Labor Migration and the Right to Health: Implications for Those Who are Abroad as Well as for Those Who are Left Behind

Ma. Ngina Teresa V. Chan-Gonzaga *

I. THE REALITY THAT IS LABOR MIGRATION

A. Recognition of Phenomenon

Labor migration has become a notable and significant phenomenon associated with economic growth and development. Globally, the importance of labor migration in development is seen in the fact that it has become part and parcel of the programs set forth by multilateral institutions, as for instance in the trade negotiations under the General Agreement on Trade and Services (GATS).[1]

---

* '02 J.D., *Valedictorian* and *St. Thomas More Awardee.* She is currently connected with the Ateneo Human Rights Center, and is likewise a Program Officer with the Working Group for an ASEAN Human Rights Mechanism. She is also a Member of the Faculty of the Ateneo School of Law, where she teaches *Legal Research*, *Problem Areas in Legal Ethics* (2003-2004), *The Law on Persons and Family Relations*, *Obligations and Contracts*, and *Statutory Construction* (2004-2005). She also teaches *Constitutional Law* at the *Pamantasan ng Lungsod ng Maynila.* This paper was prepared for the Tan Yan Kee Foundation Endowment Fund.

Cite as 49 ATENEO L.J. 794 (2004).

1. INTERNATIONAL LABOUR ORGANIZATION, DRAFT SUMMARY OF CONCLUSIONS AT THE ILO REGIONAL TRIPARTITE MEETING ON CHALLENGES TO LABOUR MIGRATION POLICY AND MANAGEMENT (June 30–July 2, 2003), *available at* http://www.ilo.org/public/english/protection/migrant/download/bngkk04.pdf (last accessed Dec. 17, 2004) [hereinafter 2003 ILO Regional Tripartite Meeting

As United Nations (UN) Secretary General Kofi Annan remarked in his message on the occasion of International Migrants Day, "Every day, in countries all over the world, people leave their home countries in search of a better life for themselves and their families. The phenomenon of migration has a profound effect on the countries migrants leave, those through which they transit, and those to which they move."[2] This is why he considers the better management of migration as a key challenge for the 21st century. In his words, "We need to maximize [migration's] many real benefits and better minimize the difficulties that it can cause."[3]

However, it is a given fact that "maximizing benefits and minimizing difficulties" needs to start by confronting the issues that affect migrant workers as a sector. Policies aimed at lessening the vulnerability of migrant workers to exploitation and abuse must also protect the right to mobility of employment, as it is an important human right in countries whose local economies present very limited occupational alternatives.

Concerns regarding labor migration across borders cannot be dealt with by independent states acting unilaterally or in isolation. While it is true that national measures are important especially in dealing with concerns regarding the vacuums caused by labor migration, it is equally undeniable that the issue of migrant workers' rights is largely transnational and therefore measures must not be confined to the national sphere but must transcend it and operate on a regional and international level.

While recognizing the fact that labor migration is a global concern with far-reaching implications, this article will limit its discussion principally to the Association of South East Asian Nations (ASEAN) region, with the Philippines as a primary point of interest, recognizing as it does that the ASEAN region is a vital source of migrant workers and that the Philippines has, according to the International Labour Organization (ILO), now officially surpassed Mexico as the largest source of migrant labor in the world.[4]

Long gone are the days when the Philippine government used to be mortified and shamed by its inability to keep its citizens at home with good jobs. Economic realities have forced its hand into accepting that Overseas

---

Draft Conclusions].

2. Kofi Annan, Message on International Migrants' Day, (Dec. 18, 2003), *available at* http://www.un.org/ News/Press/docs/2003/sgsm9081.doc.htm (last accessed Dec. 17, 2004).

3. *Id.*

4. George Wehrfritz and Marites Vitug, *Philippines: Workers for the World*, NEWSWEEK, Oct. 4, 2004 at, 32.

Filipino Workers (OFWs) constitute the nation's most lucrative export "commodity." The past administrations, as well as the current one, have made it easy for labor migrants to leave. According to the government, it has no choice when the country's unemployment rate is pegged at 14%, its poverty index is ranked amongst the highest in the world, and when OFWs' remittance figures puts foreign direct investment and aid numbers to shame.[5] President Gloria Macapagal-Arroyo herself has identified labor migration as one of eight foreign relations realities.[6]

But this phenomenon is by no means unique to the Philippines. Indonesia, Bangladesh, Sri Lanka, and a host of other traditionally migrant-sending countries are coming to terms with their economic realities as requiring labor migration.

