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### **The Management of Migration - an Issue of Controlling or Protecting? Normative and institutional developments and their relevance to Asia**

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## The Management of Migration - an Issue of Controlling or Protecting? Normative and institutional developments and their relevance to Asia<sup>1</sup>

Nicola Piper, ARI

### Introduction

The global debate on migration has experienced a major push toward the “management of migration” in the form of international cooperation among all countries implicated, indicative of the continuing salience of migration in its two major manifestations: (i) economic migration (work) and (ii) forced migration owing to persecution (asylum). The (re-)emerging concern with the elaboration of an international framework for migration management is related to a number of initiatives, such as the recent Berne Initiative,<sup>2</sup> the establishment of the Geneva Migration Group<sup>3</sup> and the work and final report (October 2005) of the Global Commission on International Migration (hereafter: GCIM). The main objective of this global agenda is to promote cooperation among states in dealing with various dimensions and the complexities of international migration. This is, thus, largely a state-owned process.

In the context of economic migration (the focus of this paper), a parallel development is the recent revival of a rights-based approach to the management of migration by the International Labour Organisation (hereafter: ILO) aimed at addressing the protective deficit for migrants in current policy practices by individual states. Due to its tripartite structure, the ILO includes worker organisations and, thus, provides a potential forum for the voicing of migrant workers’ concerns through trade unions. In addition, the Office for the High Commissioner on Human Rights (hereafter: OHCHR) has set up the Treaty Body in 2004 for monitoring the 1990 UN Convention on the Rights of All Migrants and their Families (hereafter: CRM) which came into force in September of 2003, having finally reached the required minimum number of ratifications (Piper forthcoming).

Although this shift in the migration policy debate to focus on international cooperation is primarily concerned with control over entry and exit as well as prevention of irregular migration,<sup>4</sup> broader human rights issues as well as the rights of foreign workers and thus, a concern for the basic units of analysis of migration: the migrants themselves, have indeed entered into the discussion (GCIM 2005; IOM and FOM 2005). But it is yet to be seen whether this is a matter of paying mere lip service or whether there is in fact a serious concern with migrants’ human rights and whether efforts toward implementation will be made. In other words, the central question is: Are these two trends—managing migration and the protection of

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<sup>1</sup> Research for this paper began in 2003 in connection with a project funded by the Australian Research Council (ARC Discovery Grant no. DP0343303); a follow-up research trip in December 2005 was made possible due to a fieldwork grant from the Asia Research Institute, National University of Singapore. I am very grateful to both institutions for their generous support. This paper could be seen as a follow-up to my previous ARI WP no. 58 (Piper 2006) as the two are very much linked.

<sup>2</sup>For more details, see [www.iom.int/en/know/berneinitiative/index.shtml](http://www.iom.int/en/know/berneinitiative/index.shtml).

<sup>3</sup>This is a forum bringing together the heads of several major UN agencies (ILO, UNCTAD, UNHCR, OHCHR, UNODC).

<sup>4</sup> See e.g. Global Consultation on International Protection, *Refugee Protection and Migration Control: Perspectives from UNCHR and IOM*, 31 May 2001; [www.unhcr.ch/prexcom/globalcon.htm](http://www.unhcr.ch/prexcom/globalcon.htm).

migrants' rights—going hand-in-hand or do they constitute conflicting areas of concern and policy (with rights issues being sidelined)? And if so, how can we reconcile them?

The first step toward ensuring that control and protection aspects are part of migration policies is to reach broad social consensus via an informed debate. To this end, the ILO has called numerous times for the need to engage in 'social dialogue', i.e. for governments to bring employers and workers organisations into the decision-making process on migration policy. Responses to the ILO's recent International Labour Migration Survey, however, shows that "only a few examples exist where the formulation of labour migration policies, laws and regulations takes place through formally established tripartite structures" (ILO 2004:112).

Having an organizational set-up through which influence on policy and the normative/legal framework can be channelled at all stages of the migration process (pre-migration, stay abroad, return migration) helps the promotion and implementation of migrants' rights. Having meaningful institutions in both countries of origin and destination to support migrants' rights is thus an important concern. The creation of an enabling environment can be achieved through institutions that aim to empower workers through education, knowledge provision etc. Awareness is only the first step, however. What is really significant is participation in 'voice institutions' (ILO Eco Sec 2004:339).

This raises the question of what counts as such an institution. In the realm of work, the labour movement through trade unions has historically constituted an important institution for the representation of workers' interests. In addition to trade unions, a rise in the numbers of migrant associations and NGOs can be witnessed globally advocating more specifically for migrants' rights and offering essential services to this highly marginalized group of workers. These NGOs address a protection deficit often not tackled by trade unions by reaching out to migrant workers or a certain sub-group such as domestic workers (Piper 2003 and 2005a). In order to give more impetus to the recognition of migrants' rights, recent studies have argued for a need to enhance collaboration between trade unions and migrant organisations.<sup>5</sup>

The institutional structures involved in the 'management of migration' can be analytically approached from the perspective of 'governance'. Recent years have witnessed a growing interest in governance in academic and policy circles. While there is no precise definition, the notion of governance is generally used to signal that policy-making is (or should be) broader than the formal structures of government. The literature on governance draws attention to the fact that policy-making, i.e. the purposeful steering of the economy and society, involves networks of public and private actors rather than public actors alone (IILS 2004).

In the area of migration, governance assumes a variety of forms including migration policies of individual countries, interstate discussions and agreements, multilateral forums and consultative processes, the activities of international organisations as well as laws and norms. In this paper, I address three levels of governance of migration. Firstly, the global normative and institutional level, specifically the dialectics between the ILO's attempt to revive a migrants' rights agenda on the one hand, and a global shift toward an overtly utilitarian approach to migration, especially as

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<sup>5</sup> Reports presented by Michele Ford, Mary Lou Alcid and Nicola Piper at the Workshop on 'Migrant Labour in Southeast Asia', organized by the Friedrich Ebert Foundation and the Asia Research Institute in Singapore, 13-15 August 2005. These papers are currently under revision for publication in the Asian and Pacific Migration Journal.

far as the destination countries are concerned on the other; and secondly the regional level and cooperation by states in the form of intra-regional processes; and thirdly the meso level, i.e. non-governmental organisations involved in political activism with specific reference to regional networks (most notably in Asia and Europe) formed to promote migrants' rights.

I shall test the relevance of global policy shifts and how the control-protection dynamics are played out in the context of Asia from a regional migration perspective. The regional level is highly relevant because most cross-border migration in fact takes place within regions and not between them. According to the ILO, Asia constitutes the region with the second largest volume of migrant workers after Europe (22.1 million or 27% as opposed to Europe's 27.5 million or 34%) (ILO 2004:7). In terms of contemporary economic migration, what distinguishes Asia from other regions is its rapid growth of a market-led intra-regional migration system (IOM 2003).

