance. Principles 18 and 19 refer to the needs of internally displaced persons for food and potable water, basic shelter and housing, appropriate clothing, and essential medical services and sanitation as essential elements of the right to an adequate standard of living. This represents an innovative and necessary shift in perspective. Too often, internally displaced persons and other populations under threat are regarded by humanitarian organizations simply as objects of charity rather than rights-holders. Principle 27 expressly states that international humanitarian organizations and other actors providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard.

At the same time, the Principles expressly recognize that the primary duty and responsibility for ensuring protection and assistance for the internally displaced rests with national authorities. Indeed, this general principle (Principle 3) is reiterated several times throughout the text, for instance, in relation to the provision of assistance (Principle 25), the establishment of conditions and provision of means to enable internally displaced persons to return voluntarily, in safety and dignity, to their homes or places of habitual residence (Principle 28), and assistance for internally displaced persons in the recovery of or compensation for property and possessions lost as a result of displacement (Principle 29). The use of the term "competent authorities" can be explained by the broad coverage of the Principles, which are intended to provide guidance not only to states but also to insurgent forces and "all other authorities, groups and persons in their relations with internally displaced persons".

Since their formulation in 1998, the Guiding Principles have gained significant international standing and recognition as a valuable tool for furthering protection for internally displaced persons. All the international humanitarian, human rights and development organizations and umbrella groups of non-governmental organizations (NGOs) comprising the United Nations' Inter-Agency Standing Committee endorsed the Principles and decided to integrate them into their work. The Commission on Human Rights and the General Assembly have encouraged these efforts. These intergovernmental bodies also have called for the widespread dissemination of the Principles and for the Representative to use them in his dialogue with governments. In different parts of the world, governments of countries with situations of internal displacement have

responded by using the Principles – in public awareness campaigns (often involving the translation of the Principles into local languages) – in the development of laws and policies, and even to justify their own actions in situations of displacement.

There are now examples of Constitutional Court decisions to protect internally displaced persons. National human rights institutions in a number of countries also have begun to use the Principles. Regional inter-governmental organizations such as the Organization of African Unity (OAU), the Organization for Security and Cooperation in Europe (OSCE) and the Organization of American States (OAS), have circulated the Principles, held seminars on them and used them as a reference tool when monitoring the conditions of internally displaced persons. NGOs have been especially active and effective in promoting the Principles, providing training on them, and using them as a tool for advocating the rights of the displaced with governments and non-state actors, for monitoring conditions of displacement and for pointing to required changes in national legislation and policy.<sup>1</sup>

Internally displaced persons have also begun to use the Principles to enhance protection for their own communities. The Principles support such efforts by internally displaced persons to articulate their rights. Principle 3 affirms their right not simply to receive but indeed *to request* protection and humanitarian assistance from the authorities and providing that they shall not be persecuted or punished for making such a request. Of the various initiatives underway with the Principles, their use by internally displaced persons themselves is surely the greatest testament to the Principles' utility and relevance to addressing the critical protection and assistance needs of the internally displaced.

Continued usage of and reference to the Principles at the national, regional and international levels is the best way to support local efforts around them. It is also essential to furthering the very purpose for which the Principles were formulated: to reinforce and, in so doing, help to realize the rights of the millions of internally displaced persons worldwide.

#### NOTE

Responses to the Principles are discussed in greater detail in the annual reports
presented to the Commission on Human Rights by the Representative of the
Secretary-General on Internally Displaced Persons. For the most recent developments, see the Representative's report to the Commission at its fifty-seventh
session, United Nations, E/CN.4/2001/5. See also United Nations documents
E/CN.4/2000/83 and E/CN.4/1999/79. These documents are available on the website
of the Office of the United Nations High Commissioner for Human Rights:
www.unhchr.ch.

#### REFERENCES

#### Kälin, W.

2000 Guiding Principles on Internal Displacement: Annotations, studies in Transnational Legal Policy, no. 32, American Society of International Law and the Brookings Institution Project on Internal Displacement, Washington, DC.

#### **United Nations**

- 1995 Compilation and Analysis of Legal Norms, Report of the Representative of the Secretary-General on Internally Displaced Persons, United Nations, E/CN.4/1996/52/Add.2, 5 December 1995.
- 1998 Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement, Report of the Representative of the Secretary-General on Internally Displaced Persons, United Nations, E/CN.4/1998/53/Add.2, 11 February 1998.

#### **APPENDIX**

# THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT INTRODUCTION: SCOPE AND PURPOSE

- 1. These Guiding Principles address the specific needs of internally displaced persons worldwide. They identify rights and guarantees relevant to the protection of persons from forced displacement and to their protection and assistance during displacement as well as during return or resettlement and reintegration.
- 2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.
- 3. These Principles reflect and are consistent with international human rights law and international humanitarian law. They provide guidance to:
  - (a) The Representative of the Secretary-General on internally displaced persons in carrying out his mandate;
  - (b) States when faced with the phenomenon of internal displacement;
  - (c) All other authorities, groups and persons in their relations with internally displaced persons; and
  - (d) Intergovernmental and non-governmental organizations when addressing internal displacement.
- 4. These Guiding Principles should be disseminated and applied as widely as possible.

#### SECTION I - GENERAL PRINCIPLES

- Internally displaced persons shall enjoy, in full equality, the same rights
  and freedoms under international and domestic law as do other persons in
  their country. They shall not be discriminated against in the enjoyment of
  any rights and freedoms on the ground that they are internally displaced.
- 2. These Principles are without prejudice to individual criminal responsibility under international law, in particular relating to genocide, crimes against humanity and war crimes.

#### Principle 2

- 1. These Principles shall be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction. The observance of these Principles shall not affect the legal status of any authorities, groups or persons involved.
- 2. These Principles shall not be interpreted as restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law. In particular, these Principles are without prejudice to the right to seek and enjoy asylum in other countries.

#### Principle 3

- 1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.
- 2. Internally displaced persons have the right to request and to receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request.

#### Principle 4

- 1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.
- Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.

# SECTION II - PRINCIPLES RELATING TO PROTECTION FROM DISPLACEMENT

### Principle 5

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian

law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

#### Principle 6

- 1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
- 2. The prohibition of arbitrary displacement includes displacement:
  - (a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population;
  - (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
  - (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests;
  - (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and
  - (e) When it is used as a collective punishment.
- 3. Displacement shall last no longer than required by the circumstances.

- 1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.
- The authorities undertaking such displacement shall ensure, to the greatest
  practicable extent, that proper accommodation is provided to the displaced
  persons, that such displacements are effected in satisfactory conditions of
  safety, nutrition, health and hygiene, and that members of the same family
  are not separated.
- 3. If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:
  - (a) A specific decision shall be taken by a State authority empowered by law to order such measures;
  - (b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;

- (c) The free and informed consent of those to be displaced shall be sought;
- (d) The authorities concerned shall endeavour to involve those affected, particularly women, in the planning and management of their relocation;
- (e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and
- (f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

#### **Principle 8**

Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected.

### Principle 9

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

# SECTION III - PRINCIPLES RELATING TO PROTECTION DURING DISPLACEMENT

### Principle 10

- 1. Every human being has the inherent right to life which shall be protected by law. No one shall be arbitrarily deprived of his or her life. Internally displaced persons shall be protected in particular against:
  - (a) Genocide;
  - (b) Murder:
  - (c) Summary or arbitrary executions; and
  - (d) Enforced disappearances, including abduction or unacknowledged detention, threatening or resulting in death.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

- 2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:
  - (a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas wherein attacks on civilians are permitted;
  - (b) Starvation as a method of combat:

- (c) Their use to shield military objectives from attack or to shield, favour or impede military operations;
- (d) Attacks against their camps or settlements; and
- (e) The use of anti-personnel landmines.

#### Principle 11

- 1. Every human being has the right to dignity and physical, mental and moral integrity.
- 2. Internally displaced persons, whether or not their liberty has been restricted, shall be protected in particular against:
  - (a) Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault:
  - (b) Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labour of children; and
  - (c) Acts of violence intended to spread terror among internally displaced persons.

Threats and incitement to commit any of the foregoing acts shall be prohibited.

### Principle 12

- 1. Every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.
- 2. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances.
- 3. Internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement.
- 4. In no case shall internally displaced persons be taken hostage.

- 1. In no circumstances shall displaced children be recruited nor be required or permitted to take part in hostilities.
- 2. Internally displaced persons shall be protected against discriminatory practices of recruitment into any armed forces or groups as a result of their

displacement. In particular any cruel, inhuman or degrading practices that compel compliance or punish non-compliance with recruitment are prohibited in all circumstances.

#### Principle 14

- 1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.
- 2. In particular, internally displaced persons have the right to move freely in and out of camps or other settlements.

#### Principle 15

Internally displaced persons have:

- (a) The right to seek safety in another part of the country;
- (b) The right to leave their country;
- (c) The right to seek asylum in another country; and
- (d) The right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.

### Principle 16

- 1. All internally displaced persons have the right to know the fate and whereabouts of missing relatives.
- The authorities concerned shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations engaged in this task. They shall inform the next of kin on the progress of the investigation and notify them of any result.
- The authorities concerned shall endeavour to collect and identify the mortal remains of those deceased, prevent their despoliation or mutilation, and facilitate the return of those remains to the next of kin or dispose of them respectfully.
- 4. Grave sites of internally displaced persons should be protected and respected in all circumstances. Internally displaced persons should have the right of access to the grave sites of their deceased relatives.

### Principle 17

1. Every human being has the right to respect of his or her family life.

- 2. To give effect to this right for internally displaced persons, family members who wish to remain together shall be allowed to do so.
- 3. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.
- 4. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together.

#### Principle 18

- 1. All internally displaced persons have the right to an adequate standard of living.
- 2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:
  - (a) Essential food and potable water;
  - (b) Basic shelter and housing;
  - (c) Appropriate clothing; and
  - (d) Essential medical services and sanitation.
- 3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.

- 1. All wounded and sick internally displaced persons as well as those with disabilities shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention they require, without distinction on any grounds other than medical ones. When necessary, internally displaced persons shall have access to psychological and social services.
- Special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual and other abuses.
- 3. Special attention should also be given to the prevention of contagious and infectious diseases, including AIDS, among internally displaced persons.

#### Principle 20

- 1. Every human being has the right to recognition everywhere as a person before the law.
- 2. To give effect to this right for internally displaced persons, the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.
- 3. Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names.

#### Principle 21

- 1. No one shall be arbitrarily deprived of property and possessions.
- 2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
  - (a) Pillage;
  - (b) Direct or indiscriminate attacks or other acts of violence;
  - (c) Being used to shield military operations or objectives;
  - (d) Being made the object of reprisal; and
  - (e) Being destroyed or appropriated as a form of collective punishment.
- 3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

- 1. Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:
  - (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression;
  - (b) The right to seek freely opportunities for employment and to participate in economic activities;

- (c) The right to associate freely and participate equally in community affairs;
- (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right; and
- (e) The right to communicate in a language they understand.

#### Principle 23

- 1. Every human being has the right to education.
- 2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.
- 3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.
- 3. Education and training facilities shall be made available to internally displaced persons, in particular adolescents and women, whether or not living in camps, as soon as conditions permit.

# SECTION IV - PRINCIPLES RELATING TO HUMANITARIAN ASSISTANCE

### Principle 24

- 1. All humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination.
- 2. Humanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons.

- 1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
- 2. International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.

3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

#### **Principle 26**

Persons engaged in humanitarian assistance, their transport and supplies shall be respected and protected. They shall not be the object of attack or other acts of violence.

### Principle 27

- 1. International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs and human rights of internally displaced persons and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards and codes of conduct.
- 2. The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by States.

# SECTION V - PRINCIPLES RELATING TO RETURN, RESETTLEMENT AND REINTEGRATION

#### Principle 28

- Competent authorities have the primary duty and responsibility to establish
  conditions, as well as provide the means, which allow internally displaced
  persons to return voluntarily, in safety and with dignity, to their homes or
  places of habitual residence, or to resettle voluntarily in another part of the
  country. Such authorities shall endeavour to facilitate the reintegration of
  returned or resettled internally displaced persons.
- Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

## Principle 29

 Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They

- shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.
- 2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

#### Principle 30

All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.

# PRINCIPES DE PROTECTION POUR LES PERSONNES DEPLACEES A L'INTERIEUR DE LEUR PROPRE PAYS

A l'intention des migrants forcés qui n'ont pas quitté leur pays mais qui ont été déplacés à l'intérieur des frontières, les droits de l'homme offrent un cadre important pour l'analyse de leur situation et les moyens d'y remédier. Il y a à cela deux raisons principales.

