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Pursuit of a Rights-Based Approach to Migration: Recent Developments at the UN and the Inter-American System

by Sarah Paoletti*

For the full benefits of international migration to be realized, the rights of migrants must be respected. States have the obligation to protect the fundamental rights of all persons in their territory and they must take effective action to protect migrants against all forms of human rights violations and abuse. They must also combat all forms of discrimination, xenophobia, ethnocentrism and racism.¹

While human migration is not a new phenomenon, states across the world today are grappling with how best to address the challenges, and reap the benefits, of migration in the global labor market economy. At the same time, the Inter-American Human Rights System and the United Nations have undertaken a marked shift in their focus from one of pure civil and political rights to a more inclusive examination of economic, social and cultural rights, recognizing the intersection of disparities in development and fundamental human rights.² Together these two trends have resulted in international discussions that mirror many of the domestic debates around migration: does human migration create a net benefit or a net loss for countries of origin and destination, and how can migration be managed to contribute to development? Concurrent to this discussion, migrant rights advocates are working to ensure that migrants are treated as human beings and possessors of fundamental human rights, rather than commodities in the global labor market. This article will discuss current activities at the UN level and within the Inter-American System addressing migration, and the efforts of migrant rights advocates to insert a rights-based approach into these policy discussions.

THE UN, MIGRANT RIGHTS, AND DEVELOPMENT

On September 14 and 15, 2006, the United Nations' Secretary General convened a High-Level Dialogue on International Migration and Development, conducted by the General Assembly, bringing together representatives from 127 Member States and ten intergovernmental entities. The High-level Dialogue was preceded by several intergovernmental and regional meetings during which civil society was invited to participate. The preceding hearings, as with the Secretary-General's report on migration and development, and the High Level Dialogue roundtable discussion, were framed around four major themes: (1) the effects of international migration on economic and social development on both countries of origin and receiving countries; (2) the need to promote a comprehensive rights-based approach to international migration, ensuring respect for and protection of the human rights of all migrants and their families; (3) the multidimensional aspects of international migration and development, with particular attention paid to remittances; and (4) policy responses — promoting partnerships, capacity-building, and sharing of best practices for the mutual benefit of States and migrants.

In anticipation of the UN High-Level Dialogue, in December 2005 the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families held a Day of General Discussion on "Protecting the Rights of Migrant Workers as a Tool to Enhance Development." The first half of the day was devoted to migrant workers and their contributions to development in their countries of origin (sending countries), with the second half focusing on their contributions to development in host (receiving) countries. Advocates stressed throughout the day the need for full recognition and enforcement of all labor and employment rights for all migrants regardless of migration status, for increased protections for women and children, and for greater attention to victims of smuggling and of trafficking for labor as well as for sex. As argued by civil society and other participants, failure to ensure full recognition of labor and other core human rights not only hurts individual migrants, but also has an adverse impact on the national workforce in receiving countries and on migrants' home communities. Other advocates challenged the underlying premise of the discussion, however, arguing that migrants should not be looked upon as a "tool to enhance development," but rather as individuals who, by virtue of being human beings, possess fundamental rights that must be recognized and protected irrespective of whether this would aid development.

Civil society again emphasized the need for the protection and promotion of the rights of all migrant workers and their family members in invited written commentaries to the UN Secretary General's Report on Migration and Development, issued in May 2006. In preparation for the Informal Interactive Civil Society Hearings that preceded the UN High-level Dialogue, civil society was invited to submit written commentary on the Secretary General's Report, although those submissions were limited to 1,000 words or less. The report summarizing NGO responses, collated by the UN Non-Governmental Liaison Service, provides a range of specific inquiries, commentaries, and recommendations for achieving full recognition of the rights of migrants as well as development.³ NGOs also raised concerns ranging from the negative impact recruitment of highly educated and skilled workers from the developed world has on developing countries, particularly in the health care industry, to the need to address the root causes of migration, with particular attention on trade liberalization policies. Concerns were also raised regarding racism and injustice towards migrants, the vulnerabilities and exploitation of migrants in an irregular status, women and indigenous migrants, the dangers associated with State reliance on remittances, the need for family-migration policies, and the need to ensure that migrants are not forced to abandon legal claims for rights violations when they return home.