Another reality that cannot be denied is that there is a rising inequality between the traditional north and south nations because of this siren call — this lure of prosperity in the developed world — referred to as the "globalization of migration." Hochschild[7] contends that as rich nations become richer and poor nations become poorer, there is a unilateral flow of talent and training from the south to the north that continually widens the gap between the two. With the denationalization of economies, labor migration has occurred in considerable numbers.[8] In 1980, the UN estimated that around 78 million people resided in countries other than their home countries.[9] By the late 1990s, this figure had grown to 120 million. Staggering as they may already seem, these figures even fail to include a fair amount of undocumented immigrants.[10] Statistics further denote that in the case of the Philippines, a staggering one-tenth of our population — roughly eight million people — reside outside our shores.

---

5. *Id.*

6. Department of Foreign Affairs Undersecretary Jose S. Brillantes, Address at the Second Roundtable Discussion on Philippine Migration, Asian Institute of Management-Policy Center (Nov. 24, 2003).

7. Arlie Hochschild is the author of the article, *Love and Gold*, published in the book, GLOBAL WOMAN.

8. Jose Victor Chan-Gonzaga, *Global Women: Exploring New Perspectives of Human Rights Issues in Female Migration*, 48 ATENEO L.J. 1016, 1020 (2004) (citing RHACEL SALAZAR PARRENAS, SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION AND DOMESTIC WORK 51 (2001)).

9. *Id.* at 1021.

10. *Id.*

B. Efforts to Address Labor Migration Issues

In the international community, migration issues have, in the past decade or so, figured very prominently in public policy debates. The World Summit for Social Development in Copenhagen and the Fourth World Conference on Women in Beijing in 1995, the Second United Nations Conference on Human Settlements in Istanbul in 1996, and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001 all deliberated the issue of migration. In December 2003, a Global Commission on Migration was launched with a mandate for placing international migration on the global agenda and analyzing gaps in current approaches.[11] Last year, the 92nd Session of the International Labour Conference conducted a general discussion on migrant workers based on an integrated approach. Its agenda included labor migration in an era of globalization — policies and structures for more orderly migration for employment — and improving migrant worker protection through standard setting.[12]

The ILO has also brought up migration and workers' rights issues with governments and social partners. For instance, the ILO's technical assistance project on migration management led to the signing of a Memorandum of Understanding between Thailand, Myanmar, Lao People's Democratic Republic, and Cambodia, under which migrant workers will receive wages and benefits at the same rate as national workers. ILO also works with other UN agencies as well as with the International Organization for Migration (IOM) at policy and technical levels, in bilateral and multilateral forums.[13]

There are international instruments such as the Convention on the Rights of the Child (CRC) and the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) which, while not drawn up specifically for migrant workers, apply to them as well. Indeed, CEDAW is special to migrant workers in that it mandates parties to take all appropriate measures to suppress all forms of traffic in women. In our own little corner of the world, it can be said that all members of the ASEAN are

11. GLOBAL COMMISSION ON INTERNATIONAL MIGRATION, THE MANDATE, *available at* http://www.gcim.org/mandate/GCIM_Mandate.pdf (last accessed Jan. 8, 2005).

12. INTERNATIONAL LABOUR ORGANIZATION, REPORT TOWARDS A FAIR DEAL FOR MIGRANT WORKERS IN THE GLOBAL ECONOMY DURING THE 92ND SESSION OF THE INTERNATIONAL LABOR CONFERENCE, *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf (last accessed Dec. 17, 2004) [hereinafter 2004 ILO REPORT ON MIGRANT WORKERS].

13. *Id.*

now parties to the CRC and, except for Brunei Darussalam, to the CEDAW as well.

Other human rights instruments of relevance to migrant workers include the UN Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention against Transnational Organized Crime. The last Convention even has supplementary protocols on human trafficking and smuggling of migrants.[14]

Moreover, there are also international instruments which deal specifically with migrant workers. These instruments are especially useful because migrant workers have problems and issues that are not covered by human rights instruments of a more general application. Furthermore, these migrant-specific instruments focus attention on migrant workers as a distinct group for policy and strategy purposes.[15]

The ILO, counting as it does among its goals the protection of workers when employed in countries other than their own, has established international labor standards. Specifically, Convention No. 97 Concerning Migration for Employment as well as Convention No. 143 Concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. These instruments have been the source of inspiration for national legislation, bilateral and multilateral treaties. But reviewing the list of ratifying states shows that when it comes to ASEAN, only Malaysia has ratified Convention No. 97 while Convention No. 143 has not been ratified by any ASEAN member at all.

The author also wishes to call attention to another migrant-specific instrument — the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMR). After about a decade of drafting, the UN General Assembly adopted the ICMR on 18 December 1990. It took another 13 years before it came into force in July 2003 when, with Guatemala's signing, it tabled the 20 mandatory ratifications.