Premièrement le caractère impérieux du besoin: les violations des droits de l'homme sont présentes à tous les stades des déplacements internes puisqu'elles les provoquent directement, caractérisent les conditions d'insécurité physique et de privation dans lesquelles les déplacés internes se retrouvent fréquemment, et font obstacle à des solutions équitables et durables.

Deuxièmement, comme les déplacés internes restent sur le territoire de l'Etat dont ils sont ressortissants, le droit d'asile ne leur est pas applicable, alors que les droits de l'homme contiennent les dispositions fondamentales justifiant une démarche pour tenter d'alléger leurs épreuves.

En plus des droits de l'homme, d'autres normes du droit international sont également pertinentes, à savoir le droit humanitaire international lorsque les déplacements s'effectuent dans des situations de conflits armés, et le droit d'asile par analogie.

En se fondant sur ces trois piliers du droit international, on a pu mettre au point des principes directeurs applicables aux déplacements internes qui précisent ce qu'il faut entendre par protection des personnes déplacées à l'intérieur de leur propre pays à tous les stades du déplacement. Le présent article retrace les origines et donne un aperçu du contenu de ces principes directeurs, dont le texte intégral est reproduit en annexe.

#### PRINCIPIOS DE PROTECCIÓN DE LAS PERSONAS DESPLAZADAS INTERNAMENTE

Para los migrantes forzados que no han abandonado su país pero que son personas desplazadas internamente, la ley de derechos humanos provee un importante marco para analizar y encarar su sufrimiento. Hay dos razones principales subyacentes en esta afirmación.

Primero, en razón de la necesidad apremiante: las violaciones de los derechos humanos abarcan todas las etapas del desplazamiento interno, permitiendo que ocurra, caracterizando las condiciones de inseguridad física y de privaciones

materiales en las que a menudo se encuentran los desplazados internos e impidiendo que se encuentren soluciones equitativas y duraderas.

Segundo, habida cuenta de que las personas desplazadas internamente permanecen en el territorio de su país, no se aplica la ley de refugiados y, en su lugar, la ley de derechos humanos ofrece una base fundamental para encarar su sufrimiento.

A parte de la ley de derechos humanos, hay otras normas de derecho internacional que son pertinentes, a saber, el derecho humanitario internacional cuando se produce el desplazamiento en situaciones de conflicto armado o, por analogía, la ley de refugiados.

Sobre la base de estas tres normas de derecho internacional, se han establecido los principios rectores sobre desplazamiento interno que estipulan lo que ha de ser la protección de personas desplazadas internamente en todas las etapas de su desplazamiento. Este artículo retraza los orígenes y ofrece un panorama sobre el contenido de los principios rectores, cuyo texto se reproduce íntegramente en el apéndice.

	·

# The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa

Jonathan Crush\*

#### **ABSTRACT**

South Africa prides itself on having one of the most progressive constitutions in the world. The Bill of Rights guarantees a host of basic political, cultural and socio-economic rights to all who are resident in the country. Yet there have been persistent reports that citizen intolerance of non-citizens, refugees and migrants has escalated dramatically since 1994.

This article documents this process through presentation of results of national public opinion surveyed by the Southern African Migration Project (SAMP).

The surveys show that intolerance is extremely pervasive and growing in intensity and seriousness. Abuse of migrants and refugees has intensified and there is little support for the idea of migrant rights. Only one group of South Africans, a small minority with regular personal contact with noncitizens, is significantly more tolerant.

These findings do not augur well for migrant and refugee rights in this newly democratic country, or early acceptance of the UN Convention on the protection of migrant workers.

#### INTRODUCTION

In November 2000, the international community was shocked by video footage of police brutality from South Africa reminiscent of the dark apartheid years. In the incident in question, six white South African policemen set dogs on three

<sup>\*</sup> Southern African Research Centre, Queen's University, Kingston, Ontario and Director of Southern African Migration Project (http://www.queensu.ca/samp/).

104 Crush

defenceless black men and subjected them to a torrent of racist abuse. Hardened journalists such as Max du Preez of the Johannesburg *Star* called the incident "the worst pornography of racism and violence" that he had witnessed in three decades of reporting in South Africa. In the past, such activities were routinely sanctioned by the state. Now six white police officers are on trial in Pretoria on charges of assault and attempted murder.

For many, this incident confirms the ANC's forceful argument that white racism remains entrenched in South Africa (ANC, 2000). The angry response of the media and the politicians suggests that human rights abuses motivated by racism will not be tolerated in a democratic country. Several prominent politicians, including the Minister of Safety and Security, Steve Tshwete, condemned the attack and called for the rooting out of "rogue elements" in the South African police services (*Mail and Guardian*, 2000). This is significant, for Mr Tshwete had earlier criticized local human rights groups for their opposition to police methods during a national crime-fighting blitz known as "Operation Crackdown" (SAPA, 2000; *Business Day*, 2000).

A different perspective emerges if the focus is shifted to victims of this act of brutality. For while the incident may justifiably be seen as evidence of the old plague of racism, it might equally be read as evidence of a new plague of xenophobia. The three men in question were from the neighbouring country of Mozambique, and were characterized as "illegal immigrants" in the South African press. These migrants were caught up in a massive country-wide police and army operation to identify and deport undocumented migrants, a campaign which escalated dramatically after 1994 (Klaaren and Ramji, 2001). Over 600,000 migrants have been deported by the South African government in the last five years, the vast majority (over 85 per cent) to Mozambique (Crush, 1999a). Independent investigations by Human Rights Watch (1998) and the South African Human Rights Commission (SAHRC, 1999, 2000) suggest that abuse and corruption riddle the deportation system. Sectoral research by the Southern African Migration Project (SAMP) shows that migrants also enjoy little protection at place of employment (primarily in the agriculture, mining, construction and services sectors) (Rogerson, 1997, 1999; Crush, 1999b; Lincoln, 1999; Mather, 2000; Ulicki and Crush, 2000; Crush et al., 2001).

South Africa prides itself on having one of the most progressive constitutions in the world (Simeon, 1998). The Bill of Rights guarantees a host of basic political, cultural and socio-economic rights to all who are resident in the country. The courts have been extremely active in ensuring that the basic constitutional rights of non-citizens are protected. In a succession of court challenges over the last five years, foreign citizens have won virtually every case against the Department of Home Affairs (SAMP, 2001). The Department, in turn, has been publically castigated by several judges for its failure to observe basic rules of due process and equality before the law.

South Africa is also now a signatory to various international conventions relating to forced migration and refugee protection (de la Hunt, 1998; Handmaker, 2001). In 1998, the South African Parliament unanimously passed South Africa's first-ever Refugee Act to give effect to the principles enshrined in the Conventions. South Africa also has a particularly activist state-funded Human Rights Commission which has identified protection of foreign citizens as a major platform of its activity.

Migrants from neighbouring countries (from where the vast majority emanate) enjoyed few rights and little legal protection during the apartheid era. The question, therefore, is why this has not changed significantly. How is it that the kinds of human rights abuse inherent to the inherited system can have continued virtually unchecked since 1994? Any satisfactory explanation needs to take account of four inter-related factors.

First, South Africa was totally unprepared for the inevitable consequences of the fall of apartheid and reinsertion into global circuits of capital, commodities and people. The variety and volume of migrants and asylum-seekers arriving in the country changed significantly after 1990, certainly not to the "illegal millions" of popular lore, but enough to fuel a popular perception that the country had lost control of its borders (Crush, 1999a).

Second, many in government and the media have bought into a powerful and pejorative public immigration discourse that prioritizes control over management, expulsion over admission, exclusion over inclusion (Croucher, 1998; Klotz, 2000; Reitzes, 2000; Danso and McDonald, 2001; Peberdy, 2001). The numbers of "illegal aliens" are consistently exaggerated and all are typecast as a threat to the social and economic rights of South Africans (Crush, 1999b).

Third, immigration policy reform has stalled. Policy continues to be governed by the Aliens Control Act of 1991, a draconian piece of legislation sometimes dubbed "apartheid's last act" (Crush, 1998). Rights abuse is certainly enabled by existing legislation which promotes summary arrest and deportation with the barest of due process (Reitzes, 1998; Klaaren and Ramji, 2001). New policy proposals and legislation now under consideration have been criticized by many as entrenching the potential for human rights abuse. In marked contrast to the rights-based focus of much post-apartheid transformation, few in the new government are openly supportive of *migrant* rights (Klaaren, 1998; Reitzes, 1998, 2000).

In this context, there is a growing consensus amongst independent observers that South Africans are highly antagonistic to foreigners and that intolerance is widespread. A hostile public climate places few constraints on the behaviour of the agents of the state who police "immigration". It is also extremely difficult for advocates of migrant rights to gain a sympathetic hearing. In that context,

the present article aims to document the enormity of the public education challenge that confronts those who argue that the South African constitution protects all within the boundaries of the state, not just those with the badge of citizenship. The article reports the major findings of research conducted by the Southern African Migration Project on the issue of public attitudes towards rights for migrants, immigrants, refugees and non-citizens more generally.

# THE MEASURE OF XENOPHOBIA

Claims that South Africans were becoming increasingly antagonistic towards foreign citizens began to surface after 1995 (Reitzes, 1995a; Dolan, 1995; Minnaar and Hough, 1996). In 1998, Human Rights Watch, the New York-based international human rights monitoring organization, conducted a field investigation of these reports and concluded:

South Africa has become increasingly xenophobic in recent years, with a large percentage of South Africans perceiving foreigners – especially, almost exclusively black foreigners – as a direct threat to their future economic well-being and as responsible for the troubling rise in violent crime in South Africa (HRW, 1998).

While HRW's researchers reported numerous individual incidents of human rights abuse of migrants, their claims about general public attitudes were not based on any systematic research.

Charney's (1995) focus group studies of South African political attitudes had unveiled a surprising amount of latent hostility towards migrants. Local studies of particular communities have since confirmed that many black foreign citizens feel the verbal and sometimes physical sting of denigration from South Africans on the street (Dolan, 1995; McDonald, 1998; Bouillon, 1998; Morris, 1998; Reitzes and Bam, 2000; Dodson and Oelefse, 2000). There were clear suggestions that apartheid-era solidarities were crumbling as the new, post-apartheid nation-building project redefined the boundaries of belonging (Reitzes, 1995a, 2000; Croucher, 1998). Possibly the most visible marker of this redefinition was in the area of voting rights. Many non-citizens were given the vote in the landmark 1994 elections and were pleased to participate in the ballot box overthrow of the National Party and apartheid. These rights were then abrogated by the new Constitution which (its proponents argued) simply brought South Africa into line with most other constitutional states.

Violent attacks on non-South African traders erupted on the sidewalks of Johannesburg in 1996 and assaults on foreign citizens became increasingly common in a number of cities (Peberdy and Crush, 1998a). These culminated in 1998 with the death of three foreign citizens on a moving train at the hands of a group of South Africans returning from a rally of the unemployed in

Pretoria. Meanwhile, South African MPs were receiving increasingly strident complaints from their constituents about the presence of foreign citizens in their neighbourhoods. Studies of media coverage of immigration issues and the public utterances of elected officials from all of South Africa's political parties suggested that the view on the streets was more than a grassroots phenomenon (Dolan and Reitzes, 1996; Danso and McDonald, 2001).

National surveys are a well-established means of assessing public attitudes towards immigrants and immigration in other jurisdictions (Fetzer, 2000). The first systematic attempt to gauge the temperature of public attitudes in South Africa was in October 1994 when the state-funded Human Sciences Research Council (HSRC) included questions on immigration in an Omnibus survey of 2,200 South Africans. Follow-up surveys at regular intervals allowed the HSRC to track changing attitudes and to conclude, for example, that between 1994 and 1995 there was "a considerable growth in negative sentiments, in other words xenophobia, towards illegals/immigrants/aliens" (Minnaar and Hough, 1996: 261). The results seemed questionable, not because of lack of representiveness but because the use of leading questions was almost bound to elicit negative responses. The HSRC queries were also more about attitudes to policy than attitudes to people.

