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The legal and normative framework of international migration

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EXECUTIVE SUMMARY

The legal and normative framework on international migration includes binding international law as well as non-legally binding best practices and principles. Certain international instruments affecting management of migration have been widely ratified (for example, 145 States have ratified the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees). Others have entered into force with relatively few parties (for example, only 27 States, all principally source countries of migration, have ratified the UN Convention on the Protection of All Migrant Workers and Members of Their Families).

Existing international law provides useful contributions to a normative and legal framework regarding:

- The powers and responsibilities of individual States to manage movements of people across their borders,
- The rights and responsibilities of international migrants, and
- State cooperation in managing international movements of people.

Nevertheless, the gaps in international law and norms remain, particularly related to migration for family and economic reasons.

States possess broad authority to regulate the movement of foreign nationals across their borders. Although these authorities are not absolute, States exercise their sovereign powers to determine who will be admitted and for what period. In support of these powers, States enact law and regulations to govern issuance passports, admissions, exclusion and removal of aliens, and border security. States vary in the types of laws and regulations adopted, with some being more restrictive than others are, but all States adopt rules that govern entry into and exit from their territories.

The authority of States is limited by certain rights accorded foreign nationals in international law. Non-nationals enjoy all of the unalienable rights applicable in international law. The International Covenant on Civil and Political Rights (ICCPR) defines such basic rights of all persons as: the right to life, liberty and security; the right not to be held in slavery or servitude; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest, detention or exile; the right to marry and to found a family. Additional rights are conveyed by the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child (CRC).

More specifically related to movements of people across international borders are provisions granting rights in the Convention Regarding the Status of Refugees, the Convention against Torture, the Convention on the Rights of All Migrant Workers and Members of their Families, and the Protocol to Prevent, Suppress and Punish Trafficking

in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, both of which supplement the United Nations Convention against Transnational Organized Crime.

Most of these conventions and protocols have been ratified by a wide range of States, but the Migrant Rights Convention has been ratified by only 27 States. No major destination country of international migrants is among its State parties although such States as Mexico, which is source, transit and destination country, have become parties to the Convention. The obstacles are both practical and political. On the practical side, the MWC is extensive and complex, raising technical questions as well as financial obligations on State parties. More fundamentally, the Convention raises basic questions about State sovereignty, particularly regarding the capacity of States to deter irregular migration.

Advocacy at the national and local levels appears to be the most likely inducement to State ratification. To the extent that there is a vocal and well-organised constituency in support of migrant rights, States are more likely to overcome their concerns about the Convention. States may also re-think ratification if the provisions in the Convention relating to inter-state cooperation in combating irregular migration can be operationalised into concrete actions. States may be more willing to extend rights to migrants if they believe they are able to effectively control who and how many persons migrate.

Policies and programs at the national level can be effective ways to protect the rights of migrants. The better-informed workers are prior to migrating, the better able they are to assert their rights. Access to language training courses in destination countries will also help migrant workers to learn of and assert their rights when employers or family members violate them. Monitoring recruitment agencies and employers is essential to the protection of migrant workers. When abuses occur, legal representation for migrant workers can help them fight against discrimination, sexual harassment, lost wages and other violations of their labour rights. Programmes that provide shelter and social services to migrant workers who have experienced abuse are essential to protecting their rights. Migrant workers who decide to return home after escaping abusive conditions may also need assistance in repatriation and reintegration. Consular protection can play an important role in ensuring that migrant workers do not face abusive situations. Consular officers can monitor the security of migrant workers in potentially vulnerable positions, using their diplomatic positions to engage the host country in interceding in favour of the migrant worker.

A weak but growing body of international law and effective practices focus on international cooperation in managing international migration. There are a number of models through which international cooperation has been advanced. In the General Agreement on Trade in Services (GATS), States voluntarily commit to rules for the admission of certain categories of migrants. Since the commitments are made as part of a treaty, the State foregoes the right to change the rules unilaterally. Using the GATS example as a model, an international body, such as the World Trade Organization, would monitor implementation and hear complaints that States are violating their commitments.

The Trafficking and Smuggling Protocols are more explicit in setting out specific areas in which State Parties agree to cooperate with each other. The protocols emphasize information exchange, training, public information and other joint efforts to prevent smuggling and trafficking. Implicit in this model is the recognition that unilateral actions on the parts of States will be ineffective in addressing transnational problems that affect all countries.