Though it has already entered into force, it is still very important to continue the call for more ratifications and wider acceptance of the ICMR. As the ILO Committee of Experts observed in its 1999 Report, majority of the parties to the ICMR are "on the whole, migrant-sending States which,

14. *Id.*

15. Dr. Manolo Abella, Address at the Preparatory Meeting of the Labour Migration Ministerial Consultation for Countries of Origin in Asia (2003).

while extremely important in terms of protection of migrants prior to departure and after return, hold little influence over the daily living and working conditions of the majority of migrant workers."[16] This fact holds true today although some six years have passed. To date, the only ASEAN state to have ratified the ICMR is the Philippines. This despite the fact that the ASEAN region is a vital source of migrant workers and that intra-regional labor migration takes place on a large scale.

What efforts to address and protect migrant workers have been done on a regional level?

In practically every region, the increasing mobility of people in their search for decent work has commanded the attention of policy-makers, prompting dialogues for multilateral cooperation on how to better manage the flows in the interest of protecting human rights, maximizing migration's contribution to growth and development, and preventing clandestine flows and trafficking. Regional and sub-regional bodies, the ASEAN included, have added migration management and protection of migrant workers to their agendas.[17]

In response to the increasing complexity and diversity of international migration, regional consultation mechanisms have developed around the world and have become an integral component of managing migration. Although informal and non-binding, these mechanisms serve as basis for common regional approaches to migration. In April of 2003, the IOM organized the Asian Labor Migration Ministerial Consultation for Sending Countries in Colombo, Sri Lanka. This was meant to be the first in a series of ministerial-level consultations which would serve as a forum for sharing experiences on how to manage labor migration and to agree on cooperative action.[18]

In the 2003 ILO Asia Regional Tripartite Meeting in Bangkok, it was recognized that cooperation between states helps maximize the potential benefits from migration and that regional consultation processes, such as the 1999 Bangkok Declaration on Irregular Migration and the recent consultation on anti-trafficking known as the Bali Conference 2002, should be promoted. It also recognized that existing regional cooperation mechanisms such as ASEAN and SAARC could play an important role in further advancing this objective.[19]

---

16. *Id.*

17. 2004 ILO REPORT ON MIGRANT WORKERS, *supra* note 12.

18. *Id.*

19. 2003 ILO REGIONAL TRIPARTITE MEETING DRAFT CONCLUSIONS, *supra* note 1.

Another means of protection are the so-called bilateral agreements between any given receiving state and the sending state. However, many of the receiving countries are quite hesitant in entering into these bilateral agreements as they do not want to be perceived as setting a precedent which may result into their being pressured into concluding similar arrangements with other countries.[20] This is especially true for Asia. While the number of bilateral agreements has doubled over the past decade in Latin America, countries in Asia — with the exception of the Philippines — seem to have a greater hesitation towards such agreements.[21]

In his paper, *Protection of Migrant Workers in Asia: Issues, Challenges and Responses*, Dr. Manolo Abella, ILO's International Migration Programme Chief, points out that given the global reach of migration processes, it is essential to pursue bilateral and regional consultation. Unfortunately, there has been a marked reluctance among countries in the region to enter into agreements regarding migration policies which has been the reason for abuses by market forces. It is for this reason that he stresses that the ASEAN forum must be used more directly to discuss labor mobility issues.[22]

Still, there are a number of bilateral agreements in place. Malaysia has such an agreement with Indonesia for the regulation of Indonesian migrant workers in the plantation and domestic services. Malaysia has also entered into a Memorandum of Understanding (MOU) with Cambodia, which provided that a company be delegated to process all export of Cambodian domestic workers to Malaysia.[23] The Philippines, in particular, has labor agreements with approximately 12 receiving states: the Commonwealth of Northern Marianas Islands, Indonesia, Iraq, Jordan, Kuwait, Libya, Norway, Papua New Guinea, Qatar, Switzerland, Taiwan, and the United Kingdom.[24]

The ASEAN has recognized that protecting migrant workers and managing labor migration cannot be undertaken by national governments alone and that it has an important role to play in this campaign. In 2003, the ASEAN Security Community, through the Bali Concord II, declared that it shall fully utilize the existing institutions and mechanisms within ASEAN

---

20. Amparita Sta. Maria, *Using Legal and Other International Instruments to Combat the Trafficking in Women and Children within the Asia-Pacific Region*, 46 ATENEO L. J. 700 (2001).

21. 2004 ILO REPORT ON MIGRANT WORKERS, *supra* note 12 (citing IOM: *World Migration 2003*).

