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# **The Influence of International Law on the International Movement of Persons**

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# Abstract

Many migration theories identify ‘the law’ as a significant constraint on the international movement of persons. While this constraint often operates through *national* migration legislation, this study examines the influence of *international* law in shaping contemporary patterns in the international movement of persons at the macro level. The analysis begins with an examination of the long-established power of a State to regulate cross-border movement of persons as an inherent attribute of State sovereignty, together with the accepted limitations on a State’s power to control entry and exit. Yet, international law reaches well beyond the movement of people *across* borders. The development of international human rights law has been a key constraint on state action in the United Nations era by also regulating the treatment of migrants *within* a State’s borders. The study considers how international law has responded to current migration issues, including: protection of migrant women and children; suppression of smuggling and trafficking of people; labour migration; and environmental migration. As in other areas of international society, there has been a proliferation of institutions through which international migration law is made and enforced. The most prominent among them are the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM), but the establishment of other entities with overlapping mandates has given rise to calls for a new international migration regime based on streamlined institutional arrangements. The study concludes that international law is an imperfect framework for regulating the international movement of persons because it has developed in a piecemeal fashion over a long time to deal with issues of concern at particular points in human history. Yet, despite its shortfalls, international law and its associated institutions unquestionably play a most important role in constraining and channeling state authority over the international movement of persons.

Keywords: international migration law; admission of aliens; refugees; expulsion of foreign nationals; human rights of migrants; diplomatic protection; migrant workers; international trade in services; environmental migration; migrant women and children; human smuggling and trafficking; United Nations High Commissioner for Refugees; International Organization for Migration.

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## ***1 Introduction***

1. Human populations are characterized by growth and movement. Around 10,000 B.P., when people were organized in hunter-gatherer societies, world population stood at about 6 million (Livi-Bacci 1997:31; Caldwell 2006) but today's population is more than a thousand times that figure—6,705 million (Population Reference Bureau 2008). From the earliest origins in Central Africa, humans have now migrated to every habitable part of the globe in response to pressures of resources and population, and opportunities offered by the exploration of new lands. The last region of the world to be settled—Polynesia—was inhabited only 3,000 years ago (Gibbons 2001).

2. The patterns of human settlement resulting from historical population movements form the foundation of our understanding of human populations but they are only a starting point. Individuals, families and communities are more mobile today than at any other period in human history. Globalization and its associated phenomena (transport, technology, economy, media) may have had the practical effect of 'shrinking' the world (Harvey 1989:241), but the ability of people to move from place to place to take advantage of global opportunities remains stubbornly unequal.

3. This study examines one small piece of the complex phenomenon of contemporary human migration, namely, the role of international law in shaping patterns of human migration between States in the modern era. Among the innumerable influences on human migration, laws are a small but significant factor. They have been described in a seminal work on migration theory as an 'intervening obstacle' interposed between the 'push' factors associated with the area of origin and the 'pull' factors associated with the area of destination (Lee 1966). However, as we shall see, not all laws impose a barrier to migration: many international norms have the contrary purpose of promoting certain kinds of migration.

4. To a general observer, the most obvious source of rules about migration is not international but domestic. This happens through the regulations that States prescribe to control the movement of migrants across their borders and to govern the treatment of migrants within their borders. Domestic rules exist at many levels: constitutional provisions, enacted legislation, subsidiary regulations, government policies, and the practices of state officials as they are applied 'on the ground'. Notwithstanding the importance and immediacy of domestic migration laws, it is international law that establishes the framework in which domestic laws operate, and it is international law that is therefore critical to understanding contemporary patterns of international migration at the macro level. In short, international law provides a fairly detailed, but by no means comprehensive, set of legal principles that constrain and channel state authority over migration (Aleinikoff 2003:1).

5. Since the emergence of modern states in the 17th century, the international legal system has been built on the bedrock of two principles: sovereignty and territorial integrity. These principles have supported a culture in which the movement of people across international borders has been regarded as a legitimate subject of state control. This control was never absolute, but it was very extensive because, as the Permanent Court of International Justice remarked, 'restrictions upon the independence of States cannot ... be presumed' (*Lotus Case* (1927) PCIJ Ser. A No. 10). Only later did international law develop a range of limitations on the power of States to regulate international migration, based on principles of human rights. These principles fetter state action with respect to migration, but their efficacy must always be viewed against the firmness of the pre-existing foundation principles. As this study reveals, there remains a tension

between the power of a State to exercise absolute control over the movement of people and the need to exercise restraint for the purpose of promoting human rights and human dignity.

**(a) Outline of this study**

6. This study surveys the architecture of international law and legal institutions in so far as they affect human migration. Part 2 sets the background by identifying six dimensions that need to be considered in making an assessment of the role and effectiveness of international law in this field. Part 3 examines core international principles affecting the movement of persons across borders. These include the long-established power of a State to regulate cross-border movements as an attribute of state sovereignty, and limitations on its power to control entry and exit. Part 4 discusses the way in which international law regulates the treatment of migrants within a State's borders. The development of international human rights law has been a key constraint on state action in the United Nations era. Part 5 turns to four contemporary migration issues and international law's response to them. These are: (a) the protection of women and children as vulnerable classes of migrants; (b) the suppression of cross-border smuggling and trafficking of people; (c) the role of international trade law in framing international labour migration; and (d) environmental migration arising from climate change. Part 6 examines the proliferation of international institutions through which international law is made and enforced, and a brief conclusion is presented in Part 7.

**(b) Limitations on scope of study**

7. This study is limited in two important respects: it does not address the movement of persons within a State or the transitory movement of persons between States.

8. **Internal migration.** Urbanization has been an important demographic phenomenon in recent decades. In 1975, only 37 per cent of the world's population lived in urban areas, but today about 50 per cent do so, as people have drifted from rural to urban areas in search of better economic opportunities (Population Reference Bureau 2008). International law has long recognized the importance of internal freedom of movement. In 1948 the Universal Declaration of Human Rights (UDHR) proclaimed that 'Everyone has the right to freedom of movement and residence within the borders of each State' (Art 13(1)). This right is also recognized in other international instruments (Beyani 2000), and its importance has been affirmed by the highest judicial bodies. For example, in 2004 the International Court of Justice (ICJ) advised that Israel had acted contrary to international law in constructing a security wall in Occupied Palestinian Territory, in part because the barrier impeded the liberty of movement of the Territory's occupants (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p 136, §134). While the importance of internal migration to human development should not be underestimated, this study leaves this issue to one side and focuses instead on the way in which international law regulates the movement of persons across international boundaries.

9. **Short-term movements.** Secondly, this study does not examine all cross-border movements. Some international movements—tourism for example—are generally of such short-term duration that they are not significant for present purposes. The boundary between short-term and more permanent migrations is often unclear. In 1998 the United Nations recommended that terminology and collection practices be standardized to promote international comparability of data. It defined a 'long-term migrant' as a person who moves to a country other than his or her usual residence for a period of at least a year, and a 'short-term migrant' as a person who moves for at least three months but less than a year (United Nations Statistics Division 1998:18). By 2002 only a few countries had implemented these definitions in their reporting (United Nations

Population Division 2002:11). Nevertheless, the present study conforms to the spirit of the United Nations recommendations by focusing on international movements that are more than merely transitory. Accordingly, the study examines international laws that pertain to immigration and emigration but not those that pertain only to travel for personal, family, business or educational purposes.

## **2      *Dimensions of International Legal Regulation***

10.      The role of international law in regulating international migration is complex. This Part examines six dimensions that need to be considered in making an assessment of the role and effectiveness of international law. These dimensions create a matrix of possibilities by reference to: the source of the international rule; its geographic and material scope; its impact on the size, direction and composition of migration; its influence on domestic migration law; and the development status of the States in question.

### **(a)      Source of the rule**

11.      The rules of international law relevant to migration come from a number of formal sources, which are listed in Art 38 of the Statute of the ICJ. These are: international conventions (treaties); customary international law; general principles of law generally recognized by civilized nations; and finally, as a subsidiary source of law, judicial decisions and the teachings of ‘the most highly qualified publicists’. The first two are the most important. A treaty is defined in the Vienna Convention on the Law of Treaties 1969 (Art 2(1)) as ‘an international agreement concluded between States in written form and governed by international law ... whatever its particular designation’. Customary international law is the law that has evolved from the practice (or custom) of States. Such a rule forms when a particular practice is adopted consistently by a widespread and representative group of States in the belief that the practice is binding on them as law.

12.      Each source has a role to play in defining the web of legal obligations that comprises international migration law, but there are important differences between them. Treaties are based on the consent of States and their obligations are generally legally binding only on States that have expressed their consent to be bound by the treaty (Vienna Convention on the Law of Treaties 1969, Art 26, 34). By contrast, customary law binds all States, including newly independent States, but it does not bind States that persistently objected to the rule during the process of its formation. Customary law can evolve quite independently of a treaty, but a widely-adopted treaty may also form the kernel around which new rules of customary law crystallize (Villiger 1997). As a result, parallel obligations of similar scope often arise both under treaty (for State parties) and customary law (for non-parties). Treaty law has grown in volume and importance in the United Nations era, but customary law remains an important source of international migration law in areas that have never been codified by treaty (see Part 3).

13.      The sources of law described above (treaties, custom, general principles, and the two ‘subsidiary means for the determination of rules of law’) are formal sources that give rise to binding legal obligations on the part of States. These obligations are increasingly supplemented by a myriad of ‘soft law’ derived from resolutions, recommendations, declarations and accords of international organizations and conferences. While such statements are not legally binding, they are highly influential in guiding State practice and thus indicating the future direction of new norms of international law (Van Hoof 1983:187–189). Soft law has been a potent source of development of international migration law and policy (Martin 1989) and has increasingly been the route through which multilateral, regional, sub-regional and bilateral arrangements have sought to address migration issues (IOM 2003). Influential examples include the Final Act of the



Conference on Security and Cooperation in Europe 1975, and the Programme of Action of the International Conference on Population and Development 1994, with its detailed recommendations for state action on international migration (ICPD 1994:Ch X). Soft law has often been a precursor to a hard (treaty) rule, but international institutions have progressively blurred the boundary, and States often have a strong preference for keeping soft law ‘soft’, especially in a contentious area like migration (Alvarez 2005: 599; Betts 2008).

**(b) Geographic scope**

14. A second dimension is that international law varies in its geographic scope. Principles of customary law are typically global in their reach, although geographically limited ‘local customs’ have also been acknowledged (*Asylum Case (Colombia v Peru)* 1950 ICJ Rep 266). By contrast, migration treaties may be international, regional or bilateral in scope. Treaties concluded under the auspices of the United Nations are generally expressed to be open to all States that are members of the United Nations. Other treaties may have a regional focus because they address distinctly regional concerns or arise through membership of regional institutions. The 1985 Schengen Agreement and its 1990 implementing Convention, for example, adopt measures to promote free movement of persons within Europe, but the regime is applicable only to member States of the European Communities (Art 140). Bilateral agreements on migration are also common. Some originated in treaties of ‘friendship, commerce and navigation’ in the 19th century (IOM 2003:306-307), and there are still many arrangements that allow freedom of travel, work and residence on a bilateral basis.

**(c) Material scope**

15. The absence of a comprehensive legal framework for dealing with international migration has meant that existing international laws are often narrow in their focus and deal with specialized migration topics. This study considers many examples of topic-specific laws. They may target particular classes of persons (e.g. children, women, migrant workers, refugees), particular types of activities (e.g. human smuggling or trafficking), or particular temporal situations (e.g. the Refugee Convention 1951, prior to its 1967 amendment). Within a particular field, coverage may be further limited. For example, the Refugee Convention covers persons who seek asylum in a host country because of a well-founded fear of persecution but it does not address those who wish to escape economic deprivation or environmental degradation.

