

Instruments in the Protection of Migrant Workers' Rights - The New Zealand Case

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Abstract

The issue of protection of human rights for migrant workers is, for many nations, a contentious one. This is due to the status held by migrant workers in a society as being part of that society whilst remaining on the periphery due to their non-citizenship of that society. Following the periods of rapid globalisation in the post war era, the issue of migrant rights had been mandated as being a constitutional focus of the International Labour Organisation. This resulted in several conventions and recommendations aimed at the protection of human rights of this vulnerable group of people. In addition to this, the United Nations opened its seventh convention on human rights, the *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* for signatures in 1990, following ten years in the draft stage. To date, the Convention remains one of the lowest ratified conventions of the United Nations, after having waited one of the longest periods between being opened for signature and coming into force, in 2003. The reluctance of nations to sign the Convention is of specific interest to this essay, in particular the reluctance of the highly developed industrialised nations to sign. New Zealand is used as a case study, due to its policy history as a target destination for migrant workers from the Pacific Islands and the high presence of migrants in New Zealand society. The various United Nations instruments aimed at protecting the human rights of migrant workers are examined, together with a discussion of the need for such instruments in the protection of human rights of migrant workers, before situating this debate in the New Zealand context and analysing the reasons for New Zealand's failure to sign the Convention and the implications arising from this.

Globalisation and its implications

Globalisation has been one of the most significant recent social phenomena, marking prominent consequential differences between the post-war era and the present day, when globalisation transpired at an accelerated pace. Since the post-war decades, marked by increased affluence and consumption, globalization has been spurred on by the creation of international organisations, such as the United Nations (created in 1945, hereafter referred to as the UN). Furthermore, and following the creation of the UN, globalisation was implicitly mandated in the creation of certain international instruments. In the post-war period, the world capitalist economy required stabilising, as did the national economies of the countries that had fought in the war. The answer to this was thought to be found in what McMichael calls the 'development project' (1996:29). Globalisation provided the rationale for the restructuring of states and economies, which once completed, combined the principles of mercantilist and liberal organisation into a new international regime of embedded liberalism of nation states. Additionally, Held and McGrew (2000) credit the collapse of state socialism and the consolidation of capital for the dramatic intensification of globalisation. Furthermore, they acknowledge that there is a certain amount of inequality within globalisation, pointing out that it is only the powerful, wealthy states who get to participate, possibly to the point of excluding or exploiting others. It is this exclusion and exploitation of weaker, poorer states and the consequences this has on the people of these lesser developed countries that this essay focuses on.

Migrant workers are an immensely important factor in economic terms. This is because of the nature of migrant workers, as they move from their own country to a new country, getting a job and helping the economy of the new country, while sending money back to family in their home country. With the divide between lesser developed countries and developed nations, the economic significance to both is meaningful, while being substantially more so to the lesser developed countries. Focusing on the significance of migrant workers to the Pacific Islands, remittances from migrant workers form over 40% of Tonga's gross domestic product and around 25% of Samoa's (New Zealand Herald, 2007a). In the past ten

years, the amount of remittances has tripled to \$558 million per year (New Zealand Herald, 2007a). In the New Zealand context, in 2006 overseas-born migrants contributed \$8.1 billion to the economy and used \$4.81 billion in benefits and services. Comparatively, New Zealand-born citizens contributed \$24.76 billion, while using \$21.92 billion in benefits and services. This translates as the net financial impact of the work of migrant workers being \$3547, whereas for New Zealand born citizens, this figure is \$915 (Tan, 2008). This means that immigrants generally consumed less in benefits, allowances and health, while paying more income tax. Reasons for this are primarily due to the restrictions and immigration laws New Zealand has established with respect to migrant workers. These possibly can be seen as forming part of the reason New Zealand is reluctant to sign the UN International Convention on the Protection of All Migrant Workers and Members of their Families.

United Nations instruments

In 1985, the United Nations adopted the Declaration on the *Human Rights of Individuals Who are not Nationals of the Country in which They Live*. While this Declaration does not explicitly target the protection of migrant workers, they are still included in this declaration, which covers all people who are not nationals in the state they are currently present in. The declaration includes provisions concerning the economic and social rights of such people. Five years later, in 1990, the *International Convention on the Protection of All Migrant Workers and Members of their Families* was established after a ten-year drafting period and came into force following what was at the time one of the longest periods of being open for ratification, accession and signature (Gilmore, date unknown; Niessen, 2001; Piper & Iredale, 2003).