### **Migration trends and policy concerns – a global perspective**

Both the volume and patterns of migration have undergone important changes during the last few decades. Since the 1960s, the overall volume of international migrants has doubled. In 2000, the Population Division of the United Nations estimated their total number to be approximately 175 million.<sup>6</sup> Thus, about 2.9 per cent of the world's population or one in every 35 persons are moving across borders (IOM 2003). Taken together, migrants would make up the fifth most populous "country" (ILO 2004:8). The volume of cross-border movements of workers in search of employment is likely to grow, especially in view of globalization having thus far failed to generate jobs and economic opportunities where people live (World Commission Report 2004).

With regard to the patterns and nature of today's migration flows, major policy concerns relating to international migration that have been highlighted in the existing literature include the rising numbers of irregular/undocumented migration and the increasing shift toward temporary and circular migration as opposed to permanent settlement. Irregular migration, for instance, is now much higher than in the 1980s and so is the rate of employment in the informal sectors where many migrants can be found. In addition, the issue of the asylum-migration nexus has been posed by scholars and policy-makers alike, arguing that refugee and labour migrants are moving within the same flows in many parts of this world.<sup>7</sup> The restructuring of European welfare states as well as other demographic and labour-market related changes in developed countries in the West have increased the demand for skilled foreign workers in, for example, the health sector. This has revived the debate on 'brain drain' and 'ethical recruiting' in countries such as the UK. At the same time, there are increasing numbers of undocumented migrants (usually those classified as unskilled) in certain sectors of the labour market such as agriculture (ILO 2004). Those foreign workers are typically "needed but not wanted".

All regions are implicated in the rising mobility of people in search of work and other opportunities, and the associated policy issues have correspondingly risen on political agendas of

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<sup>6</sup>This figure has been revised in the recent report by the General Secretary to 191 million as of 2005 (UN 2006). These numbers include refugees and displaced persons, but they do not capture irregular migrants who often escape official accounting.

<sup>7</sup>See e.g. Global Consultation on International Protection, *Refugee Protection and Migration Control: Perspectives from UNCHR and IOM*, 31 May 2001; [www.unhcr.ch/prexcom/globalcon.htm](http://www.unhcr.ch/prexcom/globalcon.htm).

global and regional institutions as well as national governments. Although foreign workers still represent a small percentage of industrialized countries' total workforce (4 per cent), migratory flows of workers from the developing to the industrialized countries have been rising in recent decades. The US received the largest proportion (81 per cent), followed by Canada and Australia (11 per cent) and the European Union.<sup>8</sup> Women account for an increasing proportion of international migrants (49 per cent in 2000), reflecting their significant role as primary income earners. The out-migration of women workers is most evident from Asia,<sup>9</sup> with the majority migrating as domestics, workers in the entertainment industry, factory workers, and to a lesser extent as nurses and teachers.<sup>10</sup> Substantial migratory movements continue to occur within the South or regionally, and there is evidence of former 'sending' countries turning more and more also into 'receiving' countries, such as Thailand, for example.

Yet, with scholarly focus having been more on migration from the developing to the developed world, there is a risk of ignoring intraregional migration and the specific implications of such "south-to-south" movements which are numerically highly significant (IOM 2003). Intraregional migration is more likely to involve the poorer strata of migrants and thus may actually be more important in terms of poverty alleviation. But moves of the skilled or professionals also take place within the "south". However, research on health migrants (nurses, doctors), for instance, has mostly focused on 'south to north' migration and therefore largely reflects the concerns of developed countries in the North. Thus, detailed data on intraregional migratory flows is on the whole rather scarce. Moreover, despite the feminization of migration having been widely commented upon, the gendered nature of regional movements within the south is not very well known.<sup>11</sup>

The two fastest-growing regular migration flows have been described as involving: (i) migration of highly skilled people, and (ii) temporary migration (involving both the skilled and unskilled). In addition, there has been an increasing shift toward temporary migration as opposed to permanent settlement (of unskilled and skilled migrants, as reflected in GATS/Mode 4), even in traditional settler countries such as North America and Australia. Related to this is the increasing 'bifurcation' between skilled and unskilled migration in terms of the ease of movement between countries. Skilled migrants are typically given a preferential status and more rights (such as family reunification) (Piper and Iredale 2003).

The question which arises is to what extent this describes migration from developing to developed countries (North-South, East-West), flows between developed countries (e.g. intra-European Union), and migratory movements between developing countries (South to South) or between developing and non-OECD countries (such as migration from Indonesia to Malaysia and Singapore). With many developing countries not having clear migration policies in place, there is much evidence of such outward movements taking place in an irregular, undocumented

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<sup>8</sup>Supra note 3, p. 5

<sup>9</sup> This requires qualification: the countries sending more women than men to work overseas today are the Philippines, Indonesia and Sri Lanka (Oishi 2005). However, if undocumented migration was factored in, Thailand's share of female out-migration would also be higher than officially recorded (Asis 2005).

<sup>10</sup>Supra note 3, pp. 10–11.

<sup>11</sup>This point has also been made in a recent article: Martin Ruhs and Ha-Joon Chang, "The ethics of labor immigration policy", *International Organization*, Vol. 58, Winter, 2004, pp. 69–102 (see p. 78).

manner, which creates specific types of problems.<sup>12</sup> This also points to the issue of non-transparency and thus to one of the three issues leading to out-migration highlighted by the GCIM: the lack of ‘democracy’ (see also below). This points to largely political reasons pushing people to move. But even in the destination (and typically more-developed) countries, as a result of their increasingly restrictive migration policies, the numbers of undocumented migrants who typically work in the informal sector of the economy are also rising. Their presence is tacitly approved but because they tend to be lower or unskilled, their contribution is officially ignored.<sup>13</sup>

What we can observe is not only an overall rise in mobility of the world’s population but also an increasing complexity of such movements as reflected in terms such as “replacement migration”, “circular and repeat”, “commuter” or “shuttle” migration. Thus, binary concepts of “permanent” versus “temporary”, “sending” versus “receiving” countries do not make much sense in light of contemporary migration patterns. Also increasing diversification in terms of skill levels are taking place resulting in a complex web of stratification (Piper forthcoming). The question which arises and with which this paper is concerned is: what are the concomitant policy shifts and responses?

### **Migration Dynamics and Protection Issues in Asia**

The vast majority of migrants are workers participating in regional migratory systems with specific characteristics. Although world-wide figures of migrant workers’ percentage of the labour force is relatively small (1.2 to 1.5%), in the regional context of the Asia-Pacific, their importance has grown considerably. A shift of direction of destinations has occurred from the Middle East to East and Southeast Asia, with migration to Malaysia, Hong Kong and Singapore having become indispensable (ILO 1999). In Asian destination countries, temporary contract schemes are the norm, with settlement for economic migrants being rare, if not totally out of reach. Labour migration is mediated by employment agencies resulting in ever-increasing costs for cross-border migration due to enhanced competition on the ‘regional labour market’ with more countries appearing on the ‘export scene’ pushing recruitment fees up. Migration in Asia is, thus, strictly temporary and highly regulated by tying foreign workers to one specific employer and sector. As a result, the entire migration process is replete with abuse and rights violations inflicted by agents and/or employers. The high number of undocumented migrants (who are not necessarily illegal entrants but often turn into ‘illegals’ upon entry by changing employers or overstaying their visa etc.) is a result of all of these features.