**(d) Effect on size, direction and composition of migration**

16. Rules of international law can have quite disparate impacts on the size, direction and composition of international migration flows. International law may affect the size of migratory flows by either restricting or facilitating international migration. Treaties dealing with human smuggling and trafficking are directed towards suppressing these exploitative migrations. The Refugee Convention, by contrast, is intended (albeit elliptically) to facilitate the migration of refugees to countries in which they will not face persecution. Since its inception, the Convention has protected over 50 million people in this way (UNHCR 2007a:9). International law may also affect the direction of migration flows. Thus, the customary rule that every State must admit its own nationals to its territory is aimed at inward flows, while the human right to leave any country is aimed at outward flows. International law may also influence the nature or composition of migration flows by affecting the distribution of migrants by age, sex or other attribute. Treaty provisions that support family reunion, for example, may ameliorate common demographic effects of labor migration, which tend to privilege skilled males of working age.

**(e) Relationship to domestic law**

17. International migration law has many practical points of interaction with domestic migration law, though these interactions are complex and vary widely from State to State according to constitutional provisions, legal tradition and the source of international obligation (Shearer 1997). In some States (e.g. the United States), treaties can take direct effect as part of the law of the land if they are in a form that permits them to be applied directly. In other States (e.g. the United Kingdom), treaty obligations do not automatically have the force of law within the municipal legal system but must be implemented by legislation. A State's assumption of treaty obligations will thus often be accompanied by changes to its statute book to ensure compliance with the treaty.

18. Even in the absence of implementing legislation, international migration treaties can have subtle influences on domestic law, such as by guiding the interpretation of constitutional or statutory provisions, influencing the development of common law doctrine, or affecting the manner in which administrative discretions are exercised by government officials (Mason 1997). Thus, a border official might be required to take into account a State's obligations under the Refugee Convention 1951 when making a decision about an asylum seeker even if the Convention has not been implemented in that State by legislation.

19. Customary international law can also influence domestic migration law but, again, legal doctrine in different States affects how this occurs (Shearer 1997). In some jurisdictions customary law is treated as automatically part of the corpus of domestic law without the need for any act of legislative or judicial adoption (incorporation doctrine). In other States, customary law has domestic effect only if specifically adopted by judicial decision or statute (transformation doctrine). Whichever approach is taken, international customary norms affect domestic migration laws and their application by the courts of a State. Examples of this can be seen in 19th century judicial decisions that invoked the 'right' of a State under (customary) international law to forbid the entry of any foreigner into its territory, in its absolute discretion (see §§ 26—27).

**(f) Development status**

20. A final dimension is the extent to which a State's experience of international migration law is divided along 'North-South' lines. Differences between the perspectives of developed and developing States towards international law have long been noted (Cassese 1986). While the United Nations system is formally based on the sovereign equality of States (UN Charter Art 2(1)), the reality of international relations is different. The reasons for this vary but a common pattern is that countries of 'the South' have a history of colonization, are newly independent, and are relatively poor. This can have a significant bearing on the evolution of international migration law.

21. The formation of a rule of customary law, for example, depends on the practice of States, but some States are clearly more influential than others. As De Visscher (1968: 155) has observed: 'Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.' Customary rules about international migration are thus influenced by the practice of major powers and those States whose interests are specially affected, such as the principal migrant sending and receiving States.

22. In relation to treaties, both the substance of a treaty and the pattern of ratifications may also be aligned with the North-South interests. For example, it has been said that the labour mobility regime in the General Agreement on Trade in Services (GATS) disproportionately advances the interests of developed States over those of developing states (see § 94). Conversely,

the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (CMW) contains substantial new protections for migrant workers, and perhaps for this reason has not yet been ratified by any major migrant receiving State (see §§ 72–74).

### **3 Movement of People across International Borders**

23. This Part examines the way in which international law establishes a framework for regulating the movement of people across international borders. The analysis begins with the power of a State to control population movements as an inherent attribute of its sovereignty (§§ 24–30) and continues with an examination of circumstances in which that power has been progressively constrained in relation to both entry (§§ 31–41) and exit (§§ 42–54). The relevant principles of international law demonstrate the intricate relationship between customary law and treaty law in modulating the size, direction and composition of international migrations flows.

#### **(a) State sovereignty and the power of exclusion**

24. The modern international system of states has its origins in the Treaty of Westphalia 1648, which brought to a close the long running religious wars in Europe and ushered in a state system comprised of territorially defined entities (Kratochwil 1986). Each new entity was regarded as having control over its external relations with other States, as well as authority to regulate its affairs within the confines of its territory. These aspects of state sovereignty are reflected today in the Charter of the United Nations 1945 (Art 2), which adheres to the principles of the sovereign equality of States; restraint in the threat or use of force against the territorial integrity or political independence of any State; and non-intervention in matters within the domestic jurisdiction of any State.

25. A central attribute of sovereignty is the power of a State to regulate its territory by controlling the movement of people across its borders. All States do this to a greater or lesser extent. The Westphalian system, conceived as a collection of territorial entities, thus poses challenges to migration that were largely unknown in previous periods of human history.

26. It is sometimes said that a core attribute of state sovereignty is the unfettered right of a State to deny foreign nationals (or ‘aliens’, as they are sometimes called) access to its territory, either by excluding them at the border or expelling them if they have already been admitted. At the end of the 19th century and the beginning of the 20th century a number of Anglo-American judicial decisions made such bold claims about the exclusion of foreign nationals under international law.

27. In *Nishimuru Ekiu v US* (142 US 651, 659 (1892)) Justice Gray of the United States Supreme Court stated that:

‘it is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.’

Some years later the Privy Council, on appeal from Canada, proclaimed that ‘by the law of nations the supreme power in every State has the right to make laws for the exclusion ... of aliens’ (*Attorney-General for Canada v Cain* [1906] AC 542, 546).

28. These decisions have been cited as authority around the world and have been a powerful influence on the modern understanding of the role of international law in regulating human

migration. However, the absolutist view put forward in the Anglo-American decisions was an artifact of its time; a response to the desire to control large waves of Asian migration to the New World (Nafziger 1983). In historical contrast, the right of individuals to travel to and reside in foreign countries was well-accepted in classical times, and many of the great writers in international law in the 17th and 18th centuries (Grotius, Vitoria, Wolff, Pufendorf) supported the view that a state could not exclude foreign nationals from its territory without cause (Plender 1988:61-94). Only Vattel appears to have accepted the untrammelled right of the sovereign to forbid the entrance of foreigners in general or in particular cases ‘according as he may think it advantageous to the state’ (Vattel 1758, Bk II, §94).

29. Despite its tenuous historical and jurisprudential foundations, the ‘classic’ proposition that States have an absolute right to deny territorial access to all foreign nationals has had an unusual resilience. Migration policy has often been regarded as ‘the last major redoubt of unfettered national sovereignty’ (Martin 1989:547). This is unfortunate because the classic view has been:

‘instrumental in shaping exclusionary provisions of municipal law and policy and in forestalling the emergence of human migration as a comprehensive topic on the international agenda. Consequently global discussions have only begun on one of the most serious issues of our era, the general admission of aliens.’ (Nafziger 1983:845)

30. As the following two sections show, international law now plays a greater role in shaping migration policy and practice by limiting each State’s freedom of action in regulating access to and egress from its territory. These limitations have emerged due to several developments; most importantly the growth of international human rights norms since 1945, and increasing economic integration (Plender 1988:2).

#### **(b) Limitations on a State’s power to regulate entry**

31. The admission of people into a State’s territory remains one of the most jealously guarded prerogatives of national governments, into which international law has made few real inroads (Martin 1989:572). The two most significant legal restrictions on the power of a State to control admission relate to a State’s duty to admit its own nationals (§§ 34—35) and refugees (§§ 36—41).

32. Additionally, there are some special categories of persons who are recognized under customary law or specialized treaty as being entitled to admission free of traditional border controls. These include: diplomats and consuls; representatives of international organs; members of foreign armed forces; and victims of a force majeure, for example survivors of a shipwreck or air crash (Plender 1988:159-191). These special categories are of lesser practical importance and are not discussed further in this study.

33. The restrictions on a State’s power to control admission of persons are very limited. The practical consequence of this is that nearly all States can, and do, exercise control over entry at their borders. States have thus crafted immigration laws and policies to exclude or disfavor foreign nationals on many grounds, including medical history, projected health care burden, character, criminal history, absence of skills, lack of fluency in the local language, and financial security.

#### ***Admission of a State’s own nationals***

34. The principle that every State must admit its own nationals to its territory is widely accepted. Viewed at its narrowest, it is a right that exists between States under customary law as a corollary of the right of other States to expel foreign nationals from their territory (see §§ 52—54). In other words, if State A wishes to expel a national of State B from its territory, State B is

not permitted to frustrate State A's legal rights by refusing to re-admit its own national (Plender 1988:133). In practice, because a passport is good evidence of nationality, the possession of a passport is generally sufficient to create a duty on the part of the issuing State to re-admit the passport holder (Goodwin-Gill 1978:45).

35. Despite this age-old rule of customary law, the admission by a State of its own nationals is now regarded as more than a duty owed by one State to another. Every individual has a human right to enter his or her own State. This right was proclaimed in the Universal Declaration of Human Rights in 1948, which states that "Everyone has the right ... to return to his country" (Art 13(2)). This has been reiterated in slightly different ways in the International Covenant on Civil and Political Rights 1966 (ICCPR) (Art 12(4)) and the Convention on the Elimination of All Forms of Racial Discrimination 1966 (CERD) (Art 5(d)(ii)); in regional human rights instruments in America, Europe and Africa; and in the constitutions of many States.

### *Admission of refugees*

36. Although all people have the right to return to the State of their nationality, not everyone is able or willing to do so. A properly functioning government provides its citizens with a range of civil, political, economic, cultural and social rights and services including, for example, protection from crime and persecution (UNHCR 2007a:8). If the system of national protection breaks down, international protection may be required.

37. The need for such protection became apparent in the tumult of the First and Second World Wars, which led to the displacement of persons on an enormous scale—many fleeing from persecution in the State of their nationality. Despite early hopes, the problem of refugees has never abated: war and civil unrest continue to generate successive waves of people seeking refuge from discrimination and persecution. The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that at the end of 2007 there were 31.7 millions people within its mandate, including 11.4 million refugees worldwide. Their composition has changed significantly from the predominance of Europeans in the immediate post-war period. Around 54 per cent of refugees are now found in Africa and Asia/Pacific, while only 14 per cent are European (UNHCR 2008).

38. The Convention on the Status of Refugees 1951 (as amended in 1967) creates a legal regime for the protection of refugees, and in doing so establishes an important qualification to the discretion of a State to determine who may enter its territory. The beneficiaries of the Convention are those who are defined as refugees under Art IA(2), namely, persons who, owing to a well-founded fear of being persecuted on stated grounds, are outside the country of their nationality and are unable or, owing to such fear, unwilling to avail themselves of the protection of that country. The prohibited grounds of persecution are race, religion, nationality, membership of a particular social group, or political opinion.

39. Where a claimant arrives at the border of a State seeking refuge, the principal obligation under the Convention is the obligation not to return the refugee to the frontier of a territory where the refugee's life or freedom would be threatened on account of the persecution (Art 33). This obligation is called 'non-refoulement'. Where a claimant has already lawfully entered the territory of a host State, there is a parallel obligation not to expel the refugee, except on grounds of national security or public order (Art 32). The Refugee Convention has been ratified by 144 States and thus binds a sizable portion of the international community. But the practical reach of these principles may be wider if the core obligations have passed into customary law and thus bind non-parties. On that issue there is a legitimate difference of opinion (Goodwin-Gill 1986:901-902; Hathaway 2005:363-370).

