

Immigrants' Vulnerability as Subjects of Human Rights

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An earlier version of this paper was prepared for the United Nations' group of experts on the human rights of migrants established by the Commission on Human Rights resolution 1997/15,¹ the group of which the author was elected to serve as chairman/rapporteur.

The working group interpreted its mandate to gather information as a need to advance in a search for an empirical basis to substantiate the assumptions made by the Commission in resolution 1997/15. The group decided to use a questionnaire addressed to governments as well as intergovernmental organizations and nongovernmental organizations. Given the time constraints, the working group agreed that such a questionnaire should be as simple and short as possible, since the main objective was basically of an exploratory nature; thus, four questions were finally included.

The first question aimed at obtaining a general picture of basic demographic data pertaining to migration. The second aimed at obtaining statistics and qualitative information on measures taken by member states to promote and protect the human rights of migrants. The third question aimed at obtaining some indicators of the level of awareness of member states about the human rights problem of migrants, referred to in the Commission's resolution 1997/15. It was not, however, intended to obtain precise data or a qualitative description of those human rights problems. The fourth question aimed to ascertain empirically the level of importance ascribed by member

¹United Nations Commission on Human Rights resolution 1997/15 of April 13, 1997 entitled "Migrants and Human Rights." Point 3, reads: "Decides to establish, within the approved overall budget level for the current biennium, a working group consisting of five intergovernmental experts, appointed on the basis of equitable geographical representation after consultations with the regional groups, to meet for the two periods of five working days prior to the fifty-fourth session of the Commission, with a mandate to: a) gather all relevant information from governments, nongovernmental organizations and any other relevant sources on the obstacles existing to the effective and full protection of the human rights of migrants; b) elaborate recommendations to strengthen the promotion, protection and implementation of the human rights of migrants. The content of this paper is the sole responsibility of the author. It does not represent the opinions of the UN or any member of the "working group" mentioned here.

states to the existing normative means for combating violations of the human rights of migrants by asking if they have signed and ratified specific United Nations conventions and other international standard-setting normative instruments addressing human rights of migrants.

In spite of the short period of time (December 2, 1997 to February 16, 1998) given to governments and intergovernmental organizations and NGOs to respond to the questionnaire, and despite the delicate nature of reporting on matters of human rights violations in the respective countries, thirty-eight governments and twenty-four IGOs-NGOs submitted responses by June 1, 1998. Given the standards of responses to questionnaires sent by the UN Commission on Human Rights, these numbers could be considered as better than usual.

These responses, however, were very heterogeneous. Very few included detailed responses. Many responded with reference to other documents sent to other UN bodies responding to similar requests for information. Responses to the first question on demographic data varied in the year of reference, some quoting 1990 census data.

Analysis of these responses required a preliminary effort to reach a reasonable level of homogeneity in order to make some comparisons between countries. An effort to systematize the responses made it necessary to design a synthesis format for each response, which could be consulted in the annexes to the UN document E/CN.4/AC.46/1998/5.

The work of these syntheses required an effort to complete the information through specific requests to the respective missions representing countries at UN-Geneva and/or consulting official publications from the United Nations, ILO, OECD, IOM and OAS.

A review of the literature pertaining to the combined reference to international migration and human rights was made to ascertain the extent to which the responses added something significant to the understanding of the problems of human rights of migrants. In order to allow a systematic comparison between responses, these were analyzed, searching for what governments said had been done to promote and protect the human rights of migrants, as well as how they responded to question number 3 ("Have there been manifestations (how many cases) of racism, xenophobia and other forms of discrimination against migrants in your country and against your nationals in another country?").

A scale was designed by scoring responses following a criterion on the extent to which governments have done more or less in promoting and pro-

tecting the human rights of migrants. The information contained in the responses to question number 2 of the questionnaire was pondered by answers given to questions 3 and 4.

The scale went from 0 to 3 positive to 0 to 3 negative. The maximum was given when the comparison between all responses indicated the highest effort to promote and protect the human rights of migrants.

Negative numbers were given to countries where problems of discrimination, xenophobia or racism were reported by governments or IGOs-NGOs and nothing was found to combat such problems. A score of 3 negative was given to any country where information was available in the responses about the most serious cases of violation of human rights with no data about measures to combat such problems.

The scale was constructed using exclusively the information contained in the received responses. This scaling procedure is similar to what a teacher does to grade exams "by the curve," where the minimum score is given to the poorest performance in comparison to the rest of the graded exams, and the maximum grade is given to the best. This way, the ranking of all the examined cases is completely endogenous.