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<sup>12</sup> See e.g. Graziano Battistella and Maruja M.B. Asis (eds.), *Unauthorised Migration in Southeast Asia*, Scalabrini Migration Centre, Quezon City, Manila, 2003; and Nicola Piper and Robyn Iredale, *Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia Pacific Perspective*, UNESCO, Paris, 2003; as well as A. D’Angelo and Myra Pasos Marciacq (2002), *Nicaragua: Protecting Female Labour Migrants From Exploitative Working Conditions and Trafficking*. GENPROM Working Paper No. 6, Geneva: ILO.

<sup>13</sup> This is evident from the recent Green Paper published by the European Union on migration and the reaction by NGOs and trade unions, many of which pointing to the EU’s neglect of undocumented migration and its non-understanding of the link between restrictive migration policies, labour market needs and migration reality.

In terms of type of work or sector, most male migrants find occupations in the construction sector, in the manufacturing sector of small firms and with subcontracting companies, in agriculture such as plantation and rice mills, as well as fisheries and services. Migrant women are typically confined to traditional roles in the labour market, mostly in the health, entertainment and domestic service sectors. In addition they can also be found working in factories, especially in the garment sector. As entertainers and domestic workers, they are inadequately addressed by labour legislation, and so are the so-called ‘trainees’, a system commonly used in Japan and Korea to get around official policy of not allowing the employment of unskilled foreign workers. But it has to be said that even in those sectors covered by labour laws, unskilled migrant workers often have their employment and associational rights violated (see below).

Undocumented migrants’ numbers are especially high in certain countries. In the case of Malaysia, they amount to about 50%, and the highest figure being seen in Japan with about 68%. Partly as a result of irregular migration, wage discrimination is rampant (ICFTU-APRO 2003). The rate of employment in the informal sectors where many migrants can be found is also increasing. The latter also partly explains the rising numbers of independent female migrants.

The feminization of labour migration is prominent in Asia. In Southeast and East Asian countries that admit migrants exclusively for temporary labour purposes, the share of independent women in labour migration flows has been increasing sharply since the late 1970s (ILO 2003: 9), and in some cases women clearly dominate over their male counterparts. The countries of origin sending a higher percentage of women than men are the Philippines, Indonesia and Sri Lanka. If undocumented migrants were accounted for, the share of women among Thai migrant workers would also be much higher than evident from official statistics (Asis 2005).

#### *Protection issues*

The key issues and concerns for foreign workers which centre upon workplace grievances can be broadly classified under two headings: 1) employment related, and 2) welfare, occupational health and safety issues. Employment-related issues are mainly about the non-payment or under-payment of wages and unauthorized deductions (see table 1 for Singapore). Issues to do with welfare, occupational health and safety are concerns pertaining to accommodation, long working hours and workplace hazards. The latter includes work-related injuries and accidents as well as physical/sexual abuse (as encountered by FDWs). But available official figures in Singapore, for instance, only cover male-dominated sectors (table 2).

**Table 1** – *Cases of non-payment of wages lodged by domestic helpers with the MOM, Singapore*

2001	-	137
2002	-	189
2003	-	214
2004	-	262

(Source: Sim Chi Yin, 23 January 2005, *New Paper*, page 4)



**Table 2** – *Total number of industrial accidents, all industries, Singapore*  
(includes shipbuilding and repair, construction and factories)

1998	-	4,247; 91 fatal
1999	-	3,953; 69 fatal
2000	-	3,519; 74 fatal
2001	-	3,790; 52 fatal
2002	-	3,388; 64 fatal
2003	-	3,179; 55 fatal

(Source: MOM 2005)

In Asia, domestic service is the most widespread legal employment opportunity for women. Employment-specific problems that FDWs in most destination countries are subjected to include: 1. non-coverage by the Employment Acts (explicit exclusion of “domestic servants”) with the exception of Hong Kong; 2. control through levies and security bonds; 3. orientation programs aimed at teaching submissiveness, obedience, downplaying of their religious practices if they differ from the employers; 4. no information on rights or channels of recourse (Wisnuwardani et al. 2005); 5. no uniform contracts, no uniform wage standards across all nationality groups which results in an ethnic hierarchy among domestic workers with Filipinas usually getting the most preferential treatment.

For the year 2004, it was noted by leading NGOs in Malaysia that the top violations of labour rights was the non-payment of wages, followed by unfair dismissal in the construction and small/medium industries linked to the sub-contracting labour system. There are many loopholes in the system which creates a situation of ‘no redress’ for undocumented workers, leaving employers unpunished for illegal practices. The trade union council and NGOs have begun to call for the right of all workers to seek redress to put an end to such discriminatory practices. They demand the ‘right to stay’ by issuing foreign workers not just social pass visas but work-permit visas. Tenaganita has recently published several press statements calling for the need to create a ‘culture of payment of wages’.

According to a recent report (Verité 2005) which covers Vietnam, Indonesia, the Philippines, Thailand, Taiwan, Jordan and Malaysia, the list of common abuses against foreign contract labourers were excessive overtime, improper wage payments and withholding of wages. Despite the widespread existence of legislation limiting fees, service, placement or recruitment fees charged were nevertheless excessive in practice in two regards: they exceed legal limits and often accounted for a large portion of a worker’s earnings. This discrepancy between law and actual practice has to do with the absence of formal legal mechanisms for governing the payment of placement fees (with the exception of Vietnam). The report therefore concludes that the level of indebtedness of foreign contract workers can be considered to be ‘debt-bondage’ consistent with the definition of human trafficking.

Overall, the major problems which foreign workers are facing have to do with inconsistent or non-existent migration policies, employers’ illegal practices and contract violations. In addition, they are subjected to denial of due process of law, abuse of the right to freedom of movement

and freedom of association. Government policies tend to target visa and immigration related issues, but rarely employment rights and the illegal practices by employers.

### **Managing migration – norms and institutions**

One of the key features of global governance regimes today is the management of migration (Jordan and Duevell 2003). The agenda behind managing migration has mostly been about the control of entry and exit of migrant workers. This is as such not new – the control of migration has preoccupied the minds of policy makers since the 1970s and more forcefully since the late 1980s and 1990s. Although the discursive shift to the term ‘migration management’ signifies some new nuances in the policy discourse, the policies of European, or more generally, Western governments continue “to follow a philosophy predominantly concerned with restricting and controlling migration...” (Doomernik, Gsir and Kraler 2005:35). The global push towards ‘cooperation’ thus reflects an agenda driven by destination countries. This is reflected in the response by the European Economic and Social Committee (EESC) to the recently-published Green Paper on a possible EU approach to managing economic migration, in which the EESC commented that cooperation between states must be extended to cover the overall management of migratory flows, including the perspective of origin countries – and not only be based on the interests of northern governments (CESE 2005).