40. In either case, the obligation of a State not to turn back a putative refugee falls short of a more substantial right of asylum, namely, a positive right that inheres in an individual in jeopardy to enter and remain in a host State (Hathaway 2005:300-302). The failure of the Refugee Convention to deal with the broader issue of asylum is a significant weakness in the international refugee system, but the reasons for it are largely historical. In 1951 the problem was not one of people seeking entry to foreign States (i.e. asylum), but of Europeans already outside their home States—having been driven there by the tides of war—needing protection and basic rights in the countries where they found themselves. By 1967, when a Protocol extended the temporal and geographic scope of the 1951 Convention by relaxing the requirement of a European nexus, the European situation had been largely resolved. Instead the problem had become one of people fleeing from oppression in their home States. The 1951 Convention was ill-suited to this task. As a result, the question of asylum was referred to the United Nations. In 1967 the General Assembly adopted a weak Declaration on Territorial Asylum (GA Res 2312(XXII)), which conspicuously failed to impose a duty on countries to grant asylum; and in 1977 an attempt to draft a more progressive convention at the United Nations Conference on Territorial Asylum also faltered. No effort has since been made to resuscitate the asylum convention project (Hathaway 2005:112).

41. Nevertheless, the obligation of non-refoulement in the Refugee Convention can have a similar (even if impermanent) effect for a claimant who might be entitled to residence for months (or years) in the host State while his or her claim is processed through administrative or legal channels (Martin 1989). In States such as Australia, where claimants are kept in administrative detention while their claims are considered, the similarities between non-refoulement and a genuine right of asylum are less convincing.

**(c) Limitations on a State's power to regulate exit**

42. The counterpart of the power of a State to regulate who comes into its territory is its power to determine who can exit, and in what circumstances. The question can arise in different contexts. A State may wish to expel a person whom it regards as undesirable, for example, because he or she has engaged in serious criminal conduct or poses a threat to national security. Conversely, a State may wish to prevent persons from leaving its territory because they are regarded as 'valuable commodities to be kept rather than permitted to increase the prosperity of other states' (Hannum 1987:4). Sometimes an individual's departure may be thought to pose a risk to the State, as where the person holds vital state secrets or poses a public health risk.

43. International law imposes wider restrictions on a State's power to regulate the exit of persons than it does on its power to regulate entry. This attitude embodies the deep-seated value of personal liberty. It is reflected in Socrates' belief that the right to leave one's country was an attribute of Athenian liberty; in the English Magna Carta's guarantee of freedom 'to go out of our Kingdom, and to return safely and securely, by land or water'; and in Hugo Grotius's claim that the right to travel and trade with other nations was 'the most specific and unimpeachable axiom of the law of nations' (Grotius 1609:ch 1).

44. Legal restrictions on a State's power to regulate the exit of persons apply both to state attempts to forbid exit and to state attempts to demand it. As discussed below, the former is limited by the well-accepted human right that everyone is free 'to leave any country' (§§ 45—51); the latter is limited by rules of customary and treaty law controlling a State's discretion to expel foreign nationals (§§ 52—54). Despite the constraints of international law, States continue to impose a wide variety of controls on egress, not all of which are supportable on legal grounds (Ingles 1963, Hannum 1987, Plender 1988:95-131).

### *The right to leave any country*

45. The right to leave any country, including one's own, has been widely proclaimed in international law. It is embodied in the UDHR (Art 13(2)), the ICCPR (Art 12(2) and CERD (Art 5(d)(ii)); in regional human rights instruments in Europe, America and Africa; and in constitutions around the world. The right inheres both in nationals and foreign nationals, and is thus much broader than the 'right to return' discussed above (§§ 34—35), which applies to nationals alone.

46. However, like most human rights, the right to leave is not absolute. The ICCPR (Art 12(3)) permits the right to be limited if the restriction is (i) provided by law, (ii) necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and (iii) consistent with other rights recognized in the Covenant. International law thus recognizes that a balance must be struck between the individual's interest and the State's interest; between treating freedom to leave as a right and treating it as a privilege.

47. The restrictions authorized by Art 12(3) call for two comments. The concept of necessity goes well beyond expedience, or even reasonableness. The restriction must be necessary for one of the stated purposes and this demands proportionality between the restriction and the object it seeks to achieve. Additionally, any restriction imposed by law must be consistent with other Covenant rights, including the norms against discrimination in Art 1 and 3.

48. Against the background of these provisions, States appear to accept that restrictions on departure will not draw protest from other States if they are imposed for the following purposes: (1) to prevent a national from engaging in actions abroad contrary to the security of his or her own State; (2) to prevent a national from evading an obligation to perform military or civilian service; (3) to allow a person to face trial for a serious crime, or to be punished after conviction; (4) to compel a person to reimburse the State for the cost of his or her repatriation; (5) to aid the collection of taxes or duties owed to the State; (6) to protect the interests of the family of a person (eg the payment of maintenance); and (7) to protect court processes (such as compelling appearance as a witness or defendant) or to prevent evasion of a civil liability (Plender 1988:120-121).

49. In a practical sense, the capacity of an individual to leave a country is affected by a wide range of state practices that are permissible under the preceding list. A recent World Bank study has drawn attention to the high cost of obtaining a passport, which ranges from 0 per cent to 125 per cent of annual per capita national income in some countries (McKenzie 2005). Not surprisingly, high passport costs are associated with lower levels of migration, suggesting that some developing countries might benefit from reducing the barriers to migration by tearing down the paper walls that they place around their own citizens.

50. One important question from a development perspective is the legality of a State's control over the departure of highly skilled workers or professionals who may wish to pursue economic opportunities in other countries. The phenomenon of 'brain drain' has been well documented since the 1960s and has been an ongoing challenge to the development prospects of many small developing States. Plender (1988:121) adds a further class of permissible restrictions to those listed above, namely, restrictions that require a skilled or highly trained person to serve their State of origin for a period of time as a means of repaying the cost of their education to the community in which they were trained. While this much may be accepted, blanket legislative restrictions on the departure of skilled workers would almost certainly contravene established rights to freedom of movement (Hannum 1987:34-40).

51. The departure of highly skilled professionals may have other human rights implications. For example, it has been argued that the relentless loss of health workers from under-serviced areas in the developing world impacts on the social right of people in the sending country ‘to the enjoyment of the highest attainable standard of physical and mental health’, which is embodied in the ICESCR (Art 12) (Bueno de Mesquita and Gordon 2005). There is thus a tension between a worker’s right to freedom of movement and the community’s right to good health, but this cannot be resolved simply by subverting an individual’s civil rights to society’s social rights.

### ***Expulsion of foreign nationals***

52. The power of a State to expel individuals from its territory is traditionally regarded as a natural incident of sovereignty. It is a power that may be exercised only over foreign nationals (‘aliens’) because nationals enjoy a right of return to their own State under international law and thus cannot generally be expelled in the first place (§§ 34—35). Although all States retain a discretion to ‘denationalize’ individuals and then expel them, international law imposes limits on the exercise of that discretion (Donner 1994:150-159). The UDHR, for example, states that ‘no one shall be *arbitrarily* deprived of his nationality’ (Art 15), but international jurisprudence does not provide clear rules about when denationalization is arbitrary. Every case has to be considered in light of its facts and the reasons for the decision (Goodwin-Gill 1978:7–8).

53. Throughout history the power over foreign nationals has been frequently used ‘to relieve the soil of an obnoxious guest’ (Rolin-Jacquemyns 1888) and to support the mass expulsion of minorities (Hannum 1987:5). The motivations of States have been diverse, with appeals variously made to national security, economic competition, religious uniformity, ideological rigidity, cultural distinctiveness and racial purity (Cohen 1997:372).

54. The power of a State to expel a foreign national is not unconstrained; it is a discretion whose exercise is limited by the rules and standards of international law, which are currently being reviewed by the International Law Commission. Those limits have been described in various ways: for example, it has been said that the power must not be ‘abused’ or used ‘arbitrarily’. More concretely, the limits of the discretion take their color from the purpose of the power, which is to protect the essential interests of the State and preserve public order. From this it follows that the power of expulsion must be used for this purpose in good faith, and not for some ulterior motive. Every State is given a margin of appreciation in deciding what its essential interests are and whether a particular foreign national threatens them. In practice, municipal laws frequently confine the power of expulsion to cases where a foreign national has entered in breach of immigration laws, engaged in criminal activities, become involved in undesirable political activities, or otherwise threatens national security. Even then the State must carry out the expulsion in an appropriate manner—in accordance with law, and with due regard to the dignity of the individual and his or her basic rights as a human being (Goodwin-Gill 1978:307-310).

## ***4 Human Rights of Migrants within Borders***

55. The preceding Part focused on the regulation of cross-border movement of people under international law. However, a substantial body of international law is directed to a different question, namely, how migrants should be treated within the borders of a State by virtue of their status as migrants or foreign nationals. The subject is of vital importance because many migrants are exposed to specific vulnerabilities and risks, which vary with their immigration status, gender, age, nationality, ethnicity, and occupation (Global Migration Group 2008:98).

56. The human rights of migrants is a vast field and many works have explored specialized aspects of the topic. Historically, there have been three important strains of legal development: the long-established rules governing the manner in which States must treat foreign nationals



present within their territory (§§ 57—63); newer human rights norms regulating the way in which States must treat all persons by virtue of their common humanity (§§ 64—68); and specific standards of treatment applicable to the sub-category of migrant workers, which have been developed under the auspices of organizations such as the International Labour Organization (ILO) and the United Nations General Assembly (§§ 69—75). There are areas of convergence between these three strains.

**(a) Treatment of foreign nationals**

57. All States are under an obligation, under customary international law, not to ill-treat foreign nationals present in their territory. Mistreatment may take many forms such as personal injury inflicted by state officials, expropriation of property without adequate compensation, or denial of justice (Dixon 2005:240).

58. The obligation not to ill-treat foreign nationals is owed by one State to another, rather than by a State to the foreign nationals themselves. A breach of the obligation may give rise to a claim by State A that it has been injured by State B because of the manner in which State B has treated a national of State A. In exercising this right, which is called the right of diplomatic protection, State A is asserting its own right ‘to ensure, in the person of its subjects, respect for the rules of international law’ (*Mavromatis Palestine Concessions Case (Jurisdiction)*, PCIJ Reports, Ser A, No 2, p 12).

59. The law regarding the treatment of foreign nationals was already well developed by the early 20th century (Borchard 1916). Yet, despite its vintage, there has been longstanding disagreement about the standard of treatment that a State must afford to foreign nationals. Many developed States claim that foreign nationals must be treated according to an ‘international minimum standard’, regardless of how a State treats its own nationals. By contrast, many developing States claim that foreign nationals need only be treated according to the ‘national standard’, and that foreigners cannot claim rights more extensive than those offered locally.

60. The difference of approach becomes important where the national standard is lower than the international minimum, but this is not always easy to determine because the content of the international minimum is often not articulated. In practice, the development of international human rights law has brought about some convergence between these viewpoints because it both defines a standard of treatment, and makes that standard binding on developed and developing States alike (Carbonneau 1984; Tiburcio 2001:64–73).

61. International law on the treatment of foreign nationals is an important but imperfect tool for protecting the interests of migrants abroad. There are stringent preconditions to the exercise of diplomatic protection, which have been codified by the International Law Commission in its *Draft Articles on Diplomatic Protection* (ILC 2006). These include the existence of a wrong imputable to the defendant State; establishment of a genuine link of nationality between the aggrieved person and the claimant State; and exhaustion of all local remedies in the defendant State. Moreover, a State is not obliged to exercise its right to protect nationals who suffer injury abroad. This is a matter for the State’s discretion and can be influenced by political considerations unrelated to the merits of the claim. It should also be emphasized that the rules benefit only foreign nationals: they do not protect the significant class of migrants who become nationals of the receiving State and thus lose their alienage.