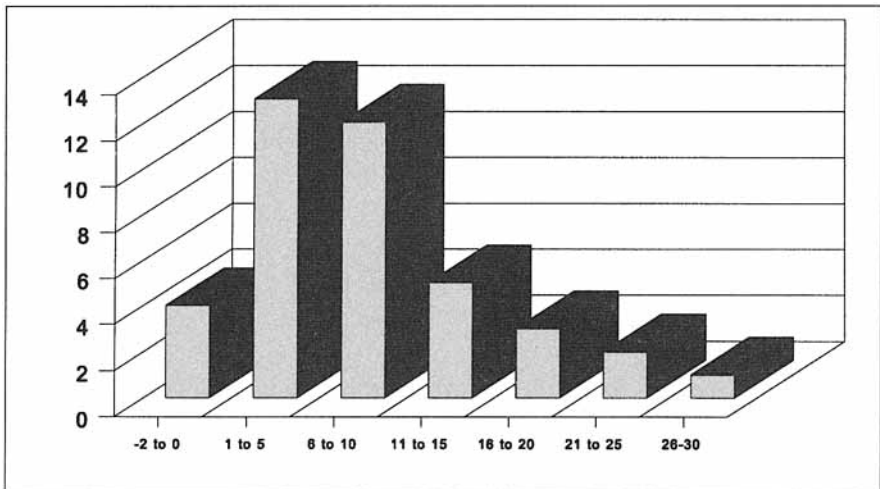
Given the fact that many countries in which serious cases of violation of human rights occur did not respond to the questionnaire, an evaluation – implicitly or explicitly universal – of the country's performance concerning the protection or promotion of human rights of migrants would be unfair, let alone invalid from a scientific point of view. The analysis of the data of the received responses is limited to a comparison of the countries that responded to the questionnaires. Its findings are not valid for a universal comparison between countries since the majority did not respond.

An assumption could be made that those countries whose governments responded showed a certain degree of awareness and a sense of responsibility regarding problems of violations of the human rights of migrants. Concomitantly, another assumption could be made that governments that did not respond to the questionnaire include those where there is less awareness or interest in these problems of human rights of migrants in comparison with the countries that responded.

Because of this lack of an empirical basis to compare countries whose governments responded to the questionnaire, *vis á vis* those that did not, findings of the use of the scale are presented here without reference to specific countries. The value of this scale should be judged by the extent to which it shows the grouping of countries along the various points of the scale; it shows

where the majority of countries stand in regard to the promotion and protection of human rights of migrants. The main findings of such a use of the scale are presented in Figure I.

Figure I. Number of Countries in Ranking Categories by Scores in a Human Rights Protection Scale



Source: UN Commission on Human Rights – Working Group on Migrants and Human Rights questionnaire responses during 1998.

This figure portrays a poor showing even among those countries whose governments responded to the questionnaire, whom we assume have a higher level of awareness of or interest in the problem in comparison to those governments who did not respond to the questionnaire. In spite of the increasingly higher participation of governments expressing their interests and concerns about violations of human rights of migrants, the limited empirical basis available regarding what they are actually doing suggests a contrastingly poor performance.

This finding, as limited as it is, provides an empirical basis for the identification of a serious problem – that is, the contrast or contradiction between the interest and concern of UN member states of this problem and what they are doing about it.

In addition to the findings presented in Figure I, other empirical information supporting this statement can be derived from some preliminary results of a general survey carried out during 1998 by the International Labor Organization Committee of Experts. As of the first week of August, 77

responses had been received. Thirty-six of the countries that responded indicated they intended not to ratify either the ILO or the UN conventions on the matter. Only five indicated that they are examining ratification. Only one had ratified the 1990 UN Convention.

These facts appear in startling contradiction to the wide concern of the worsening human rights problems for migrants expressed by the UN General Assembly in approving the creation of the working group by its resolution UN 1997/15.

The explanation of this contradiction can only be tentative. It is obvious that it requires more generalized data, including from the countries that show no interest in responding to the questionnaire.

Such an explanation not only requires more data but also a further development of a conceptual framework under which such an explanation could be scientifically plausible. A review of the literature relevant to the question of human rights of migrants, and an interpretation of the responses or lack of them, suggested the need to produce such a conceptual frame of reference by defining the problem of human rights for migrants around the notion of the vulnerability of migrants.

DEVELOPING A CONCEPTUAL FRAME OF REFERENCE

The level of awareness among UN member states about a worsening trend in the status of human rights for migrants in many parts of the world was revealed by the UN General Assembly resolution that created a group of experts to study the problem.

A subsequent indicator of the level of awareness about that worsening trend was the number of responses to the questionnaire, referred to earlier in this article. Despite its limitations, this represents an empirical basis to ascertain the realities of the trend concerning the violation of human rights of migrants in various parts of the world. Other indications of a growing preoccupation in the international community about the violation of human rights of migrants have appeared in international meetings and UN resolutions.² The International Labor Organization (ILO) pioneered standard-setting

²During the first half of 1998, the UN Commission on Human Rights approved the following resolutions: 1998/15 International Convention on the Protection of the Rights of all Migrant Workers and Their Families; 1998/16 Migrants and Human Rights; 1998/17 Violence against Women Migrant Workers; 1998/26 Racism, Racial Discrimination, Xenophobia and Other Analogous Types of Intolerance; and E/CN.4/Sub.2/1998/L.19 from the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

efforts calling the attention of the international community to the increasing need for regulations to prevent the violation of the human rights of migrant workers, including irregulars or undocumented.

One of the most relevant factors that led the UN Commission on Human Rights to create the working group on International Migration and Human Rights was stated as follows:

Deeply concerned at the increasing manifestations of racism, xenophobia and other forms of discrimination and inhuman and degrading treatment against migrants in different parts of the world. . . .