Common to almost all civil society commentaries was a call for increased participation of migrants themselves, ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the need for migrants' human rights to play a central and foundational role in all discussions. As one NGO commented, "Migrants' voices should be part and parcel of this process because migrants them-

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selves are the real experts when it comes to discussing the benefits as well as the downsides of being part of the international migration processes.”⁴ Yet even in the midst of concerns regarding the lack of full participation, civil society was largely excluded from the High-Level Dialogue, with only a limited number of organizations invited to participate as observers in the plenary sessions, and twelve members of civil society invited to participate in round-table discussions — eight NGOs and four from the private sector.

In the absence of meaningful civil society participation, the Committee on the Protection of the Rights of All Migrant Workers and their Families took up the mantle of the need for a rights-based approach to migration, and sought to strike a balance between this approach, and the development goals articulated by the UN General Assembly for the UN High-Level Dialogue on

all States parties to take effective measures to implement the rights contained in the Convention. It equally calls upon States that are not yet parties to the Convention to consider adhering thereto without delay.

The participating States did not adopt the Committee’s recommendations at the conclusion of the High-level Dialogue, nor did they reach any concrete resolutions regarding migration and development. Instead, the dialogue will continue with the first follow-up Global Forum to be held in Belgium in July 2007. Some states voiced opposition to a follow-up forum, arguing that pre-existing structures and institutions addressing global migration were sufficient. Impetus for a follow-up meeting came, however, from the identified need for a forum that would “foster practice, evidence-based measures to enhance the benefits of international

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Migration and Development. Perhaps borrowing from commentaries presented by civil society in its meeting convened in December 2005, and in their written responses to the Secretary-General’s report, the Committee stated:

Migrants are above all human beings with rights, but also active agents of development. The question of migration should thus be approached from a human rights perspective, in conformity with the Universal Declaration of Human Rights and State obligations under core international human rights treaties, bearing in mind that development is not just economic development, but also entails cultural, social and political development.⁵

Consistent with this statement, the Committee made the following recommendations: (1) dissemination of reliable information to migrants on conditions of migration in the receiving country, as well as information to receiving countries on the contributions of migrants “to counter racism, xenophobia and discrimination;” (2) control over recruitment agencies, including a licensing system and enforcement of employment contracts, the lack of which has led to abuse of migrant workers ranging from exorbitant recruitment fees to trafficking and forced labor; (3) equality in remuneration and conditions of employment; and (4) protection of migrants’ rights and integration. In its conclusion, the Committee stated:

All states have a shared responsibility to guarantee the human rights of migrant workers and members of their families. The Committee recommends that States, as appropriate, consult and cooperate with a view to promoting sound, equitable and humane conditions for the international migration of workers and members of their families. The Committee also calls upon

migration and to minimize its negative effects.”⁶ Yet notably absent from the follow-up summary was any mention of promotion and protection of the fundamental human rights of migrants. Equally disappointing to migrant rights advocates were states’ desires to limit the forum to governments only. In response, a civil society day, hosted by the King Baudouin Foundation, will immediately precede the forum, with the stated aim of engaging civil society and garnering their input for the forum itself.⁷ The success of the July 2007 Forum and its outputs, coupled with the degree to which civil society is granted meaningful participation, will likely be determinative in future global dialogue on migration and its impact on the human rights of migrant workers.

THE OAS, MIGRANTS, AND HUMAN RIGHTS

Occurring simultaneously with the UN’s global dialogue on migration, the Permanent Council of the Organization of American States (OAS) has undertaken an Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and their Families. This program originated well before the discussions at the UN at the First Summit of the Americas where Member States undertook a Plan of Action to “guarantee the protection of the human rights of all migrant workers and their families.” From this, the Committee on Juridical and Political Affairs established in 2004 the Working Group on Migrants to prepare the Inter-American Program, which was officially adopted by the OAS General Assembly in 2005. The objectives of the Program are significant: promote development of public policies, legislation and best practices to protect the human rights of migrants; promote cooperation activities and best practices through

the work of the different organs, agencies and entities of the OAS and through linkages with member states, multilateral organizations and civil society; and establish specific benchmarks for protecting the human rights of migrants, including the exchange of best practices and cooperation among sending, transit, and receiving countries, mindful of the special needs of vulnerable groups of migrants.