62. The extent to which the right of diplomatic protection is used by States to safeguard the interests of their national abroad is difficult to assess. This is partly because such claims are typically resolved at a diplomatic level and public records either do not exist or are incomplete. Nevertheless, an informative study of known claims for injuries to foreign nationals conducted

by Yates (1983) affirms the importance of this branch of international law. Yates identified 44 claims against States for ‘non-wealth’ injuries to foreign nationals since 1945, which fell into four broad categories: personal injury and death; denial of justice; failure to protect; and expulsion. For instance, in 1956 the United Kingdom protested at the proposed expulsion of British subjects from Egypt, and in 1972 the United Kingdom protested to the United Nations General Assembly that the threatened expulsion of 50,000 Asians from Uganda was ‘an outrage against standards of human decency’. The claims relating to expulsion are instructive in the present context because they reinforce the principle (see §§ 52–54) that foreign nationals cannot be expelled arbitrarily, either individually or *en masse* (Brownlie 1983:76–77).

63. The modest history of claims of diplomatic protection for ‘non-wealth’ injuries should not be seen as undermining the importance of these customary law principles in protecting the rights of migrants living outside their State of nationality. Apart from the paucity of documented information, noted above, Yates suggests that the apparent decline in the number of postwar claims may be due to underlying improvements in the treatment of foreign nationals; expansion of local remedies available to foreign nationals (which must be exhausted before diplomatic protection can be exercised); and the greater reluctance of States to make such claims against each other in an increasingly interdependent world. All three factors are likely to have had an impact, although the extent to which they have done so is difficult to quantify.

#### **(b) International human rights norms**

64. Since the creation of the United Nations in 1945 there has been a shift in international law from its traditional focus on the rights and duties of States to encompass the rights of individuals as legitimate subjects of international law (Scaperlanda 1993). This change has come about largely through the evolution of human rights norms in international and regional treaties, customary law, and the recommendations and declarations of international organizations.

65. The core human rights instruments are known as the International Bill of Rights, which comprises five documents: the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR), the International Covenant on Civil and Political Rights 1966 (ICCPR), and its two Optional Protocols. These Protocols deal, respectively, with individual complaints mechanisms and abolition of the death penalty. The International Bill of Rights is supplemented by a range of human rights treaties on specific topics, including the protection of particular classes of vulnerable persons (e.g. women, children) and the prohibition of particular types of conduct (e.g. race discrimination, torture).

66. The International Bill of Rights aims to promote respect for rights and freedoms of ‘all peoples and all nations’ (UDHR Preamble). For this reason, the instruments proclaim the rights of ‘everyone’ within the territory of a State and not merely individuals with a particular legal status as nationals or aliens. Generally speaking, migrants are thus included in the class of persons protected by the Covenants once they are lawfully within a State’s territory. As the United Nations Human Rights Committee has observed in its general comments on the ICCPR, ‘In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness’ (UNHCHR 1986). Two rights of particular relevance to migrants are the right to equality and the right to be free from discrimination on grounds that include race, national origin, or other status (ICCPR Art 2, 26; ICESCR Art 2).

67. However, the position of migrants is more nuanced in practice because many rights and freedoms are subject to permissible limitations which allow migrants to be treated less favorably than nationals (Fitzpatrick 2003). Under the ICCPR, these limitations may arise by express

derogation in times of public emergency (Art 4), or more commonly because specific rights must be balanced with a democratic society's interests in national security, public safety, public order, and the protection of public health or morals (e.g. Art 14, 21, 22). Under the ICESCR, the equal treatment of migrants may be even less secure because economic, social and cultural rights can be balanced against the wider state interest of 'promoting the general welfare in a democratic society' (Art 4).

68. In summary, there is a matrix of circumstances in which States can and do make lawful distinctions between migrants and others based on their status as foreign nationals ('alienage'). International law therefore permits a number of discriminatory practices affecting migrants, even if these practices are considered by some to be undesirable on moral grounds. However, conformity with international law still requires any differential treatment of migrants to be in pursuit of a legitimate aim, objectively justifiable, and reasonably proportionate (Goodwin-Gill 1978:78). These are important constraints on state action because they require state-sanctioned discrimination to be carefully tailored to achieve legitimate objectives, and thus to reach a fair balance between migrant rights and compelling state interests.

### **(c) Protection of migrant workers**

69. One category of migrants that has drawn the special attention of international law is migrant workers. In part this is because of the existence of an international agency whose mission has been to champion the cause of these workers. The ILO, established in 1919 as part of the Treaty of Versailles, recognizes in its constitution the need to protect the interests of 'workers employed when in countries other than their own' (Preamble). International attention is also a product of the practical significance of the issue. It has been estimated that of the 174.9 million migrants in the world in 2000, 86.3 million (49 per cent) were migrant workers, and many millions more were their family members (ILO 2004:7).

70. The ILO has drafted two treaties dealing with migrant labour. These are the Convention Concerning Migration for Employment (ILO No. 97), adopted in 1949, and the Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No. 143), adopted in 1975. Both conventions are supplemented by recommendations that flesh out the convention provisions.

71. Although it has been said that these ILO conventions are 'innovative, rich in detail and break new ground', they have been largely ignored by the international community (Cholewinski 1997:135). ILO No. 97 has been ratified by 48 States, and ILO No. 143 by only 23 States. This poor record of adoption is exacerbated by the fact that receiving States, in which the protections are most needed, are the States least likely to have ratified the conventions (see Annex IV). Different reasons have been given for their apparent lack of interest, including the generality of the conventions; preference for a State's own nationals in economic matters; and concern that treaty obligations may impede the regulation of illegal migration (Fitzpatrick 2003:177). A review by the ILO itself concluded that the conventions lacked relevance to contemporary migration issues such as regional integration, commercialization of recruitment, and the rise of female labour migration (Leary 2003:233).

72. The importance of the ILO conventions has been eclipsed by the conclusion of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (CMW). This comprehensive convention was drafted under the auspices of the United Nations General Assembly and adopts a new approach to migrant labour. In contrast to the ILO's methodology of minimum standards, the CMW focuses on the human rights of migrant workers, and thus promotes a degree of convergence with the human rights

norms discussed above (§§ 64—68). Many of the convention's provisions reiterate the civil and political rights of the ICCPR and the economic, social and cultural rights of the ICESCR, but the convention goes further than this in extending existing rights and creating new ones (Nafziger and Bartel 1991). It seeks to prevent and eliminate the exploitation of all migrant workers and members of their families throughout the entire migration process, including preparation to migrate, adjustment in the receiving country, and access to social and medical services.

73. The CMW required 20 ratifications to come into force (Art 87), which was achieved in 2003, after 13 years. Currently, 40 States are party to the convention, which is nearly as many States as have adopted ILO No. 97 over its 60 year lifetime. The expectation that a treaty negotiated by the United Nations General Assembly would attract more support than a new convention drafted by the ILO appears to have been fulfilled (Lönroth 1991:728). Nevertheless, the States that have ratified the CMW to date are predominantly States that send migrant labour abroad. This can be seen in Annex IV, which shows the parties classified according to (i) their status as net senders or receivers of migrants and (ii) their index of human development. Of the 40 State parties, 35 (88%) are net senders of migrants and only 5 (12%) are net receivers. None of the 33 countries ranked by the UNDP in the 'very high' category of human development is party to the CMW, whether as net sender or receiver. Yet it is the support of highly developed receiving States that will ultimately hold the key to the success of the CMW, as was the case with the ILO conventions.

74. Some commentators remain pessimistic about the prospect of any real progress on this front in the near future (Taran 2000:92–93; Leary 2003: 238). Many reasons have been given for the low ratification record of the CMW. These include: incompatibility with existing national legislation; technical and financial challenges of implementation; coordination problems between government departments because of shared responsibility for migrant workers; lack of awareness of the CMW; failure of the CMW to differentiate sufficiently between regular and irregular migrant workers; and general lack of political will (Pècoud and de Guchteneire 2004; Cholewinski 2007:266–267).

75. The limited state action on the ILO Conventions and the CMW has stimulated additional measures to secure protection for migrant workers through the development of soft law (Betts 2008). In 2005 the ILO adopted a *Multilateral Framework on Labour Migration* as a means of providing guidance to migration policy makers through a collection of principles, guidelines and best practices. The Framework adopts a rights-based approach to labour migration, but does so within a non-binding framework that recognizes the sovereign right of all States to determine their own migration policies. By way of example, Principle 9 states that national laws and regulations should be 'guided by the underlying principles' of ILO 97, ILO 143 and the CMW, and that these conventions should be fully implemented if they have been ratified. This softer language is more accommodating of both inherent differences between States and the need for gradual implementation. In time, the Framework may have the beneficial effect of shifting state practice towards the better protection of migrant workers, without the strictures of binding legal instruments. This will especially be so if world-best practices are disseminated widely and promoted through inter-agency programmes.

## 5 *Special Migration Issues*

76. The preceding Parts have addressed the primary rules of international law that affect the movement of migrants across state borders and the treatment of migrants within state borders. In addition to these rules, international law addresses a number of specialized issues of great significance to contemporary migration. This Part discusses four emerging areas of international regulation: the position of migrant women and children (§§ 77–85); measures to prevent human

smuggling and trafficking (§§ 86–91); the impact of international trade law on regional economic integration and labour migration (§§ 92–101); and environmental migration arising from climate change (§§ 102–109).

#### **(a) Migrant women and children**

77. Women and children are especially vulnerable migrant groups. In their capacity as ‘foreign nationals’, ‘human beings’ or ‘workers’, they are the beneficiaries of the general legal protections discussed above (see Part 4). But international law also affords them additional protections.

78. The special needs of child migrants have been recognized for many decades because of their vulnerability as refugees and their susceptibility to exploitation through smuggling and trafficking. The League of Nations acknowledged these concerns in its 1924 Declaration of the Rights of the Child, and several treaties concluded in the first half of the 20th century were designed to suppress the trafficking of children and the exploitation of their labour (Bhabha 2003). In the present day, it is the Convention on the Rights of the Child 1989 (CRC) that goes furthest in protecting the interests of children generally, including in the context of migration. The CRC has been ratified by 193 States and is the most widely subscribed human rights treaty in history.

79. Many of the CRC provisions echo the human rights articulated in the ICCPR. In the context of migration, these include the right to be free from discrimination; to leave any country and to enter one’s own country; and to acquire nationality (Art 2, 10, 7). These rights are finessed by the overarching requirement that in all actions concerning children, including actions taken by the State, ‘the best interests of the child shall be a primary consideration’ (Art 3). For example, the CRC imposes an additional requirement that applications by a child to enter or leave a State for the purpose of family reunification are to be dealt with ‘in a positive, humane and expeditious manner’ (Art 10).

80. Several rights enumerated in the CRC have special importance for migrant children (IOM 2008). These include the right to an education, which shall be ‘compulsory and available free to all’ at the primary level (Art 28); the right not to be deprived of liberty (e.g. by immigration detention) except as ‘a measure of last resort and for the shortest appropriate period of time’ (Art 37); the right not to be separated from one’s parents against one’s will unless it is in the best interests of the child (Art 9); and the right to family reunification following separation (Art 10). The latter two rights are expressions of a value that has been widely accepted since the Universal Declaration of Human Rights: the family is the fundamental unit of society and the natural environment for the growth and well-being of all its members, particularly children (Abram 1995; Jastram 2003). This is expressly reaffirmed in the Preamble of the CRC.

81. The IOM recently noted that international law on children’s rights has developed with considerable speed over the past two decades. Under the CRC, migrant children have gained a position as bearers of rights rather than mere objects of adult charity. Yet, in practice, discrimination often prevents migrant children from enjoying their rights, and there is ample room for development of the notion that children should be not only protected but respected as human agents (IOM 2008:73).