The Problem

A combination of the empirical elements presented in Figure I and those derived from the review of the literature suggests that 1) there is a worldwide problem concerning the human rights of migrants; 2) there is an awareness of this problem among a significant number of national governments of both sending and receiving countries; 3) derived from 1) and 2), international standards have been agreed upon by UN member states with the purpose of solving or alleviating the problem.³ Thus, two questions arise: why is there a contrast between what governments say and what they do about the problem of human rights of migrants, and why is this problem widely perceived as growing.

A basic fact is that the international community, or more precisely the United Nations or any other of the intergovernmental organizations, has not been successful in establishing a mechanism out of which a political, economic or other significant cost might be derived for a member state where patterns of violations of human rights of migrants occur. The fact remains that there is a worldwide problem of violation of the human rights of migrants, widely perceived as growing.

It is assumed here that the recommendations mandated by the working

³The most important international standards specifically applicable to the human rights of migrants are: *UN International Covenant on Civil and Political Rights* (adopted by UN General Assembly Resolution 2200 A, XXI, of December 16, 1966, entered into force March 23, 1976); *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted by UN General Assembly Resolution 39/46 of December 10, 1984; entered into force June 26, 1987); and *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (adopted by UN General Assembly resolution 43/173 of December 9, 1988). The most comprehensive standard-setting of them all (which has not entered into force) is the *UN International Convention on the Protection of the Rights of All Migrant Workers and their Families* (adopted by UN General Assembly resolution 45/158 of December 18, 1990).

group on Migrations and Human Rights require the elaboration of a reasonable basis for the explanation of the origins of the problem at hand. This task could be facilitated by an elaboration of the basic premises for a workable definition of the problem.

Basic Premises

The basic premises to be discussed refer to the concept of "vulnerability of migrants as subjects of human rights." One basic premise is that there is a structural and a cultural nature of the vulnerability ascribed to non-nationals or foreigners or immigrants by the nationals of a given country. The structural nature derives from the existence of a power structure which empirically shows that in any given national society some have more power than others. Power as a shaping factor of social relations is taken here from the writings of the American sociologist Howard S. Becker (1968), who included it in his theoretical development for the explanation of deviant behavior in the following sense:

Differences in the ability to make rules and apply them to other people are essentially power differentials (either legal or extralegal). These groups whose social position gives them weapons and power are best able to enforce their rules. Distinction of sex, age, ethnicity and class are related to differences in power, which accounts for differences in the degree to which groups so distinguished can make rules for others (pp. 17-18).

The cultural nature of vulnerability derives from the set of cultural elements (stereotypes, prejudices, racism, xenophobia, ignorance and institutional discrimination) with derogatory meanings which tend to justify the power differentials between nationals and non-nationals or immigrants.

The combination of power differentials based on a power structure where immigrants are at a lower level than nationals with the set of cultural elements which justify it results in various degrees of impunity for the cases of violation of the human rights of migrants. This impunity becomes an empirical indication of the powerlessness of the migrant, which is equal to his or her vulnerability. Impunity here is understood as the absence of economic, social or political costs for the violator of the human rights of a migrant.

WHAT IS "VULNERABILITY"?

The responses received to questions 2, 3 and 4 of the questionnaire suggest an explanation of the contrast between the concern of an increasing number of countries regarding the violation of the human rights of migrants, the lack

of actions taken by the governments, and the inefficacy of standard-setting rules approved by the United Nations and other standard-setting international bodies. This explanation, however, can only be tentative, pending further research on countries whose governments have not responded to the questionnaire.

The question of vulnerability of migrants must be understood in terms of its social nature, its causes, as well as its consequences, in order to go beyond what seems to be a stalemate situation. There is an increasing consensus that the factor most commonly associated with the abuses of human rights of migrants is their vulnerability. There has not been sufficient discussion, however, of the origin or the causes of the vulnerability of migrants. This has provoked a case of what Aristotle called *en Arche aiteisthai*, translated by Romans as *petitio principii*, wherein the argument about the human rights problem of migrants is explained as caused by their vulnerability, a condition understood as applicable to those who are victims of violations of their human rights.

This section focuses on the social nature of the vulnerability of migrants as subjects of human rights. Vulnerability is understood here as a social condition of powerlessness ascribed to individuals with certain characteristics that are perceived to deviate from those ascribed to the prevailing definitions of a national. Vulnerability is a social condition associated with outcomes of impunity for those who violate the human rights of those migrants labeled as deviants (Becker, 1968).

One of the most important elements of this definition is that vulnerability is not an inherent characteristic of individuals who emigrate from their countries of origin. More precisely, vulnerability is not inherent to racial characteristics, or to a country or an ethnic origin, or to the conditions of underdevelopment of the country or the region of origin. Vulnerability is not a condition brought by an immigrant to a country of destination, regardless of the legality of his or her entry or stay in a given country. In this sense, the causes of vulnerability should not be confused with the causes of immigration. In general terms, international migrations, whether for job purposes or family reunification, are indeed provoked by the interplay of factors located in both the country of origin and the country of destination. It could be said then, that international migrations are, in general, the result of a combination of endogenous and exogenous causes. In contrast, the vulnerability of a migrant as a subject of human rights is an endogenous condition, both at the country of origin and at the country of destination, each independent from the other.