22. Abella, *supra* note 15.

23. Sta. Maria, *supra* note 20, at 700.

24. Brillantes, *supra* note 6.

with a view to strengthening national and regional capacities to counter transnational crime including trafficking in persons.[25] The ASEAN also intends to pursue regional and international collaborations as well as work in partnership with its member countries to advance the cause of migrant workers in the region. In November 2004, the ASEAN heads of state met in Vientiane, Laos where they drew up the Vientiane Action Plan. One of the points articulated in this document is the need for an elaboration of the plan to set up a regional thematic mechanism for the protection and promotion of migrants' rights.

Presently, there are few detailed reports assessing the accomplishments and successes of regional consultative mechanisms. There is, however, agreement that they can be of great assistance in the management of migration, especially through the exchange of information and the sharing of experiences. Regional processes may very well be a truly effective means for achieving closer cooperation in managing labor migration in the future.[26]

Although it is true that much still needs to be done in terms of migrant workers' protection on the regional level, efforts have been made to address the issues affecting the sector and protect the human resources involved. All these regional initiatives and inter-state cooperation presently in place for the protection of migrant workers and in answer to issues which beset this sector only goes to show that the ASEAN treats the issue with the seriousness it deserves. After all, migrant rights are human rights.

Having said that, the author now wishes to draw attention to one specific human right which has not really been in the forefront of the migrants' rights agenda but which, if continued to be underrated in importance, may have ramifications more overreaching than any of us would care to imagine.

This article will not proffer resolutions to migration problems or delve into the issue of whether labor migration is a good developmental model or merely an economic stopgap. It concerns itself mainly with the following inescapable truths:

1. Migrant workers' rights are human rights. All human rights apply universally to all people including migrant workers.
2. The right to health is a human right.
3. Population mobility brought about by labor migration has serious health and human rights implications not only for the

25. DECLARATION OF ASEAN CONCORD II (Oct. 7, 2003), *available at* http://www.asean.or.id/15159.htm (last accessed Dec. 17, 2004).
26. *Id.*

> workers who leave their home states but also for those they leave behind.

Since labor migration is not a new occurrence, a significant amount of literature has been written on the matter. However, it is undeniable that most of the discourse, not to mention the measures adopted by concerned stakeholders and duty-bearers, are focused on traditionally "hard-core" issues such as trafficking or physical violence and abuse perpetrated against migrant workers and their families, and not on the critical intersection of other human rights issues.

This article will not deal with such traditional migration issues but will endeavor to discuss the right to health as a basic human right applicable to migrant workers, as well as the health implications of labor migration both for migrants in the various receiving states as well as for those who are left behind. While it is true that, as will be shown further on in this article, there have been a number of measures (*e.g.*, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families) that provide human rights protection for migrant workers, there must be a more conscious effort to ensure that these be recognized as integral to policies, programs and legislation concerning health and migration both at the national and regional levels.

II. THE RIGHT TO HEALTH AS A FUNDAMENTAL HUMAN RIGHT

> *"It is my aspiration that health will finally be seen not as a blessing to be wished for, but as a human right to be fought for."*
>
> *- Kofi Annan, U.N. Secretary-General*

The Constitution of the World Health Organization rightfully describes the enjoyment of the highest attainable standard of health as one of the fundamental rights of every human being without distinction as to race, religion, political belief, and economic or social condition. This fundamental characterization of the right to health has not changed since 1948 when it saw articulation in the Universal Declaration of Human Rights (UDHR). However, the intervening decades have seen the expansion of the way it is interpreted.[27]

In 2000, the Committee on Economic, Social and Cultural Rights (CESCR) issued General Comment No. 14 on the right to the highest attainable standard of health. This document sums up earlier clarifications on

27. JUDITH ASHER, THE RIGHT TO HEALTH: A RESOURCE MANUAL FOR NGOS 31 (2004).

the meaning of the right to health. It has also been innovative on other details as well.

According to General Comment No. 14, state obligations regarding the right to health may be classified into three categories, namely: (1) respecting the right to health, (2) protecting the right to health, and (3) fulfilling the right to health. The three different categories require different applications, *viz*:

1. *Respecting the right to health* applies mainly to government laws and policies and requires that states refrain from undertaking actions which inhibit or interfere, directly or indirectly, with the people's ability to enjoy the right to health, such as by introducing actions, programs, policies or laws that are likely to result in bodily harm, unnecessary morbidity, and preventable mortality. It also requires states to refrain from taking retrogressive measures as part of their health-related laws and policies.

2. *Protecting the right to health* applies mainly to obligations of governments to make efforts to minimize risks to health and to take all necessary measures to safeguard the population from infringements of the right to health by third parties. States are not responsible for the acts or omissions of non-governmental enterprises such as the private sector, but they are responsible for taking measures aimed at ensuring that such bodies refrain from violating the rights of individuals and communities.