Being mainly concerned with combating illegal immigration, maintaining border controls and returning deportees, it does not come as a surprise that states’ actual practice of managing migration is tied to immigration policies rather than labour policies. This is also evident from the fact that individual state’s governing of migration has been part of the portfolio of ministries of justice or home affairs rather than ministries of labour, making policy elaboration and implementation part of policing and national security rather than labour market regulation. This partially also explains the little cooperation and coordination (and sometimes outright reluctance to pursue such) between immigration authorities and labour ministries in many countries (Piper and Iredale 2003).

It has been suggested that the very use of the term ‘management’ is based on the pre-globalisation assumption of state control over migration processes (Newland 2005). Today, and especially in Asia, however, much cross-border movement does not follow state procedures and relies heavily on private agencies or migrant networks. There is in fact a proliferation of actors making decisions about international migration independently from, and outside of, state frameworks of regulation. And most importantly it is the migrants themselves whose actions and behaviour defy state regulation in many ways (Ford and Piper, forthcoming).

On the global level, concerns for the need to govern migration have gradually built up since the World Conference on Population and Development in 1994. For a long period, there was no consensus at the UN level (General Assembly) on international migration until the Secretary General finally called for an integrated approach and set up the GCIM in 2003 with the mandate “to provide the framework for the formulation of a coherent, comprehensive and global response to the issue of international migration” (GCIM 2005: vii). In the meantime, a number of so-called regional consultative processes have taken place (Puebla, Bali, Manila, Southern Africa, and Budapest) as part of the Berne Initiative. The GCIM’s consultations in connection with the

preparation of its final report took the form of ‘regional hearings’.<sup>14</sup> What all of this attempt to achieve is: the promotion of a comprehensive debate among all states involved and other stakeholders with regard to migration; the analysis of gaps in current policy approaches to migration; the examination of inter-linkages between migration and other global issues; and the presentation of appropriate recommendations to the UN, governments and other stakeholders.

Parallel to these attempts to ‘manage migration’ that tend to focus more on controlling cross-border flows run the ILO’s efforts to address the protection deficit by reviving a rights-based approach to economic migration. Reflecting state’s reluctance to enter into a new multilateral agreement (which might be symptomatic of a general multilateral fatigue and the current critical stance vis-à-vis the UN by many western states), the ILO has chosen the route of the ‘non-binding framework’ to promote, and push for implementation of, its rights-based approach. The ILO’s Governing Body took note of this framework at its meeting in March 2006 and agreed to its wider promotion and dissemination, which means a *de facto* approval.<sup>15</sup>

Reflecting the ILO’s concern for a rights-based approach to migration and the need for social dialogue among all stakeholders on migration policy, the Declaration of The Hague on the Future of Refugee and Migration Policy from 2002 (the product of a three-year consultative process involving government officials and non-governmental representatives, aimed at shaping future policy on migration) argues that all states need to cooperate on developing a common approach to migration based on human rights standards. In its preamble it is noted in an optimistic manner that the potential for international cooperation is increasing, and together with the global advance of human rights and democratic governance, new perspectives are opening up. This Declaration further emphasizes that migration management is a “complex process which goes beyond punitive measures and instruments of control”. Dialogue and cooperation of all stakeholders is, therefore, required as well as a transparent and participatory approach to migration management that is to be developed within the framework of international law.

Reflecting the trans-border nature of this phenomenon, the global management of migration in the form of more cooperation among origin, transit and destination countries has thus been supported by international, inter-state organisations and global commissions – albeit by giving more or less weight to the importance of the protective aspects of the ‘management of migration’.

### *Rights-Based Approach*

Rights-based approaches (RBAs), that is, conceptual frameworks which are normatively based on international human rights standards, to address global issues such as development (General Assembly 1986), health (as championed by the WHO) and migration (ILO 2004) are becoming increasingly the norm in global policy parlance. Whilst there is no single, universally agreed definition of RBAs, there seems consensus that they relate to accountability or transparency, empowerment, participation, and inclusion or non-discrimination. Despite the unprecedented

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<sup>14</sup> The Regional Hearing organized in Asia took place in Manila between May 17 and 18, 2004.

<sup>15</sup> Personal email communication with Dr. Ryszard Cholewinski, [Migration Policy, Research and Communications Department, IOM](#) (May 19<sup>th</sup>, 2006).

attention this is being given by global institutions, donor agencies and development NGOs in recent years, the idea of an RBA as such is not a new concept.<sup>16</sup>

Analysing the relevance of RBAs to development for the provision of social protection in developing countries, Prion (2004) argues that RBAs strengthen the normative case for social policy in general and social protection in particular. The key contributions of an RBA are: its focus on rights and entitlements, rather than charity; its involvement of clear obligations on states as guarantors of such entitlements; the highlighting of core obligations and minimum standards; its placing of people at the centre of concern and their ability to claim entitlements. One of the main characteristics of an RBA is its normative nature and that international standards constitute one level or normative 'regime' in a rights-based framework. These, however, need to be translated into constitutions or statutory laws, and often customary or other informal systems are also relevant (Prion 2004).

Within the UN's standard-setting structure, it is the ILO which is concerned with workers' rights including migrant labour. In the specific context of migrant women, it is UNIFEM which is devoted to ensuring gender equality of migration and migrant women's rights. This is especially the case in the Asian context: from its Bangkok office, UNIFEM runs a regional project entitled *Empowering Migrant Workers in Asia* aimed at the adaptation of CEDAW to migration – a project which does not exist in any other region. The ILO's Gender Programme has published numerous reports on women migrants in various countries.

Unlike CEDAW that has been widely ratified, migrant worker-specific conventions (ILO conventions no. 97, 143 and UN CRM) have the lowest ratification rate in the developed as well as developing world and recent studies have pointed to the largely political reasons for this: the little promotional activity by the UN itself,<sup>17</sup> and the obstacles to the ratification in key regions of migration.<sup>18</sup> The general reluctance to ratify and implement these migrant-specific instruments is, on the other hand, paralleled by an increasing interest in combating trafficking and smuggling. This is reflected in the relative success of the 2000 United Nations Convention Against Transnational Organized Crime, also called the Palermo Convention, and its two protocols (aimed at swift implementation). This convention focuses on criminal aspects within migration and is more concerned with national security rather than the protection of trafficked victims. Thus, human rights issues are clearly sidelined in this document.<sup>19</sup>

To assess to what extent a rights-based approach to migration is in fact becoming a global norm and an accepted legal practice among states (who are, after all, the members of international organisations), the influence and standing of such organisations as UNIFEM and ILO has to be analysed. UNIFEM is less well-funded compared to other UN agencies,<sup>20</sup> and the ILO has to compete with the IOM in the field of migration. Many Western governments in fact provide more support for the IOM, hoping to reduce the ILO's mandate in respect of migrant workers.

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<sup>16</sup> [www.unhcr.ch/development/approaches.html](http://www.unhcr.ch/development/approaches.html) (downloaded 06 May 2006).