This is to say that each case of vulnerability is of a different kind. A migrant might be vulnerable as a subject of human rights in his or her country of origin. There, his or her vulnerability is more likely to be related to the distance that separates the internal migrant from his or her community of origin. This is based on the assumption that any individual is more likely to be less vulnerable as a subject of human rights at home than away from it. This suggests that such a vulnerability increases in the country of origin of a migrant, relative to the distance between such individual and his or her home and community of origin. The nature of this kind of vulnerability lies in the realm of the relationship between individuals and the state, which might vary depending on the resources an individual has available to protect himself or herself, which in turn might depend on the distance from home of such an individual. Distance is not to be taken as the only factor causing that vulnerability. The assumption here is that, all other things being equal, distance from home would make a difference whether an individual's resources to defend himself or herself from violations to his or her human rights are less or not. It is outside of the scope of this study to discuss the factors associated with the structural inequalities affecting the relationship between nationals and their respective states which determine the existence of various levels of the vulnerability discussed here. The important point to be made is that such a vulnerability is basically an internal matter of the state of which an internal migrant is a subject. This, by definition, cannot be the case of the immigrant/foreigner's human rights.

Vulnerability here is understood as related to the violation of human rights taking place in a country of destination of an immigrant. It is the opposite of a situation of full respect of immigrants' human rights as defined by the UN Universal Declaration of Human Rights and current international standards.

There is an important difference to be made between a condition of vulnerability ascribed to an individual in his or her country of origin and a condition of vulnerability ascribed to the same individual in a country other than his or her own. It might be that such an individual was suffering a condition of vulnerability of his or her human rights as a national of his or her country of origin. The juridical nature of this vulnerability is analytically different from the condition of vulnerability ascribed to the same individual in a different country. In the first case, vulnerability is often defined as an internal matter concerning the relationship between a national and his or her government. In the second case, vulnerability is an international matter, con-

cerning the human rights of a foreigner in a country different than his or her own.

The recent cases of Somalia, Kosovo and East Timor have shown that there is a growing consensus in the international community that violation of human rights of nationals, either by government or nongovernment actors, is a matter of legitimate concern for other countries and/or international bodies. These cases have demonstrated that when there are gross violations of human rights of citizens, directly or indirectly by their national governments, the argument of "this is an internal matter" or "this is within the realm of our sovereignty" has not been acceptable to the international community represented by the United Nations. These cases have demonstrated the limits of a claim of sovereignty by countries where public evidence, such as television reports, make other countries aware of open patterns of violations of human rights of nationals. The case of apartheid was perhaps a turning point from the previously successful claim of "an internal matter of sovereignty." Apartheid in South Africa became a case in which the United Nations and the community of nations shared the view of such an internal case as intolerable and acted accordingly. However, out of extreme situations such as that of apartheid, the principle of no-intervention in the internal affairs continues to be a strong argument, relative to the weight of a country criticized by the international media or accused of the violation of human rights of its own nationals in international fora.

On the other hand, it would be a mistake not to recognize that the principle of no foreign intervention in the internal affairs of a sovereign state has been a cornerstone of international relations and the juridical basis for peace in the international community. The important point here is that still debatable is the extent to which vulnerability of people within their own country can be dealt with legally by other countries or international bodies, whereas it is not debatable whether the vulnerability of immigrants is indeed an international matter. Failure to recognize the difference between the internal nature of this kind of vulnerability with the international nature of an immigrant/foreigner's vulnerability as a subject of human rights renders tautological the argument for a definition, or for the causes, or for the solutions to the problem.

The condition of vulnerability of an immigrant or foreigner's human rights is an international matter. It has to do with an obligation derived from a country's interest in belonging to or participating as a member of the international community of nations. More specifically, it is associated with the

principles agreed upon by the community of nations as the Universal Declaration of Human Rights, *vis á vis* citizens of another country as human beings. These human rights are a fundamental part or *raison d'être* of the United Nations' organization. In the context of international law of nations, it is considered as within the "responsibilities of state" to comply, as a UN member state, with the human rights of individuals as human beings regardless of their nationality or country of origin. Full compliance with the Universal Declaration of Human Rights is what in international law is understood as "responsibility of a State" *vis á vis* the community of nations organized under the structure of the United Nations. It is also a responsibility of the same kind *vis á vis* a legitimate claim of the country of origin of immigrants or the immigrants themselves. Such a full compliance with the Universal Declaration of Human Rights is indeed the opposite of the condition of vulnerability of migrants as holders of those human rights. This is the vulnerability dealt with in this report.

THE SOCIAL CONSTRUCTION OF VULNERABILITY

This notion of vulnerability of immigrants involves some assumptions and some concomitant paradoxes. The relevance of its practical meaning derives from the fact that immigrants' vulnerability is a social construct that can be deconstructed. First, however, we must understand the process of becoming vulnerable.