3. *Fulfilling the right to health* applies to positive measures that governments are required to take, such as providing relevant services, to enable individuals and communities to enjoy the right to health in practice. It requires that all necessary steps be taken to ensure that the benefits covered by the right to health are provided and that appropriate legislative, administrative, budgetary, judicial, promotional and other relevant measures are adopted to ensure its full realization. It also requires that special measures be taken to prioritize the health needs of the poor and other vulnerable groups in society.

The obligation to fulfill the right to health is commonly divided into the associated obligations to facilitate, provide and promote the right to health. This reflects the different types of responsibility that governments incur to take positive measures to implement the right to health.

- Facilitating the right to health requires states to take positive measures that enable and assist individuals and communities to enjoy the right to health.
- Providing the right to health requires states to intervene when individuals or groups are unable, for reasons beyond their control, to realize the right to health themselves through the means at their disposal.

- Promoting the right to health requires states to undertake actions that create, maintain and restore the health of the population.

In effect, this right is really a claim to a set of social arrangements that can best secure its enjoyment.[28]

A. The Right to Health of the Migrant Worker

Migrant workers should be viewed as more than mere economic commodities to be traded across borders. Good health and economic prosperity tend to support each other. It is only logical that healthy people can more easily earn an income, and people with a higher income can more easily seek medical care, have better nutrition, and have the freedom to live healthier lives.[29]

That is, of course, the ideal. The reality however is that migrant workers and their families, being aliens residing in states of employment, are generally unprotected by the national legislation of the receiving states or, in fact, by their own states of origin. In the Philippines for example, notwithstanding the constitutional directive that "[t]he State shall afford full protection to labor, local and overseas,"[30] the programs for such protection are invariably inadequate. This is in fact one situation which the ICMR recognizes when it points to the international community, through the UN, to provide measures of protection.

To be fair, there have been measures by which the government strives to protect migrant interests. Most of the agreements the Philippines has entered into with Middle Eastern countries aim at strengthening areas of cooperation in labor, employment and manpower development, and to enhance the welfare of migrant workers.[31]

---

28. Helena Nygren-Krug, Health and Human Rights Adviser, WHO, Address at the International Human Rights Academy at Utrecht, Netherlands (Aug. 2004).

29. Amartya Sen, Keynote Address to the World Health Assembly (May 1999).

30. PHIL. CONST. art 3, §13.

31. Agreements with European countries, on the other hand, are much more specific. The bilateral agreement with Switzerland deals with the exchange of professionals and technical trainees for short-term employment. The agreement with the United Kingdom aims to facilitate the recruitment of health professionals. This is true of the agreement with Norway as well which aims to reduce the shortage of health professionals in the receiving state and to promote employment opportunities for Filipino professionals in the health sector (Brilliantes, *supra* note 6).

Having said that, it is still undeniable that migrant workers' right to health — like most of their fundamental rights — are too easily violated or ignored. This is all the more true in the cases of those who are not registered or documented as registration or documentation do secure some form of legal protection. Violations of their rights in turn lead to increasing social disintegration and declining respect for the rule of law.[32] Thus, the vicious cycle continues. It cannot be denied that there has been, as reported by the ILO, an explosive growth in irregular migration. This has been the most alarming development in labor migration in terms of impact on migrants' rights protection in Asia.[33]

Labor migrants often find themselves vulnerable in terms of health matters for a variety of reasons. One of the most crucial determinants in their access to health services is their legal status in the country. Migrants as a group may not be entitled to the same health services as citizens and permanent residents. Irregular migrants are often worse off. Legal status is not the only problem with regard to accessibility. There is also the question of just how affordable such health services are. Other factors like physical accessibility, associated costs and inability to take a day off, not to mention stigma and discrimination, can also seriously hamper access to health services.[34]

One of the most fundamental obligations arising from the right to health is ensuring non-discrimination. While this does not mean that every individual or group should be treated in exactly the same manner, it does mean that health systems must recognize and make provisions for the variances and particular needs of groups within the general resident population who experience a "disproportionate level of morbidity and disability."[35] Equity allows-and ensuring non-discrimination mandates-specific health standards for particular marginalized sectors such as labor migrants. Any other interpretation of this aspect of the right to health will not only exacerbate current disparities between the health status of marginalized sectors and the general population but will in fact reinforce any existing inequality. General Comment No. 14 in fact articulates the need for states to actually take affirmative action to correct the adverse effects which

32. The Global Campaign for Ratification of the Convention on Rights of Migrants, *at* http://www.migrantsrights.org/about_campaign_engl.htm (last accessed Dec. 17, 2004)

33. ABELLA, *supra* note 15.

34. *International Migration, Health and Human Rights*, Health and Human Rights Publication Series, Issue No. 4, Dec. 2003 at 19-27 [hereinafter International Migration, Health and Human Rights].