<sup>17</sup> See *The UN Treaty Monitoring Bodies and Migrant Workers: A Samizdat*, ICMC, 18 December 2004, which can be obtained from [grange@icmc.net](mailto:grange@icmc.net) and/or [myriam@december18.net](mailto:myriam@december18.net).

<sup>18</sup> See Piper and Iredale, 2003; and Pécoud and de Guchteneire, 2004.

<sup>19</sup> See Gallagher (2001).

<sup>20</sup> It has to be pointed out, however, that its development funds go directly to women in vulnerable sectors, like migrant women, no matter how small is the amount. Despite its limited budget, it stretches funds to do more activities (personal conversation, ex-UNIFEM employee, April 2005).

The IOM, however, is not a norm- and standard-setting organisation and has in fact no normative framework for the protection of migrants' rights (Human Rights Watch, 2003). Also, with the role of state and international agreements among states remaining critical in setting standards and monitoring the implementation of these standards (Skeldon 2004), it would also be a useful exercise to investigate the complaints mechanism at the ILO, to determine to what extent migrant worker and migrant women-related issues appear and what the rulings are. Likewise, as much as gender mainstreaming has been pushed for, concerns for migrants should also be mainstreamed in the workings of the Treaty Bodies at the OHCHR (an extension of the study by December 18 and the International Catholic Migration Commission<sup>21</sup>).

Recent studies identifying the obstacles to the ratification of the ICMR conclude that the broadest common result is lack of political will (Piper and Iredale 2003; Pécoud and de Gucheneire 2004). As a next step, an in-depth analysis of the lack of political will is needed, engaging with the literature on the processes through which international norms are made part of domestic legal and political systems, to see why there is so much resistance to the equal treatment of migrant workers.

### *The State level*

Unless they are part of a regional bloc such as the EU, where there has been a gradual shift towards the harmonisation of migration policies (even though as yet incomplete), individual states usually design their own immigration and emigration policies, with some having no policies in place at all. It has been shown that such a laissez-faire approach can result in a worse deal for migrants (as in the case of Nicaragua, for which see D'Angelo and Pasos Marciacq 2002). Where clear policies exist, it does, however, not necessarily mean 'good' policies (from the perspective of migrants' well-being).

States typically take a utilitarian approach to migration with little concern for migrants' rights, which is demonstrated by the low ratification rate of the ICRM and the two migrant worker ILO conventions. But even in regions such as Europe where one of the arguments against ratification of migrant worker specific conventions is that those rights are covered in already ratified and implemented instruments, a rights-based approach to migration is not favoured or promoted.<sup>22</sup> This reflects the politically-sensitive (and potentially volatile) nature of this issue. In addition, there is little evidence of a 'social dialogue' taking place as part of this policy-making anywhere in the world, which typically means that governments take less notice of workers' voices as opposed to those of employers – and sometimes not even of employers who are in favour of increasing legal migration. Some countries have set up special ministries dealing with overseas migration (e.g. Philippines, Bangladesh, Sri Lanka) and there are examples of 'migrant welfare funds' or commissions, but often migrant worker associations or advocacy NGOs are not part of their boards of management (by contrast, recruitment agencies usually are represented) and thus, the migrants' own concerns do not find expression. In addition, there is no transparency with regard to the spending of the accumulated fees charged by recruitment agencies.

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<sup>21</sup> This study refers to *The UN Treaty Monitoring Bodies and Migrant Workers: A Samizdat*, ICMC and 18 December 2004, which can be obtained from [grange@icmc.net](mailto:grange@icmc.net) and/or [myriam@december18.net](mailto:myriam@december18.net).

<sup>22</sup> The EU was among the most outspoken critics at the ILO Congress in 2004 where the rights-based approach was formulated and negotiated. Likewise, the recent Green Paper on future migration policy has been criticized by trade unions and NGOs for its overtly utilitarian approach with too little concern for migrants' rights.

Between destination and origin countries, there is the option of negotiating bilateral agreements, but examples of ‘good practices’ with regard to the inclusion of rights clauses are few and far between.<sup>23</sup> Moreover, the problem with bilateral agreements and Memoranda of Understanding (hereafter: MoU) is that they give preferential treatment to a specific group of migrants, and by not promoting universal standards across all nationality groups, a hierarchy among migrant workers often emerges.<sup>24</sup> Also, international agreements affecting migration at global, regional and national levels are more likely to be more favourable towards skilled than unskilled migrants (Skeldon 2004). UNIFEM in Bangkok is currently facilitating the establishment of an implementing mechanism for MoUs between Jordan and Indonesia and between Jordan and the Philippines that contain rights protection for migrant workers. It is yet to be seen what the concrete outcome of this promising endeavour will be. There are apparently also MoUs in place between Thailand and its neighbours Laos and Cambodia which are said to contain clauses on migrants’ rights.<sup>25</sup>

From a governmental perspective, this also raises the issue of incentives and why they should be interested in protecting migrants in the first place. Countries of origins’ interest in their nationals overseas are largely driven by their recognition that migrants can advance national development from abroad through remittances and investment. Thus, emigrants are increasingly being endowed with special rights and protections toward this end. As far as countries of residence are concerned, it is up to employers’ organisations (contrary to popular belief, ‘good’ employers are often in favour of legal migration) and workers’ organisations to put pressure on governments – an issue further discussed below.

The implementation of ‘rights-based approaches’ is a difficult task in regions such as Asia for a number of reasons. Broadly, transparency and accountability issues are linked to the issue of democracy and are thus a problem in more authoritarian countries such as Malaysia and Singapore. Liberal principles of equality and non-discrimination are hardly promoted or legally codified, being often depicted as western-centric values. The socio-cultural dynamics of contemporary labour migration and policies in the context of the multi-ethnic and multi-religious societies in Southeast Asia (and the degree to which this is distinct from East Asia) deserve in fact more in-depth research, especially from a historical perspective.

### *Regional developments - RCPS*

Apart from bilateral agreements, one further step towards achieving a global policy agenda that aims to maximize the benefits of migration and protective standards for migrant workers can be pursued at the regional level. At this current stage of the debate on global governance of migration, states are often intimidated by what they seem to perceive as open-ended undertakings which compromise their sovereignty in the migration area. Therefore, regional agreements might be seen as less threatening. There are differences with regard to the level of institutionalisation of regional structures, with the EU having the most developed common approach to migration,

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<sup>23</sup> The most recent example is the MoU signed between Indonesia and Malaysia on domestic workers. It has been criticized by the NGO community for its lack of concern for foreign domestic workers’ rights.

<sup>24</sup> This is particularly evident in the case of foreign domestic workers in Asia. Filipinas are usually given the best deal, followed by Indonesians and Sri Lankans (e.g. Wee and Sim 2005).

<sup>25</sup> Personal communication with the IOM in Bangkok in April 2004.

followed by NAFTA and the African Union. Asia has the least advanced common approach in this regard of all regions.