The little attention paid to the Convention is indicative of the importance afforded to it by nation states around the world, and particularly by richer, developed countries. The Convention came in to force in 2003, following the ratification of the treaty by 20 states. Presently, the Convention has been ratified by 37 parties, with an additional 15 signatories. The countries which have ratified the Convention are as follows: Albania,

Algeria, Argentina, Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Honduras, Kyrgyzstan, Lesotho, Libyan Arab Jamahiriya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Peru, Philippines, Senegal, Seychelles, Sri Lanka, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Uganda and Uruguay. This list confirms the perception of the Convention as primarily catering to the least developed countries. The fifteen additional signatories to the Convention are as follows: Bangladesh, Benin, Cambodia, Comoros, Gabon, Guinea-Bissau, Guyana, Indonesia, Liberia, Montenegro, Paraguay, Sao Tome and Principe, Serbia, Sierra Leone and Togo (UN online). The highest developed country party to the Convention, according to the United Nation's Human Development Index is Argentina, which ranks at number 38. The majority of the parties to the Convention are among the bottom half of developing countries and furthermore, seven of the parties are among the 20 least developed countries in the world (UNDP). The distinct disinterest in the Convention by developed countries is disappointing, particularly when one considers the fact that these countries are the countries hosting the largest amount of migrant workers, whereas the countries who have already signed or ratified are the predominantly the countries migrant workers are nationals of.

In addition to these newer conventions and declarations implemented by the UN is the presence of older recommendations and conventions enforced by the International Labour Organisation (ILO). The ILO is a specialised agency of the UN and the only UN agency with a constitutional mandate to protect migrant workers. The ILO is fundamental in the area of migrant workers' rights, as it adopts a rights-based approach to labour and migration and promotes tripartite participation between government, employers and workers in migration policy. As such, every instrument of the ILO, in principle, is relevant to migrant workers, in addition to the specific migrant workers' Conventions 97 and 143 and the associated Recommendations. The ILO's broadest instruments on fundamental principles and rights are also applicable to migrant workers, as well as making specific references to certain groups, including migrant workers.

The ILO and UN instruments all have similar aims of furthering the protections and rights of people migrating for employment and to discourage and eventually eliminate irregular migration. Irregular migration refers to undocumented migration, with either false documents and fake passports, no documents and passports, overstaying a lawfully granted visa and in the worst circumstances, people-smuggling and trafficking. Interestingly, while New Zealand (as with many other developed nation) has not signed and has shown no interest in signing the UN Convention on Migrant Workers, it was among the first to sign the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, which opened for signatures after and came into force before the Convention on Migrant Workers. While it is a human rights issue and the Convention of Migrant Workers does cover such illegal and undocumented migrants, this Convention has been framed as a crime issue. Even more intriguing, is the fact that while the Convention on Migrant Workers covers many similar rights issues in relation to this group of people, signatures and ratifications on this Protocol remain between two and three times as many, possibly due to its position as being framed as a criminal issue towards those facilitating it more so than as oppose to an emancipatory rights measure for those who are exploited in such situations.

Reasons for protection of migrant workers' rights

Migrant workers are an extremely vulnerable group present in most nations across the world. In the United Nations' Universal Declaration of Human Rights, which is now in its sixtieth year, Article 2 sets forth that everyone is entitled to all the rights and freedoms established in the Declaration regardless of, among other things, national or social origin. Despite this, there are discrepancies in the national laws of many states ensuring that people of differing national origin (such as migrant workers) are not entitled to the same rights as people who are nationals, particularly in the areas of economic, social, civil and political rights. Accordingly, in order to further ensure the rights of such vulnerable groups of people, as well as to draw the attention to these groups as being vulnerable and in particular need of

protection, it is essential that such groups be catered for in Conventions and other instruments targeted at particularly their needs.

Elaborating on these points, Niessen (2001) asserts that for several reasons, migrant workers' rights must be recognised with specific conventions targeted at their protection and protection of rights in addition to being implicitly recognised in general rights conventions. Niessen goes on to point out the reasons for this are four-fold, as follows: Migrant workers are an increasing group of people in the world and their legal and social position is vulnerable and more so for the millions of undocumented migrants who do not have the necessary documentation required to stay and work in a country. In addition to this broad base for the need of their protection, Niessen posits a further three reasons for migrant workers to have protection in additional conventions, as well as general ones. As has previously been acknowledged in this essay, general conventions do not always prevent and sometimes actually allow for certain rights to be not granted absolutely under national laws and practices even to legally residing foreigners and non nationals. Migrant workers are faced with specific problems, such as recruitment, remittances, political participation and family reunification, which are not addressed in general rights conventions. Subsequently, following from this, migrants' rights conventions elaborate on general human rights conventions by applying these general principles to the specific situation of migrant workers. Additionally, migrant workers require extra protections of their human rights due to the forms of work they are often engaged in. These industries and occupations are usually low paying, manual labour in occupations which are often described as the three Ds - dirty, dangerous and demeaning (Amnesty International, 2006). Accordingly, these occupations are typically ones which resident citizens avoid, such as employment in labouring construction, hotel and hospitality, domestic work, prostitution, low skilled factory positions and manual agriculture and viticulture.

