Introduction

Human rights are rights that all human beings possess by virtue of their humanity. They are not *given* to individuals by states, but are merely recognized by states. Human rights are recognized or *enshrined* in various documents and practices, among them national constitutions, regional agreements, international agreements and customary international law. This manual focuses on international human rights law, that is those human rights and freedoms which states are bound to respect.

International Human Rights Law

International law, more specifically, international human rights law, has been and continues to be dominated by States and their governments. This means that States are primarily responsible for formulating human rights standards and enforcing them. Moreover, States are only bound by international instruments to the extent that they consent to being bound. If they refuse to sign and ratify an international agreement or persistently object to a given international practice, they will not be bound by the obligations flowing there from. In the area of human rights, this has meant that States have been able to mistreat, torture, and execute their citizens (and even non-nationals on their territory) with virtual impunity. However, non-State actors such as individuals and non-governmental organizations are becoming increasingly influential in the field of international human rights law. Through a process referred to as the 'mobilization of shame', these non-State actors are pressuring States and their governments to respect certain minimum human rights standards. When States fail to meet these standards, individuals and NGOs can point to existing human rights instruments, and draw the attention of the international community to the human rights violations committed by these States. The purpose of this kind of action is to compel governments into complying with international human rights instruments, by exposing human rights violations perpetrated by governments, to international public scrutiny and condemnation.

Women Migrant Workers

Women migrant workers are faced with the double burden of being both women and migrants: two of the groups most vulnerable to human rights abuses. The experiences of these modern day pioneers who leave their homelands in search of a better life abroad for themselves and their families magnify the challenges that workers everywhere face in the age of globalization.

There are three main aspects of the experience of women migrant workers that set them apart from other workers:

- their status as women;
- their status as non-nationals; and
- the fact that many are compelled to migrate to escape poverty in their homeland.

These three characteristics make them particularly vulnerable to human rights abuses because they are indicia of powerlessness. This fact is increasingly being recognized at the international level, although much remains to be done. Two developments in particular are worth noting. First, it is now generally accepted in international law that women's rights are human rights. The fact that gender based persecution and abuses are now recognized as distinct types of human rights violations give women avenues of escape and redress they were once denied such as the ability to seek asylum on this basis. Second, the weakening of the distinction between the private and public spheres has led to the recognition of violence in the home, and other private contexts, as constituting a human rights violation. This recognition strengthens the call for greater state protection for women workers, especially those employed in the home (be it their own or that of their employer). While women workers face particular types of problems as both women and non-nationals, they also have particular needs as workers.

The Application of International Human Rights Standards to Non-Nationals, Including Migrant Workers

In general terms, the main universal human rights instruments and most ILO instruments protect the rights and freedoms of non-nationals (individuals who are not citizens of the state in which they are present) and nationals (citizens of the state in which they are present) alike. This means that migrant workers, who are non-nationals of the states in which they are employed, are also protected by international human rights instruments unless the instrument in question contains language excluding them and other non-nationals from such protection. This exclusionary language may be direct or indirect. An example of direct exclusion is a statement to the effect that only citizens enjoy certain human rights guarantees, while an example of indirect exclusion is a statement to the effect that nationality is not a prohibited ground of discrimination (meaning that states are permitted to discriminate against non-nationals). When an international instrument does not explicitly state whether or not it applies to non-nationals, one can assume that it does. This is especially the case where broad wording such as "Everyone has the right", "Workers

without distinction whatsoever" or "No one shall be" is used.[1] Another reason for assuming that international instruments apply to non-nationals unless they explicitly exclude them from protection is the treatment of non-nationals (or "aliens") in international law. Historically, there was a debate between those who maintained that non-nationals should be treated in the same manner as nationals (the proponents of "equal treatment") and those who maintained that non-nationals deserved to be treated in accordance with certain international minimum standards (and in some cases, better than nationals). It is safe to say that the debate has settled, as far as international human rights instruments are concerned, on the idea that when a state consents to be bound by an international human rights instrument, its obligations extend to both nationals and non-nationals on its territory regardless of which of these two approaches one accepts. The human rights guarantees should apply to non-nationals either because should be treated on equal terms with nationals, or because they should be treated according to the international minimum standards that these international instruments embody.[2]

UN Instruments

It seems likely that most of the human rights standards embodied in UN treaties and declarations are as applicable to non-nationals as they are to nationals. In some cases, a particular provision will specify that it is applicable to "citizens". In this case, it is clear that the provision is meant to apply only to nationals of the state that ratified or signed the instrument. In other cases, the language used is "everyone", in which case the provision applies to anyone within the jurisdiction of the state concerned.

