

**The 6th Informal ASEM Seminar on Human Rights Series
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**Address
of
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The International Commission of Jurists (ICJ) since its establishment in 1952 has remained the global advocate of the rule of law and human rights. Among its core objectives and activities have been standard setting for the promotion of rule of law and protection of human rights and judicial independence. To this end with its international Secretariat in Geneva it works closely with the UN Commission on Human Rights and other like minded international and national non-governmental organizations.

The human rights of migrants, whether regular or irregular, including refugees and asylum seekers, have been a concern to the ICJ as they strike at the core value of equality before the law irrespective of, amongst others, race, religion, nationality or origin which is one of the first principles of the rule of law.

Subjects like access to justice, right to education, rights of minorities, freedom of expression and right to information, right to a healthy environment, freedom of conscience and religion, human rights and multi-

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national companies and human rights and foreign investment which were topics discussed in the previous five seminars are issues of importance and concern for the region. I congratulate ASEM for this initiative.

I thank the organizers of this seminar for inviting me to share some thoughts on this subject of human rights implication on international migration which is currently taking a global momentum.

I am indebted to the two rapporteurs for the excellent resource papers they have produced.

Singapore appears to be the springboard for dialogues and discussions on human rights in the region. In 1993 in the Joint Communique of the 26th ASEAN Ministerial Meeting in Singapore paragraph 18 read:

“The Foreign Ministers reviewed with satisfaction the considerable and continuing progress of ASEAN in freeing its peoples from fear and want, enabling them to live in dignity. They stressed that the violations of basic human rights must be redressed and should not be tolerated under any pretext. They further stressed the importance of strengthening international cooperation on all aspects of human rights and that all governments should uphold humane standards and respect human dignity. In this regard and in support of the Vienna Declaration and Programme of Action of 25 June 1993, they agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights”

In 1997 at its first meeting of ASEM Foreign Ministers in Singapore it was agreed to hold informal seminars on human rights within the ASEM framework to initiate and promote mutual understanding and co-operation

between Europe and Asia in the area of political dialogue, particularly on human rights issues.

Having taken a leadership, at least in providing the venue, the Republic State which has a 34% migrant population¹ and near developed status could lend more support in the promotion and protection of human rights in the region.

In early 1993 Ministers and representatives of Asian States met in Bangkok and adopted a declaration known as the Bangkok Declaration in preparation for the Vienna Conference. In that Declaration the Ministers and representatives, inter alia, reiterated “*the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia.*” They also acknowledged “*the importance of co-operation and dialogue between governments and non-governmental organizations on the basis of shared values as well as mutual respect and understanding in the promotion of human rights.....*”

After eleven years since Vienna the exploration still continues.

Since 1996 the Regional Working Group for an ASEAN Human Rights Mechanism has been in dialogue with ASEAN governments for the establishment of a sub-regional human rights mechanism following the 1993 Singapore Joint Communiqué referred to earlier. In recent annual workshops in Jakarta, Manila and Bangkok in conjunction with the annual ASEAN Ministerial meetings the human rights of migrant workers were subject of discussions among other issues of common concern in the region such as women and children and related trafficking.

There is a school of thought that a human rights mechanism for ASEAN could begin on a moderate scale by identifying common concerns for the region to address. Three such concerns are the rights of women, children and migrant workers including trafficking. Difficulty in reaching consensus particularly on the migrant workers issue has been apparent during these debates while Philippines, Indonesia and Thailand are supportive.

Cross border movements of people have grown considerably over the last three decades. According to the UNDP Human Development Report 2004 the number of international migrants – people living outside their country of birth - grew from 76 million in 1960 to 154 million in 1990 and 175 million in 2000. This is about 3% of the world's population. This figure is said not to have taken account of the irregular or undocumented migrants. In the 1990s the foreign born population in more developed regions increased by 23 million. Today 1 in 10 people living in those countries was born elsewhere. About 26 million are within the borders of the European Union. Again this figure does not include the irregular migrants.

Irregular migration has reached unprecedented levels: up to 30 million people worldwide do not have legal residing status in the country where they live.

About 9% of the world's migrants are refugees (16 million people) Europe appears to have hosted more than 2 million asylum seekers in 2000, four times more than North America.

Between 1990 and 2002 remittances to developing countries from developed countries increased from \$30 billion to \$80 billion. The economic benefit migrant labour brings to developing countries cannot be denied. As our Rapporteur has pointed out in 2001, 8.9% of the Philippines GDP was generated by these remittances by about 4.7 million Filipino migrant workers, both regular and irregular.