There is a conventional assumption that foreigners/immigrants do not have or should not have complete equal rights as nationals do. As congruent as this might be with international standards on sovereignty, it implies a difference, legitimized by the state, between foreigners/immigrants and nationals. This difference becomes one of power. It is implemented when a national wants to transfer it to a wider social context than that alluded to by the text of the legal difference. This happens in real life between a national and a foreigner/immigrant when real or perceived conflicts of interest emerge between them. While a particular state might not accept a discriminatory behavior against foreigners/immigrants by its nationals, the distinction it makes in favor of the nationals by granting them rights not granted to the foreigner/immigrant might be socially processed as a basis for a power differential, with the lower level of power *de facto* ascribed to the foreigner/immigrant.

There are, of course, a variety of degrees in which such lower status is socially ascribed to a foreigner/immigrant. Preferences or protections granted

by a state to its nationals are generally understood as legitimate rights of sovereignty. They might be rooted in history. Sometimes these preferences and protections are associated with ideologies or traditions or a history of certain international events such as wars or other instances of domination of one country over another. For example, although the sovereign right of a country to follow principles of *jus sanguinis* for the ascription of nationality is acceptable, it establishes a difference which then might be abused by nationals to the degree of a violation of the human rights of immigrants.

Looking at patterns of abuses of immigrants' rights as they are reported in some of the NGOs' responses to the above-mentioned questionnaire, particularly the case of irregular domestic migrant workers and irregular migrant farmworkers and migrants who are victims of trafficking, a hypothesis could be drawn. This hypothesis derives logically from the conceptual frame of reference in which the concept of vulnerability is understood here – namely, that their ascribed vulnerability as subjects of human rights could be associated with the low cost of the services or labor they deliver, which in turn is associated with a demand for them in recipient countries, which in turn is associated with the increase in numbers of outmigrants currently observed. There are numerous implications of the virtual circularity of the process suggested in this sequence. For the purposes of this report, only one implication is to be identified – if the vulnerability of immigrants is reduced, the closer it gets to zero, the more likely it is to increase the cost of deliverance of migrants' services or labor in the recipient countries; thus, the more likely it is to reduce the demand for them and the more likely it is to disincentive economically related outmigration.

FROM VULNERABILITY TO ITS POTENTIAL "CURE"

This is not to suggest that a sovereign right of a country to determine who should enter and who should not is a source of violations of human rights, nor necessarily that foreigners/immigrants should have all the rights of nationals, including voting rights. It is to suggest an explanation of the sociological nature of vulnerability of immigrants, which is aimed at solving the contradiction between expressions of deep concern by an increasing number of countries about what is viewed as growing violations of human rights of migrants and what they actually are doing about it.

The notion of vulnerability used here departs from the notion that privileges or protections legitimately given by the state to its nationals are logically exclusionary of non-nationals. Regardless of any discriminatory intent

on the part of the legislative branch of a state, privileges or protections issued in favor of nationals, by definition, exclude non-nationals in their consequences. That exclusion, which is issued from a legitimate sovereign right, becomes the basis from which a social process might *de facto* depart. That social process derives from the social interaction between nationals and non-nationals in which a power differential between them is established on the basis of the criterion of "nationality." This, in turn, becomes a *de facto* abuse of power against those excluded by the distinction.

A paradox arises when a state, in its legitimate exercise of its sovereign rights, establishes a distinction between nationals and non-nationals. As a consequence, the state does create power differentials while, at the same time, that state commits itself, *vis á vis* the community of nations, to defend the human rights of those rendered powerless as a social outcome of the process through which the distinction between "we-the-nationals" versus "they-the-non-nationals" is imposed as the structure under which the social relations between the two should be carried out. A contradiction emerges when those nationals empowered by such legal distinction encounter non-nationals and take the distinction to a wider social level than intended in the legal distinction itself. At the same time, the same state tells the nationals that non-nationals have human rights that limit the power the former can exercise over the latter. The challenge a UN member state faces is how to reconcile its sovereign right to issue a privilege or a protective measure in favor of its nationals, *vis á vis* the non-nationals, and at the same time comply with international standards of immigrants' human rights. In theory, there should not be contradictions between the sovereign right expressed in the state's protection of its nationals *vis á vis* foreigners/immigrants and the state's protection of human rights of the latter. Doing both, however, is viewed more often than not as a zero sum game.

Those who believe that granting human rights to immigrants, particularly if they are irregulars, is detrimental to a national's rights or detrimental to principles of legality tend to reinforce the idea of a power differential that results in impunity for the violation of the human rights of the immigrants. A basic principle of human rights is that entering a country different from his or her own, in violation of that country's immigration laws, does not deprive such an "irregular immigrant" of his human rights, nor does it erase the obligation of a UN member state to protect those individuals. If this principle of human rights applies to war prisoners as well as to the worst of criminals, there is no reason, other than that of sheer power, to deprive an irregular

immigrant of his or her human rights on the premise that his or her entry or stay in a country is in violation of its immigration laws.