82. The position of migrant women has been more controversial. Historically, concerns about the rights of migrants have been focused on male workers, with the impact on women reduced to a subsidiary role as accompanying family members. However, the demography of international migration has changed. The increasing ‘feminization of migration’ is reflected in the fact that half of all international migrants are now women and that, in increasing numbers, women

migrate independently in search of jobs rather than as dependants of male workers (UN-INSTRAW 2007).

83. The patterns of international female migration differ fundamentally from those of men. A sizeable portion of female migrants are employed in the informal domestic sphere in receiving States—for example as household workers—reinforcing their cultural association with the home. These jobs are often poorly remunerated, socially marginalized, ineffectively regulated, and potentially abusive. The frequency of adverse experiences, despite years of regulation, has led some commentators to describe the international legal framework as a ‘pious but ineffectual’ response, which exacerbates the social and cultural inequalities of migrant women (Fitzpatrick and Kelly 1998:48, 50). An example of the special problems faced by women migrants is provided by a World Bank study of 17 countries that impose legal restrictions on the ability of women to obtain a passport or to travel outside their country by requiring the permission of their husbands or fathers (McKenzie 2005).

84. International treaties contain a panoply of protections for migrant women, at least in a formal sense. The Convention on Migrant Workers (CMW) includes many provisions that speak to the concerns of migrant women: the prohibition of cruel, inhuman or degrading treatment (Art 10); the prohibition of forced labour (Art 11); an entitlement to effective protection by the State against violence, threats or intimidation (Art 16); and a guarantee of working conditions in keeping with principles of human dignity (Art 70). Criticisms of the international framework are thus, in part, claims about the ineffectiveness of international legal norms in fostering real improvements in the day-to-day experience of migrant women. The absence of robust enforcement mechanisms for human rights at the international level compels the system to rely on the power of international organizations and NGOs to expose abuses and bring about incremental change by ‘naming and shaming’.

85. The legal protections for migrant women set out in the comprehensive framework of the CMW should not be taken to diminish the importance of other instruments for articulating the human rights of this vulnerable class of migrants. Other major human rights instruments—ICCPR, ICESCR, CERD and CEDAW—also embody core principles of equality and non-discrimination, and establish mechanisms for reporting, monitoring and promoting compliance (Satterthwaite 2005:3–4). Added to this is the more vigorous role now taken by a variety of United Nations bodies whose functions include gathering and analyzing data, raising awareness, and setting enlightened standards for the treatment of migrant women. These bodies include the Secretary-General; the General Assembly; the Human Rights Council (and its predecessor, the Commission on Human Rights); the Office of the High Commissioner for Human Rights; and the thematic mandates given under the auspices of the Human Rights Council, such as the Special Rapporteurs on the human rights of migrants, violence against women, and trafficking in persons.

### **(b) Human smuggling and trafficking**

86. Human smuggling and human trafficking are related but different activities. Smuggling is the illegal movement of persons across international borders for profit: the smuggler and the smuggled are ‘partners, however unequal, in a commercial transaction’ (Gallagher 2002:25). Trafficking is the illegal movement of persons across international borders by coercion or deception. The trafficker typically exploits the trafficked person by selling the latter’s labour or sexual services in the receiving State. The differences between the activities explain why most smuggled migrants are men, while most trafficked migrants are women and children. The latter are often coerced into prostitution, pornography, forced labour, child adoption, and even the sale of human organs. A global analysis of 21,400 trafficking victims in 2006 revealed that 66 per

cent were adult women and a further 25 per cent were children—girls and boys in equal proportion (UNODC 2009:11).

87. The full extent of global smuggling and trafficking is impossible to quantify but by many accounts these practices are widespread and have grown exponentially in recent years. Many reasons have been given for this increase, including the spread of war, persecution and violence; the decline in opportunities for legal migration; and the inadequacy of enforcement mechanisms. In addition, the involvement of organized crime has spawned a multibillion dollar global industry that justifies its description as ‘the fastest growing criminal market in the world’ (Kyle and Koslowski 2001; Castles and Miller 2003: 115–116).

88. Widespread international concern about these burgeoning practices has led to concerted international action, including the acceptance of new international laws under the ‘Vienna process’. In 2000, the United Nations adopted a Convention against Transnational Organized Crime, which included two Protocols to address human smuggling and trafficking. The Protocol against the Smuggling of Migrants by Land, Sea and Air came into force in 2004 and currently has 117 parties. The Smuggling Protocol contains some protections for smuggled migrants but—perhaps because they are assumed to be voluntary actors in an illegal enterprise—this is not its focal point. Rather, the Protocol seeks to criminalize smuggling and strengthen border controls to suppress smuggling.

89. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children came into force in 2003 and currently has 124 parties. The Trafficking Protocol also seeks to criminalize trafficking and strengthen border controls. However, it goes further than the Smuggling Protocol in promoting cooperation between countries to eradicate exploitative practices, and in protecting the human rights of the victims of trafficking. It has been said that the Protocol’s human rights protections are weak, mostly optional, and fall short of the norms articulated in other international instruments (Gallagher 2001; Muntarhorn 2003:156). The reason lies in the genesis of the Protocols in the Vienna process, which sought to further the interests of developed States in suppressing organized crime and facilitating orderly migration rather than advancing the human rights of individuals unwittingly involved in irregular migration (IOM 2008:62).

90. The Smuggling and Trafficking Protocols did not arrive in a legal vacuum. There are age-old treaties dealing with these topics. They include several instruments from the first half of the 20th century aimed at crime prevention and the suppression of trafficking in women and children. These include the International Convention for the Suppression of the White Slave Traffic 1910; the International Convention for the Suppression of the Traffic in Women and Children 1921, and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1950. These have been supplemented more recently by treaties that adopt a sectoral approach and give greater emphasis to human rights and the protection of victims. For example, both CEDAW (Art 6) and the CRC (Art 35) contain express provisions dealing with the trafficking of women and children, respectively. Layered upon these instruments are innumerable calls in international declarations for governments and others to take concerted action, internationally and regionally, against human smuggling and trafficking. Accordingly, there is no shortage of international legal principles—hard and soft—articulating the necessity for prompt and effective action.

91. What remains to be done is to move beyond the promulgation of new international laws to the comprehensive implementation and effective enforcement of existing norms at a national level. In this regard, a survey of legislative and institutional responses to human trafficking, conducted by the United Nations Office on Drugs and Crime in 2007–08, is instructive (UNODC

2009). Of the 155 States surveyed, approximately 80 per cent had introduced legislation incorporating a specific offence of trafficking in persons, which was more than double the response in 2003. In addition, 54 per cent of States had introduced a special anti-human trafficking police unit, 91 countries reported at least one human trafficking prosecution, and 73 countries reported at least one conviction. While this was hailed by UNODC as ‘tremendous progress’ in a short period of time, there is still a large gulf between criminalizing certain types of conduct and eradicating that conduct. Closing the gap between what States promise and what they deliver is a substantial challenge. Successful action needs to address both the demand and supply sides of the problem, with the object of converting irregular flows into orderly migration streams. Suggestions for action have included: robust national monitoring programs; better resourcing of national law enforcement; educational and awareness programs; and bolstering in-country and inter-country cooperation to counter trafficking and smuggling (Muntarbhorn 2003:165–166).

### **(c) International trade law and labour migration**

92. Running parallel to the above developments is a strain of international economic law that has the potential to impact on international migration in the years ahead. International trade law seeks to promote development through greater economic integration. Promoting the free movement of labour across international borders is one means of facilitating economic integration and delivering greater economic prosperity to sending and receiving States.

93. The liberalization of labour migration is sometimes negotiated through bilateral treaties, especially between States that are geographically proximate or have strong historical or cultural ties. Many regional agreements also exist to enhance economic integration, and these may extend to the free movement of people across borders (Trachtman 2007:155–156). The most liberal of these arrangements is Europe’s Schengen Convention, which allows for free movement of labour among participating States—effectively creating a single labour market in much of Europe. Other important examples of regional trade agreements with a labour mobility component are those in South America (MERCOSUR) and the Caribbean (CARICOM). Regional trade agreements are being developed elsewhere too, in a series of processes that show signs of convergence (ILO 2004:83–84). In Africa, the Common Market for Eastern and Southern Africa (COMESA) is expected to introduce a labour mobility regime for its 19 member States by 2025 (IOM 2003). In the Pacific, negotiations are underway to extend the Pacific Island Countries Trade Agreement 2001 (PICTA) to include trade in services and, in particular, the temporary movement of natural persons. The purpose of the proposed extension is to promote economic development by enabling Pacific States to source labour from a bigger pool and meet skills shortages from within the region.

94. In addition to bilateral and regional arrangements, international trade agreements have the potential to impact on labour migration. For much of its history, international trade law did not concern itself with the movement of labour. The General Agreement on Tariffs and Trade 1947 (GATT) was concerned solely with trade in goods, and early attempts to expand its ambit were unsuccessful (Hoekman and Mattoo 2007). In the 1980s, the United States sought to broaden trade liberalization to include trade in services. This expansion was initially resisted by developing States, which were concerned about the impact of opening their economies to service providers from developed States (Islam 2006:344). The interests of developed States ultimately prevailed when agreement was reached in the Uruguay round (1986–1994) for a comprehensive multilateral treaty on trade in services. The result was the General Agreement on Trade in Services 1994 (GATS), which came into force on 1 January 1995, contemporaneously with the establishment of the World Trade Organization (WTO). GATS currently binds 153 States.



95. GATS is a framework agreement that rests on three pillars. First, it contains basic obligations that apply to all WTO members. The most important of these are the non-discrimination principle embodied in ‘most favoured nation’ (MFN) treatment (Art II), and the requirement of transparency of regulations affecting trade in services (Art III). The second pillar comprises the binding commitments that each State makes for the liberalization of trade in services. The extent to which GATS facilitates trade in services thus depends on the range and depth of commitments given by States in successive rounds of trade negotiations (Art XIX). These commitments can be either horizontal (across all sectors) or specific (on a sectoral basis). The third pillar comprises special arrangements that have been made in individual service sectors. These are dealt with in a series of annexes dealing with air transport services, financial services, maritime transport services, telecommunications and, most relevantly, movement of natural persons.

96. The multi-layered structure of GATS obligations is complex and the operation of its provisions can be unclear (Hoekman and Mattoo 2007:133–144). The essence of the agreement, so far as it relates to labour migration, can be summarized as follows. Under the first pillar, GATS covers all measures affecting ‘trade’ in ‘services’. GATS takes a wider view of ‘trading’ than is necessary in relation to trade in goods. Internationally traded goods must physically cross a frontier, but this is not true of traded services. Under GATS, trade in services covers four modes of supply (Art I (2)). Supposing ‘State A’ to be the supplying State and ‘State B’ to be the receiving State, the four modes are the supply of a service:

- from the territory of State A into the territory of State B (*cross border*);
- in the territory of State B to the service consumer of State A (*consumption abroad*);
- by a service supplier of State A, through commercial presence in the territory of State B (*commercial presence*); and
- by a service supplier of State A, through presence of a national of State A in the territory of State B (*presence of natural persons*).

The last mode is known as Mode 4, and it is the mechanism through which GATS demonstrates its concern for the movement of people across international borders to provide services that are traded (for money) in the receiving State. A hypothetical example would be a Canadian engineering firm providing a Canadian engineer to supply services in India through the engineer’s physical presence in India.

97. In relation to the second pillar, it is important to note that GATS does not require a State to open its borders to foreign labour: States need only do so to the extent that they have made binding commitments with respect to market access, national treatment, or other matters (Art XVI–XVIII). Once a binding commitment has been made, core GATS principles will apply, such as non-discrimination under the MFN clause. This underpins the claim that international trade law is less concerned with eliminating obstacles to the free movement of labour than ensuring that any such obstacles are reciprocal and non-discriminatory. For example, suppose State B makes a binding commitment to allow the entry of foreign engineers and health professionals for a period of up to one year. This operates as a guarantee to economic agents in other States that the conditions of entry and operation in the local market will not be changed to their disadvantage. If State B then accepts engineers or health professionals from State A, the MFN clause would require State B to afford treatment ‘no less favorable’ to engineers and health professionals from other WTO members.