Regional human rights bodies also play an important role in consolidating a rights-based approach to migration. The most progressive example here is the Inter-American Human Rights System. It created its own Rapporteurship on migrant workers. The reports, together with those of the UN Special Rapporteur, have documented the failure of restrictive policies to halt irregular migration, the negative consequences of fortified borders in creating opportunities for trafficking and smuggling, leading to increasingly dangerous journeys and a rise in migrant deaths. They also record the rampant rights violations migrant workers are subjected to.

In the Asia-Pacific, a region-wide human rights body does not exist, which is not surprising considering that statistically Asia ranks the lowest with regard to ratifications of UN human rights instruments. In 1996, existing national human rights institutions in this part of the world formed the Asia Pacific Forum as a forum to discuss and promote human rights standards in Asia but migrant worker issues have so far not been among its main concerns.

With regard to broader regional agreements, trafficking seems the most dealt with and best covered issue. Unlike the management of labour migration about which has been subject to little regional cooperation in the Asia Pacific, the problem of trafficking has been taken up on the regional level to some extent. A number of initiatives, however, do not directly relate to human trafficking but deal with this as a subset of other issues, such as irregular migration. Most of these initiatives deal with the control and prevention of such migratory flows, rather than addressing the root causes leading to trafficking and putting protective measures and victim support mechanisms in place.<sup>26</sup>

A fairly recent and important development in the Asian region is the holding of three ministerial-level (labour ministries) consultations by Asian labour sending countries - in Colombo (April 2003), Manila (September 2004) and Bali (2005) - to discuss issues of common concern, including the protection of migrant workers. Concrete action has not been taken, other than the plan for a feasibility study on the establishment of a Common Migrant Resource Centre in the Gulf Cooperation Council Countries. The final statement of the Bali ministerial consultation, however, directly refers to the 'management of migration' which is defined as "orderly labour movement and employment policies consistent with the welfare of workers". Four areas of management are highlighted as essential: 1. ensuring the welfare and well-being of vulnerable overseas workers, especially women, during recruitment employment; 2. optimising benefits of organised labour flows, including the development of new markets; 3. building institutional capacity and inter-ministerial coordination to meet labour movement challenges; 4. increasing cooperation between countries of origin and destination countries in ensuring the welfare of overseas workers. More specifically, one area of cooperation is to aim at "establishing minimum wage levels and ensuring safe and decent conditions of employment for contract workers,

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<sup>26</sup> More recently, there has been a new development on the sub-regional level in Asia, the so-called Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) whose planning and setting up phase was to be finalized by February 2005. In addition, a number of bilateral agreements on trafficking are at various levels of discussion between Thailand, Lao PDR, Myanmar, Cambodia and Vietnam. Among the specific objectives, agreed standards and procedures on repatriation and victim support are mentioned. In addition, COMMIT is one of the few, if not the only, anti-trafficking initiative which explicitly includes men as potential victims. How this will translate into victim support programmes is unclear at this stage.

particularly women, in low skill and low wage sectors.” This finally constitutes a clear recognition of the rampant abusive employment practices. The challenge which lies ahead is to translate this rhetorical statement into action.

### **Social Partners**

Social partners are essentially all types of non-governmental organisations that are somehow involved in political and, ideally, policy-making processes. In the realm of work and economic migration, this relates mainly to trade unions, migrant associations and NGOs involved in migrant labour (Piper 2005c). The political organising of migrant workers poses a particular challenge in contexts where migration is characterized by widespread informalization, temporariness, and/or illegality. Migrant associations, trade unions and other civil society institutions have an important role to play in offering support services and advocacy for the rights of migrants. This has been recognized by academics (Ford and Piper, forthcoming) as well as policy-makers (ILO 2004; GCIM 2005). These different types of organizations have their respective strengths and weaknesses, based on their organizational ‘histories’ and processes, offering different opportunities and posing different limitations for advocacy and labour organising. In recent years, new strategies have begun to emerge in the form of intra-organizational policy shifts – and trade unions opening their doors to migrant workers - or reform processes and inter-organizational alliances within and across borders.

Representation in some institutional form is highly important as migrants’ own perspective is often missing when ‘management of migration’ is being discussed or in the actual management practices. From the perspective of individual migrants, management of migration is largely about risk management and securing of livelihoods (getting and remaining in overseas employment). This is where governments have not responded well enough – lessening the level of insecurity. What is really significant is direct participation in ‘voice institutions’ (ILO Socio-Economic Security Programme 2004:339) and thus, self-organising. In the context of migration this means organising by migrants themselves (or by former migrants). This, however, often proves to be difficult based on foreign workers’ legal and visa status as well as type of job – and the democratic space and recognition of associational rights given by destination countries (Piper 2005a).

### *Associational Rights*

The right to organize or join trade unions or form other organizations is firmly established in international human rights law. The freedom of association is among the fundamental principles and rights at work championed by the ILO which are universal and applicable to all people in all States, regardless of the level of economic development. In addition to the ILO norms and standards, the right to form and join trade unions is also enshrined in the International Covenant on Economic, Social and Cultural Rights (hereafter: ICESCR) as well as in the 1990 UN Convention on the Rights of All Migrant Workers and Their Families (hereafter: CRM).

However, there are crucial differences and nuances with regard to the scope and extent to which migrants can organize politically as set out by relevant covenants, the migrant worker specific ILO conventions, and the CRM. Article 26 of the latter stipulates that all migrant workers



(regardless of legal status) have the right “to take part in meetings and activities of trade unions and of any other associations established in accordance with the law” and “to join freely any trade unions and any such association as aforesaid”. The explicit right to *form* an organisation, however, is confined to *documented* migrants. The ICESCR in its article 8 refers to the “right of everyone to form trade unions and join the trade unions of his (*sic*) choice, subject only to the rules of the organization concerned”. Unlike the CRM, this Covenant, however, only refers to trade unions and not to ‘other associations’ which would include civil society organisations.

Based on its tripartite structure including trade unions, the clauses on ‘freedom of association’ championed by the ILO relate to trade unions only. Unlike the CMR, the two migrant worker specific ILO conventions (no. 97 and 143) restrict the equality of treatment and opportunity in respect of trade union rights to those migrant workers *lawfully* within the territory of the destination country. This means the CMR goes the furthest with regard to ‘rights to institutional representation’ in terms of *types* of organisations, but the ICESCR takes associational rights one step further by extending this to all workers regardless of legal status, even though this right to self-organising remains restricted to trade unions.