35. ASHER, *supra* note 27, at 54.

past discriminatory health systems have brought about and to address the factors which contributed to such effects.[36]

In order to correct these adverse effects, there must be recognition of the fact that issues regarding the right to health of migrant workers vary both in severity and nature. In New Zealand, for instance, the primary concern is health care access which is only given to those with a work permit of two years or more.[37] On the other hand, specific instances of right to health violations in Asia include work accidents in South Korea[38] and reported accidents due to inadequate health and safety regulations in Japan. There is usually a considerable possibility that low-skilled or irregular migrants accept positions that local workers have already refused and are thus placed in high-risk, low-pay jobs.

Detention centers in Malaysia have also been the source of great concern and controversy. Twelve such centers have been established with the capacity to hold 12,000 detainees. There are reports which maintain that these places are woefully over-crowded, lacking in sufficient sanitary facilities and ventilation, missing medical care and nutritious food. Worse, children are reportedly kept in similar circumstances. Detention of migrant workers in such centers is inevitable for various reasons, the most common of which is the lack of proper documentation upon inspection. Such a circumstance is extremely unjust as migrant workers are usually required by their employers to leave their passports with the latter — an act which in itself is a violation of Malaysia's Passport Act of 1956.[39]

It is argued that using a rights-based approach to health should be the paradigm that all countries, whether sending or receiving, must work under. Recognizing the special needs of the vulnerable individual that is the labor migrant, ensuring participation, promoting the right to education and information, among others, are the considerations that matter. Furthermore, the kind of intervention or affirmative action needed by labor migrants in various areas of the world cannot be undertaken by the state without the participation of those most affected. Setting up a mechanism by which free and effective participation by labor migrants can be had with regard to decision-making processes should be an integral part of any health development program drawn up by any state. Only by making human rights

36. *Id.*

37. ROBIN IREDALE & NICOLA PIPER, 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 39 (2003).

38. *Id.* at 32.

39. IREDALE & PIPER, *supra* note 37, at 36.

an integral part of health-related policies and making the right to health an integral part of migrant-related programs can it be said that labor migrants are recognized as bearers of rights and not commodities totally lacking in privileges and entitlements.

As the WHO Director-General remarked in 2002, "People need to be more aware of their rights so that they can take more control over their lives. Only then can effective action be generated to hold governments, and other powerful actors, accountable."[40]

B. The Right to Health of the General Populace

> *Although the stereotypical Filipino migrant is a nanny in Hong Kong, the largest group of new recruits falls under the category 'professional and technical worker,' which includes engineers, pilots, physicians and nurses. In 2002 they accounted for 35 percent of all departures and many social workers fear their flight will bring down the country's medical system, erode its technology base and, in the end, ruin any chance the Philippines has of becoming a modern, industrialized country. 'One of the defining characteristics of the Philippine middle class,' says a senior Western economist in Manila, 'is that they all want to get out.'*[41]

Discussions on the so-called "brain drain" have been *de rigueur* for decades. Perhaps such a phenomenon has been, to date, felt more in Africa where a 1998 survey of African states show public health sector vacancy levels as high as 72.9%. Malawi, for instance, claimed a 52.9% vacancy level for nurses.[42] Of doctors trained in Ghana in the 1980s, 60% left the country to work overseas.[43] These trends inescapably lead to inadequate health coverage in the home country. While statistics are perhaps not as alarming yet in Southeast Asia or indeed the Philippines, a lot of the new groups of recruits for overseas work are health professionals and we may see a day in the not so distant future when it is our own health systems that have degenerated into

---

40. Gro Harlem Brundtland, WHO Director-General, Foreword, The Right to Health(2002),*available at* http://www.who.int/hhr/news/en/cartoon_health.pdf (last accessed Dec. 17, 2004).

41. *Philippines: Workers for the World*, Newsweek, Oct. 4, 2004, at 32.

42. *International Migration, Health and Human Rights*, *supra* note 34, at 11 (citing DOVLO DY, RETENTION AND DEPLOYMENT OF HEALTH WORKERS AND PROFESSIONALS IN AFRICA (2004); ADDIS ABABA, CONSULTATIVE MEETING ON IMPROVING COLLABORATION BETWEEN HEALTH PROFESSIONALS AND GOVERNMENTS IN POLICY FORMULATION AND IMPLEMENTATION OF HEALTH SECTOR REFORM (2002)).

43. Stalker's Guide to International Migration, *Emigration-Brain Drain*, *at* http://pstalker.com/migration/mg_emig_3.htm (last accessed Dec. 17,2004).

increasingly worse conditions than they are now and the health needs of our people which have become dramatically problematic.