The understanding of and apparent dilemma between the rights of nationals to be protected by their state and the legal or moral obligation of a state to protect the human rights of foreigners/immigrants could be derived from an understanding of power differentials in the shaping of social interactions between nationals and immigrants. Sociologists have tried to understand how power differentials shape social relations.

A SOCIOLOGICAL NOTION OF POWER

There are numerous sources of power in a given society. These sources are generally not distributed equally among its members. Whatever the degree of inequality derived from such a *de facto* unbalanced or skewed distribution of sources of power, some have more power than others.

Those with more power tend to maintain norms and values which tend to perpetuate the system of distribution of power that led to the power differentials benefiting them. Perpetuation of norms and values in any given society has to do with the perpetuation of a power structure. Such a perpetuation of norms and values includes the social definition of "deviants." This becomes an important function to the extent that perceived deviations imply a challenge, if not a threat, to the prevailing system of norms and values. That is, those perceived to deviate or set themselves apart from these norms and values become socially defined as "deviants," from the perspective of those interested in a social behavior to be carried on in conformity with the established norms and values.

THE "LABELING" OF IMMIGRANTS AS DEVIANTS

The social definition of a deviant involves a virtual labeling process to individuals so defined. This labeling process involves usually the existence of a normative context of legitimacy of the labeling process and the exercise of power through legitimate law enforcement officials. In the final instance, the social definition of a deviant involves a power differential between those who define people as deviants and those so labeled.

In the social context of everyday life, people interact with others basically perceived as sharing a certain context of norms and values. This is the sense of what Max Weber (1925) meant by his concept of *Gemeinter Sinn* as an essential component of social relations – the culturally shared understand-

ing of an action, a gesture, or a symbolic expression emitted and exchanged by actors in the context of their social interactions. Here, the intersubjective or culturally shared meaning by the members of a community is "who is," and how one recognizes "who is not" a member of that community. When a person encounters another who does not conform to such a shared understanding, either by his or her unusual or "different" appearance or by any other means of communication, a labeling situation may arise. Whoever has more power is more likely to make his or her labeling of the other "stick." This may or may not derive in a social consequence. Labeling is understood as a social process. This implies a historical context in which a power structure and a system of values and norms supporting it evolves from elementary to more complex forms of what Weber calls "legitimate authority." In everyday life, however, it always involves a social interaction between one who labels another as "deviant" and the one so labeled. The labeling of a person as such implies some sort of an exercise of power. It could be a legitimate power supported by the norms and values upheld by the state; it could be an abuse of that power.

If we accept the premise derived from the labeling theory that labeling involves a social context based on power differentials, the vulnerability of people with certain characteristics, real or perceived, would be equal to the likelihood of not having the power to challenge other people doing the labeling. In other words, the vulnerability of migrants is equal to the likelihood of being powerless enough in another country so as to be labeled as deviant by nationals who do not perceive the immigrant to conform, by appearances or behavior, to the prevailing system of norms and values. Thus, the vulnerability of an immigrant is equal to the likelihood of being labeled as deviant from socially accepted definitions of a national.

The importance of understanding the social process through which a condition of vulnerability is ascribed to an immigrant has to do with a clear definition of the problem for those concerned with the violation of human rights of the international migrants and a realistic understanding of feasible solutions.

The bottom line concerns how to enforce UN standards. In the case of international migrants, the problem is definitively not a lack of international standards. The problem is one of political will, as it was recognized in a recent international conference on the subject in regard to the conspicuous absence of ratifications of the most comprehensive body of norms ever produced in the context of the United Nations on the subject, approved in 1990 by the

General Assembly of the United Nations as the *International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families*. In that international conference an official document of IOM (1996) concluded:

Political realities cannot however be ignored. Many countries are opposed to the recognition and protection of clandestine and irregular workers. The recent resurgence of xenophobia and racism has led to anti-immigrant sentiment, meaning that governments are exceedingly cautious in this area.

The political realities alluded to by the IOM should not be allowed to open a field of hypocrisy between public concerns of UN member states for the growing tendencies of violations of the human rights of the migrants and staunch refusals to ratify UN standards approved to combat such tendencies.

One advantage of applying the labeling theory to explain the condition of vulnerability of migrants in the receiving countries is that the same assumptions of such a theoretical framework can lead one to a logical conclusion suggesting the way toward a solution. The analytical premise to be followed for such a purpose is if the vulnerability of migrants means lack of power, the opposite should be their empowerment. This, however, has to take into account what the IOM meant as the "political realities" that work against such an empowerment. This means that whenever the empowerment of migrants is thought of as a solution, it has to be a realistic one.

Before getting there, some precision should be added to the working concept of the problem discussed above. This was defined as the vulnerability of the migrants. There is another problem, however, concomitant to that of the vulnerability. That problem is the gap between a) the manifested concern for the violation of the human rights of the migrants by UN member states and b) the *de facto* refusal to accept the enforceability of UN standards by not ratifying the respective UN instruments. The gap between the two is an integral part of the basic problem understood as the vulnerability of migrants.

There is an important analytical distinction between the two problems. A necessary condition for the creation and implementation of direct measures addressed to the vulnerability of migrants involves an internal process of decisionmaking by UN member states individually. In contrast, a necessary condition for the reduction or the closing of the gap between a) and b) involves an international mechanism, created in accordance with UN conventional rules of decisionmaking.