In 1997, the Southern African Migration Project (SAMP) embarked on an ambitious programme of public opinion surveys in relation to migration and immigration. The following national surveys have been conducted:

- 1998 national South African public opinion survey of diversity attitudes which included questions on attitudes to immigrants and migrants (sample size: 3,200);
- 1998 national public opinion survey of attitudes on migration to South Africa conducted simultaneously in three SADC countries (Zimbabwe, Lesotho and Mozambique) and subsequently in two others (Botswana and Namibia) (sample size: 3,500);
- 1998 attitudinal survey of migrants from other African countries living in South Africa (sample size: 501);
- 1999 national South African public opinion survey of attitudes to human rights, migrants and refugees (sample size: 1,600);
- 1999 national survey of skilled South Africans on attitudes towards emigration (sample size: 725);
- 1999 attitudinal survey of skilled non-citizens living in South Africa on attitudes and treatment in South Africa (sample size: 400).

Another round of surveys is planned for 2001. Together, these surveys provide a unique statistical data base for accurately assessing the attitudes of citizens and immigrants towards a wide range of immigration-related issues in the Southern African region (McDonald, 2000; McDonald and Crush, 2000).

This article focuses on various themes that have emerged during the course of this international migration research endeavour, and which are of particular relevance to this special issue on migrant rights. It seeks to address four basic questions: (a) the basic level and character of human rights awareness amongst the South African citizenry; (b) citizen views of immigration and the presence of non-citizens in the country; (c) the kinds of rights citizens are willing to extend to non-citizens including refugees; and (d) migrant perceptions of their own treatment in South Africa. The article concludes with a discussion on the implications of these findings for public education initiatives around human rights in South Africa.

# INSIDE THE FORTRESS

While South Africa is not an "immigration country" in the conventional sense, the vast majority of its white population are either immigrants or the descendants of immigrants who arrived in the late nineteenth and early twentieth centuries (Peberdy and Crush, 1998b). For decades, successive white governments aggressively pursued racist and highly selective immigration policies. Prior to the late 1980s, all immigrants had to be "assimilable by the white population". In the minds of white South Africans, immigration was the key to survival. In the minds of their black counterparts, immigration was another instrument of racial oppression.

Since 1994, the new South African government has been avowedly antiimmigration, justified primarily in terms of the threat to jobs for citizens (Reitzes, 1995b, 2000; Croucher, 1998; Crush, 1999a; Peberdy, 2001). Legal immigration has declined to an all-time low (less than 10,000 per annum by the late 1990s). Even temporary residence permits have been increasingly hard to obtain. This has occurred at a time when South Africa has been opening up again to the world and in the face of a litany of complaints from South African employers seeking to access the global skills market. There is little political will and no appetite for immigration at the highest levels of government (Mattes et al., 2000). Yet, the vast majority of people (87 per cent in total) still feel that too many foreign citizens are being allowed into the country, a view shared by both black and white (Table 1, page 124).

Comparative data presented in Table 2 (page 124) confirm that South Africans are among the most intolerant and hostile of people towards outsiders. There is widespread support for policies that would place strict limits on or prohibit

in-migration altogether. Fully one-quarter of respondents favour a total ban on immigration and migration, considerably more than in any other country for which there are comparable data. One in five feels that everyone from neighbouring countries living in South Africa (legally or not) should be sent home (Mattes et al., 1999: 10). Table 2 also shows that attitudes have hardened rapidly. Between 1995 and 1999, for example, support for a highly restrictionist policy increased from 65 per cent to 78 per cent. Corresponding support for a policy that tied immigration to job availability has declined dramatically from 29 per cent in 1995 to only 12 per cent in 1999.

More progressive policy initiatives, sporadic as they have been, enjoy little public support. Between 1996 and 2000, the government offered legalization amnesties to longstanding contract workers, SADC country citizens resident in South Africa, and ex-Mozambican refugees (Crush and Williams, 1999). Over 350,000 persons benefited from this effort to compensate for the actions of the apartheid government. There was little public debate before or during these amnesties and government made little effort to gauge the level of public support for the amnesties. This was probably just as well because there appears to have been widespread opposition to the whole idea (Table 3, page 125). Antagonism is particularly intense amongst white respondents (76 per cent), a set of reactions tinged with racism. Black South Africans, perhaps more mindful of the history of the anti-apartheid struggle, are significantly more magnanimous even though the majority of respondents (59 per cent) oppose the granting of amnesties to undocumented migrants.

The majority of South Africans believe that immigration and migration impact unfavourably on the country (nearly 60 per cent believe that they "weaken" society and the economy, and over 60 per cent that they put a strain on South Africa's resources) (Mattes et al., 1999: 18). Fear of crime, disease and threats to jobs are the leading reasons for opposition to immigration (Table 4, page 125). These are the core "elements" of anti-immigration discourse worldwide (Cohen, 1994; Watts, 1997; Finzsch and Schirmer, 1998). As Mattes et al. (1999: 19) point out: "South Africans not only hold negative attitudes towards foreigners, they also have a readily accessible set of stereotypes with which to justify or rationalize their negative attitudes."

South Africans favour draconian approaches to regulating immigration. In the 1998 SAMP survey, respondents were asked their opinion of control-oriented policy measures such as turning on the electric fence on South Africa's borders, putting more money into border protection, using the army to patrol borders, increasing taxes to pay for border patrols, requiring foreigners to carry identification, giving police the right to detain suspected illegal immigrants and penalizing those who employ illegal immigrants. With the notable exception of raising taxes, each of the measures enjoyed massive support right across the racial divide (Table 5, page 126).

These views have serious rights implications. Not only is there comprehensive endorsement of the controversial army and police role in immigration control, but even more troubling is the degree of support for using electrified fences on the borders. These lethal fences, erected by the apartheid government to deter ANC guerillas and Mozambican refugees, are no longer operational. Over 70 per cent of respondents feel that non-citizens should carry documentation with them at all times, something that harkens back to pass laws during the apartheid era and is clearly unconstitutional (Klaaren, 1998).

A significant minority of the surveyed population is unprepared to leave the policing of migration solely to the authorities. Respondents were asked whether they would take action against people from neighbouring SADC countries. Table 6 (page 126) shows that a third of respondents would be prepared to personally try and prevent migrants from moving into their neighbourhood, operating a business, becoming a fellow worker or having their children in the same classroom. They were also asked what they would do if they found out someone was "illegally" in the country. Forty-seven per cent said they would report them (with 3 per cent saying they would actually band together to force the person to leave the area). This climate ensures that official snoop-lines do a brisk business and that there would be generous support for the government's controversial plan to make communities and service providers legally responsible for identifying and reporting "illegal foreigners".

These responses can have come only from a citizenry that feels under siege from the outside. Whether it is, in fact, is highly questionable. But there is no doubt that public attitudes are being fanned by a highly-emotive discourse that portrays South Africa as being "flooded" by undocumented migrants (or "illegal aliens" in the xenophobic lexicon). So panicked is the populace that it is universally prepared to endorse unconstitutional measures to police immigration. This collective state of mind certainly helps explain why there is so little scrutiny or accountability in police and army policing methods and so little public outcry when the rights of migrants are compromised (Klaaren and Ramji, 2001). Indeed, as noted below, South Africans take a dim view of rights for migrants and non-citizens generally.

# RIGHTS FOR ALL?

The South African constitution has been widely praised as being amongst the most progressive and inclusive in the world (Simeon, 1998). Not only does it guarantee unprecedented rights and freedoms but clearly extends these rights to everyone living within the boundaries of the nation-state. Only two sets of rights are expressly reserved to citizens: (a) the right to vote; and (b) the right to engage in freedom of trade, occupation and profession. All other rights are extended to all "persons" in the country. In the public forum, the flowering of

a human rights culture since 1994 has been further enhanced by the high-profile activities of the Truth and Reconciliation Commission (TRC), watchdogs such as the South African Human Rights Commission (SAHRC), Public Protector's Office and Commission for Gender Equality, and the judgements of an activist Constitutional Court. The question, however, is whether ordinary South Africans have embraced the new "official" human rights culture and, indeed, how the populace understands the concepts and essence of "human rights" protection in the first place.

A 1998 survey of human rights awareness conducted by the Community Agency for Social Enquiry (Pigou et al., 1998) suggests that negative attitudes towards migrants may be part of a broader problem of human rights awareness. Knowledge of the existence of the Bill of Rights, for example, is remarkably low in the South African population, only 55 per cent of respondents having heard of it. Awareness is greater amongst urban populations and amongst whites (80 per cent versus 50 per cent of Africans), and increases with level of education. Only 18 per cent have received any kind of formal explanation or training about the contents of the Bill of Rights, and over half of those surveyed (56 per cent) thought that the rights guaranteed by the constitution were only for South Africans.

Asked for definitions of "human rights", the vast majority gave vague generic responses. A quarter of the rural respondents and 15 per cent overall were unable to give a definition at all. Rights are also prioritized with freedom of speech the most important, followed by the right to equality, the right to education, the right to housing and the right to a job. The survey showed overwhelming support for the death penalty (73 per cent in favour) and significant levels of homophobia (only 49 per cent agreeing that homosexuals should be treated the same as everyone else).

There was also massive support for the proposition that "the Constitution gives too many rights to criminals" (69 per cent in favour). This is not insignificant, given that South African immigration law effectively criminalizes undocumented migrants and deportation figures are regularly included in police crime-fighting statistics. Focus groups also elicited strong opinions on immigrants and tepid enthusiasm for the idea of migrant rights. On the basis of this research, Pigou et al. (1998: 1) concluded that "levels of knowledge about the range of rights included in the Bill of Rights remain highly uneven among state officials and the general population alike".

SAMP research has focused more specifically on the issue of rights for migrants. Large numbers of South Africans clearly disagree with aspects of their own Bill of Rights. On the positive side, the 1998 survey found that 47 per cent of respondents feel that Africans from other countries should be allowed to vote in elections (an unconstitutional proposition). On the negative,

around 40 per cent are opposed to Africans from elsewhere enjoying the same access to health and educational services as South Africans. Fifty-four per cent oppose giving the same right of access to housing. White South Africans are significantly less charitable than blacks on all of these issues (Table 7, page 127).

South Africans of all races display a distinct aversion to Africans from elsewhere on the continent. Asked to choose, South Africans of all races show definite preferences for European and North American immigrants. Disappointingly, for those who feel that South Africans ought to show a little more gratitude to their neighbours, migrants from Southern Africa are viewed only marginally more favourably than those from elsewhere on the continent. This does not augur well for attempts to build a regional consensus around migration management within the SADC (Oucho and Crush, 2001).

The 1999 survey provided a much more nuanced profile of rights sensitivity since it asked respondents what kinds of rights they considered should be given to which kinds of people (Table 8, page 127). Respondents were asked whether they thought a particular right should be granted to the group in question, including citizens, (legal) temporary workers, and "illegal immigrants." Table 8 shows overwhelming support for *citizen* access to the various rights of freedom of speech and movement, legal protection, police protection and access to services.

Second, there is a consistent pattern of conditional support for rights for legal temporary migrant workers. While only a quarter of the population thinks that these rights should always be accorded to legal migrants, around half are prepared to see these rights extended in certain circumstances. Only in the case of freedom of speech and movement are people less generous.

Third, when it comes to unauthorized migrants, the picture changes dramatically. Eighty-five per cent of respondents feel that these migrants should have no right to freedom of speech or movement, and 60-65 per cent feel that undocumented migrants should not enjoy police or legal protection or access to services. There is clearly a predominant feeling, certainly not confined to South Africa, that by being in a country illegally one sacrifices any entitlement to basic rights and protections, even if (as in South Africa) those are guaranteed by the constitution.

#### PROTECTING REFUGEES

In 1998, South Africa passed its first refugee legislation. Some commentators were sceptical, arguing that South Africa was opting for an essentially unworkable set of solutions to refugee protection (Barutciski, 1998). But the new Refugee Act was widely hailed by government and NGOs as a progressive yet

firm piece of legislation which would enable South Africa to honour the conventions, afford protection to those in need, and terminate abuse of the system by bogus claimants. Early assessments of the new legislation are not particularly encouraging, primarily because government's first action was to investigate the possibility of holding centres for refugee claimants in remote areas (Handmaker, 2001).

SAMP research into citizen attitudes provides insights into the response of South Africans to the notion of refugee protection and to the issue of what rights refugees should be entitled to. While the idea of "illegal immigration" is, almost by definition, likely to elicit negative responses, the same cannot be said for "refugees". Numerous black South Africans, including many in government, were themselves refugees in the past. South Africa is also a signatory to the UN and OAU Conventions. Yet, immigration discourse in South Africa has consistently failed to make the distinction clear to the people. Despite the best efforts of the UNHCR, the National Refugee Forum and the South African Human Rights Commission, there is strong suspicion that most South Africans regard refugees in their midst as fakes and fraudsters.