In developing countries such as the Philippines and a host of other ASEAN states, the brain drain is increasingly becoming more real and imminent. This is even more pronounced in countries, like the Philippines, which have "established traditions of education and professional training."[44] Elmer Reyes Jacinto is perhaps an example of how late the hour is. This medical graduate topped the board exams in March of 2004 and immediately announced to all and sundry that he intended to leave for the United States to work as a nurse. No matter what other factors may be alluded to, it usually still boils down to economics and status. Developed countries recruit health professionals from developing countries and they can afford to pay much better wages. It is not only that they pay their health professionals higher than we pay our health professionals, but they also pay their health professionals more than most of our professionals ever receive. It is not only the doctors who are going back to school to earn nursing degrees in the hope of leaving; it is also a growing number of lawyers and engineers. Anecdotal evidence even points to regional trial court judges enrolling in nursing school. Dr. Jaime Galvez Tan, former Secretary of Health, has had occasion to lament that, "Sadly, this is no longer brain drain, but more appropriately, brain hemorrhage. Very soon, the Philippines will be bled dry."

General Comment No. 14 articulates that states have the obligation to ensure the availability of functioning public health and health-care facilities, goods and services, as well as programs, to the general populace. Such obligation includes trained and skilled health professionals working with domestically competitive compensation. Concerns as esoteric as the realization of the UN Millennium Development Goals and as grounded as being one step ahead of the next outbreak of influenza, tuberculosis, meningococcemia or SARS, are contingent on how well the states are able to maintain a viable national health system and how well they manage their health development plans.

In developing countries, increasing losses of health professionals to developed countries have aggravated the health care situation. The picture of local health services not having been rosy in the first place, there are problematic issues in making health care available to local and grassroots communities, the ability to execute health development programs having also been impaired.

---

44. International Migration, Health and Human Rights, *supra* note 34, at 11.

Writing on the conceptual and practical challenges of developing evidence-based ethical policies on the migration of health workers, Stilwell points out that because of the exodus of their colleagues to developed countries, remaining health professionals sometimes have no choice but to deliver services which are technically outside their scope of practice. These remaining professionals also have to bear the burden not only of an exponentially increased workload but also substandard equipment, poor pay, added stress, and seeming lack of career opportunities, among others. These are factors which do nothing for their motivation in continuing to work in their home countries.[45]

Serious loss of human capital due to migration of health professionals can drastically affect the source country's ability to deliver health services and hamper health sector development.[46] Moreover, consider this scenario: hosts of graduates not only of medicine and nursing but also of allied medical professions leaving the country for the United States of America, Great Britain, Saudi Arabia, among others. A large number of these graduates and migrating hopefuls come from state universities under government funding or from private institutions granted substantial tax breaks for being educational facilities. This does not only mean that the exodus of health professionals constitute a huge financial as well as human resource loss; given the financial investment states make in education and training,[47] this also leads to the ludicrous and absurd situation of the Third World actually supporting the health systems of the First World.

III. CONCLUSION

This essay simply acknowledges that labor migration has repercussions not only on the right to health of migrants themselves but also on the right to health of those who are left behind in countries whose health professionals are on an exodus to the developed world.

As to the implications on the right to health of migrants, contemporary surveys show little global uniformity in migration management, much less migration health programs. This is true even of relatively modern regional groupings like the European Union. There is a dearth of sound statistics from which advocates can derive a coherent and sound image of how migration, human rights and the right to health in particular, interface. Thus

---

45. *Id.*

46. International Migration, Health and Human Rights, *supra* note 34, at 11 (citing BARBARA STILWELL, EVIDENCE AND INFORMATION FOR POLICY, WORLD HEALTH ORGANIZATION (2003)).

47. *Id.* at 13.

far, only initial and rudimentary observations can be made as to exactly how far labor migrants are subjected to discriminatory health policies and practices, how such migrants make use of health services, and how extensively they participate in the economy, including the supplying of health services.[48] Acquisition of sound and relevant data therefore is essential in understanding the problem and addressing the gaps.

Such awareness and comprehension is even more vital in the present context as current negotiations within the GATS framework are headed towards liberalization of trade in health-related services. Growing reliance on the free market, increasing influence of international financial institutions in national policy-making, deregulation of certain sectors and activities, these are risks that must be managed as definitely not all countries are ready and able to transform liberalization's potential benefits into health gains for their citizenry.[49] Human rights advocates and analysts are apprehensive that liberalization trends restrict the state's ability to enforce human rights and protect marginalized sectors like labor migrants from the adverse effects of globalization.[50]

Migration management, in the face of liberalization of trade in health services, is still the most viable solution. As Kofi Annan remarked in his Emma Lazarus Lecture on international flows of humanity, managing migration is still where we can find the answer for "it is the only approach that can ensure that the interests of both migrant and host communities will be looked after and their rights upheld."[51]

Of the health implications for those who are left behind, while international monitoring of labor migration is far from precise, there is enough reliable data to substantiate the contention that rich countries will continue to recruit health professionals from developing countries and these health professionals in turn will keep migrating as long as more competitive salaries can be had on foreign shores.