The first case may be illustrated by countries where legislation has been enacted to empower immigrants to protect themselves against violations of

their human rights. This is the case, for instance, in countries that have granted voting rights to immigrants in municipal elections (Spain, Sweden, Portugal). These cases illustrate a comparably high level of commitment of certain countries, in the exercise of their respective sovereignty, to grant a significant degree of empowerment to otherwise powerless immigrants.

Unfortunately, there is no correlation between seriousness of patterns of violations of immigrants' human rights and the expressed concern of countries to combat such violations. In most cases, there is a ratified commitment of such countries to international standards by which they should not allow such patterns of violations of human rights against immigrants/foreigners. A consensus is growing that these violations are worsening in many parts of the world. Therefore, there is no other way to combat this trend than to bring pressure on the part of the international community to countries where serious violations of immigrants' human rights are currently occurring.

The gap between a) and b) is not likely to close by the creation of more international standards focusing on the violation of human rights of migrants. There has to be something more affirmative than what has been done already by the international community to reduce such a gap, perhaps something at a lower level than what might be producing resistance to the ratification of the existing standards. A Catch-22 situation has resulted from existing international standards to combat violations of the human rights of migrants, which countries refuse to ratify, and a need to produce more standards to alleviate a problem that an increasing number of countries agree requires some international action to combat it. The problem seems to be that UN member states who have agreed to do something to address the problem of violations of human rights of the migrants do not seem to agree to go as far as the proposed international standards mean to take them. It is increasingly apparent that something new and different should be done at the international level to break the vicious cycle of an increasing awareness about a problem and an increasing resistance to accept the current standards created to solve it.

The international community seems to have the clock of globalization running against its common goals of peace and rationality by allowing such a vicious cycle to continue, while in the meantime involving more and more individuals joining the migratory flows around the world. The likelihood that this migratory phenomenon becomes one of the most serious challenges to the stability of international relations of the twenty-first century has been considered ominously high. If the analysis made in this report makes some

sense, it could be said that it would be a mistake to attribute such a challenge only to the "exogenous" causes of rates of population growth and underdevelopment of sending countries.

For the reasons explained above, vulnerability of immigrants as subjects of human rights might be at the center of a rational response to the challenges derived from current increases in the volume of migratory flows around the world. A concerted action within the UN context to reduce the vulnerability of migrants by means of an affirmative action plan could lead the way toward more realistic conditions of manageability of the economically related migratory flows.

This is not to suggest that current efforts to obtain the ratification of existing international standards, such as the ILO conventions 97 and 143, and the 1990 UN International Convention on the Rights of All Migrants and Their Families, should be relinquished. It is to suggest that, until such an objective of reaching a sufficient number of ratifications of these instruments is achieved, an intermediate mechanism toward a solution should be created in the UN context with due acknowledgement of the "political realities" alluded to by the ILO conclusion quoted above.

THE QUESTION OF "OBSTACLES"

An important part of the mandate for the working group as stated in Resolution 1997/15 of the fifty-third session of the UN Commission on Human Rights was to gather information on the "obstacles existing to the effective and full protection of the human rights of migrants." Question numbers 2, 3 and 4 of the questionnaire were intended to identify such obstacles. There was a wide spectrum of responses, which is reflected in Figure I. Most action-oriented responses went from the establishment of government programs specifically designed to protect migrants' human rights on a permanent basis, to the creation of public funds specifically destined to assist and protect immigrant/foreigners, to the creation of institutes for the study of racism and xenophobia against immigrants (Belgium), to the creation and funding of programs of public information and education to combat prejudices and stereotypes against immigrants/foreigners (Spain), to keeping statistics about incidents of xenophobia or racism against them (United Kingdom, Germany and France), to the creation of high level government offices to deal specifically with migrants needs and their human rights (Portugal). It is noteworthy that in the majority of governments' responses there were only legislative changes in favor of immigrant's human rights with no indication as to their

effectiveness or enforcement practices. The level of commitment to protect the human rights of migrants shown in these legislative changes varied significantly, from the establishment of Constitutional rights specifically for migrants (Turkey), to the granting of voting rights in municipal elections to immigrants, to mere declarations in favor of human rights of immigrants.

It is understandable that governments were not more specific in their responses to our questionnaire in their references to "obstacles" for the full protection of human rights of migrants. The self-incriminatory potential of a direct question was a reason why the members of the working group decided not to do it in a direct way. The majority of the countries who answered the questionnaire, however, reported on some actions to promote the integration of immigrants into their economy and society. These governmental actions or programs in favor of immigrants speak indirectly of the "obstacles" to which the working group's mandate alluded. If the conceptual frame of reference suggested in this study makes sense, it could be argued that whatever existing obstacles to the full protection of human rights of migrants, these are likely to be associated with the interest of those who benefit from the availability of the lower cost labor immigrants represent, as it has been recognized in some UN resolutions. These people tend to be the same who benefit from the power differentials based on which lower wages and poor working conditions, more often than not, characterize immigrant participation in the labor markets of the recipient countries. The interests of these immigrants' employers point in the direction of maintenance of the structural conditions that allowed the availability of such low cost immigrant labor, thus, the maintenance of the conditions under which their vulnerability as subjects of human rights comes into being. If such an interest on the part of immigrants' employers exists, the power they use to enhance this interest is equal to that needed to maintain them as *de facto* obstacles for the improvement of the human rights conditions of immigrants. The central hypothesis guiding the present analysis would suggest that is precisely what motivates the wide array of countries that have resisted the ratification of the international standards such as the ILO and UN conventions referred to in question number 4 of the questionnaire.