The New Zealand Context

At the time the Convention of Migrant Workers opened for signatures and ratifications, the New Zealand Human Rights Commission submitted a report to the Prime Minister on migrant workers (NZHRC, 1990). One of the case studies of this report is the account of a strawberry grower who employed 30 women from Tuvalu through a scheme initiated by the New Zealand government designed to help aid the economy of Tuvalu. This case study claims that the employer held the women's passports and tickets for their return journey to Tuvalu, while also failing to pay overtime and other penal rates. Over the course of the three month strawberry season for which the women were present, they were subject to verbal abuse on a regular basis. In addition to this is the further abuse of unfair working conditions, in that if the employer perceived any of the women to be working too slowly, the employee concerned would be sent home for the remainder of the day without pay. The 30 women also lived in two houses between them, for which they paid 20 dollars a week. The Labourers' Union was involved in the resolution of this matter, and was further concerned that the employer had deducted money from the women's wages at such a rate in order to repay their airfares that little was left for them to live on. At the time, although the Convention on Migrant Workers and the ILO Convention 143 were still in the drafting or final stages, the New Zealand government had ratified the International Covenant on Economic, Social and Cultural Rights and the ILO's Convention No 97 (NZHRC, 1990). The treatment of these women was clearly in breach of both the Covenant and the Convention at the time. In this account one can see the way in which, although (and perhaps most worryingly) the scheme was government initiated; the employer was still able to commit such abuses. In such instances, the abuses do not only hinder the progression of the women and their families financially, it also could significantly negatively affect the development of Tuvalu.

Between the 1960s and the early 1990s there had been at least nine various similar work schemes for short-term workers from Fiji, Tonga, Samoa, Tuvalu, Niue, Tokelau and the Cook Islands in New Zealand (Crocombe, 1992). During this time, due to the large amounts of people from the Pacific Islands overstaying their visas there was a revision to the scheme. The scheme was then reintroduced in 1986 before again being

cancelled in 1987 due to the influx of migrant workers with the stated intention of staying in New Zealand (Crocombe, 1992). In addition to the occurrence and fears of reoccurrence of overstaying, there is evidence to also suggest that the schemes were largely not used by Tongan and Samoan migrants, who rather, were sponsored or adopted by relatives already in New Zealand, which was followed by moving to the country and subsequently finding employment. Recently, the New Zealand government has restructured and reintroduced seasonal worker permits under the Recognised Seasonal Employer scheme (RSE), allowing up to 5000 workers from Samoa, Tonga, Vanuatu, Kiribati and Tuvalu to work for seven out of every eleven months in New Zealand's horticulture and viticulture industries, which are currently experiencing "an absolute labour shortage" in some areas (NZ Herald, 2007b).

While the New Zealand government purports that the scheme is designed to help the Pacific Islands' economies, there is the condition that employers will only be allowed to recruit overseas workers once they have proven that there is a shortage of New Zealand workers able to fill the vacancies. There is an issue here, however. The New Zealand Herald (2007a) states that there were at that time 5500 vacancies in the Central Otago fruit picking area alone and the Department of Labour - Immigration web site lists a further six areas in which there are short to longer term seasonal labour shortages (DOL, 2008). While this alone is not a human rights issue, there are fears amongst fruit farmers in the regions worst affected by the seasonal labour shortages that this is the point at which "agents offering illegal labour tended to thrive", as stated by Horticulture New Zealand's National Seasonal Labour Manager, Jerf van Beek (Booker, NZ Herald 2008).

Further issues parties have with the scheme are primarily human rights issues. The workers are believed to be receiving only adult minimum wage, despite the commitment to the scheme expected by the New Zealand Department of Labour that employers will be responsible for paying "market rates" (DOL, date unknown). Furthermore, leaders in the Pacific Islands are concerned about the pace at which the policy was established. Chairman of the Tongan Advisory Council, Melino Maka, believes that the policy was