The SAMP 1999 survey shows that South Africans are prepared to accept that many newcomers to South Africa are indeed refugees. Whites believe that one-quarter of all newcomers are refugees, and blacks one-fifth. Respondents also agree with the general proposition that refugees warrant protection. However, they distinguish between the general principle of protection and their own government's responsibility in offering that protection. Nearly 70 per cent agree, or strongly agree, that refugees warrant protection. In contrast, only 47 per cent feel that the South African government should give asylum and protection to refugees (Table 9, page 128). Only 20 per cent are opposed or strongly opposed. While this response may seem encouraging, when asked whether they would personally support the South African government *paying* for the cost of sheltering refugees, the response was decidedly lukewarm: only 17 per cent were in favour and 55 per cent were opposed.

The central question is what people understand by "protection" and what rights they are prepared to extend to refugees as a result. Protection clearly does not extend to granting basic rights to refugees. As Table 10 (page 128) shows, nearly 70 per cent of respondents feel that refugees in the country should never have the rights of freedom of speech and movement. Only 3 per cent feel that these are automatic entitlements. Government plans for holding centres for refugees would therefore meet with very little public opposition.

Support for other refugee rights is only marginally more solid. Less than 20 per cent of respondents held the opinion that refugees should always enjoy legal and police protection in South Africa, or access to basic services. None of this indicates a citizenry well-educated in the circumstances and plight of refugees.

"Protection" is defined in the narrowest of terms. There should be cause for great concern that reluctance to grant rights to refugees is uncomfortably close to the set of responses given for "illegal immigrants" (Table 8). South Africans clearly continue to have difficulty distinguishing in their own minds between refugees and migrants. Government, NGOs and refugee organizations have a major task ahead to turn some latent sympathy for refugees into widespread popular support for genuine refugee protection that is consistent with South Africa's convention obligations.

# ON THE RECEIVING END

Since most of the research to date on victimization has been qualitative and individualistic, SAMP conducted large-scale survey research amongst migrants on their own perceptions of how they are viewed by South Africans. Nationally representative sampling is extremely problematical since no one is sure of the size or location of all non-citizens in the country. SAMP therefore devised a strategy to create a general stratified sample of 500 non-citizens in the country, and a targeted sample of skilled non-citizens living in South Africa. A third source of data was nationally representative surveys of citizens of the surrounding states of Botswana, Lesotho, Mozambique, Namibia and Zimbabwe.

Open-ended interviews and community case studies reveal a persistent pattern of verbal and physical harassment by the authorities and by citizens. The South African Human Rights Commission, for example, after interviewing detainees at a facility for deportees recently concluded:

Arrested persons were deliberately prevented from providing accurate documents, valid identity documents were destroyed, bribes were taken for avoiding arrest or for release without documentation and processes were delayed by inefficient methods and insufficient communication between the different departments. As a consequence, many persons with valid documents were arrested (SAHRC, 2000: 36).

Treatment by ordinary citizens appears to be no more tolerant or humane. On the basis of his work in inner-city Johannesburg Morris (1999: 327) notes:

It is clear that being a black foreigner ... is no protection from racism, especially if you are from a country north of South Africa's neighbouring states. Instead, black foreigners from these countries can expect to experience the same levels of abuse, discrimination and stereotyping endured by black aliens in other parts of the world.

Morris makes the important point that South Africans are not unique, although there is still puzzlement amongst African migrants who had imagined that South Africans, particularly black South Africans, would be more welcoming. On the basis of interviews with migrants in Cape Town and Johannesburg, Sinclair (1999: 469-470) found a "significant level of public and official hostility" articulated by her subjects: "a common theme is the hostility that they face. Many migrants respond with anger and indignation" given their earlier support of the anti-apartheid struggle. As one said "We have never treated them like they do to us."

Many migrants interviewed in the Morris and Sinclair studies were not from the region and were relatively well-educated. There was an initial assumption amongst researchers – perhaps because of the longstanding migration ties of South Africa and its immediate neighbours – that migrants from countries such as Mozambique, Lesotho, Swaziland and even Zimbabwe and Malawi might be viewed more favourably. This is called into question by Reitzes and Bam (2000). Their study of long-time Mozambican residents of Winterveld near Pretoria notes a significant shift in South African attitudes around 1994:

Having been promised formal inclusion into the new democratic South African state and having been encouraged to claim and consolidate a South African identity, they are now increasingly defined and treated as "outsiders" on the basis of their national identity. A previously shared and inclusive racial identity has been substituted with an exclusive national identity (Reitzes and Bam, 2000: 87).

The implication seems to be that a sea change of attitude accompanied the post-1994 nation building project. The change impacted not only migrants but non-citizen residents, including those with the same ethnic and cultural imprint as many South Africans.

Dodson and Oelefse (2000) make the point that the "xenophobia debate" in South Africa needs to be framed in terms of a "nesting of scales" from the local to the global, identifying which processes operate at what scale. They caution that there is a tendency to "generalize" xenophobia, to see all South Africans as complicit, "extending to the national scale competition and conflict which are far more localized in causation, character and extent" (p.126). Nevertheless, local case-study evidence to date suggests a remarkable similarity of attitude and perception amongst South Africans that is not place-dependent. Similarly, there is no suggestion in the literature that attitudes vary significantly by race, gender, age or educational level (though several have commented on the particular hostility of black South Africans to West and Francophone Africans). The evidence presented in this article confirms these qualitative assessments with representative national survey data.

One hypothesis consistent with this analysis is that proximity to and direct social interaction with non-citizens will impact upon citizen attitudes (negatively or positively). What emerges from the SAMP surveys is that many South Africans have no direct interaction and experience of foreigners, even from neighbouring states. As Table 11 (page 129) shows, only 4 per cent of

respondents in the 1998 Survey said they had "a great deal of contact" with people from countries in Southern Africa; with 80 per cent having little or none.

The 1999 Survey attempted a more sophisticated understanding by building in questions about types of contact and interaction. Correlations between views and contact show that those with no contact are statistically most likely to have negative opinions. The more contact they have, the more likely they are to have tolerant opinions (Kirkman, 2001). Type of contact is also critical. South Africans who are friends with foreign citizens are more likely to have positive views than those who live next to, work with or buy things from them. This finding is the major positive aspect in an otherwise dismal picture. Table 11 seems to indicate that frequency of interaction may itself be on the rise, with 7.8 per cent of 1999 respondents saying they have a great deal of contact and only 60 per cent that they have little or none.

In general, citizens of neighbouring states are evenly divided on whether they are viewed positively or negatively by South Africans. This surprising finding seems to suggest that not all migrants have personally experienced hostility and intolerance. Tables 12 and 13 (page 129-130) take the analysis a step further by providing answers to questions about perceptions of South African attitudes and treatment. A significant minority of persons interviewed (30-50 per cent) feel that South Africans have positive or very positive views of people from their home country. Yet at the same time, the majority do not feel that South Africans have a particularly positive view of people from their own country.

When asked what kind of treatment they personally would expect in South Africa, there was even greater optimism (Table 13), less than 30 per cent in each case expecting bad or very bad treatment. Most would expect better treatment from other non-South Africans than they would from citizens, but the differences are not massive. What is clear is different responses from Lesotho/Namibia and Mozambique/Zimbabwe vis-à-vis all the questions asked. People from Mozambique and Zimbabwe expect significantly worse treatment from South Africans, immigration officials and the police. This perception is entirely consistent with other research showing that citizens of these two countries bear the brunt of the state's arrest-and-deport campaign (Minnaar and Hough, 1996, Johnston and Simbine, 1998).

The more focused SAMP survey of migrants and non-citizens living within South Africa produced broadly similar results. Certainly not everyone has had, or admits to having, negative experiences. Asked, for example, about their general experiences in South Africa, 64 per cent said it had been positive or very positive, with only 20 per cent saying it was negative or very negative. Follow-up questions about fairness of treatment while in South Africa (Table 14, pages 130-131) showed again that while the foreign experience in South Africa is not uniformly positive, a significant minority find little to complain about in

their treatment by ordinary South Africans and the authorities. This suggests that the majority of migrants and immigrants from the SADC region are very much aware of the negativity that surrounds their presence in the country. However, only those who have had direct personal experience of hostility, abuse or prejudice are prepared to translate that general awareness into a firm belief that South Africans are intolerant and hostile. This, of course, highlights something of a paradox in the data. There is still a considerable gap between belief and action. The vast majority of South Africans hold negative views about all categories of migrant and immigrant and are unprepared to extend to them the rights actually guaranteed by their own constitution. Many migrants and immigrants are aware that South Africans are not favourably disposed towards persons from their home country.

Yet they are also surprisingly generous in their expectations of South Africans. They expect to be treated well and, with the exception of those who have had direct negative experiences, they believe that they will be, not only by ordinary South Africans but by the police as well. But the situation is finely balanced. Earlier sections of this article showed that the majority of South Africans are attitudinally hostile to outsiders but are not yet prepared to translate those attitudes into action; at worst they are latent xenophobes. They also suggest that the single biggest mitigator of negative stereotyping is personal familiarity. In other words, as South Africans become more socially familiar with non-South Africans their attitudes begin to change positively. This, in turn, suggests that public education programmes (the preaching of tolerance and good neighbourliness in the abstract) are unlikely to be successful. What is required from those in government, and outside, is a committed rejection of the discourse of otherness (isolating and stigmatizing all migrants as "aliens" and "foreigners"), and its replacement by a discourse of diversity (accepting and promoting dialogue and interaction as a desirable means of growing social capital).

# **CONCLUSION**

The struggle to articulate a rights-based culture for migrants has pitted NGOs, unions and the South African Human Rights Commission against employers, the Department of Home Affairs and other organs of state. The South African Human Rights Commission has received generous publicity and high level political endorsement for its anti-racism campaign. By contrast, its efforts to counter xenophobia and publicize the poor treatment of migrants by employers, citizens and the state have not met with anything like the same enthusiasm from government, the media or civil society.

Human Rights Watch was roundly criticized by both the Minister of Home Affairs and his ANC Deputy Minister when it released its 1998 report documenting widespread abuse of migrants in detention (*Business Day*, 1998). In

policy terms, the seminal Draft Green Paper on International Migration called for a rights-based approach as a fundamental pillar of any new immigration system (RSA, 1997). But the White Paper on International Migration and Draft Immigration Bill essentially dispensed with the rights emphasis of their predecessor (RSA, 1999). ANC objections to the proposed Immigration Bill (unlike those of the unions and NGOs) are directed more at its proposals for a privatized immigration system than any strong convictions about its rights-based implications.

Against this backdrop, this article has identified the enormity of the public education challenge of building a rights-based culture that includes migrants in a highly polarized society. Far from South Africa being a place of tolerance and openness, the SAMP surveys reveal high levels of societal intolerance towards non-citizens (whether legal and illegal, immigrants or migrants, refugees or asylum-seekers). South Africans are, of course, far from unique in this regard. Interestingly, the problem of hostility does not appear to be confined to any one racial, social or economic group, although it is directed disproportionately at Africans from neighbouring countries and further afield. Yet, as the surveys show, South African's first-hand contact with other Africans in the country is relatively limited. Hostile attitudes are not driven by experience but by stereotype and myth. Here the South African media and officialdom have had a defining role in articulating a discourse around migration and immigration issues that regularly borders on the xenophobic.

South African immigration discourse, with its relentless attacks on "illegal aliens" and "illegal immigrants", still presents a homogenizing view of all noncitizens in the country. Rarely are the various categories of immigrant and migrant, legality and illegality, regularity and irregularity, clearly identified and differentiated. At the same time, it is clear that not all migrants are perceived or treated equally. The great divide, as in many aspects of South African social life, is racial. White immigrants and migrants are not totally immune from the subtler forms of South African resentment, but their presence does not prompt the kind of panic and hostility that seems to attach to Africans and Asian migrants, immigrants and refugees.

As a number of analysts have pointed out, the rise of xenophobia cannot be divorced from the ideology and practice of new nation-building. In a very real and tangible sense, xenophobia is the underside of democratic nationalism. While the country has made enormous strides in building a constitutional and human rights culture appropriate to the new democratic order, there are clearly considerable obstacles to be overcome before the government and the citizenry are prepared to embrace the notion of equal rights for foreigners and to ensure that migrants (whether legal or undocumented) are constitutionally entitled to basic human and labour rights, simply by virtue of being on South African soil. Unless there is the political will and leadership to strike out in a new direction,

it is hard to see how even the best of public education campaigns will effect the necessary shift in public attitudes. In that context, South African ratification of the Convention for the Protection of Migrant Workers Treaty by South Africa will remain no more than a faint hope for the foreseeable future (Taran, 2000).