Nonetheless, there is a compelling argument in favour of applying human rights standards to nationals and non-nationals alike. This argument focuses on the binding nature of the Universal Declaration of Human Rights (UDHR) as part of customary international law. Because the UDHR does not distinguish between nationals and non-nationals, and because the rights enumerated in subsequent UN instruments have reflected the standards in the UDHR, it is arguable that those subsequent instruments should be interpreted as applying to everyone within the jurisdiction of the state concerned. That is, any suggestion that the human rights standards established in various UN instruments only apply to nationals must be met with the moral force of the UDHR.

ILO Instruments

According to R. Cholewinski,

> …it is widely acknowledged that the majority of ILO labour standards, with few exceptions, apply to alien migrant workers and nationals equally. In a number of more general ILO Conventions, the standards are specified to apply to 'all persons employed', to 'every person employed', or to workers 'without distinction as to nationality', or 'without distinction whatsoever'. Notable exceptions to this principle are Convention No. 111 of 1958 concerning Discrimination in Respect of Employment and Occupation and the accompanying Recommendation No. 111. The non-discrimination provision in Article 1(1)(a) of Convention No. 111 does not include 'nationality' amongst the prohibited grounds of discrimination.[3]

Therefore, when determining whether or not a given ILO instrument applies to migrant workers, one must read the instrument as a whole and look for language excluding them from protection. Remember that this exclusionary language can be direct or indirect, that is, the instrument may only apply to nationals or it may allow states to discriminate against non-nationals in certain circumstances. If there is no such exclusionary language or, if on the contrary, broad wording is used, one can assume that the instrument does apply to migrant workers. Generally speaking, ILO instruments dealing with general conditions of work such as wages, hours of work, and occupational health and safety apply to migrant workers. This is also the case for the fundamental ILO Conventions on the abolition of forced labour, the elimination of child labour, and freedom of association. Those ILO instruments dealing with broader policy issues, social security benefits or social programs are more likely to exclude migrant workers from their protection or to limit protection to those migrant workers whose home states have also ratified the conventions in question (a condition known as "reciprocity").[4] As for ILO instruments dealing specifically with migrant workers, some provisions only apply to documented workers.

The Methodology Developed for this Manual

Our aim was to develop a process whereby NGOs could identify the international mechanisms available in cases of human rights violations involving women migrant workers. Our premise was that merely identifying relevant human rights standards is not enough; NGOs must also evaluate the standards that are legally binding on the state concerned. This catalogue of legally binding standards will generate a corresponding list of UN or ILO mechanisms. NGOs must then identify which of these

mechanisms they can actually employ. Factors that may eliminate certain mechanisms include:

- the admissibility requirements;
- the remedy sought by the victim;
- the resources available to the victim; and
- the exclusive nature of certain mechanisms.

The strength of this approach is that it challenges NGOs to focus on mechanisms that they can actually use. NGOs that understand which of the mechanisms are available in practice will be less likely to waste valuable resources pursuing inadmissible claims and more effective in bringing victims' cases to the UN and ILO. Greater awareness at the international level of the pattern of abuse experienced by women migrant workers should translate into pressure for more effective protection and enforcement of human rights at both the national and supra-national levels.

The weakness of this approach is that it may deflect attention from the standards embodied in human rights instruments that are not legally binding on the state concerned. We have tried to remedy this potential defect by including suggestions for NGOs who find that the state concerned has either not ratified certain relevant instruments or has modified its obligations under those instruments. These suggestions highlight the use of non-binding standards as benchmarks or tools in domestic advocacy and lobbying.