rushed, airing concerns about the details of the well being for the workers. He states, “While the intention behind the scheme is good, there are concerns about the process and lack of real engagement with Pacific communities. In the rush to develop this initiative, the lessons from similar policies and initiatives in the past may have been overlooked” (Gregory, 2007). Maka further maintains that the policy was designed and established in favour of New Zealand, rather than considering the interests of the workers. In addition to this, he says, are the inadequate opportunities for involvement in setting up the scheme for the overseas governments and non-profit organisations that have an interest in this area and community organisations which provide a range of support services to workers. Agencies that could have been engaged in consultation with the concerned governments and non-profit organisations include social services and legal advice, for example with regards to employment and tenancy (Gregory, 2007). Furthermore, the benefit of the scheme to the Pacific Islands was questioned, due to press releases about the programme stating that there would be skill transfers to the Pacific Islands (for example, NZ Herald 2007b). However this is questionable due to the lack of training programmes to ensure this. Moreover, Maka articulated scepticism of how fruitful the work would be financially. With workers being paid at New Zealand adult minimum wage and deductions being permitted to be taken from this by the employer, for example for air fares, Maka suggests that beyond the short term, the net gains are likely to be modest at best.

Reasons behind New Zealand’s failure to adopt the Convention

As, in many respects, the New Zealand situation with regards to migrant workers is very similar to that of other highly developed industrialised countries, being a sought after destination with a strong social welfare state, the reasons for New Zealand’s failure to adopt the Convention are very similar to those of other highly developed countries. However, there are inherent differences in the New Zealand context as compared to other highly developed nations: including the size of the nation and the size of the nations whose nationals are accepted as migrant workers in the country and further, New Zealand’s status as a receiving country, a transit country (for people

who eventually wish to migrate to Australia) and also a sending country in its own right. Whilst acknowledging New Zealand's point of difference as compared to other highly developed receiving nations, New Zealand is primarily concerned with its status as a receiving country and aligns itself as being similar to these nations. Thus, its reasons for failing to ratify the Convention are similar to such nations. These reasons centre upon issues of a primarily political nature, with respect to internal politics, external politics and the political relations, which may be mediated by either adoption or non-adoption of the Convention. Closely linked to political reasons are economic factors. Again, this is both internal and external, although with respect to human rights these are primarily internal concerns. Further, as shown by an examination of the Convention in the Asia Pacific context, Piper and Iredale (2003) demonstrate that failure to adopt the Convention in the region is also linked to the misperceptions of national citizens surrounding the principles and intent of the Convention. Piper and Iredale (2003:13) go on to write that the Convention of Migrant Workers:

. . . specifically addresses the fundamental human rights of migrant workers and members of their families based on their vulnerability as non-nationals in states of remunerative employment and states of transit. . . Overall, this Convention underscores the age long conflict between the international norms of human rights and state sovereignty. Ultimately, the 'rights of states' clearly prevail over the 'rights of migrants' with states retaining the right to set the conditions under which foreigners may enter and reside in their territory.

The rights of states in denying the rights of migrant workers can be seen to be centred on political pressures, expectations and relations. Political pressure from the Pacific Islands lead to the development of the recognised seasonal employer scheme for short term migration. New Zealand has a history of supporting human rights, which it tends to pride itself on, having ratified all other core UN treaties. Additionally, once New Zealand ratifies, it takes adherence to all ratifications extremely seriously (Piper and Iredale, 2003). This forms one of the, if not the single, biggest external political pressure for New Zealand, with the view that, in ratifying,

it would need to comply with the Convention. In terms of a cost-benefit perspective for New Zealand, it is thought that the costs of compliance would outweigh the benefits of having ratified (Piper and Iredale, 2003). The reason for this is due to the fact that New Zealand sees itself as having already taken enough measures towards the protection of the human rights of migrant workers.

The measures already in place in New Zealand covering migrants' human rights are the ILO Conventions signed by New Zealand, in addition to the fact that migrants are covered under the New Zealand Bill of Rights. Accordingly, the New Zealand government sees the Bill of Rights as protecting the rights of migrant workers under the provision of what is reasonable, whereas the UN Convention on Migrant Rights is viewed as being the transference of absolute rights to migrant workers (Piper and Iredale, 2003). Hence, the costs of ratifying and implementing the UN instrument when New Zealand considers its national laws and ratifications to other Conventions as sufficient to the protection of human rights for migrant workers outweighs the extra benefits and protections on offer to migrant workers under the UN Convention. Despite the view that the protections extended under these instruments are enough, under the latest work scheme, the recognised seasonal employer policy the only health benefits the Pacific migrant workers are entitled to be the coverage of accidents that qualify under ACC (DOL, date unknown). Contrary to this, under the UN Convention migrant workers are entitled to "enjoy equality of treatment with nationals of the State of employment in relation to: Access to social and health services, provided that the requirements for participation in the respective schemes are met" (Article 43(e)). Unfortunately, the requirements for participation in the respective scheme of New Zealand, which is free health care, only applies to citizens and permanent residents. This is yet another way in which the 'rights of citizens' are superior to the 'rights of migrants'.