Globalization is hardly new but the globalization which the Philippines, not to mention the rest of the world, appears to be encountering today is of a different strain. Never before has the world seen migration of people on a

48. *Id.* at 29.

49. *Id.* at 14.

50. *25 Questions and Answers on Health and Human Rights*, Health and Human Rights Publication Series, Issue No. 1, Jul. 2002, at 24.

51. Kofi Annan, Lecture on International Flows of Humanity delivered at Columbia University (Nov. 21, 2003), *available at* http://www.un.org/news/press/docs/2003/sgsm9027.doc.htm (last accessed Dec. 17, 2004).

level of this magnitude, aided as it is by the convenience of modern travel. Modern globalization also appears to be creating new trends of inequality which states are not yet fully equipped to deal with.

As Mary Robinson, UN High Commissioner for Human Rights, had occasion to note:

> Although we refer to our world as a global village it is a world sadly lacking in the sense of closeness towards neighbor and community which the word village implies. In each region, and within all countries, there are problems stemming from either a lack of respect for, or lack of acceptance of, the inherent dignity and equality of all human beings.[52]

While the "brain drain" appears, at first glance, only to affect those migrant-sending countries, it is imperative that states realize that it will, ultimately, not only affect the countries bled dry by the exodus but the entire world order. There is therefore a real need for international cooperation. State obligation requiring international cooperation demands that receiving countries reassess the impact of their recruiting policies and programs on the fulfillment of human rights in the countries where they source health professionals.

This in turn brings us to the question of whether international cooperation is really a state obligation.

Articles 55 and 56 of the UN Charter pronounce international cooperation for development and the realization of human rights as an obligation of all states.

The Declaration on the Right to Development adopted by the UN General Assembly in 1986 stresses an active program of international assistance and cooperation based on sovereign equality, interdependence, and mutual interest.

Article 2 of the International Covenant on Economic, Social and Cultural Rights requires every state to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of recognized rights.

So apparently, the answer to the above stated question is in the affirmative. Having established that, what are some concrete measures states can consider?

---

52. Mary Robinson, UN High Commissioner on Human Rights, Address at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Mar. 24, 1999), *available at* http://www.unic.un.org.pl/durban/regional1.pdf (last accessed Dec. 17, 2004).

Strategies must be developed that benefit all concerned. Possible incentives to stay in the home state for a given period can be an option; a compulsory period of service for health profession graduates at the grassroots level is another. Substantial investment by recruiting institutions in the source country's educational establishments, if constitutionally allowed, may also serve as compensation. If recruiting governments and/or facilities have the political will to help the source countries, they can also impose contracts which require counter-parting of services in the source countries. Whatever approach is used, it is imperative that governments of recruiting states create opportunities to empower the source-nations over and above just rendering financial assistance and doling out "aid."

It is true that health rights may be comparatively "immature." There is, as yet, a lack of policy coherence among key players. This must be remedied.

Non-governmental players must monitor state compliance with the right to health. There must also be clearly identifiable and appropriate indicators and national benchmarks by which state compliance with their obligations and state progress as to health policies can be measured. There must be a strong advocacy for health priorities in national development plans with regard to migrant workers. At the same time, there must be recognition that political participation of the groups affected by health-related decision making processes is an important aspect of a human rights approach. There must be a conscious effort to use human rights as a framework for health development. If we are to achieve a paradigm shift towards accepting migrants as global rights-holders and the right to health as something to be demanded as a fundamental right whether abroad or at home, it is important to treat the human rights framework as a pillar for policy-making.

At the same time, there must be a recognition that the right to health and migration do not only interface on one level. One cannot afford tunnel vision on this issue. The implications of migration on the right to health of those who are left behind must also be taken into account. The alarming rate at which health professionals leave developing countries like the Philippines, as well as the mindset of the young to take up courses in the allied medical professions as *the* escape route from the home country, must be examined and addressed. It is one thing for the patriots of a country to leave its shores for a while when the motherland cannot produce enough jobs and needs foreign remittances. It is much more disquieting to realize that citizens choose their university courses based on which one can guarantee the fastest route out of the country.

One last note — it is difficult to tilt at windmills and insist on a national policy negatively disposed to adopting labor migration as a panacea to the country's economic ills when economic realities keep hitting one in the face. Still, whether as a developmental model or as an economic stopgap, labor migration policies should keep, as integral elements, not only the protection

and promotion of migrants' right to health but the progressive realization of the health rights of the general populace in the home country. Such concerns must be factored into every migration policy especially in countries where migrating health professionals are increasing in number.