This reflects two major issues: the dominant recognition of trade unions as *the* institution to represent workers as far as international law is concerned and the widespread reluctance to allow *all* foreign workers the right to organize regardless of migration status. This confirms general comments made on migrant worker specific instruments as well as other UN conventions: that they tend to reflect the situation and concern of *western* countries more than of countries in the global South (Piper and Iredale 2003; see Davies 2004 on the 1951 Refugee Convention) – and in the South, the trade union movement has never had the same influence as in the North. Moreover, this also underpins the argument that priority is given to controlling migration rather than the protection of all migrants in their capacity as workers. On the issue of protecting *undocumented* migrants, there has been a gradual shift in recent years (coming mainly from trade unions and NGOs) to treat migrants first and foremost as workers once they have entered the territory and are working at the destination, regardless of their legal status. More and more national trade unions take steps to offer some kind of protection to ‘sans papiers’ (Piper 2005a). This development has become evident on the international level also, in the revival of a rights-based approach to migration by the ILO which includes irregular migrants. The most recent and ground-breaking development in this regard, however, is the ruling by the Inter-American Court of Human Rights that clarifies that all migrants – documented and undocumented – are covered by the principles of non-discrimination, equality and equal protection in the host states where they live and work and must not be excluded from the protection of labour laws on the basis of their migration status. This, however, still leaves the issue of political organising and impediments to associational rights.

While temporary migrant workers often have the legal right to join trade unions, this is more often violated in practice. Even legal migrant workers face various tactics of employers and contractors to keep them out of trade union membership despite their legal entitlement to do so (of which they are often not aware). Migrant workers are typically concentrated in the informal sectors of the labour market doing unskilled jobs and working extremely long hours without much time off; they often have a high level of mobility by moving between jobs or even sectors; they work in great isolation as in the case of domestic workers or other women factory workers whose mobility outside of the workplace is highly restricted due to cultural restrictions, such as

in the case of South Asian factory workers (Dannecker 2005). Domestic workers face the additional problem that their remunerative activity is not even socio-legally recognized as ‘work’: most labour standards laws in Asia explicitly exclude domestic work from their coverage. Hence, established unions have never included domestic workers in their labour activism (with the rare exception of Hong Kong). The controversial issue of work in the sex industries (even contested among feminists as to whether this should be treated as ‘work’) is yet another matter entirely – this line of work is completely invisible. A related issue is that despite the legal right to join trade unions, unions rarely actively seek membership by migrants which leaves the latter unaware of this option (and migrant workers are often not unionized in their country of origin either).

As a result of these factors, in many destination countries, organising of foreign workers is very difficult. In the Malaysian case, for instance, migrants’ contracts typically contain clauses prohibiting (legal!) foreign workers from joining an existing union or being politically active.<sup>27</sup> These provisions actually violate the national employment law. The Industrial Relations Act and Trade Unions Act govern the formal industrial relations system in the country and the law allows migrant workers to become members of trade unions (but not hold office), but in practice migrants are prevented from joining unions as stipulated in their contracts. The moment a migrant joins a union, the employer can sack this worker without being punished. Thus, the formal labour/employment system is weakened by the existence of an informal system. Even for ‘willing’ trade unions, this poses extraordinary obstacles.

In addition, in Southeast Asian countries, migrant workers are not legally allowed to set up their own organisations, with the notable exception of Hong Kong. In Singapore, for example, any organization engaging in ‘political activity’ is strictly scrutinized. Intentions to advocate rights issues have to go through a lengthy registration process and it is presumed that citizenship would be an issue. An entirely non-citizen group attempting to register a rights-based organization is unheard of. Malaysia has a more vibrant NGO sector than Singapore, even in the area of human and workers rights, but there are no NGOs set up by migrants themselves which is partly a reflection of the fairly large number of undocumented migrants. In such circumstances, migrants depend on concerned local citizens to extend support to foreign workers through existing NGOs.

The situation is different in East Asia where migrant workers are legally allowed to set up their own organisations. The irony in much of East Asia is that it is the migrant workers who are ‘illegal’ (often by overstaying their visa or absconding from an employer they are tied to) and it is their own legal status that renders self-organising a difficult if not impossible issue.

### *Promoting migrants’ rights*

Research has shown that it is more through NGO activism that migrant workers’ rights have been advocated for in Asia than via trade unions. It is in particular transnational networking among NGOs which has led to some small ‘success stories’ on the local level (Ford and Piper forthcoming). The involvement by trade unions is a more recent development and the level of

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<sup>27</sup> The exact wording in one contract for a Nepalese worker is “The Employee shall not marry with any Malaysian and shall not participate in any political activities of those connected with Trade Unions” (copy shown to the author during interview, June 2005, Kuala Lumpur).

their engagement is uneven across the region. With regard to destination countries, it is Korean and Hong Kong-based unions which seem to be more actively involved than anywhere else.

In the context of cross-border migration, international NGOs such as Amnesty International have argued that the starting point of the management of migration should be the rights of migrants. Together with other NGOs and regional NGO networks in Europe and Asia, they argue that the ratification of the CMR by more migrant origin, but especially by migrant receiving, countries (of whom to date not a single has acceded to this Convention) is paramount. NGOs in Asia, however, are acutely aware of the fact that many rights set out in the CMR are out of reach as this moment in time and although they support ratification campaigns, they prefer to spend their time and energy to address a more narrow range of protection issues (Piper and Iredale 2003).

What type of rights have been championed or prioritized by social partners? Minimum rights as defined by international NGOs and the International Confederation of Free Trade Unions (ICFTU) as well as European NGOs differ from those prioritized by Asian NGOs. According to Amnesty International, for instance, minimum rights involve freedom of association, family unity as well as access to education, housing, healthcare and other social services. Social rights are particularly highlighted and so is the right of workers to resign and change employers as a crucial labour market principle. The right to change employers and sectors, and the possibility to switch migration status, are seen as paramount. Such issues should be relevant to advocacy in Asia also but are not the focus of advocacy campaigns at all.

Broadly, the main issues fought for by migrant worker associations and NGOs in Southeast and East Asia revolve around employment-related rights and improved working conditions. Advocacy does not address the temporary nature of prevalent migration schemes as such.<sup>28</sup> Family unification, settlement and integration related issues are, therefore, non-issues. In the specific case of domestic workers who are locked into informal interactions within the home, much of the activism in Singapore and Malaysia has appealed to the “morals” of employers as reflected in campaigns such as “Dignity is Overdue”. NGOs have called for standard contracts as a minimum protection and are also demanding the inclusion of domestic work in the coverage of national labour laws (more vocally in Malaysia; in Singapore there is disagreement among NGOs whether a uniform contract is to the benefit of all FDWs). In Malaysia, the trade union council and NGOs have begun to jointly call for the right of all workers to seek redress and to put an end to under- or non-payment of wages and to create a ‘culture of payment of wages’. This includes a call for the right to stay by issuing foreign workers not just social pass visas but work permit visas to allow them to earn money while waiting for labour disputes to be resolved. This indicates that a huge problem issue is the non-existence of functioning complaints structures. A notable exception in this regard is again Hong Kong (see below).