A further political pressure New Zealand faces with regards to ratifying the Convention, in the opinion of Piper and Iredale (2003), is the internal pressure of what they term the "Pakeha - Maori divide" (2003:42). Under this perspective, rights and the access to them is implicitly deemed to

be a zero-sum game. The argument Piper and Iredale (2003) present is that there is a crowding-out of other voices due to the dominance of Maori perspectives on societal issues. Piper and Iredale (2003) also present the view that, in accordance with rights as being zero-sum, Maori would fear “losing out” (2003:42) should migrant workers be seen to be given preference or special treatment. This account as a reason for failing to promote the ratification of the Convention in particular lacks validity due to the unique position in New Zealand society occupied by the Maori as *tangata whenua*, the people of the land. Despite the refutations presented here in response to their argument, Piper and Iredale’s (2003) perspective does present what may be termed grains of truth. These grains of truth come in the form of framing migrants’ rights on par, or on a continuum, with Maori rights as indigenous people. In doing this, Piper and Iredale (2003) point out that by failing to ratify the Convention, it is possible that the New Zealand government is, while not opposing human rights protections for migrant workers, may simply be opposing “further broadening of the human rights frame” (2003:42). This could quite possibly be a consequential reaction, as in ratifying the Convention on Migrant Workers, this could also mean more rights for Maori as indigenous people, the people directly concerned by the only other recent Convention New Zealand has failed to sign (one of only four countries to vote against the adoption of the Declaration of the Rights of Indigenous Peoples; OHCHR, date unknown).

As the Convention covers both legal, documented migrant workers and their illegal, undocumented counterparts, the New Zealand government is concerned with the effect this may have on illegal immigrants. As New Zealand is a relatively small nation in relation to the population of the nation and size of the country, compared to other receiving countries in the developed world, the strain placed on the economy by allowing migrant workers to access social security benefits and ensuring the access to other state allocated provisions such as health care is immense. Likewise, as the Convention applies to undocumented migrants on the same fundamental basis as it does documented migrants, with more privileges afforded to the latter, the New Zealand government reiterates the concern it has in doing so. The concern in doing this lies in the fact that undocumented migrants have

come to the country illegally. While, as referred to earlier, the New Zealand government has ratified protocols concerning the circumstances of such migration, in affording such migrants the same fundamental rights as those who procured their position in New Zealand society legally, the New Zealand government remains anxious that this may be construed as condoning such behaviour, on the part of undocumented migrants (Piper and Iredale, 2003). Simultaneously, the financial and economic impact on a nation the size of New Zealand is of further concern to the government.

Conclusion

In conclusion, due to the societal changes in the world occurring in the post war period, the globalisation of production fundamentally altered the globalisation of labour to an unprecedented scale. As this meant people were leaving their home countries in search of better opportunities in employment, a need arose for the protection of human rights of migrant workers due to their position in host nations as being participants but not citizens of the host nations. Hence, the International Labour Organisation was created with the explicit constitutional mandate of protecting the human rights of migrant workers, leading to the creation of a number of conventions and recommendations. The United Nations also established its Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, although nations which had either ratified or become signatories to the Convention were predominantly lesser developed countries and those which were sending migrant workers to other parts of the world. In this essay, I illustrate the various mechanisms through which the United Nations and its agency, the International Labour Organisation attempt to protect the human rights of migrant workers and to extend these rights to their families. In employing New Zealand as the case study for this essay, I demonstrated the need for migrant workers to have protections of their human rights additional to those covered in more general United Nations human rights covenants and declarations. Furthermore, I analysed reasons for New Zealand's failure to sign the Convention on Migrant Workers as being functions of political and economic pressures, expectations and relations. This essay reaffirmed the need for migrant workers to be further

protected in their human rights while acknowledging the difficulties for a nation such as New Zealand to make ratification a viable option, both politically and economically. Furthermore, while it is acknowledged that New Zealand may struggle to make ratification of a measure such as the Convention on Migrant Rights a viable option, it has, at its own enterprise established measures to help protect these rights. The fact that New Zealand takes ratification so seriously and, although having not ratified the Convention, has established such measures as this at its own behest further endorses its commitment to human rights on both an international and also at a national level. Although New Zealand is a small nation on the world stage, the steps it has taken towards ensuring the continued protection of migrant workers as a vulnerable group in need of further human rights protections is reassuring in the hope that other, more powerful nations are compelled to follow suit and offer the same securities offered to their own nationals by either signing or ratifying the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their families.

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Biographical

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