Skilled workers from developing countries continue to legally emigrate to developed countries. Though this brain drain is in the long run detrimental to the economic and political development of the developing countries but it is inevitable in the exercise of one's right to seek better opportunities. It is learnt that the International Organisation for Migration (IOM) is working to stem this brain drain and to ensure that skills are returned back home.

Generally this category of migrants does not encounter difficulties in the host countries. In many cases they are given priorities and privileges by host governments for permanent resident status or citizenship. Only last week the Malaysian Minister for Home Affairs was reported to have said that only those with skills and expertise will be given priority for permanent resident status or be granted citizenship. He pointed out that they should be an asset at a time when the nation was fast moving towards the global era.²

Unskilled migrants enter developed countries illegally looking for better work. Then there is the category described as "involuntary" movement of people, whether skilled or unskilled, across borders seeking asylum. This category is considered a grey area in the international migration debate.

These two categories are a source of concern to many countries particularly the developed ones which take measures to bar their illegal entry. These are often the vulnerable groups subjected to many forms of violation of human rights and first victims of governmental securitization and control policies. The situation has become more acute since the September 11 attacks in the United States when governments began to take counter terrorism measures. US Attorney General, John Ashcroft's, new policies to restrict protection enjoyed by immigrants drew protests from civil liberty organizations and Islamic and Arabs ethnic organizations resulting in lawsuits. We also recall the proposal by Prime Minister Tony Blair and the then Prime Minister of Spain, Jose Maria Aznar of Spain, two years ago at the European Council meeting in Seville that the European Union withdraw aid from countries that did not take effective steps to stem the flow of illegal immigrants to the EU. Due to widespread protests the proposal was not pursued.³

In his message to commemorate International Migrants Day on December 18, 2003 the UN Secretary General, Kofi Annan, said amongst others:

“In building that framework, let us remember the people at the heart of this issue – migrants themselves. Many migrate under duress, endure a perilous journey, and face hardships in their new home countries. Many remain vulnerable to exploitation and abuse by unscrupulous traffickers, smugglers and employers. Moreover, in recent years, migrants have been vilified in certain societies, while some have been denied their rights in the name of national security. Despite all these obstacles, the vast majority of migrants contribute greatly to their new societies, and many send back remittances which support the economies of their countries of origin.

More must be done to ensure the respect of the human rights of migrant workers and their families – be they regular or irregular, documented or undocumented. That is why I call on States to become parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which entered into force this July. The Convention establishes for its ratifying countries the obligation to respect the core human rights and fundamental freedoms of migrant workers in their State of immigration. It is a vital part of efforts to combat exploitation of migrant workers and members of their families.”

The International Convention on the Protection of the Rights of Migrants referred to by the Secretary General is widely regarded as a major contribution to setting standards on the rights of migrants. Its entry into force on July 1, 2003 capped a process that began in 1940 at the international level with the development and adoption by the International Labour Organisation (ILO) of new global norms for the protection of the rights of migrants. The Convention sets minimum standards for protecting the civil, political economic, social and cultural rights of migrant workers. Such workers are 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*”. Its binding international standards not only address the treatment, welfare and human rights of documented and undocumented migrants, but also the obligations and responsibilities of sending and receiving States.

The Convention is also aimed at preventing and eliminating the exploitation of migrant workers throughout the entire process of migration. It also seeks to put an end to the illegal or clandestine recruitment and

trafficking of migrant workers and to discourage the employment of migrant workers in an irregular or undocumented situation.

The first meeting of the member States to the Convention took place in New York in December 2003 and the 10 members of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families were appointed.

It is a sad reflection to note that it took 13 years for this Convention on the Rights of Migrant Workers to come into force. It was adopted by the General Assembly in December 1990. It was not until June 2003 it received the requisite ratifications from 20 member States to bring it into force. To date only 24 States have ratified. Among them none from Europe or North America. Save for the Philippines and Sri Lanka none from Asia. Largely the sending States seem to have ratified.

The Vienna Declaration on Human Rights urged all States to guarantee the protection of the human rights of all migrant workers and their families.⁴

In addition to the Convention on Migrants there are other general international instruments which are applicable to protection of migrant's rights.

Article 2 of the Universal Declaration of Human Rights is the starting point. It provides that everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin,

property, birth or other status. This is reiterated in Article 2.1 of the International Covenant on Civil and Political Rights. Many of these rights in the Declaration and the Covenant are non-derogable pursuant to Article 4 of the Covenant.