In the Philippines, activism for migrants’ rights reflects what I have termed “transnationalisation of rights” in my previous ARI Working Paper (Piper 2006). This includes, e.g., the rights of family members left behind, rights to economic security ‘at home’, as well as absentee voting rights – a campaign which resulted in the passing of the Overseas Voting Bill in 2004. To assist returned migrants with reintegration has also become part of their advocacy agenda. Filipinos

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<sup>28</sup> Korean NGOs have fought for the abolition of the so-called ‘trainee system’ in favour of a ‘work permit system’ (the latter would mean that ‘trainees’ would be covered by the Employment Law and could join trade unions). They have been partially successful: while implementing a work permit system the government has kept the parallel trainee system running.

have emerged as the most widely and best organized group of migrants, to the extent that they are even engaged in ‘training’ other groups of migrants to become good activists (as happens in Hong Kong) (Piper 2005c). They have the most extensive networks ‘at home’ and ‘abroad’ which show that the issue of ‘migrants’ rights’ is addressed by Filipino activists from the origin country *as well as* the destination country perspective. This is not only a reflection of Filipino migrants being the most dispersed workforce in the world, but also of the long tradition of an active civil society in general. Furthermore, Filipino NGOs have been able to work within a more open political system and have managed to gain access to elite allies within the government structure.

Another development among migrant associations in the Philippines (which seems unique as far as Asia is concerned) is the establishment of return migration programs by NGOs. According to the Economic Resource Center for Overseas Filipinos (ERCOF), migrant NGOs have traditionally focused on programs for the protection of migrant rights. But the search for solutions to migrant problems has somehow evolved to mobilizing migrant communities for economic empowerment, particularly in providing a viable economic alternative to returnees. The long-term aim is to reverse the migration cycle through the development of a vibrant local economy, the lack of which is one of the main reasons why people migrate to the cities and overseas. Groundbreaking work on such thinking is being done in Asia. For example, the case of the Asian Migrant Center in Hong Kong implemented a savings program for migrants (Gibson et al., 2001).

### *Addressing rights violations*

The extent to which trade unions and NGOs make use of national and international complaints structures to address the violation of labour or economic rights is an area which requires in-depth research. Nationally, labour courts offer a possibility to address wage claims and other types of contract violations. This, however, requires coverage by the labour standards law from which foreign domestic worker are excluded. In Singapore, the only option is the mediation structure offered by the Ministry of Manpower. Malaysia does not even have such informal mechanism for domestic workers. Other types of legal foreign workers can be represented by trade unions in labour disputes and the Malaysian Trade Union Council has begun to assist individual migrants by representing them.

According to Wee and Sim, because foreign domestic workers are covered by the Employment Ordinance, breaches against this law can be enforced via civil claims and criminal prosecution. In practice, most of such cases are adjudicated as civil claims by the Labour Tribunal which results in financial settlements rather than the full amounts owing. The Labour Department is reluctant to take out criminal prosecution against deviant employers for breach of employment laws. Of the 31,698 cases handled by the Labour Department in 2001, most were related to wage arrears, holiday pay and wages in lieu of notice (Wee and Sim 2005: 193). Labour disputes not resolved by the Labour Department are referred to the Labour Tribunal. In 2001, 10,500 cases were filed with the Labour Tribunal (*ibid.*).

On the international level, the ILO and OHCHR offer mechanisms by which human rights violations are addressed. The ILO’s complaint structures would be relevant in terms of rights

violations in the destination countries. Its tripartite structure, however, is not conducive for NGOs' ability to file any complaints as the only organisations representing workers that are part of this structure are trade unions. Unions are not in favour of the formal inclusion of NGOs (Waterman 2005) and their attempts to organize and assist migrant workers seem to be too recent a policy change to have resulted in concrete usage of the ILO's mechanism. It appears that the ILO's complaint mechanism is highly under-used with regard to migrant rights' violations. The precedent in fact is a recent case of a coalition of Hong Kong-based NGOs, which filed a formal complaint with the ILO through its member-unions -- the Indonesian Migrant Workers Union (IMWU) and Asian Domestic Workers Union (ADWU). In this complaint they accused the Hong Kong government of violating ILO Convention 97, of which HK is a State-party (Piper 2005d).

The Treaty Body structure of the OHCHR requires State Party governments to submit regular reports on their implementation duties and NGOs are given the opportunity to submit shadow reports pointing to any gaps or inconsistencies to governmental obligations. The CRM relates to obligations by origin and destination countries and would therefore offer the opportunity to address rights' violations at both ends of the migration process. With the CRM having only come into force in 2003, however, the entire treaty body structure for this Convention is still very new, with the OHCHR having to date only received two governmental reports from among the 34 State Parties and no shadow reports by NGOs yet. A recent impact study has shown that NGOs are often not aware of this possibility (Iredale, Piper and Ancog 2005).

### **Concluding remarks**

The high level of attention given to international migration reflects the fact that both the volume and patterns of migration have undergone important changes during the last few decades. Global policy on migration has most certainly shifted to a greater recognition of the need to push for human rights dialogue indicative of the convergence of labour rights and human rights. However, the most important standard-setting institution with regard to workers' rights, the ILO, has chosen the path of a 'non-binding' framework reflecting states' reluctance to engage in multilateral commitments. In this context and current political climate, the role of regional and even bilateral levels is probably more significant. Most states at this stage are intimidated by what they perceive as open-ended undertakings which compromise their sovereignty in the migration area. Although such a notion may be wrong, it remains a fact that it is smaller regional and bilateral agreements which are perceived as less threatening and might, thus, prove to be a better starting point for the recognition of migrant rights (as part of a 'step by step' approach).

On a less optimistic note, it has to be noted that to date, social dialogue (consultation with social partners) is absent in most national and international migration policy initiatives. As a result, the 'management of migration' takes place outside of normative protections, outside social dialogue and outside labour market institutions. In Western liberal countries, migration is simultaneously approved and yet combated. Thus, the distance between policy pronouncements and de facto arrangements reflects a major contradiction in governments' practice (Taran and Demaret forthcoming). In addition, there is increasing unease with, if not outright hostility towards, trade unions (Adams 2001). In Asia, the labour movement has historically been (politically and resource-wise) weak and stagnant. Due to the temporary nature of their contracts and their

political attention being directed toward the countries of origin and destination, migrant worker issues could actually become a revitalizing force of the labour movement in Asia and elsewhere.

It is migration associations and trade unions which have key leadership roles to play in generating strategies, common approaches and in mobilizing societies to ensure the implementation of a rights-based approach to the management of migration. The increasing levels of international labour migration and the political activism surrounding foreign workers - especially when seen from a transnational perspective – have the potential to reinvigorate labour activism in general by highlighting the global connections between local and foreign workers. Apart from transnational networking, however, it is equally as important for the various organisations involved in worker advocacy to form alliances trans-institutionally and trans-ethnically. Stronger collaboration and alliance formation between the broader human rights community, migrant associations, trade unions and other influential actors such as lawyer associations is needed. Freedom of association and the right to self-organize for *all* workers could be the common political frame to “make labour a whole”.<sup>29</sup>

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<sup>29</sup> Expression used by Dr. Thomas Palley, Assistant Director of Public Policy, AFL-CIO, Panel Discussion Transcript, 30 November 2001, downloaded from [www.cis.org/articles/2001/unionpanel.html](http://www.cis.org/articles/2001/unionpanel.html), on 11<sup>th</sup> May 2006.

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