#### NOTE

1. SAMP practice is to use the recommended UN term "undocumented migrants" rather than "illegal immigrants". However, because the latter has more public resonance than the former, it was used in the questionnaire. The association with "illegality" may have negatively influenced attitudes. If so, the similarities with attitudes to refugees become even more troubling.

#### REFERENCES

ANC (African National Congress)

2000 "Uprooting the demon of racism", National General Council discussion document, (http://www.anc.org.za/ancdocs/ngcouncils/docs2000/discussion, html).

Barutciski, M.

1998 "The development of refugee law and policy in South Africa", *Journal of Refugee Law*, 10(4): 700-724.

Bouillon, A.

1998 "Immigration and immigrants in South Africa", Revue Européenne des Migrations Internationales, 14: 193-219.

Business Day

1998 "Rights report deemed inaccurate", 26 March 1998.

2000 "Guarding the guardians", 31 March 2000.

Charney, C.

1995 Voices of a New Democracy: African Expectations in the New South Africa, Centre for Policy Studies, Johannesburg.

Cohen, R.

1994 Frontiers of Identity: The British and the Others, Longman, London.

Croucher, S.

1998 "South Africa's illegal aliens: constructing national boundaries in a post-apartheid state", *Ethnic and Racial Studies*, 21: 639-660.

Crush, J.S.

1999a "Fortress South Africa and the deconstruction of apartheid's migration regime", *Geoforum*, 30(1): 1-11.

1999b "The discourse and dimensions of irregularity in post-apartheid South Africa", *International Migration*, 37(1): 125-151.

Crush, J.S. (Ed.)

1998 Beyond Control: Immigration and Human Rights in a Democratic South Africa, Idasa, Cape Town.

Crush, J.S., and V. Williams (Eds)

1999 The New South Africans? Immigration Amnesties and their Aftermath, Idasa, Cape Town.

Crush. J., T. Ulicki, T. Tseane, and E.J. Van Veuren

2001 "Undermining labour: the rise of sub-contracting in South African gold mines", *Journal of Southern African Studies*, 27(1): 5-31.

Danso, R., and D. McDonald

2001 "Writing xenophobia: immigration and the press in post-apartheid South Africa", *Africa Today*, (in press).

de la Hunt, L.

"Refugees and immigration law in South Africa", in J. Crush (Ed.), *Beyond Control: Immigration and Human Rights in a Democratic South Africa*, Idasa, Cape Town: 123-148.

Dodson, B., and C. Oelofse

2000 "Shades of xenophobia: in-migrants and immigrants in Mizamoyethu, South Africa", *Canadian Journal of African Studies*, 34(1): 124-148.

Dolan, C.

1995 "Aliens aboard: Mozambicans in the new South Africa", *Indicator South Africa*, 12: 29-32.

Dolan, C., and M. Reitzes

1996 "The insider story? Press coverage of illegal immigrants and refugees, April 1994-September 1995", *Centre for Policy Studies Social Policy Series*, no. 48, Johannesburg.

Fetzer, J.

2000 Public Attitudes Toward Immigrantion in the United States, France and Germany, Cambridge University Press, Cambridge.

Finzsch, N., and D. Schirmer

1998 Identity and Intolerance: Nationalism, Racism and Xenophobia in Germany and the US, Cambridge University Press, Cambridge.

Handmaker, J.

2001 "No easy walk: advancing refugee protection in South Africa", *Africa Today*, (in press).

HRW (Human Rights Watch)

1998 Prohibited Person: Abuse of Undocumented Migrants, Asylum Seekers and Refugees in South Africa, Human Rights Watch, New York.

Johnston, N., and C. Simbine

"The usual victims: the aliens control act and the voices of Mozambicans", in J. Crush (Ed.), *Beyond Control: Immigration and Human Rights in a Democratic South Africa*, Idasa Publishing, Cape Town.

Kirkman, A.

2001 "Xenophobia in South Africa: stereotypes, processes and outcomes", unpublished report.

Klaaren, J.

1998 "Immigration and the South African constitution", in J. Crush (Ed.), Beyond Control: Immigration and Human Rights in a Democratic South Africa, Idasa, Cape Town: 55-78. Klaaren, J., and J. Ramji

2001 "Inside illegality: migration policing policy in South Africa after apartheid", *Africa Today*, (in press).

Klotz, A.

2000 "Migration after apartheid: deracialising South African foreign policy", *Third World Quarterly*, 21(5): 831-847.

Lincoln, D.

1999 "Southward migrants in the Far North: Zimbabwean farmworkers in Northern Province", in J. Crush (Ed.), *Borderline Farming: Foreign Migrant in South African Commercial Agriculture*, Southern African Migration Project Policy paper no. 16, Cape Town and Kingston.

Mail and Guardian

2000 "Nation stunned by cop brutality footage", 8 November 2000.

Mather, C.

2000 "Foreign migrants in export agriculture: Mozambican labour in the Mpumalanga lowveld, South Africa", *Tijdschrift voor Economische en Sociale Geografie*, 91(4): 426-436.

Mattes, R., D.M. Taylor, D.A. McDonald, A. Poore, and W. Richmond

1999 Still Waiting for the Barbarians: SA Attitudes to Immigrants and Immigration, Southern African Migration Project Policy paper no. 14, Cape Town and Kingston.

Mattes, R., J. Crush, and W. Richmond

2000 "The brain gain and legal immigration to post-apartheid South Africa", *Africa Insight*, 30(2): 21-30.

McDonald, D.

1998 "Hear no housing, see no housing: immigration and homelessness in the New South Africa", *Cities*, 15: 449-462.

McDonald, D. (Ed.)

2000 On Borders: Perspectives on International Migration in Southern Africa, SAMP and St Martin's Press, Cape Town and New York.

McDonald, D., and Crush, J. (Eds)

2000 "Understanding the scale and character of skilled migration in Southern Africa", Special Issue of *Africa Insight*, 30(2): 5-9.

Minnaar, A., and M. Hough

1996 Who Goes There? Perspectives on Clandestine Migration and Illegal Aliens in South Africa, Human Sciences Research Council, Pretoria.

Morris, A.

1998 "Our fellow Africans make our lives hell': The lives of Congolese and Nigerians living in Johannesburg", *Ethnic and Racial Studies*, 21: 116-136.

Oucho, J., and J.S. Crush

2001 "Contra free movement: South African responses to the SADC migration protocols", *Africa Today*, (in press).

Peberdy, S.

2001 "Imagining immigration: inclusive identities and exclusive immigration policies in the 'new' South Africa", *Africa Today*, (in press).

Peberdy, S., and J.S. Crush

1998a Trading Places: Cross-Border Traders and the South African Informal Sector, Southern African Migration Project Policy paper no. 6, Cape Town and Kingston.

Peberdy, S., and J.S. Crush

1998b "Rooted in racism: the origins of the Aliens Control Act", in J. Crush (Ed.), Beyond Control: Immigration and Human Rights in a Democratic South Africa, Idasa, Cape Town: 18-36.

Pigou, P., R. Greenstein, and N. Valji

1998 "Assessing knowledge of human rights among the general population and selected target groups", Community Agency for Social Enquiry, Johnannesburg,

Reitzes, M.

1995a "Insiders and outsiders: the reconstruction of citizenship in South Africa", *Centre for Policy Studies Social Policy Series*, 8(1), Johannesburg.

1995b "Divided on the 'demon': immigration policy since the election", *Centre for Policy Studies Social Policy Series*, 8(9), Johannesburg.

1998 "Immigration and human rights in South Africa", in J. Crush (Ed.), *Beyond Control: Immigration and Human Rights in a Democratic South Africa*, Idasa, Cape Town: 37-54.

2000 "Mindsets and migrants: conceptions of state, sovereignty and citizenship of insiders and outsiders in South Africa", in J. Whitman (Ed.), *Migrants, Citizens and the State in Southern Africa*, St Martin's Press, New York: 62-81.

Reitzes, M., and S. Bam

2000 "Citizenship, immigration and identity in Winterveld, South Africa", *Canadian Journal of African Studies*, 34(1): 80-100.

Rogerson, C.M.

1997 "African immigrant entrepreneurs and Johannesburg's changing inner city", *Africa Insight*, 27(4).

1999 "International migrants in the South African construction industry: the case of Johannesburg", *Africa Insight*, 29: 40-51.

RSA (Republic of South Africa)

1997 Draft Green Paper on International Migration, Government Gazette 383 (18033), Pretoria.

1999 White Paper on International Migration, Government Gazette 406 (19920), Pretoria.

SAHRC (South Africa Human Rights Commission)

1999 Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act, South African Human Rights Commission, Johannesburg.

2000 Lindela at the Crossroads for Detention and Deportation: An Assessment of the Conditions of Detention, South African Human Rights Commission, Johannesburg.

SAMP (Southern African Migration Project)

2001 "Immigration law reform in Southern Africa", Southern African Migration Project, Website (http://www.queensu.ca/samp/policy.html).

SAPA (South African Press Association)

2000 "No apology for arresting illegal immigrants: Tshwete", 28 March 2000.

Simeon, R.

1998 Considerations on the Design of Federations: The South African Constitution in Comparative Perspective, Institute of Intergovernmental Relations, Queen's University, Kingston.

Sinclair, M.

"'I know a place that is softer than this ...', emerging migrant communities in South Africa", *International Migration*, 37(2): 465-483.

Taran, P.

2000 "Status and prospects for the UN Convention on migrants' rights", *European Journal of Migration and Law*, 2: 85-100.

Ulicki, T., and J.S. Crush

2000 "Gender, farmwork and women's migration from Lesotho to the New South Africa", *Canadian Journal of African Studies*, 34(1): 64-79.

Watts, M.

1997 *Xenophobia in United Germany: Generations, Modernization and Ideology,* Macmillan Press, Basingstoke.

TABLE 1 SOUTH AFRICAN ATTITUDES TO VOLUME OF IMMIGRATION

Is South Africa letting in too many, too few, or about the right number of foreigners? (per cent)					
	Too few	Right number	Too many		
White	5	11	84		
Black	6	5	90		
Total	6	8	87		

Source: 1998, SAMP (South African Survey).

TABLE 2 SOUTH AFRICAN ATTITUDES IN COMPARATIVE PERSPECTIVE

Country	1	2	3	4	5
South Africa 1999	2	12	53	25	7
South Africa 1998	6	17	45	25	7
South Africa 1995	6	29	49	16	0
Russia 1995	6	48	28	18	2
Philippines 1995	9	16	63	12	0
Peru 1995	8	39	40	12	4
China 1995	7	33	40	11	9
Argentina 1995	8	49	31	9	3
United States 1995	5	32	53	8	0
Finland 1995	8	30	51	8	3
Taiwan 1995	2	16	30	7	45
Japan 1995	4	41	40	6	8
Chile 1995	10	50	31	7	1
Nigeria 1995	18	37	40	6	3
Spain 1995	14	55	23	4	3
Zimbabwe 1997	16	30	48	4	0
Australia 1995	5	52	39	3	2
Southern Mozambique 1997	12	61	23	2	0
Sweden 1995	8	32	55	1	3
Lesotho 1997	61	23	12	3	1

- Notes: 1. Let anyone in who wants to enter (per cent).
  - 2. Let people come as long as there are jobs available (per cent).
  - 3. Place strict limits on the numbers of foreigners who can come here (per cent).
  - 4. Prohibit people coming here from other countries (per cent).
  - 5. Don't know (per cent).

TABLE 3
ATTITUDES TOWARDS AMNESTY

Would you support or oppose the government offering amnesty to all foreigners now living illegally inside the country?  (per cent)					
	Support	Neither support nor oppose	Oppose	Don't know/haven't heard enough	
Black	18	18	55	9	
White	3	13	76	8	
Total	14	17	59	9	

Source: 1998, SAMP (South African Survey).

TABLE 4
PERCEIVED THREATS FROM IMMIGRATION

	(per cent)		
	Black	White	Total
Criminal threat	40	45	48
Threat to jobs and economy	37	56	37
Threat of disease	30	16	29
Nothing to fear	28	24	24
Over-population	9	8	9
Making housing shortages worse	3	6	3
Threat to land	2	2	1
Cultural differences	2	0	1

Note: Columns add up to more than 100 per cent due to the fact that respondents gave more than one response.