98. The nature of labour migration facilitated by GATS depends on the schedules of commitments that governments make under Mode 4. Thus, although GATS is neutral on its face

as to whether it facilitates skilled, semi-skilled or unskilled migration, the actual migration flows are determined by the preferences of States as revealed in their undertakings in successive trade rounds. Empirically, State commitments so far have been heavily weighted towards facilitating the migration of highly-skilled persons (Charnowitz 2003:248-249). Of the horizontal commitments, about 42% relate to intra-company transfers, 28% to executives and managers, 13% to visitors involved in sales negotiations, 10% to other business visitors, and 7% to independent contractors. Significantly for developing States, only about 17% of all commitments (horizontal or specific) are directed towards allowing market access for low-skilled personnel (which developing States have in comparative abundance). Even then, access is often further limited by an economic needs test in the receiving State.

99. Under the third pillar, the Annex on movement of natural persons contains several provisions that qualify the general obligations described above. First, GATS does not apply to measures regarding ‘citizenship, residence or employment on a *permanent* basis’. In short, freedom of movement is to be liberalized only for short-term or temporary migrations. Secondly, GATS does not prevent States from applying measures to regulate the ‘integrity’ of their borders, or the ‘orderly movement’ of natural persons across their borders, provided these measures do not impair the benefits accruing to other States under a specific commitment. For example, the exclusion of a prospective migrant because of his or her prior criminal history would be a permissible immigration control despite its restrictive effect on trade in services. Thirdly, and most curiously, GATS does not apply to measures affecting natural persons who seek access to the *employment* market of a member State. The meaning of this exclusion is unclear, but it may be designed to prevent foreigners from placing themselves on the local employment market—a prohibition that may not be infringed if the foreign worker is self-employed or works for a foreign company that operates a branch in the host country (Charnowitz 2003:243).

100. The importance of GATS to labour migration does not lie in the additional factor mobility that GATS has facilitated since 1995, for the empirical impact of the Agreement appears to have been small so far. Its significance lies rather in the creation of an institutional framework for future negotiations, and in the commitment ‘in principle’ to liberalize trade in services, including the movement of natural persons (Matsushita *et al* 2006:674–675). Further liberalization is currently being canvassed in the Doha Round of trade negotiations, which commenced in 2000 and still continues (Leal-Arcas 2007). In 2005, the WTO Hong Kong Ministerial Conference issued a declaration identifying the need for ‘new and improved commitments’ in two areas of Mode 4 supply: (i) removing or substantially reducing any economic needs test, and (ii) indicating the prescribed duration of stay and the possibility of renewal (WTO 2005). WTO Members are now in the process of making individual offers and requests for new binding commitments, but there appears to have been little movement. The WTO has reported that offers so far have focused on sectors and modes that already dominate existing schedules, ‘with relatively few significant changes in the pattern of bindings’ (WTO 2009).

101. The WTO’s legal norms on the movement of persons are in the process of evolution and will no doubt be refined during the Doha trade round. One avenue for development is the obligation on members to facilitate the greater participation of developing States in world trade, for example by liberalizing market access in sectors and modes of supply of export interest to those States (Art IV). This might be achieved by developed States opening their borders to larger temporary migrations of low-skilled workers from developing States. It has also been said that better progress might be made if the WTO took a more inclusive and people-centered approach which allows greater participation by other stakeholders and links more closely with existing legal regimes for the protection of human rights (Charnowitz 2003:251-253; Klein Solomon 2007).

#### **(d) Environmental migration**

102. There is an emerging consensus among scientists that the world's climate system is warming, as evidenced by increases in average air and ocean temperatures, widespread melting of snow and ice, and rising average sea levels (Intergovernmental Panel on Climate Change 2007). Although past climate change has been a fact of human and ecological history, there is a widely held concern that most of the warming observed over the past 50 years is attributable to human activities such as deforestation and greenhouse gas emissions.

103. By 2050, it is predicted that between 150 and 200 million people will be displaced from their homes by global warming due to disruption to rainfall, drought, rising sea-level, and coastal flooding (Myers and Kent 1995; Stern 2006). This prediction is tentative but daunting: it represents a ten-fold increase in today's entire population of refugees and internally displaced persons (Brown 2008). People displaced by environmental change are sometimes described as 'environmental refugees', as they abandon their homelands to seek sanctuary elsewhere, with little hope of a foreseeable return (Myers 1993:752). Although widely popularized, this term has also been vigorously criticized (Kibreab 1994).

104. States sometimes give special immigration status to people displaced by catastrophic events, as an act of humanitarian assistance, but no government has yet expressed its willingness to accept large flows of persons displaced by long term climate processes (Brown 2008). For example, Australia and New Zealand have so far rejected requests by Kiribati and Tuvalu to accept their entire populations (about 100,000 and 10,000 respectively) when the rising sea-level renders these tiny atoll States of the Pacific uninhabitable.

105. An important question for the years ahead is whether States should be obliged to accept large populations of environmental migrants who are displaced when their homelands are no longer fit for habitation. The question has ethical and legal dimensions. Ethically, where does moral responsibility lie for accepting persons displaced by anthropogenic climate change, especially when those affected have made a negligible contribution to the global warming that necessitates their relocation? Legally, what rights and obligations exist under international law to deal with the consequences of such large-scale environmental processes?

106. Existing international law is an inadequate basis for dealing with the challenges of environmental migration. Although people displaced by climate change are entitled to the panoply of human rights protections conferred by treaty and customary law, international law does not yet recognize them as a group deserving special legal protection in their own right. A recent survey of legal principles suggests many obstacles (Saul and McAdam 2009). Environmental migrants do not fit into the framework of *international refugee law*. Typically they are internally displaced (not outside their country of origin), and their displacement is not the result of persecution on prohibited grounds (race, religion, nationality, political opinion, or membership of a particular social group).

107. Environmental migrants are unlikely to gain from recourse to *international environmental law*. Although customary law obliges a State to refrain from using its territory in a way that causes environmental harm beyond its borders (*Trail Smelter Arbitration (United States v Canada)* 1938, 1941), there are difficulties in establishing causation between greenhouse gas emissions and climate change; in quantifying the damage that results from gradual environmental processes; and in establishing that migration is an appropriate remedy if any breach of an obligation is established.

108. Environmental migrants are also unlikely to gain from recourse to the framework of *international humanitarian law*. Most environmental migration is not connected with armed

conflict. Even where climate change does contribute to armed conflict (e.g. due to competition for dwindling resources), international humanitarian law pays little attention to the causes of displacement, and its rules regarding the protections afforded to displaced persons are sparse.

109. If international law is to play a role in relation to environmental migration it is a role that is clearly in a lengthy process of development. Existing legal principles will have to be adapted to new circumstances, or new legal norms will have to be crafted, to give the humanitarian need of environmentally displaced persons a solid legal foundation. It is important, however, to avoid extravagant claims about the present reach of international law by confusing wishful legal thinking with the harsher reality of state practice (compare Goodwin-Gill 1986 and Hailbronner 1986).

## **6 *Role of International Institutions***

110. Before the advent of the United Nations, international law relating to migration evolved slowly as customary law responded to changing state practice, and as occasional treaties were concluded and entered into force. International institutions were largely absent from this process because, until the 20th century, they were largely non-existent (Klabbers 2002:16-23). After the establishment of the League of Nations in 1919 and the United Nations in 1945 the situation changed radically. There has been a proliferation of international institutions with widely differing aims, functions and memberships. Estimates of their number differ because of variations in classification, but there may be 500-700 public international organizations and many thousands more private international organizations or NGOs (Amerasinghe 2003).

111. It has been said that it is unusual for a new problem in international relations to be considered without, at the same time, some international institution being proposed to deal with it (Amerasinghe 2003:7). International migration has been no exception, and the problems generated by migration have added both to the number of institutions and to the range of functions performed by existing ones. These institutions have shown variegation across all the usual axes of classification: public or private; open (universal) or closed; supranational or international; and general or sectoral in their functions.

112. The chief characteristics of international organizations, properly so called, are that they are established under international law by the agreement of States (usually on the basis of a treaty) and embody an organ with a will that is distinct from the will of individual members (Alvarez 2005:4–17). To these bodies must be added the large number of specialized institutions however named—commissions, committees, offices, and councils—that are established under the auspices of an international organization but are not international organizations in their own right.

113. Annex V gives a selective list of international institutions that are important actors in the field of migration, with dates of their establishment and a summary of their mandates. Many of these institutions (e.g. the United Nations General Assembly) are generalist in nature and deal with migration issues in the course of discharging broader functions. Others (e.g. the Special Rapporteur on the Human Rights of Migrants) are sectoral and deal with migration issues alone. The institutions also differ in the source of their mandates, some being defined directly by treaty while others by resolutions of United Nations organs. Despite the variety of institutions, two stand out as being of particular importance to international migration, and are described below.

### **(a) United Nations High Commissioner for Refugees**

114. The Office of the United Nations High Commissioner for Refugees (UNHCR) was established by General Assembly resolution in 1950. Its principal concern was to tackle the

refugee problem arising from war in Europe, and its work was underpinned by the Refugee Convention that was concluded in the following year. UNHCR was not the first organization of its kind. The League of Nations had established a High Commissioner for Refugees in 1921 to deal with the exodus of Russians after the 1917 Revolution, and other bodies were established by the Allies in the period 1945–1950.

115. Under its Statute, UNHCR is to provide international protection to refugees and seek permanent solutions for the problem of refugees by facilitating their voluntary repatriation or assimilation in new communities (Art 1). Importantly, the work of UNHCR is considered ‘humanitarian and social’ and is to be entirely non-political in character (Art 2). The mandate of UNHCR was initially constrained by the Statute’s definition of a refugee which, like the Refugee Convention itself, was directed principally to events arising before 1951 (Art 6). However, the mandate was capable of being extended by the General Assembly or the Economic and Social Council (Art 3), and the Cold War soon made apparent the need for flexibility.

116. The first extension of UNHCR’s mandate came in 1956, when it was authorized to respond to the Hungarian refugee crisis following the quashing of the anti-Communist uprising by the Soviet Union. Other extensions followed to deal with Algerians in Morocco and Chinese in Hong Kong (Gallagher 1989). In 1967 a Protocol was agreed for the purpose of removing the temporal and geographic limitations of the 1951 Convention. This put UNHCR in a better position to deal with massive displacements of people that were occurring in the developing world as a result of decolonization, independence movements, civil war and internal disturbances (Barnett 2002). The extension of UNHCR’s activities beyond the strictures of its founding Statute has occasionally drawn protest from individual States but, overwhelmingly, the international community has acquiesced in these practices or encouraged them through General Assembly resolutions authorizing UNHCR to use its ‘good offices’ to assist other persons in need of protection (Goodwin-Gill 1983: 6–12).

117. The complexion of the ‘refugee’ problem has changed over the years in its causes, scale and geography. An important development has been the growth in the number of people who are displaced and in need of protection, but who have not crossed an international frontier and therefore do not fall within the Convention definition of a refugee. In 2007, the largest groups of internally displaced persons (IDPs) were located in the Sudan (5.3 million), Colombia (3 million) and Iraq (2.2 million), but there were also significant populations in Algeria, Turkey and the Congo (UNHCR 2007b). Through flexible interpretation of its Statute, UNHCR has also extended its protection to IDPs, and its activities in this respect are complemented by the Secretary-General’s Representative on the Human Rights of Internally Displaced Persons, and supported by the *Guiding Principles on Internal Displacement*. By agreement with other specialized agencies of the United Nations, since 2005 UNHCR has assumed lead responsibility for protection, emergency shelter, and camp coordination and management of IDPs.