While the International Economic Social and Cultural rights has a similar article prohibiting discrimination of any kind including as to national or social origin yet it also provides that “*Developing countries with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals*”

ILO Conventions too provide some protection for migrant workers. For example ILO Convention 97/49 concerning Migration for Employment (Revised) established, amongst others, obligations on member States to extend to immigrants lawfully within its territory treaties no less favourable than that which it applies to its own nationals in respect of remuneration, membership to trade unions, social society, taxes and access to justice. It provides an obligation on States to oversee the activities of recruiting bodies. ILO Conventions – however do not cover the situation of temporary migrants. Several countries place migrant domestic workers into this category thereby denying them the protection of the Convention.

Last year the Global Commission on Migration was launched. This independent non-UN body has a three-pronged mandate. Firstly it is to bring international migration issues to the top of the global agenda; secondly it is to analyse shortcomings in approaches by governments or other bodies to migration; and thirdly it is to make practical recommendations on how to

manage migration better. This independent panel began its work in January this year and is expected to complete its report by mid 2005. This Commission is the initiative of States from both North and South. I was pleased to note that the Commission is called to make practical recommendations. Often panels of experts invited by international organizations make recommendations bordering on academic jargon or couched on theoretical terms often difficult to implement.

The UN Special Rapporteur on Migrant Workers in her last report to the Human Rights Commission in April this year identified some of the factors which contributed to the vulnerability of migrant domestic workers and went on to list a string of rights often violated, including the right to life, human dignity, privacy, health care, sexual harassment, trafficking, servitude and persecution, arrest and detentions, restriction of movements, etc⁵. Some of these migrants have lived in the host countries for many years illegally. There have been instances where the social ills in societies are attributed to the presence of migrant workers. Just more than a week ago a leading Malaysian English daily published a report under the heading “*Diseases on the rise due to foreign workers*”. It was a report of a joint press conference after the first bilateral meeting between the Health Ministers of Indonesia and Malaysia in Kuala Lumpur. The Malaysian Health Minister said that medical examination on 700,000 foreign workers in 2003 revealed that 2.6 per cent of them suffered from various communicable diseases. “Even during random checks at entry points, five per cent of them were found with such diseases.” he said “*We have some one million illegal workers who have never undergone any medical examination*”, he went on to say. 124 clinics in Indonesia have been authorized to examine workers coming to Malaysia. The Indonesian Minister assured that his Ministry will work

closely with Malaysia to ensure that their workers coming to Malaysia were free of disease.

While such bilateral dialogues and arrangements are a step in the right direction for better migrant management yet how a 2.6% of 700,000 migrant workers could be classified as contributors to the rise of diseases in the country is hard to believe. Media hype particularly in States where they are controlled or practising self censorship can be detrimental to the protection of rights and welfare of migrants.

At a recent workshop on human rights in Kuala Lumpur a participant asked the Human Rights Commission of Malaysia what steps had been taken to expel illegal immigrants because they contributed to the increase in the crime rate in that country. This again is due to press reports of a few apprehended for certain crimes and identified as illegals.

With the present international trend in migration coupled with the advent of globalization effective migration management can only be addressed at a global level with member States consenting to sacrifice an element of State sovereignty. This calls for member States to become team players within the community of nations. Bilateral and regional arrangements may help as short term measures yet with the present trend we must take effective steps for global arrangements.

Some Asian States may not be comfortable compared with those in the other regions including the developed West. Philippines appear to be the only country in Asia adopting to the global arrangement. Many Asian States have not been receptive to ratification of international treaties particularly on

human rights. This is evident from the list of status of ratifications of these instruments. As mentioned earlier after nearly 14 years only two Asian States have ratified the Convention on Migrant Workers. This is indicative of the lack of political will from Asian governments. The major Covenants on Civil and Political Rights and Economic Social and Cultural are to date ratified by only 13 and 14 Asian States respectively. Only 11 have ratified the Convention against Torture. Within the Asian caucus of ASEM/ASEF Malaysia, Singapore and Indonesia have not ratified any of these three major instruments.

Among the 145 member States who have ratified the 1951 Convention relating to the Status of Refugees and the 1967 Protocol only 4 are from Asia. In the case of the 1954 Convention Relating to the Status of Stateless Persons among the 57 who have ratified Philippines is the only Asian State. None from Asia has ratified the 1961 Convention on the Reduction of Statelessness.

What are the reasons which underlie the reluctance of these Governments to ratify these international instruments? One reason is that their national laws and policies are inconsistent with these Conventions. There is no political will to embark on a scheme to amend the national laws to conform with the Conventions. Sovereignty of State and Security of State are often walls of defence.

Veneration for human rights, particularly civil and political rights, has been seen by some Asian States as detrimental to economic growth.