TABLE 5
ATTITUDES TO GOVERNMENT POLICING MEASURES

Would you support or oppose the government taking the following actions? (per cent support)					
	White	Black	Total		
Using the army to patrol South Africa's borders	82	81	83		
Giving police the right to detain suspected illegal immigrants	90	78	82		
Penalizing businesses or persons who employ illegal immigrants	87	75	79		
Requiring foreigners to carry identification with them at all times	80	68	72		
Turning on the electric fence that surrounds part of South Africa's borders	73	64	66		
Allocating more money from the national budget to border protection	69	55	59		
Increasing taxes to cover the expense of increased patrols	13	22	22		

Source: 1998, SAMP (South African Survey).

TABLE 6
LIKELIHOOD OF TAKING ACTION AGAINST FOREIGNERS

How likely is it that you would take part in action to prevent people who have come to South Africa from other countries in Southern Africa from doing the following activities? (per cent who said "likely" or "very likely")						
Black White Total						
Moving into your neighbourhood	36	32	34			
Operating a business in your area	65	32	34			
Sitting in class with your child 34 27						
Becoming one of your co-workers	35	27	32			

Source: 1998, SAMP (South African Survey).

TABLE 7
ATTITUDES TOWARDS RIGHTS FOR IMMIGRANTS

What about government policy toward people from other African countries who are in South Africa? Would you support or oppose giving them the following? (per cent "opposed") Black White Total The same access to medical service as South Africans 61 34 39 The same access to a house as South Africans 69 50 54 The same access to education as South Africans 57 36 39 The right to vote in South African elections 74 49 53 The right to become a citizen of South Africa 51 44 44

Source: 1998, SAMP (South African Survey).

TABLE 8
SOUTH AFRICAN ATTITUDES TO RIGHTS FOR CITIZENS AND MIGRANTS

	Always	Sometimes	Never
Should be granted right to freedom of speech and movement <sup>1</sup>			
Citizens	86.4	13.1	0.5
Temporary workers	12.8	43.3	43.7
Illegal immigrants	2.8	12.7	84.4
Should be granted right to legal protection <sup>2</sup>			
Citizens	90.8	8.7	0.5
Temporary workers	23.9	52.7	23.2
Illegal immigrants	8.3	29.2	62.2
Should be granted right to police protection <sup>3</sup>			
Citizens	92.6	6.7	0.6
Temporary workers	30.1	45.6	24.1
Illegal immigrants	11.4	27.1	60.9
Should be granted right to social services <sup>4</sup>			
Citizens	96.2	3.8	0
Temporary workers	29.7	45.6	24.6
Illegal immigrants	8.9	28.3	62.7

<sup>1.</sup> Literally "Depends on the circumstances".

Source: 1999, SAMP (South African Survey).

<sup>2. &</sup>quot;Including not being detained without trial or having a lawyer in court".

<sup>&</sup>quot;Including freedom from illegal searches and to have property protected".

<sup>4. &</sup>quot;Such as education, housing, health care and water".

TABLE 9 SOUTH AFRICAN ATTITUDES TO REFUGEE PROTECTION

	Refugees <sup>1</sup> deserve protection (per cent)	South Africa should protect refugees (per cent)
Strongly agree/support	22.2	11.3
Agree/support	44.7	36.8
Indifferent	12.4	33.2
Disagree/opposed	15.2	13.9
Strong disagree/opposed	5.5	4.7

Literally "Depends on the circumstances".

Source: 1999, SAMP (South Africa Survey).

TABLE 10 SOUTH AFRICAN ATTITUDES TO RIGHTS FOR REFUGEES

	Always	Sometimes <sup>1</sup>	Never
Should be granted right to freedom of speech and movement	3.3	27.3	69.3
Should be granted right to legal protection <sup>2</sup>	13.3	43.5	42.8
Should be granted right to police protection <sup>3</sup>	16.7	40.7	42.2
Should be granted right to social services <sup>4</sup>	16.9	40.6	42.4

- Literally "Depends on the circumstances".
- "Including not being detained without trial or having a lawyer in court".
- "Including freedom from illegal searches and to have property protected".
  "Such as education, housing, health care and water".

Source: 1999, SAMP (South African Survey).

TABLE 11
PERSONAL CONTACT WITH NON-CITIZENS

	1998	1999
Great deal of contact	4	8
Some contact	15	29
Hardly any contact	20	16
No contact	60	44

Source: 1998 and 1999, SAMP (South Africa Survey).

TABLE 12
PERCEPTIONS OF SOUTH AFRICAN ATTITUDES

Do South Africans have a positive or negative view of people from your country who go to live and work in South Africa?						
Lesotho Mozambique Namibia Zimbabwe						
Very negative	23	5	12	14		
Negative	19	23	12	25		
Neither	4	16	22	12		
Positive	31	37	17	25		
Very positive	13	10	29	6		

Source: 1998, SAMP (South African Survey).

TABLE 13
EXPECTATIONS OF TREATMENT IN SOUTH AFRICA

What kind of treatment do you expect in South Africa?					
	Lesotho	Mozambique	Namibia	Zimbabwe	
From Black South Africans					
Bad/very bad	14	22	13	28	
Good/very good	87	45	60	37	
From other SADC citizens					
Bad/very bad	12	7	12	15	
Good/very good	81	57	64	45	
From South African immigration officials					
Bad/very bad	8	27	11	22	
Good/very good	87	28	62	37	
From South African police officers					
Bad/very bad	8	37	13	33	
Good/very good	88	25	62	33	

Source: 1998, SAMP (South African Survey).

TABLE 14a
PERCEPTIONS OF TREATMENT BY SOUTH AFRICANS

Extent to which:							
	Always	To a large extent	To some extent	Hardly at all	Never	Don't know	
People from your country are treated unfairly by South Africans	13	16	46	16	3	6	
People from your country are treated unfairly by South African Government	5	13	38	20	16	9	
You personally are treated unfairly by South Africans	9	14	38	17	22	0	
You personally are treated unfairly by South African Government	4	9	31	19	36	2	

TABLE 14b
PERCEPTIONS OF TREATMENT BY SOUTH AFRICANS

Since you have been in South Africa, have you received good or bad treatment from:							
	Very good	Good	Neither good nor bad	Bad	Very bad	Not applicable	Don't know
Other people from your country	29	50	14	3	2	1	1
Other people from Southern African countries	9	47	24	6	5	8	1
White South Africans	7	34	33	13	4	6	3
Black South Africans	5	30	28	22	12	2	1
Employers	5	20	18	12	2	41	3
Landowners/ Landlords	7	37	20	9	5	20	2
Government officials, e.g. customs and immigration officials	5	28	32	20	9	4	2
Police officers	3	28 20	32 35	20 19	9 14	4 8	1
Police officers	3	20	35	19	14	ď	I

# LA FACE OBSCURE DE LA DEMOCRATIE: MIGRATION, XENOPHOBIE ET DROITS DE L'HOMME EN AFRIQUE DU SUD

L'Afrique du Sud s'enorgueillit d'avoir l'une des constitutions les plus progressistes du monde: la Déclaration des droits garantit toute une série de droits fondamentaux dans les domaines politique, culturel et socio-économique à tous ceux qui résident dans le pays. Pourtant, les rapports faisant état d'une progression spectaculaire de l'intolérance des nationaux à l'égard des non-citoyens, des réfugiés et des migrants s'accumulent depuis 1994.

Le présent article examine cette situation en présentant les résultats de sondages d'opinion effectués par le Projet sur la migration en Afrique australe (SAMP).

Cette étude montre que l'intolérance est très répandue et ne cesse de s'intensifier. Les abus dont sont l'objet les migrants et les réfugiés ont augmenté et l'idée de la défense des droits des migrants ne trouve guère d'écho. Un seul groupe de Sud-Africains, une petite minorité ayant des contacts personnels réguliers avec les non-citoyens, se révèle significativement plus tolérant.

Ces conclusions ne présagent rien de bon pour les droits des migrants et des réfugiés dans ce pays ayant récemment accédé à la démocratie, ni pour une adhésion prochaine à la Convention des Nations Unies sur la protection des travailleurs migrants.

# EL LADO OSCURO DE LA DEMOCRACIA: MIGRACIÓN, XENOFOBIA Y DERECHOS HUMANOS EN SUDÁFRICA

Sudáfrica se enorgullece de tener una de las constituciones más progresistas del mundo. La Declaración de los Derechos garantiza toda una serie de derechos políticos, culturales y socioeconómicos a todos los que residen en ese país. Ello no obstante, constantemente se informa de la intolerancia ciudadana hacia extranjeros, refugiados y migrantes, hecho que ha aumentado drásticamente desde 1994.

Este artículo documenta este proceso a través de la presentación de los resultados de una encuesta nacional de opinión pública realizada por *Southern African Migration Project* (SAMP).

Esta encuesta demuestra que la intolerancia se difunde rápidamente y va adquiriendo mayor intensidad y gravedad. El abuso de migrantes y refugiados

133

se ha intensificado y la idea de derechos de los migrantes no cuenta con ningún apoyo. Sólo un grupo de sudafricanos, una pequeña minoría con contactos personales regulares con extranjeros, es considerablemente más tolerante.

Estos resultados no son un buen augurio para los derechos de los migrantes y refugiados en este país con una democracia reciente, ni tampoco para la aceptación temprana de la Convención de las Naciones Unidas sobre la protección de los derechos de los migrantes.

	·

# Annotated Bibliography on Human Rights of Migrants

Prepared by Migrants Rights International\*

#### **BOOKS**

Abella, Manolo. 1997: Sending Workers Abroad: A Manual for Low- and Middle-Income Countries. Geneva, International Labour Office.

This handbook provides extensive information for governments and social partners towards elaborating policy on foreign employment of nationals. Particular attention is focused on measures to protect migrants and provision of social support and services.

Ahmed, S.R. 2000: Forlorn Migrants: An International Legal Regime for Undocumented Migrant Workers.
Dhaka, University Press Limited.

Concentrating on Bangladesh and India, this book proposes an international legal regime on undocumented labour migration aimed at ensuring equitable, human and lawful conditions. It reviews the extent to which the 1990 International Convention on migrants rights provides components for such a regime, and ar-

gues that political will is required to respond to the urgency of addressing irregular migration.

Asian Migrant Centre; Ateneo Human Rights Center; Canadian Human Rights Foundation; Asia Pacific Forum on Women Law and Development. 2000: A UN Road Map: A Guide for Asian NGO's to the International Human Rights System and other Mechanisms. Montreal, Canadian Human Rights Foundation.

An overview of issues, instruments and approaches to utilizing international standards and mechanisms to strengthen national and local protection of migrants' human rights. The first part describes methodologies to identify and address violations of migrants' rights; the second part includes descriptions of the UN mechanisms relevant to migrants' rights, and the third part describes the role of the International Labour Organization and its relevant standards. This book is designed to serve as an educational tool and to suggest ef-

<sup>\*</sup> Originally compiled by MRI interns Simone Blake and Peter T. Merrion, Kent State University Geneva Program and Ronja Hoelzer, Johannes Gutenberg University, Mainz (Germany); expanded and edited by Patrick Taran.

fective strategies for NGOs in Asia – and around the world – to better promote and protect the rights of migrant workers, particularly women. It identifies practical approaches which can be used both within and outside the formal mechanisms of the UN and ILO systems.

Asian Migrant Centre; Migrant Forum in Asia. 2001: Asian Migrant Yearbook 2000: Migration Facts, Analysis and Issues in 1999. Hong Kong, AMC.

An annual review of regional issues, with numerous articles on protection of migrant human rights and general migration issues. Also, detailed country by country summations of data related to presence, conditions and treatment of migrants in Asia. Published yearly since 1998.

Böhning, Roger. 1996: Employing Foreign Workers: A Manual on Policies and Procedures of Special Interest to Middle- and Low-Income Countries. Geneva, International Labour Office.

This handbook provides extensive guidance towards elaboration of national immigration policies and practices, including regarding admissions, protection of rights, provision of services, issues of family reunion, and treatment of irregular immigration and employment.

Canadian Human Rights Foundation; Asia Pacific Forum on Women; Law and Development; Asian Migrant Center. 2000: A Collection of UN Treaties and ILO Conventions Relevant to Migrant Workers' Rights. Montreal, CHRF.

This collection of treaties and conventions regarding migrants' rights is

intended to complement the *UN Road Map* listed above, providing the complete texts of all relevant instruments. It also provides a listing of which countries have signed, ratified and/or acceded to each Convention.

Comisión Chilena de Derechos Humanos; Centro de Asesoría Laboral del Perú. 2000: Los Derechos Humanos de los Migrantes: Situación de los Derechos Económicos, Sociales y Culturales de los Inmigrantes Peruanos y Bolivianos en Argentina y Chile. La Paz. (Capítulo Boliviano de Derechos Humanos, Democracia y Desarrollo).