The Concept of State Responsibility

Under international human rights law, states have negative and positive obligations. The negative obligations require that states refrain from doing certain things (such as committing acts of torture), while the positive obligations require that states actually do certain things (such as setting up a national system of workplace inspection). In respect to negative obligations, in order for a state to be held accountable for breaching its obligations under international law, one has to show that an individual acting on behalf of the state (called an 'agent of the state', a 'state actor' or a 'private individual') has acted contrary to those obligations.[5] Therefore, states cannot be held accountable for the actions of individuals who are not authorized to act on their behalf, and the victims of human rights violations committed by such private individuals will usually have no recourse under international law. However, there are exceptions to this general rule, such as individual responsibility for war crimes and crimes against humanity (and the fact that International Criminal Court also has

jurisdiction over the actions of individuals who commit these types of crimes), but mostly, these do not apply in the context of migrant workers' rights.

However, when a state has a positive obligation to do something, fails to do it and this failure leads to the commission of a human rights violation by a private individual, the state may be held accountable under international law. This is because such a human rights violation can be tied back to the state's inaction. For example, a state may have ratified an ILO Convention on workplace inspection that requires it to establish an effective national system of workplace inspection. If that state does not establish such a system, but had it done so, an employer's safety violations would have been discovered and remedied before workers perished in a fire due to unsafe working conditions. Therefore, the state has breached one of its obligations, resulting in a private individual, i.e. the employer, violating the rights of the employees. The human rights violation can be tied to the state indirectly, and therefore the state can be held accountable for not establishing the system of workplace inspection.

In sum, it is not enough to simply establish that there has been a violation of a human right or freedom enshrined in an international instrument or accepted as part of customary international law. The human rights violation must be linked to a state's obligation to do something or refrain from doing something.

The Importance of Domestic Remedies

One of the most glaring weaknesses of international law is the limited number of formal enforcement mechanisms available in cases of human rights violations. For this reason, victims of human rights violations are well-advised to consult the constitution and legislation of the state in which the violations took place to determine whether or not they can obtain redress using remedies provided by the laws of that state. Such domestic remedies are often more accessible to individual complainants than international mechanisms, and national legal systems generally have more effective enforcement mechanisms. For example, the victim of a human rights violation committed in Canada can seek redress in the courts under the Canadian Charter of Rights and Freedoms (a constitutional document) or the Canadian Bill of Rights if the violator is a state actor. She may also approach provincial human rights commissions which administer human rights codes applying to private individuals in certain contexts such as employment and housing. The enforcement mechanisms available under these remedies range from judgments which strike down legislation violating human rights guarantees, to orders for compensation. In contrast, the international legal system depends on the consent of states and their willingness to be bound by certain standards.

For this reason, the only genuine enforcement mechanism in international law is a state's sensitivity to criticism of its human rights practices.[6] Even in cases where the international community takes concrete action against a state such as expelling it from international organizations or imposing sanctions against it, as was done in the case of South Africa while it practiced apartheid, there is no guarantee that the state will be compelled to comply with its international obligations.

However, there are situations in which complainants may find it useful or necessary to resort to international mechanisms. First, there may be no effective domestic remedies available. For example, the state in question may have failed to implement the terms of a treaty it has ratified because a certain act or omission by a state actor is not an actionable violation in domestic law, even though it violates the state's obligations under that treaty. Second, the complainant may have accessed all available domestic remedies and carried them through to the end (a process known as the 'exhaustion of domestic remedies'), but the results have proved unsatisfactory. For example, a complainant pursues a domestic remedy through all the levels of a state's court system, but the highest court in the land does not find a violation of her rights or throws out the case on procedural grounds. Third, there are strategic reasons which make it desirable to pursue a case in an international forum. For example, the human rights violation in question is evidence of a larger pattern of abuses by a state, and the complainant's resources would be better spent drawing international attention to this fact, rather than in a domestic court whose impartiality may be cast in doubt.

Exhaustion of Domestic Remedies

There is another important point to be made with respect to domestic remedies and their relationship to international mechanisms. Certain international mechanisms require that the complainant exhaust (that is access and carry through to the end) the legal remedies available to her in the state where the alleged human rights violation took place. The rationale for this requirement is practical and ideological. Some of the practical considerations were discussed above, while the ideological reasons stem from the continuing importance of state sovereignty. The principle of 'exhaustion of domestic remedies' serves to protect state sovereignty by minimizing the possible intrusion of international bodies in a state's domestic affairs. However, this principle does not apply when the act complained of violates an international human rights norm binding the state in question but is not a breach of the local law.[7] It is also inapplicable when there are no effective remedies available in the national system. Effective remedies are defined as all types of legal and administrative remedies which an individual has a right to access, but

does not include 'extra-legal' or 'discretionary remedies'. A remedy is effective if it is available 'as a matter of reasonable possibility' in the state concerned, and it does justice to the claim in the domestic courts. A remedy is ineffective if the domestic courts did not act independently of the executive.[8]

In order to determine whether a given UN mechanism requires exhaustion of domestic remedies before it can be invoked, refer to the section on that particular mechanism.