through the end of 2006. Venezuela recently contributed funds to the Rapporteurship, and it is hoped that other States and organizations will do the same, so that the IACHR can fulfill its mandated activities under the Work Plan. To date, these include: (1) the promotion of migrants rights within the Inter-American human rights system; (2) the exchange of information and techni-

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These objectives differ from those of the UN High Level Dialogue in that they are driven by the protection of migrants’ rights rather than by development, but the OAS process is not immune from discussions seeking to balance the costs and benefits of migration.

At the Second Special meeting of the Working Group convened by the Committee on Juridical and Political Affairs on February 17, 2007,⁸ the Work Plan for the Program, adopted by the Secretary General of the OAS, was distributed. This outlined activities already undertaken by different OAS entities pursuant to their respective assigned objectives, and documented future plans for achieving specific goals for the promotion and full protection of the human rights of all migrant workers and their families.⁹ The mandates are impressive and the participating entities and Member States’ participation to date demonstrates the promise the Program holds for migrants. Yet the implementation of the mandates presently falls short of the potential, in part due to the same limited participation of civil society as seen at the UN level.

The Program is also hampered by funding constraints. Unfortunately, although the Special Rapporteurship on Migrant Rights within the Inter-American Commission on Human Rights was identified as a focal point for the work of the OAS, the Rapporteurship lacked operational funding from August 2005

cal assistance on migration legislation; (3) trainings on due process guarantees in migration proceedings, the use of the Inter-American human rights system, and the availability of free legal aid programs for migrant workers and their families; and (4) trainings for government officials on consular protections available to migrants in accordance with the Vienna Convention on Consular Relations.

Despite concerns over resources and ongoing internal debates within the OAS and OAS Member States on migration, sovereignty and the rights afforded migrants of irregular status, the proposed framework and the objectives articulated are clearly designed to ensure the protection of the human rights of all migrant workers. It recognizes migration as a human phenomenon, and not just a means toward development. As such, the Inter-American Program can serve as a model for other regions seeking to develop cooperative mechanisms for addressing migrant rights. But the existence of regional cooperative mechanisms does not obviate the need for global cooperation. Migration is a global phenomenon and thus dialogues and cooperation must extend beyond regions. And in the development of both regional and international cooperation, it must be remembered that migrants themselves are the most valuable resource for understanding the risks, costs, and benefits associated with migration, and their voices need to be included. *HRB*

ENDNOTES: Pursuit of a Rights-Based Approach to Migration

1 International Migration and Development, Report of the Secretary-General, U.N. GAOR, 60th Sess., U.N. Doc. A/60/781, at para. 77 (2006).

2 See Sarah Paoletti, *Human Rights for All Workers: The Emergence of Protections for Unauthorized Workers in the Inter-American Human Rights System*, HUMAN RIGHTS BRIEF, Vol. 12, Issue. 1 (Fall 2004) (discussing the Inter-American Court’s Advisory Opinion on the Legal Status and Juridical Rights of Undocumented Migrants (OC-18), and the Inter-American Human Rights System’s inclusion of economic, social and cultural rights in its consideration of migrant workers and their family members); UN Millennium Development Goals.

3 International Migration and Development: NGO Responses to the UN Secretary-General’s Report, UN Non-Governmental Liaison Service, A/60/871 (May 18, 2006).

4 Response of December 18 (Belgium) to the UN Secretary General’s Report on International Migration and Development.

5 Contribution by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families to the High-Level Dialogue on Migration and Development of the General Assembly, U.N. Doc. A/61/120, at para. 2 (July 3, 2006).

6 Summary of the High-Level Dialogue on International Migration and Development: Note by the President of the General Assembly, U.N. Doc. A/61/515 (13 October 2006).

7 For more information on the Civil Society Day preceding the Global Forum, see <http://www.gfmd-civil-society.org/index.html>.

8 See http://scm.oas.org/doc_public/ENGLISH/HIST_07/CP17576E04.doc.

9 OEA/Ser.G CP/CAJP-2456/07 (Feb. 12, 2007).