An extensive survey of the situation of migrants from neighbouring countries in Argentina, Bolivia and Chile, with particular studies on economic, social and cultural rights, review of immigration and State policies, discussion of racism and xenophobia, and proposals for political, legislative, administrative and civil society initiatives to improve respect for migrants rights. (In Spanish)

Cholewinski, Richard. 1997: Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment. Oxford, Clarendon Press.

This book comprises a thorough examination of the enumeration and protection of *migrant workers rights* in international law.

The first part provides an in-depth look at international migration for employment, and distinctions in treatment between non-nationals and citizens. The second part covers universal standards specifically relating to the protection of migrant

workers and their families, incorporating discussion of the role of the International Labour Organization in protecting the rights of migrants as well as the applicability of UN standards and mechanisms. The third section reviews protection of the rights of migrant workers and their families in Europe, including the role of relevant regional instruments.

Council of Europe. 1996: *Migrant Workers and their Families*. Strasbourg, Council of Europe Press. (Social Charter Monograph No. 4)

This book presents the norms and the case law of the European Social Charter for the *protection of migrants*, including equal treatment in working conditions, trade union rights, housing, taxation, legal proceedings, questions of family reunion and guarantees against expulsion.<sup>1</sup>

Council of Europe. 1995: *Tackling racism and xenophobia: Practical action at the local level*. Strasbourg, Council of Europe Press.

A collection of ten profiles of activities, measures and responses to racism and xenophobia in various European localities. Included are local government, NGO, and community initiatives.

Guerrero, Teresa Jurado (Ed). 2001: Easy Scapegoats: Sans Papiers Immigrants in Europe; State Strategies and Intervention Strategies for the Civil Society. Weinheim, Freudenberg Stiftung.

This short book presents the results of a year-long study in Belgium, France, Ger-

many, Italy and Spain reviewing the social-economic situation of undocumented migrants, strategies of four governments to address irregular migration, civil society initiatives to assist undocumented migrants, and case studies of violence against migrants. Also includes contact addresses.

International Labour Organization. 1999: *Migrant Workers*. International Labour Conference, 87th Session, Report III (Part 1B). Geneva, ILO.

A comprehensive 300 page report on the context and current considerations regarding ILO Conventions No. 97, the Migration for Employment Convention, and No. 143, the Migrant Workers (Supplementary Provisions) Convention, and two related ILO recommendations.

The book includes an in-depth look at the international migration process from start to end, a full summary of ILO data and perspective on working conditions, equal opportunity and return faced by migrant workers and members of their families, and issues of migrant employment, irregular (clandestine) movements and migrant workers in society. It also contains a summary of country attitudes towards these two ILO Conventions with some indicating interest ratification.

Jones, Sidney. 2000: Making Money off Migrants: the Indonesian Exodus to Malaysia. Hong Kong, Asia 2000 Ltd.

A detailed analytical report, including data and case studies on recruitment issues, problems of contract workers, situations of domestic workers and women migrants, arrests, detention and deportation of migrant workers, and treatment by the criminal justice systems. Contains a specific chapter on the trial of Irene Fernandez, and conclusions and recommendations.

Layton-Henry, Zig. (Ed.) 1990: *The Political Rights of Migrant Workers in Western Europe*. London, Sage Publications. (SAGE Modern Politics Series)

A comprehensive collection of articles addressing issues of extending economic, industrial, social and political rights to immigrant workers in Western Europe.

Chapters and authors include The Absence of Rights: The Position of Illegal Immigrants by Catherine Wihtol de Wenden, Industrial Rights by Jan Vrnaken, The Civil Rights of Aliens by Tomas Hammar, Consultative Institutions for Migrant Workers by Uwe Anderson, Tomas Hammar, Voting Rights by Jan Rath, Naturalization: the Politics of Citizenship Acquisition by Gérard de Rham, and two articles by the editor: The Challenge of Political Rights, and Citizenship or Denizenship for Migrant Workers?

Linard, A. 1998: *Migration and Globalization: The New Slaves*.
Brussels, International Confederation of Free Trade Unions.

A detailed report and analysis of deteriorating situation of labour migrants worldwide, focusing on harsh conditions, violations of human, labour and trade union rights, with recommendations for remedies and options and strategies for trade union action.

McMaster, N. 1997: Colonial Migrants and Racism: Algerians in France 1900-1962. New York, St. Martins Press.

This book addresses the situation of Algerians and their political and social status in France during the 1960's. It describes the colonial destruction of Algerian society and relates subsequent Algerian history, with a focus on issues of racism, emigration, departure and employment.<sup>1</sup>

Rotheberg, D. 1998: With These Hands: The Hidden World of Migrants Today. New York, Harcourt Brace.

An in-depth look at the lives of farm workers and the structure of the United States' and Mexican labour systems, exposing conditions that reflect denial of human rights. Abuses such as low wages, housing and transportation in dangerous conditions, and debt peonage are documented. Migrant farm workers tell their own stories, often of deplorable conditions such as workers being paid with wine and drugs, farmers being forced to live in isolated labour camps with collapsing roofs and dirt floors, and employers who controlled workers with threats and violence.<sup>1</sup>

Shameem, S.; Brady, E. 1998: *Understanding International Migration: A Sourcebook*. Bangkok, Asian Partnership on International Migration; UNDP.

A comprehensive reference book with summaries of relevant conventions and instruments, texts from the Declarations and Plans of Action adopted at the main UN International Conferences over the last decade, and ILO Conventions and Recommendations, as well as an extensive glossary of terms. It also contains a

summary report of an Asian Regional Consultation on the Impact of Transboundary Migration and Urbanisation as well as a report on a consultation on international migration by the United Nations Development Programme and the Asian Research Foundation.

Soysal, Y. N. 1994: Limits of Citizenship: Migrants and Post-national Membership in Europe. Chicago, University of Chicago Press.

This book compares different ways European nations incorporate immigrants, how policies evolved, and how they are influenced by *international human rights* discourse. It focuses on postwar international migration, with in-depth looks at France, Germany, the Netherlands, Sweden, Switzerland, and the United Kingdom. Discusses international pressure to extend membership rights to aliens, and suggests a model of postnational membership that derives its legitimacy from universal personhood, rather than national belonging.<sup>1</sup>

Stalker, Peter. 1994: *The Work of Strangers: A Survey of International Labour Migration*. Geneva, International Labour Organization.

A comprehensive review and analysis covering causes of migration, costs and benefits, immigrants rights, integration, issues of employment, impacts on countries of origin, and other issues, together with an extensive survey of country experiences region by region worldwide.

Ugalde, A.; Cardenas, G. (Eds). 1998: *Health and Social Services Among* 

International Labor Migrants: A
Comparative Perspective. Austin,
University of Texas (CMAS Border and
Migration Studies Series).

A comparative study of *health care for migrants* around the world, including comparisons of European and United States' systems, discussion of the health care situation of different groups of immigrants and migrants, and comparisons of treatment between groups. Includes a chapter on traumatic events among unaccompanied migrant children from Central America.

UN International Research and Training Institute for the Advancement of Women; International Organization for Migration. 2000: *Temporary Labour Migration of Women: Case Studies of Bangladesh and Sri Lanka*. Santo Domingo, INSTRAW; Geneva, IOM.

Two national case studies focusing on the impact of temporary female labour migration on the families left behind and on women migrants' own roles and status.

United Nations. 1998: *International Migration Policies*. New York, UN.

An overview of current policies in both developed and developing countries, based on information collected by the UN Population Division. Includes specific summations on implementation of political, civil, social, economic and labour ("industrial") rights, and of strategies for integration.

van Krieken, P.J. (Ed.) 2001: *The Asylum Aquis Handbook: The Founda-*

tion for a Common European Asylum Policy. The Hague, T.M.C. Asser Press.

A definitive compilation of the texts of European and international instruments on migration, including ministers' texts, Conventions, Resolutions, Recommendations and Decisions by both European (Union) Council and the Council of Europe, ILO Conventions and Recommendations and relevant UN Instruments and Declarations. Also includes a discussion of views on ageing and demography, globalizations, irregular migration, trafficking and family reunification.

Watts, Julie R. 2000: An Unconventional Brotherhood: Union Support for Liberalized Immigration in Europe. San Diego, University of California Press.

A fascinating review of evolution of labour union attitudes towards more open policies in France, Italy and Spain, highlighting both their more sophisticated understanding of migration effects on labour market and economic conditions and their increasingly effective policy advocacy.

Weiner, M. 1995: *The Global Migration Crisis: Challenge to States and to Human Rights*. New York, Harper Collins College Publishers.

A summary and analysis of global migration trends and issues, with particular focus on issues of international relations, international and national security and social conflict, as well as implications for government policy and for protection of human rights of refugees and migrants.

# REPORTS, BOOKLETS AND OTHER PUBLICATIONS

Ateneo Human Rights Center; Lawasia Human Rights Committee; Canadian Human Rights Foundation. 1998: Legal Protection for Asian Women Migrant Workers: Strategies for Action. Makati City, AHRC.

A report on and texts of presentations at the 1997 Conference by the same name held in Manila, co-organized by these three organizations. Titles include: "Overview of Asian Women Migrant Workers: Current Trends in Institutional and Social Problems," "How to Develop and Initiate Legal Protection Through Research, Documentation and Fact-Finding" and numerous others.

Center for Migration Studies. 1991: International Migration Review Special Issue: U.N. International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. Vol. 25 No. 4. Staten Island, Center for Migration Studies.

A special collection of eleven in-depth articles covering the genesis of the Convention, its interpretation, and several case studies on prospects for and barriers to its implementation.

Churches' Committee for Migrants in Europe. 1992: *Protecting Migrants' Rights: Application of EC Agreements with Third Countries*. Brussels, CCME. (CCME Briefing Paper No. 10)

An analysis of the extent of legal protection offered by EC agreements, written by Elspeth Guild.

Churches' Committee for Migrants in Europe. 1993: *The CSCE and the protection of the rights of migrants, refugees and minorities*. Brussels, CCME. (CCME Briefing Paper No. 11.)

A review of the roles and further possibilities of the Council for Security and Cooperation in Europe to enhance protection of rights in Europe, written by Urban Gibson and Jan Niessen.

Human Rights Watch. 1998: "Prohibited Persons": Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa. New York, Human Rights Watch.

This report documents the treatment of foreigners in that country, including where government practices are judged to be not in compliance with international human rights treaty standards. Included are detailed summaries of conditions and treatment of undocumented migrants, refugees and asylum-seekers and of manifestations of xenophobia in civil society as well as by authorities. Includes recommendations for ending abuse and achieving compliance with international standards.

Prepared on the basis of an extensive Human Rights Watch field mission, which visited several areas in South Africa and interviewed undocumented migrants, legal residents, asylum-seekers, and refugees as well as representatives of NGOs and government officials.

International Labour Organization. 2000: Summary report: Achieving equality in employment for migrant workers. High-Level Meeting on Achieving Equality. Geneva, ILO. This report summarizes an ILO anti-discrimination consultation in March 2000 which concluded an initial seven-year ILO research project "Combating discrimination Against (Im)migration and Ethic Minority Workers in the World of Work". The report examines findings and implications of the ILO research project, discusses a framework and inventory of measures and mechanisms to combat discrimination and promote equality of opportunity, identifies an initial listing of best practice measures replicable elsewhere, and includes recommendations for future activity.

International Labour Organization. 2000: Asia Pacific Regional Trade Union Symposium on Migrant Workers. Kuala Lumpur, Malaysia 6-8 December 1999. Geneva, ILO.

A compilation of papers and country reports covering labour migration trends, protection issues and norms, concerns in ASEAN, role of trade unions, and trafficking concerns.

International Organization for Migration. 1996: Round Table on Effective Respect for the Rights and Dignity of Migrants: New Needs and Responses. Geneva, IOM.

A summary report highlighting key issues, "commitments for action" and recommendations from a meeting among representatives of governments, international organizations, migrant groups and non-governmental organizations from all regions, held in Ferney Voltaire, France, in 1996, co-organized by the International Institute for Humanitarian Law and IOM.

Migrants Rights International. 1998, 2000: Achieving Dignity: Campaigner's Handbook for the Migrant Rights Convention. Geneva, MRI.

A handbook designed to orient NGO advocates, government officials, migrants and other concerned, regarding the background, importance and content of the 1990 International Convention on the Protection of all Migrant Workers and Members of their Families. It provides a summary overview of trends in migration in regional and global levels and an up-todate history of human rights standards. It outlines and highlights the content of the Convention – also explaining significant points in the Convention. It concludes with a section giving suggestions on how to organize promotion and advocacy for ratification of the Convention in national contexts.