118. Today UNHCR exercises its mandate over 31.7 million ‘persons of interest’, including 11.4 million refugees, 13.7 million internally displaced persons, and 2.9 million stateless persons (UNHCR 2008). From a hesitant start—with a temporary mandate, small budget, and qualified national support—UNHCR has grown into the preeminent international agency dealing with refugee issues on a global basis, and commands an annual budget in the order of US \$1,500 million.

## **(b) International Organization for Migration**

119. The International Organization for Migration (IOM) was established in 1951 but assumed its present name only in 1989. It was born out of similar concerns to those that led to the

formation of UNHCR—the need to resettle millions of Europeans displaced by the Second World War. In its original role as a logistical agency, it helped to transport and resettle nearly one million Europeans during the 1950s, largely to the New World. From these origins, IOM has broadened its scope to become what it describes as ‘the leading international agency working with governments and civil society to advance the understanding of migration issues, encourage social and economic development through migration, and uphold the human dignity and well-being of migrants’. Today IOM conducts operations on a global scale, employing around 7000 people, with an annual budget of US \$1,000 million.

120. Unlike UNHCR, IOM is not an entity within the United Nations system but an intergovernmental organization (IGO) whose members are bound by a constitution. Under that constitution, membership is confined to States with a ‘demonstrated interest in the principle of free movement of persons’, together with States that were previously members of the Intergovernmental Committee for European Migration. There are currently 125 member States, and 94 other entities have observer status (18 States and 76 IGOs/NGOs).

121. The mandate of IOM is set out in Art 1 of its revised constitution of 1989. Its principal functions are: to make arrangements for the organized transfer of migrants, refugees and displaced persons; to provide migration services to States upon request (including services for voluntary return migration or repatriation); and to provide a forum for the exchange of views and coordination of efforts on international migration issues. The issue of coordination is a critical one. This is reflected in the requirement that IOM cooperate closely with international organizations concerned with migration, refugees and human resources to facilitate the coordination of international activities.

122. This mandate suggests that IOM and UNHCR have significant points of distinction. While the UNHCR addresses forced migration using a rights-based approach and a formal protection mandate, IOM addresses forced and voluntary migration with a service-based orientation and no formal protection mandate. Nevertheless, as the boundaries between voluntary and forced migrations become increasingly blurred (the ‘asylum-migration nexus’), the roles of UNHCR and IOM are increasingly likely to overlap. This can be seen in the protective role exercised by IOM in relation to refugees under its 1989 constitution (Perruchoud 1992).

### **(c) Proliferation or Consolidation?**

123. While UNHCR and IOM are the preeminent migration organizations, a broad range of other international institutions have responsibilities or interests in migration. The proliferation of international institutions concerned with migration has some positive attributes. The institutions can gain expertise, develop effective networks, and focus on their specialized tasks without the bureaucracy and inefficiency that often attends larger organizations with their long chains of command (Schermers 2001: 551). However, proliferation of specialized institutions can also lead to gaps and overlaps. The overlaps can give rise to conflicts between bodies, duplication of effort, and wasted resources (Blokker 2001). An instance of these difficulties is the tension that arose between the ILO and the United Nations General Assembly in negotiation of the Migrant Workers Convention, in which the ILO’s historical role was side-stepped by developing States (Böhning 1991).

124. The choice between proliferation and consolidation of migration institutions cannot be understood without considering calls for a new international regime for migration. The calls for change are often based on familiar arguments: globalization has generated new problems that cannot be solved within national borders, and effective regulation requires an international response. Bimal Ghosh, for example, has advocated a regime based on ‘regulated openness’,

which would be achieved through a comprehensive multilateral framework that balances the interests of all stakeholders. The regime would be based on three pillars—(i) a set of shared objectives; (ii) an agreed normative framework to ensure coherence of action; and (iii) establishment of a ‘coordinated institutional arrangement, including a monitoring mechanism’, whose details are not elaborated (2000:227). In 2002 an American refugee lawyer, Arthur Helton, went further and advocated a ‘World Migration Organization’ whose function would be to make effective, generous and humane global migration policy, free from the narrow political considerations that typically motivate individual States. Such an agency would support, not supplant, the work of UNHCR, IOM and ILO.

125. The question of appropriate global institutions was expressly considered by the Global Commission on International Migration (GCIM), which was mandated to provide a framework for the formulation of a coherent, comprehensive and global response to international migration. Reporting to the United Nations Secretary-General in 2005, the Commission considered both short and long-term solutions. The GCIM took the view that in the long term:

‘a fundamental overhaul of the current institutional architecture relating to international migration will be required, both to bring together the disparate migration-related functions of existing UN and other agencies within a single organization and to respond to the new and complex realities of international migration’ (GCIM 2005:75).

The options for institutional reform included creating a new agency (e.g. by merging IOM and UNHCR); designating a lead agency from among existing agencies (e.g. UNHCR or ILO); or bringing IOM into the United Nations system to take a lead on the issues of voluntary migration. Despite its apparent preference for institutional consolidation, the GCIM made no specific recommendation on this issue, suggesting only that the matter be taken forward at an appropriate time in the context of ongoing reform of the United Nations.

126. An alternative to consolidating existing institutions is consolidating the operational efforts of those institutions. The GCIM supported this as a short-term goal and recommended the establishment of an inter-agency facility to strengthen cooperation between all international institutions dealing with migration (GCIM 2005:76-78). This suggestion was implemented by the Secretary-General in 2006 with the establishment of the Global Migration Group (GMG), which was built on an existing group with a more limited membership. The establishment of the GMG, which now comprises 14 relevant agencies, is an encouraging sign of greater cooperation. The GMG builds on other inter-State and inter-agency initiatives in recent years, such as the Berne Initiative launched by the Swiss Government in 2001, and the United Nations High Level Dialogue which commenced in 2006 (Klein Solomon 2007; Nielsen 2007).

127. Another approach, which deserves further consideration, is to strike a compromise between building new organizations and building new processes for coordination. In some areas of United Nations activity with cross-agency impact, the need for better coordination of effort has been addressed by creating new programmes, without new organizations. An example is UNAIDS (formally, the Joint United Nations Programme on HIV/AIDS), which was established in 1994 as a collaboration between ten United Nations agencies to coordinate the global fight against the disease. This more flexible structure was established because of the wish to concentrate immediately on substance and not lose time in ‘institutional tomfoolery’ (Blokker 2001:8). Using such precedents, it is possible that a ‘Joint United Nations Programme on International Migration’ might in time be a useful outgrowth of the coordination efforts of the GMG, without running the gauntlet of establishing a new international organization under the aegis of the United Nations.

128. Regardless of whether the institutional architecture that underpins international migration continues with its present plurality of institutions or evolves into a more streamlined system, the ongoing importance of international institutions should be affirmed. Over time they have changed the sources of international law, the substantive content of that law, the actors that make the laws, and compliance with those laws (Alvarez 2005:583–650). In the context of migration, international institutions will continue to provide vital forums for consolidating existing principles of international law and progressively developing new principles.

## 7 *Conclusion*

129. International law is an imperfect framework for regulating international human migration. It has developed in a piecemeal fashion over a very long period to deal with issues of concern at particular points in human history. While there are many gaps and overlaps, it is a system in evolution and there have been many important advances in recent decades.

130. There has been a gradual shift in the relative importance of different sources of international law in the field of migration, which parallels the shift in other fields. Treaties have become progressively more important in shaping developments over an ever larger number of specialized migration topics. Nevertheless, customary law remains a significant source of binding legal norms in areas that have never been codified by treaty, and for States that lie outside a particular treaty regime.

131. While the number of concluded treaties on migration continues to grow, ratification of those treaties remains poor in some subject areas, and in some geographic regions. Thus, not only are treaties imperfect in their potential reach, but their impact is limited in practice by the number of States that have accepted the treaty obligations. For example, one of the most widely ratified migration treaties—the Refugee Convention—has been adopted by only three-quarters of the international society of States. In other areas (such as certain ILO conventions), the number of ratifications is so low as to call into question the utility of having the instruments at all.

132. A further challenge to the effectiveness of international migration law is non-compliance with treaty obligations, even among those States that have accepted them. A case in point is the increasing variety of ways in which States have sought to push back asylum seekers from their frontiers—in possible breach of the obligation of non-refoulement under the Refugee Convention—through physical barriers, border closures, summary ejection and interdiction (Hathaway 2005:279–300). Legal regimes can only be truly effective if States comply both with the letter and spirit of the law. Quite commonly, compliance with international legal obligations is brought about by ‘naming and shaming’ in international forums—a process whose effectiveness has been improved immeasurably by actors in the non-government sector. International law has been forever changed by the empowerment of NGOs (Alvarez 2005:611), but there is a continuing need for these informal compliance mechanisms to be complemented by effective legal measures.

133. Since the Second World War there has also been an important shift in the language of international migration law, away from a state-centric view of the relevant rules towards one that recognizes individuals as legitimate subjects of international law. An example of this phenomenon is the way in which international human rights norms, with their central focus on the individual, have gradually supplanted customary law principles regarding the standard of treatment that a State must afford to foreign nationals within its territory. This shift has been of great benefit to migrants, who are now generally entitled to the protection of international norms (such as non-discrimination) wherever they sojourn.



134. International agreements are not the only locus of change in migration law. Many significant developments are today arising from regional regimes pursuant to agreements for closer economic integration and the liberalization of trade in services. These arrangements have operated as regional safety valves by facilitating access to economic opportunities across international borders.

135. Despite the shortfalls of the existing arrangements, international institutions, in all their variety, are instrumental in shaping international migration law and policy. Not only do they cast a watchful eye on compliance with existing norms, but they mold the debate on migration by setting agendas that move states incrementally towards more enlightened policies (Martin 1989:551).

136. States are unlikely anytime soon to renounce their treasured power to influence the size and composition of their populations by regulating the flow of people across their borders. Yet international law has an unquestionable role to play in shaping those movements (Henkin 1979). It empowers States by giving legal legitimacy to their role in controlling the flow of people across borders. It constrains States by articulating generally accepted norms of behavior, which reflect the often opposing interests of other stakeholders. It sets aspirational standards for international society and drives an agenda for enlightened change in the treatment of different classes of migrants. Over time, goals set in a spirit of optimism may come to operate as real constraints on state behavior (Martin 1989). And it provides an institutional framework for promoting compliance with international norms and facilitating their progressive development.

137. From a demographic perspective it is difficult to quantify the influences of international law on international migration. Some of these influences operate at a micro level in individual cases—an unwanted foreigner fighting expulsion or an individual asylum seeker claiming protection from political persecution. The operation of international law at this level is important for the dignity of individuals who are, at root, the ultimate subjects of all laws. But the importance of international law runs deeper. At a macro level, international law underpins the modern system of States, comprised of territorially bounded populations, and thus gives an explanation for the absence of wholesale relocation of human populations across international boundaries. Instead, human migration has been, and will remain, a nuanced affair in which there are many different legal justifications for inward and outward movements. The continuing importance of international migration in the modern era suggests that international law is ultimately a flexible and adaptive framework that has responded to the engines of globalization and economic growth, while seeking to protect the human rights of all people.