The exhaustion of domestic remedies is not required under the ILO procedures.[9] However, the Committee on Freedom of Association does consider the extent to which domestic remedies have been accessed when examining complaints.

The Relationship between UN and ILO Mechanisms: Are They Exclusive or Concurrent?

Where more than one mechanism is available to solve a problem, complainants must determine whether they are exclusive or concurrent. An exclusive mechanism cannot be used in conjunction with another mechanism. However, a mechanism that is 'concurrent' can be used simultaneously with another procedure. If one of the mechanisms available to a complainant is exclusive, he or she must evaluate which is the better course of action. Factors to consider in making this decision include the remedy sought by the complainant and the resources available to the interested parties.

“The ILO procedures...may be invoked while another procedure is pending”. [10] This applies to both the ILO’s regular system of supervision, including the reporting mechanism, and its special system of supervision. Nonetheless, for practical reasons, the relevant ILO body may consider it advisable to wait for another procedure to run its course before examining a case. However, certain UN mechanisms are exclusive. The 'individual complaint mechanism', for example, cannot be used in relation to any matter which is already under another procedure of international investigation or settlement. The Human Rights Committee has interpreted this to mean "identical parties to the complaints advanced and the facts adduced in support of them". This definition probably encompasses any other UN or ILO mechanisms that would otherwise be available.

However, it is likely that the UN reporting mechanism is an exception to this rule. Treaty bodies do not investigate the information submitted in government reports, nor attempt to settle the dispute. Rather, they use the reports to monitor the progress of States Parties in fulfilling their treaty

obligations. Therefore, information about a human rights violation could probably be submitted as part of an individual complaint and/or as part of an NGO's 'shadow' or 'mini' report.

UN extra-conventional mechanisms also seek to avoid overlap with other procedures and the repeated submission of communications. Therefore, special rapporteurs and working groups are unlikely to investigate any communication that has also been submitted for investigation under another UN mechanism or ILO procedure. Again, the UN reporting mechanism is probably an exception to this rule.

The Limits of International Mechanisms

Victims of human rights violations should be aware that procedures available under the UN and ILO are limited by the failure of states to ratify relevant human rights instruments, strict admissibility requirements for complaints and a lack of enforcement mechanisms. Despite these weaknesses, NGOs must recognize the interface between international human rights standards and advocacy and lobbying at the national level. NGOs must work to create awareness of human rights standards at the national level by using outcomes at the international level as tools in domestic advocacy and lobbying. Reports by international bodies can be distributed to the media, local groups and individual citizens.

Public awareness of human rights standards can be used to create pressure for the ratification of UN and ILO instruments. Pressure at the domestic level must also be directed at the implementation of effective enforcement mechanisms for violations of human rights. Because the UN and ILO can only attempt to compel states to respect human rights, where such rights have been violated, it is at the national level where sanctions, enforcement and relief are most ideally sought.

End Notes

1. Cholewinski, R. Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment. (Oxford: Clarendon Press, 1997) at 47-48.

2. *Ibid*. at 46.

3. *Ibid.* at 98-99.

4. *Ibid.* (footnotes 94, 96).

5. Examples of state agents are: government employees such as police officers, members of the armed forces; members of the judiciary such as judges and arbitrators; and members of the executive branch of government, such as ministers.

6. Women, Law & Development International and Human Rights Watch Women's Rights Project. *Women's Human Rights Step by Step: A Practical Guide to Using International Law and Mechanisms to Defend Women's Human* Rights. (Washington, D.C.: *Women*, Law & Development International) at 13.

7. I. *Brownlie*, Principles of Public International Law, 5th ed. (Oxford: Clarendon Press, 1998) at 497.

8. *Ibid*. at 499-500.

9. Da *Fonseca*, G. *How to File Complaints of Human Rights Violations: A Practical Guide to Inter-Governmental Procedures*. (Geneva: World Council of Churches, 1975) at 14-15.

10. Da *Fonseca* at 14-15.