UNAIDS. 2001: Migrants' Right to Health. Geneva, UNAIDS and IOM.

A UNAIDS Best Practice Collection booklet written by Margaret Duckett discussing access to health for migrants, balancing international treaties versus States' interests, policy issues and offering recommendations for policy and practice to ensure migrants' right to health.

United Nations. 1999: Intergovernmental Working Group of Experts on the Human Rights of Migrants. Report submitted to the 55th session of the Human Rights Commission. Geneva, UN (Document E/CN.4/1999/80).

An important assessment with a wideranging list of recommendations for eradication of institutional, social and economic obstacles to effective protection of migrants rights. The report paved the way for subsequent work of the High Commissioner for Human Rights, and the appointment of the Special Rapporteur in the Human Rights of Migrants in 1999.

United Nations. 2000: Special Rapporteur on Migrants Human Rights (Ms Gabriela Rodriguez Pizarro), Report submitted to the UN Human Rights Commission in its 56th Session. Geneva, UN (Document E/CN.4/2000/82, 6 January 2000).

This first report of the Special Rapporteur includes description of her mandate, discusses the key migrants human rights issues worldwide, and outlines her subsequent work programme.

United Nations. 2000: Special Rapporteur on Migrants Human Rights (Ms Gabriela Rodriguez Pizarro), Report submitted to the 57th Session of the UN Human Rights Commission. Geneva, UN (Document E/CN.4/2001/83, 9 January 2001).

This second report submitted by the Special Rapporteur describes activities, including a number of special actions, during the first year of her mandate, and discusses in detail major protection dilemmas for migrants, including trafficking, situation of migrant women and xenophobia.

United Nations. 2000: Special Rapporteur on Migrants Human Rights Report from the visit to Canada, addendum to the report submitted to the Human Rights Commission. Geneva. UN (Document E/CN.4/2001/83/Add.1)

Report on context, findings and recommendations from the Special Rapporteur's first country visit at the invitation of a government. Includes comments from meetings with government officials, NGOs and migrant groups.

United Nations Centre for Human Rights/Office of the High Commissioner for Human Rights. 1996: *Human Rights of Migrants*. Geneva, UN-OHCHR (Fact Sheet No. 24).

A brief review of multiple aspects of international migration focusing on human rights protection needs, the drafting and application of the Convention, and the complete text of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Available in Arabic, Chinese, English, French, Russian and Spanish.

World Council of Churches; Churches' Committee for Migrants in Europe. 1991: Proclaiming Migrants Rights: The New International Convention on the Protection of All Migrant Workers and Members of Their Families.

Geneva, WCC; Brussels, CCME (CCME Briefing Paper No. 3).

This booklet was the first publication intended to promote ratification of the 1990 International Convention on migrants' rights. It summarizes the content of the Convention, gives an overview of its importance and origins, describes the drafting process and concludes with recommendations for promoting ratification. Subsequently published in Arabic, French, German, Japanese, Portuguese, Spanish and other languages.

# ARTICLES AND PAPERS

Bustamante, Jorge. 1998: *Vulnerability of migrants as subjects of human rights*. Geneva, United Nations/Ecosoc/Commission on Human Rights.

Working paper prepared by the Chairman/rapporteur of the UN Working Group of Intergovernmental Experts on the Human Rights of Migrants, describing a model of understanding vulnerability of migrants to human rights violations and suggesting remedies for protection.

Carino, Felix. 1998: "Migrant Workers: CCA Calls for the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families". CCA Bulletin. Hong Kong, Christian Conference of Asia.

An editorial-article putting the main regional ecumenical Christian organization on record in defense of migrants' human rights and in support of ratification by Asian States of the 1990 International Convention on migrants rights. It highlights the specificity of the migrant scene in Asia, and an accompanying article lists recommendations to promote the Convention.

Castles, Stephen. 2000: "International Migration at the Beginning of the Twenty-first Century: Global Trends and Issues", *International Social Science Journal, Issue 165*. Oxford, Blackwell.

Article reviewing causes, patterns and key issues of migration; includes discussion of safeguarding migrants' rights, migration contributions to sustainable development and maximizing positive aspects of social and cultural change.

Crush, Jonathan. 2001: "The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa", *International Migration*, Vol. 38 No. 6 – Special Issue 2/2000. Geneva, IOM.

An article documenting escalation of citizen intolerance of non-citizen refugees and migrants, based on research and public surveys by the Southern African Migration Project (SAMP).

*Note:* SAMP has published a number of policy briefing papers addressing issues of migrants' human rights and xenophobia in the Southern Africa region.

Goodwin-Gill, Guy. 2000: "Migration: International Law and Human Rights", in B. Ghosh (Ed.), Managing Migration: Time for a New International Regime. Oxford, Oxford University Press.

This chapter in a book on global policy reviews existing international legal standards of treatment for migrants and refugees and discusses whether and how they will remain effective.

Hune, Shirley; Niessen, Jan. 1994: "Ratifying the UN Migrant Workers Convention: Current Difficulties and Prospects", *Netherlands Quarterly of Human Rights*, Vol. 12 No. 4, Amsterdam, and *Asian Migrant*, Manila.

This extensive article gives a brief background of the Convention and describes some of the changing views towards the issues of human rights and migration. The work is perhaps the most detailed treatment to date regarding the obstacles to the ratification of the Convention. General lack of awareness of the Convention is noted as a serious constraint; the article clearly recommends increased attention to these issues in international fora.

International Labour Organization. 2000: *Approaches to Promote Equality*. Geneva, ILO.

This working paper for a High-Level Meeting on Achieving Equality in Employment for Migrant Workers offers a framework to guide the identification and discussion of approaches and measures to combat discrimination and promote equality of opportunity.

International Organization for Migration. 1999: *The Effective Respect for Migrants' Rights*. Geneva, IOM.

This paper provides an overview of the main international treaties and standards which articulate rights applicable to migrants, and describes the extent to which these different instruments can be applied to further the incorporation of basic legal protections in national law.

Mattila, Heikki. 2001: "Migrants' Human Rights: Principles and Practice." *International Migration*, Vol. 38 No. 6 – Special Issue 2/2000. Geneva, IOM.

A summary of main human rights principles and instruments applying to migrants, plus discussion of recent international initiatives promoting respect for migrants' rights, including the UN expert Working Group, the Special Rapporteur,

the Campaign for the 1990 Convention and IOM activity.

Perruchoud, Richard. 2000: Legal Standards For The Protection Of Migrant Workers. Symposium on Migration in the Americas, San José Costa Rica, September 2000.

Text of address summarizing concepts of international human rights law and describing applicability of a number of main international conventions to protection of migrants, including groups at risk such as women and children migrants and those in irregular situations.

Perruchoud, Richard and Vohra, Shyla. 1998: *Identifying core rights of concern to migrants*. Regional Seminar on Human Rights and Migrants, Crystal City, Virginia, April 1998.

IOM background paper prepared for a seminar organized under auspices of the regional inter-governmental *Puebla Process* on migration in Central and North America, identifying core human rights principles applicable to protection of migrants.

Philippine Migrants Rights Watch. 1997: *Rights of Migrant Workers*. Manila, PMRW.

An overview of rights of migrants for general audiences. It explains the what and why of migrants human rights, emphasizes rights of family members and also addresses questions of expulsion.

Taran, Patrick. 2001: "Human Rights of Migrants: Challenges of the New

Decade", *International Migration*, Vol. 38 No. 6 – Special Issue 2/2000. Geneva, IOM.

A comprehensive summary of main trends, issues, debates, actors and initiatives worldwide regarding protection of human rights of migrants. The most extensive global survey to date, it addresses globalization, exploitation of migrants, State concerns and civil society responses, and includes recommendations for governments, NGOs and international agencies.

Taran, Patrick. 2000: "Status and Prospects for the UN Convention on Migrants Rights", *European Journal of Migration and Law*, Vol. 2 No. 1. The Hague, Kluwer Law International.

A review asserting that migrants rights is a key human rights issue, reviewing conditions affecting recognition of migrants rights, the status of and obstacles to ratification of the 1990 Convention, and strategies towards its entry into force, with emphasis on importance of civil society advocacy.

Taran, Patrick. 1998: *Globalization*, *Migration*, *and Human Rights: Broken Keys to the 21st Century?* 5<sup>th</sup> International Conference on Health and Human Rights, Cape Town, South Africa, December 1998. <sup>2</sup>

Keynote address discussing the impact of globalization on migration, trends in migration, i.e. breakdowns of economic, political, and social structures, and evolution of human rights concepts.

Taran, Patrick. 1994: *Protecting Migrants Rights and Dignity in Chal-*

*lenging Migrant Trafficking*. Geneva, International Organization for Migration.

A background paper for the 1994 IOM Seminar on Combating Trafficking in Migrants, assessing political, economic, and social aspects of migrant trafficking and human rights issues. It highlights the centrality of ensuring protection of migrants in efforts to combat organized crime.

World Council of Churches. 1998: "Using Human Rights Standards for Uprooted People: How and Why they Apply", *Uprooted People*, Vol. 1 No. 6. Geneva, WCC.

A description in the WCC bimonthly bulletin *Uprooted People* of challenges of protecting human rights of uprooted people, summarizing concepts of human rights applying to refugees, migrants, and internally displaced persons, and how international standards can be utilized in the field.

Vohra, Shyla. 1998: *International Migration Law: Global Legal Instruments*. International Migration Policy and Law Course, Budapest, November 1998. IOM.

A presentation summarizing the main international human rights instruments including the 1966 Covenants, CERD and the 1990 Convention, and discussing applicability to migrants.

Zegers de Beijl, Roger. 1997: Combating Discrimination against Migrant Workers: International Standards, National Legislation and Voluntary Measures – The Need for a Multi-pronged Strategy. Geneva, ILO.

Paper prepared for the Seminar on Immigration, Racism and Racial Discrimination, UN Centre for Human Rights, May 1997.

# WORLD WIDE WEB

There are now numerous websites of international, national and local organizations that include relevant information, documents and activity listings. As it is impossible to list these, two main websites which include links to most other relevant sites are included here.

December 18 Portal Website on migrants rights: www.december18.net

A comprehensive and authoritative source for recent documentation, articles, contacts, and organizations related to protection of migrants human rights worldwide. It includes references and texts for numerous recent papers not included in this bibliography; and has links to websites of many local, national and international organizations promoting migrants rights.

Global Campaign for ratification of the migrants rights convention: www.migrantsrights.org

This website provides information on the global effort to promote entry into force of the 1990 International Convention on migrants rights, identifies national campaign contacts, and has links to the 16 international organizations participating in the campaign Steering Committee.

People & the Planet: *Migration Today: the Global Challenge.* www.oneworld. org/patp/pap\_migration.html

An essay dealing with contemporary international issues of migration, including a review of causes of forced human displacement. It focuses on problems of protection faced by migrants in host countries, and concludes by discussing the application of human rights standards to migrants.

# NOTES

- Descriptive text adapted from Amazon.com website.
- 2. Available from MRI.

For additional citations, see:

www.december18.net

# The Human Rights of Migrants

International migration is at an all-time high. However, government officials, policy makers, NGO advocates, academic researchers and international agencies have only recently begun to consider the human rights dimension of migration.

Under the Universal Declaration of Human Rights, signed over 50 years ago, human rights are universal, indivisible, and inalienable; in other words, "human rights for all". However, their de facto extension to many vulnerable groups, such as migrants, has been a long and difficult process, by no means complete.

This collection of articles – also published as a special issue of IOM's *International Migration* journal – has been compiled to promote further debate and research on the issues of migration and human rights. This book includes a discussion of the challenges in the next decade for the recognition and extension of the human rights of migrants; a summary of applicable international human rights instruments; a review of her work by the UN Special Rapporteur on the Human Rights of Migrants; an analysis of the special human rights situation of internally displaced persons (IDPs); and an examination of the human rights abuses in South Africa, the host country of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance in September 2001. The book concludes with an annotated bibliography on migrants' human rights.

# Recent IOM publications

The Role of Regional Consultative Processes in Managing International Migration — published 2001

World Migration Report 2000 - published 2000

Migrant Trafficking and Human Smuggling in Europe: A Review of the Evidence with Case Studies from Hungary, Poland and Ukraine – published 2000

Return Migration: Journey of Hope or Despair? - published 2000

Perspectives on Trafficking of Migrants - published 2000