An important finding arises from the analysis of "obstacles" as defined in the questionnaire. These should be understood as obstacles to the integration of immigrants in the respective recipient societies. To the extent that integration can be understood, in the way Max Weber meant by an ideal type, it means, a condition which is socially, legally, economically and culturally

granted to an immigrant, of full participation with equal rights as a national, in all aspects and opportunities, existing in a given society. This condition of integration has certain costs for an immigrant. He or she cannot live and behave as if in their home country. The popular saying "when in Rome, do as the Romans do" could be applied here as long as this it is not understood in absolute terms. It means that an integrated migrant should be able to speak the language of the receiving country and cannot maintain certain home country customs that might be against the law of the recipient country. Integration, as understood here, however, should not imply a negation of the immigrant's ethnic identity and his or her right to maintain it in the recipient country. Integration should imply the acceptance of cultural pluralism.

CONCLUSIONS

The basic premise of the analysis presented here, that the vulnerability of immigrants is equal to a virtual disempowerment of their human rights, suggest the following conclusions: 1) such disempowerment is socially constructed in a context of a *de facto* power structure; 2) such disempowerment is a necessary condition for the use of migrants as suppliers of illegitimate but real, and some times massive, demand for migrants "services" or labor, the term "services" alluding here to the trafficking of migrant women and/or children for prostitution in the receiving countries; 3) the existence of such a *de facto* demand in the receiving countries is in itself a manifestation of power of the criminals involved in the trafficking of migrants, who operate as brokers and/or providers for the market of trafficked women's services; and 4) the case of irregular immigrants as a labor force for legitimate activities in the receiving countries is different than the case of immigrants for illegitimate "services." This is mostly because these immigrants' labor demands in the receiving country tend to be supported by the legitimate power held by the employers of these immigrants in the power structure where the international labor markets involving irregular immigrants operate.

This is not to suggest that the power structures of the receiving countries where either the trafficking of migrant women and children or the hiring of irregular immigrants are purely endogenous, nor to suggest an absence of responsibilities from the part of governments of these immigrants' countries of origin in the operation of these *de facto* international markets of immigrants' "services" or cheap labor. The importance of the analysis suggested here lies in the need to conceptually deconstruct the process of social construction of the vulnerability of migrants once this has been accepted as a

problem of human rights. The phenomenon of the large number of countries who have resisted the ratification of the ILO and the United Nations human rights standards benefiting immigrants is not an act of nature. It is the result of real and concrete interests supported by real and concrete sources of power, benefiting real and concrete group interests which are at the basis of the obstacles to full compliance with such human rights standards. It is obvious that the inability of governments to enforce those international standards after a proper ratification of the international covenants where they are specified as they apply to immigrants as human beings renders them vulnerable as subjects of human rights, concomitantly benefiting those who are interested in the maintenance of migratory inflows of foreigners with zero or minimum rights, whose exploitation is concomitant to their powerlessness. Less evident is the real or apparent collusion of xenophobic and racist sentiments of members of the receiving society with the inaction of governments about patterns of violations of immigrants' human rights and the failure to ratify international standard-setting instruments applicable to the protection of the human rights of the migrants, let alone a *de facto* collusion with those who profit from the inflows of irregular immigrants.

There is a two-fold logical conclusion from this reasoning: 1) the closer to zero action from the part of nation states to implement human rights standards for immigrants, the higher their vulnerability as subjects of human rights; 2) the higher the impunity of violators of immigrants' human rights, the greater the need for United Nations involvement in this matter.

The latter conclusive point requires further elaboration. To the extent that there is empirical evidence of the resistance of a sizeable number of UN member states to comply or to ratify the above-mentioned UN and ILO standard-setting instruments favoring the protection of immigrants' human rights, one could assume little or no progress in the actual condition of powerlessness of immigrants associated with their exploitation in the receiving countries. This is particularly relevant for cases of some receiving countries whose national governments have expressed in international fora their concern for the promotion and protection of immigrants' human rights, giving rise to a sort of growing hypocrisy.

Findings of the surveys conducted by the ILO and the UN Commission on Human Rights cited here suggest an increasingly wider stagnation among receiving countries on the implementation of international standards for the protection of the human rights of the migrants.

We can be sure of one thing – the number of international migrants moving around the world estimated by the UN Population Agency of approximately 120 million is bound to increase. This trend and the problem of their vulnerability as subjects of human rights as discussed herein imply a spectrum of instability and conflict as one of the most serious problems of the twenty-first century, negatively affecting peaceful relations in the community of nations.

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