Another reason is the periodic reporting procedures to the respective committees monitoring State compliance with the Conventions and the consequential examination of the States by the committees. This process requires transparency. Asian governments generally are wanting in transparency. Many resent scrutiny by outside bodies. We all recall how the Asian economic miracle envied by the rest of the world in the mid nineties burst into a melting crisis in 1997/98. The crisis exposed, amongst others, the perils of non-compliance with principles and procedures of accountability and transparency.

This want of transparency is also evident from the fact that hardly any Asian State has freedom of information legislation. Sometimes the Official Secrets legislation meant for the protection of State defences are used to resist flow of information on public administration.

Another drawback for Asia is that it is the only region in the World today which has not a regional mechanism to address human rights issues. Even Africa has an African Commission on Human and People's Rights established under the African Charter on Human and People's Rights. While both Europe and the Americas have regional courts, Africa too is about to set up a regional court on human rights. Asia on the grounds of diversity within the region has been resisting such institutions.

While we continue with our efforts to pursue migration policy, management and protection at international level, which as I said is the most effective procedure, we must nevertheless, given the circumstances, continue to address these issues particularly those related to protection at national levels.

What are the national institutions migrants can look up to for protection of their rights? Just like other nationals it is the independent judiciary supported by an independent legal profession. The Vienna Declaration and Programme of Action 1993 expressly provides that an independent judiciary and legal profession “are essential to the full and non-discriminatory realization of human rights and indispensable to the process of democracy and sustainable development”.

What needs to be done is that the judiciaries and the legal profession should be sensitized to the prevailing issues relating to vulnerability of migrants particularly the irregular ones including refugees. The subject should form part of the syllabus for continuing legal education for judges and lawyers. There have been recent cases of assaults and ill treatment of migrant maid servants brought before courts and given wide publicity in both Singapore and Malaysia.

In 1993 and 1995 during the two LAWASIA Biennial conferences in Beijing and Manila respectively representatives of the UNHCR in Geneva were invited to address on the refugee problems in the region. Looking at recent programmes of national and regional legal conferences and seminars subjects on migration and refugees are not often seen. They may not be seen sexy enough but we need to drive home the realities of the problem for the legal fraternity to update its knowledge on this growing international concern.

Another important institution which should take greater interest and address migration issues are the national human rights institutions. Today

there are about thirteen States in the Asian region who have set up national human rights commissions. These institutions should also be sensitized to address the issue more effectively. More than the judiciary these national institutions have wider scope and access to competent government authorities and agencies to seek information and give advice.

The role of the media in influencing government policies cannot be underestimated. The media can be an effective tool if journalists too are properly sensitized of the issues.

Civil society groups committed to the cause of the rights and welfare of migrants should be encouraged and given space to address the issues. In some countries they face harassment and intimidation when violation of rights are exposed. The case in point is that of Ms. Irene Fernandez, leader of a non-governmental organization in Malaysia, which addresses human rights concerns of migrant workers amongst others. She was charged with “*maliciously publishing false news*” in 1995 after releasing a memorandum entitled “*Abuse, torture and dehumanized treatment of migrant workers at detention camps*”. After a protracted trial, considered longest in Malaysian history, she was convicted and sentenced to 12 months imprisonment by the court in October last year. That decision is now pending appeal and she has been granted a stay of execution and is on bail.

Let me conclude. The current phenomenal trend on international migration has to be reckoned with particularly in the light of the effects of globalization. Borders will be beyond control much to the discomforts of many governments in the regions particularly the developed ones and some of the receiving States in Asia and more particularly South East Asia. The

concept of territorial sovereignty and the protection of the security of State will continue to be challenged. Equality before the law as one of the first principles of the rule of law will be asserted towards harmonization of the treatment of migrant and migrant workers for greater respect for their human dignity and integration with the nationals and citizens of host countries.

Let me end with the words of Kofi Annan which appropriately addresses the theme of this seminar. He said: *“migration has a demand as well as a supply side. Migrants are rational human beings who make economic choices. Up to now, rich countries have been far too comfortable with a policy of framework that allows them to benefit from migrant labour, while denying immigrants the dignity and rights of a legal status. That is not good enough. Let us remember from the start that migrants are not merely units of labour. They are human beings. They have human emotions, human families, and above all, human rights – human rights which must be at the very heart of debates and policies on migration.”*⁶

September 16, 2004

Endnotes

¹ UNDP Human Development Report 2004 page 87.

² New Straits Times Sept. 10, 2004

³ Borders Beyond Control by Jagdish Bhagwati, Foreign Affairs Vol. 82 No. 1 pg. 98. See also ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism.

⁴ Para. 33

⁵ E/CN.4/2004/76; E/CN.4/2003/85.

⁶ Emma Lazarus Lecture on International flows of humanity delivered at Columbia University on Nov. 24 2003 by Kofi Annan.