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## ***Annex II      Abbreviations***

CARICOM	Caribbean Community
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women 1979
CERD	Convention on the Elimination of All Forms of Racial Discrimination 1966
CMW	Convention on Migrant Workers 1990
COMESA	Common Market for Eastern and Southern Africa
CRC	Convention on the Rights of the Child 1989
GATS	General Agreement on Trade in Services 1994
GATT	General Agreement on Tariffs and Trade 1947
GCIM	Global Commission on International Migration
GMG	Global Migration Group
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic Social and Cultural Rights 1966
ICJ	International Court of Justice
ICPD	International Conference on Population and Development
IDP	Internally displaced person
IGO	Inter-government organization
ILC	International Law Commission
ILO	International Labour Organization
IOM	International Organization for Migration
MERCOSUR	Southern Common Market ( <i>Mercado Común del Sur</i> )
MFN	most favoured nation
NGO	Non-government organization
PCIJ	Permanent Court of International Justice
PICTA	Pacific Island Countries Trade Agreement 2001
UDHR	Universal Declaration of Human Rights 1948
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
WTO	World Trade Organization



*Annex III International Instruments and their Status*

<b>Year</b>	<b>Instrument</b>	<b>Reference</b>	<b>Open for Signature</b>	<b>Entry into Force</b>	<b>Parties (at 12/02/2009 unless specified)</b>
<b>1648</b>	Treaty of Westphalia		—	—	—
<b>1910</b>	International Convention for the Suppression of the White Slave Traffic	3 LNTS 278	4/05/1910		41
<b>1921</b>	International Convention for the Suppression of the Traffic in Women and Children	53 UNTS 39	30/09/1921	24/04/1950	46
<b>1924</b>	Declaration on the Rights of the Child		—	—	—
<b>1945</b>	Charter of the United Nations		26/06/1945	24/10/1945	49 (+142 admitted members)
<b>1947</b>	General Agreement on Tariffs and Trade	55 UNTS 187	30/10/1947	1/01/1948	See WTO
<b>1948</b>	Universal Declaration of Human Rights	GA Res 217(III)	—	—	—
<b>1949</b>	Convention Concerning Migration for Employment	ILO No. 97	1/07/1949	22/01/1952	48 (7/01/2009)
<b>1950</b>	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	96 UNTS 271	21/03/1950	25/07/1951	81
<b>1950</b>	Statute of the Office of the United Nations High Commissioner for Refugees	GA Res 428 (V)	—	—	—
<b>1951</b>	Convention Relating to the Status of Refugees	189 UNTS 150	28/07/1951	22/04/1954	144
<b>1966</b>	International Convention of the Elimination of All Forms of Racial Discrimination	660 UNTS 195	7/03/1966	4/01/1969	173

<b>Year</b>	<b>Instrument</b>	<b>Reference</b>	<b>Open for Signature</b>	<b>Entry into Force</b>	<b>Parties (at 12/02/2009 unless specified)</b>
<b>1966</b>	International Covenant on Civil and Political Rights	999 UNTS 171	16/12/1966	23/03/1976	164
<b>1966</b>	International Covenant on Economic Social and Cultural Rights	993 UNTS 3	16/12/1966	3/01/1976	160
<b>1969</b>	Vienna Convention of the Law of Treaties	1155 UNTS 331	23/05/1969	27/01/1980	108
<b>1975</b>	Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers	ILO No. 143	24/06/1975	9/12/1978	23 (7/01/2009)
<b>1979</b>	Convention on the Elimination of All Forms of Discrimination against Women	1249 UNTS 13	1/03/1980	3/09/1981	185
<b>1989</b>	Convention on the Rights of the Child	1577 UNTS 3	20/11/1989	2/09/1990	193
<b>1990</b>	Convention Implementing the Schengen Agreement		19/06/1990		
<b>1990</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	Doc. A/RES/45/158	18/12/1990	1/07/2003	40
<b>1994</b>	Agreement Establishing the World Trade Organization		15/04/1994	1/01/1995	153 (28/07/2008)
<b>1994</b>	General Agreement on Trade in Services		15/04/1994	1/01/1995	153 (28/07/2008)
<b>2000</b>	Protocol against the Smuggling of Migrants by Land, Sea and Air	Doc. A/55/383	15/11/2000	28/01/2004	117
<b>2000</b>	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	Doc. A/55/383	15/11/2000	25/12/2003	124

<b>Year</b>	<b>Instrument</b>	<b>Reference</b>	<b>Open for Signature</b>	<b>Entry into Force</b>	<b>Parties (at 12/02/2009 unless specified)</b>
<b>2000</b>	United Nations Convention against Transnational Organized Crime	2225 UNTS 209	15/11/2000	29/09/2003	147 (13/01/2009)
<b>2001</b>	Pacific Island Countries Trade Agreement	[2001] PITSE 4	18/08/2001	13/04/2003	10 (12/01/2009)

*Annex IV State Parties by Migration Status and Development Level*

	<b>Human Development Index (HDI)</b>			
	<b>Low (&lt;0.5)</b>	<b>Medium (≥0.5 – &lt;0.8)</b>	<b>High (≥0.8 – &lt;0.9)</b>	<b>Very High (≥0.9)</b>
<b>1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) (N=40)</b>				
Receiving countries (N=5)	Uganda (N=1)	Ghana, Syrian Arab Republic (N=2)	Argentina, Libyan Arab Jamahiriya (N=2)	—
Sending countries (N=35)	Burkina Faso, Guinea, Lesotho, Mali, Rwanda, Timor-Leste (N=6)	Algeria, Azerbaijan, Belize, Bolivia, Cape Verde, Colombia, Egypt, El Salvador, Guatemala, Honduras, Jamaica, Kyrgyzstan, Mauritania, Morocco, Nicaragua, Paraguay, Peru, Philippines, Senegal, Sri Lanka, Tajikistan, Turkey (N=22)	Albania, Bosnia & Herzegovina, Chile, Ecuador, Mexico, Seychelles, Uruguay (N=7)	—
<b>1975 Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO 143) (N=23)</b>				
Receiving countries (N=6)	Uganda (N=1)		Venezuela (N=1)	Norway, San Marino, Slovenia, Sweden (N=4)
Sending countries (N=17)	Benin, Burkina Faso, Guinea, Togo (N=4)	Armenia, Cameroon, Kenya, Philippines, Tajikistan (N=5)	Albania, Bosnia & Herzegovina, Macedonia, Montenegro, Serbia (N=5)	Cyprus, Italy, Portugal (N=3)
<b>1949 Convention Concerning Migration for Employment (ILO 97) (N=48)</b>				

Receiving countries (N=17)	Malawi, Nigeria, Zambia (N=3)	Tanzania (N=1)	Malaysia, St Lucia, Venezuela (N=3)	Belgium, France, Germany, Israel, Netherlands, New Zealand, Norway, Slovenia, Spain, United Kingdom (N=10)
Sending countries (N=31)	Burkina Faso (N=1)	Algeria, Armenia, Belize, Cameroon, Dominica, Grenada, Guatemala, Guyana, Jamaica, Kenya, Kyrgyzstan, Madagascar, Moldova, Tajikistan (N=14)	Albania, Bahamas, Barbados, Bosnia & Herzegovina, Brazil, Cuba, Ecuador, Macedonia, Mauritius, Montenegro, Serbia, Trinidad & Tobago, Uruguay (N=13)	Cyprus, Italy, Portugal (N=3)

**Notes:** Classification of countries by HDI is based on data supplied to the author by UNDP. Classification of countries as net senders or receivers of migrants is based on World Bank data, discussed in Parsons et al (2007), and supplied to the author by UNDP.

*Annex V Relevant International Institutions and their Mandates*

<b>Year Established</b>	<b>Institution</b>	<b>Summary of Mandate</b>
<b>1919</b>	International Labour Organization	To improve the conditions of labour for the advancement of world peace and social justice, including the protection of the interests of workers when employed in countries other than their own <b>(ILO Constitution, Preamble, Art 1)</b>
<b>1945</b>	United Nations General Assembly	To initiate studies and make recommendations for the purpose of: (a) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; (b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all <b>(UN Charter 1945, Art 13)</b>
<b>1945</b>	International Court of Justice	To give binding determinations and advisory opinions as the principal judicial organ of the United Nations <b>(UN Charter 1945, Ch XIV; Statute of the ICJ, Art 36, 65)</b>
<b>1947</b>	International Law Commission	To promote the progressive development and codification of international law, in its role as a subsidiary organ of the UN General Assembly <b>(UNGA Res 174 (III) 1947; Statute of the ILC Art 1)</b>
<b>1950</b>	Office of the United Nations High Commissioner for Refugees	To provide international protection to refugees; seek permanent solutions for the problem of refugees by assisting Governments and private organizations; and facilitate the voluntary repatriation of refugees or their assimilation within new national communities <b>(UNGA Res 528 (V) 1950, Statute of the UNHCR 1950 Art 1)</b>
<b>1951</b>	International Organization for Migration	To provide services and advice to governments and migrants to promote humane and orderly migration including: the transfer of migrants and refugees; the provision of migration services; and the provision of a forum for the exchange of views and experiences <b>(Constitution of International Organization for Migration Art 1)</b>
<b>1960</b>	Organisation for Economic Cooperation and Development	To promote policies designed to (a) achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries; (b) contribute to sound

		economic expansion in the process of economic development; and (c) contribute to the expansion of world trade on a multilateral, non-discriminatory basis <b>(Convention on the Organisation for Economic Cooperation and Development 1960, Art 1)</b>
<b>1965</b>	United Nations Development Programme	To assist countries in their endeavour to realise sustainable human development, in line with their national development programmes and priorities <b>(UNGA Res 2029 (XX) 1965; Executive Board Decision 94/14, 95/22)</b>
<b>1977</b>	United Nations Human Rights Committee	To consider reports by State parties on the measures they have adopted to give effect to the ICCPR; and to examine individual complaints about alleged violations of the ICCPR by States <b>(ICCPR Art 40; First Optional Protocol Art 5)</b>
<b>1982</b>	United Nations Committee on the Elimination of Discrimination against Women	To consider reports by State parties on the measures they have adopted to give effect to CEDAW; and to examine individual complaints about alleged violations of CEDAW by States <b>(CEDAW Art 20, 21; Optional Protocol)</b>
<b>1985</b>	United Nations Committee on Economic Social and Cultural Rights	To consider reports by State parties on the measures they have adopted to give effect to the ICESCR; and to report to the UN Economic and Social Council on the implementation of the ICESCR <b>(ECOSOC Res 1985/17)</b>
<b>1990</b>	United Nations Committee on the Rights of the Child	To consider reports by State parties on the measures they have adopted to give effect to CRC and its Optional Protocols (including issues of child trafficking, pornography, prostitution, and sale of children) <b>(CRC Art 43)</b>
<b>1992</b>	Secretary-General's Representative on the Human Rights of Internally Displaced Persons	To engage in coordinated advocacy for the protection of the human rights of IDPs; enhance dialogues with governments, NGOs and others; and strengthen the international response to internal displacement. <b>(UN Commission on Human Rights Res 2004/55)</b>
<b>1993</b>	Office of the United Nations High Commissioner for Human Rights	To have principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General, for the purpose of promoting and protecting the effective enjoyment of all civil, cultural, economic, political and social rights (among other things) <b>(UNGA Res 48/141, 1993)</b>
<b>1995</b>	World Trade Organization	To provide a forum for negotiations among Members of their multilateral trade relations

		(including trade in services) <b>(Agreement Establishing the World Trade Organization Art III)</b>
<b>1999</b>	Special Rapporteur on the Human Rights of Migrants	To examine ways to overcome obstacles to the full and effective protection of the human rights of migrants, including non-documented and irregular migrants <b>(UN Commission on Human Rights Res 1999/44)</b>
<b>2004</b>	United Nations Committee on Migrant Workers	To consider reports by State parties on the measures they have adopted to give effect to the CMW <b>(CMW Art 73, 74)</b>
<b>2006</b>	United Nations Human Rights Council	To promote universal respect for the protection of human rights and fundamental freedoms for all; to make recommendations to the General Assembly for further developing international law in the field of human rights; to undertake a Universal Periodic Review of each State's fulfillment of its human rights obligations; and to assume the mandates previously entrusted to the Commission on Human Rights. <b>(UNGA Res 60/251 2006)</b>