The 1951 UN Refugee Convention and regional agreements on refugees promote international cooperation as a way to share responsibility for assisting, protecting and finding solutions for persons who cannot rely on their own governments. Again, implicit in this approach is the need for international cooperation to address a phenomenon that is beyond the capacity of any one country. The forms of international cooperation include the sharing of financial resources and the potential movement of refugees and others in need of protection from one country to another. A key role is assigned to the United Nations, particularly the UNHCR, not only in protecting the rights of the refugees but also promoting cooperation among States.

Weak institutional arrangements make international cooperation in managing international migration all the more difficult to achieve and retard the development of effective legal and normative frameworks to handle the full range of issues discussed in this paper. To date, much of the consensus building has taken place through ad hoc, informal mechanisms such as the Berne Initiative, at the international level, and the various consultative mechanisms established at the regional level.

Moving from the current arrangements to a more robust international regime may be premature, however. While there has been progress in setting out common understandings, there continue to be fundamental disagreements among States as to causes and consequences of international migration and the extent to which it is in the interests of States to liberalize or restrict flows of migrants. This situation contrasts sharply with the general consensus that governs movements of goods, capital and services—that it is in the ultimate interest of all States to lessen barriers to the movements of these factors.

Yet, there is growing consensus that a well-regulated and more comprehensive framework for managing international migration would be in the best interest of both States and migrants. There is no inherent conflict between policies that protect State interests and security and those that protect the rights of migrants. In fact, to be sustainable, international migration laws and policies must address a wide range of issues, including but not limited to the following:

- Legal channels for migration of persons seeking work opportunities in other countries;
- Protection of the rights of migrants and their families, including persons who have been smuggled or trafficked;
- Protection of refugees and durable solutions to refugee problems;

- Prevention and prosecution of human smuggling and human trafficking operations; and
- Return, readmission and reintegration of persons who do not have, or no longer have, authorization to remain in a destination country.

A well-regulated system must also provide avenues for international cooperation in managing the flows of people from source, through transit, to destination countries and, often, back to the source country or onto another destination country.

INTRODUCTION

Discussing the legal framework for managing international migration, Professor T. Alexander Aleinikoff concludes, “there is both more and less international law than might be supposed”¹. Areas with considerable legal bases include the protection of refugees from return to countries in which they would face persecution², the suppression of human trafficking and human smuggling³, the obligation of States to provide consular protection to their nationals in other States⁴, and the duties of States to readmit nationals who seek to return⁵. Areas where the international consensus is less developed include migration for purposes of family formation and family reunification⁶, migration for economic purposes, norms to manage dual nationality⁷, and frameworks to govern the integration of immigrants⁸.

This paper focuses on binding international law as well as non-legally binding best practices and principles. Certain international instruments affecting management of migration have been widely ratified (for example, 145 States have ratified the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees). Others have entered into force with relatively few parties (for example, only 27 States, all principally source countries of migration, have ratified the UN Convention on the Protection of All Migrant Workers and Members of Their Families). See appendix I for complete listing of relevant instruments with their State parties.

¹ T. Alexander Aleinikoff, “International Legal Norms and Migration: A Report,” in T. A. Aleinikoff and V. Chetail, Eds., *Migration and International Legal Norms*, The Hague, The Netherlands: Asser Press, 2003, p. 2. See also Louis B. Sohn and Thomas Buergenthal, *The Movement of Persons Across Borders, Studies in Transnational Legal Policy, No. 23*, Washington, DC: The American Society of International Law, 1992 for discussion norms established in international law.

² Convention Relating to the Status of Refugees, adopted 28 July 1951, 189 UNTS 137, entered into force 22 April 1954 and the Protocol Relating to the Status of Refugees, adopted 31 January 1967, 606 UNTS 267, entered into force 4 October 1967. Also, see Guy Goodwin-Gill and Kathleen Newland, “Forced Migration and International Law,” in Aleinikoff, *Migration and International Legal Norms*, pp. 123-136.

³ Protocol on Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted 15 November 2000, GA Res. 55/25 (Trafficking Protocol), and Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted 15 November 2000, GA Res. 55/25 (Smuggling Protocol). See also Vitit Muntarbhorn, “Combating Migrant Smuggling and Trafficking in Persons, Especially Women: The Normative Framework Re-Appraised,” in Aleinikoff, *Migration and International Legal Norms*, pp. 151-166.

⁴ Vienna Convention on Consular Relations, adopted 24 April 1963, 596 UNTS 261, entered into force 19 March 1967

⁵ Universal Declaration of Human Rights, adopted 10 December 1948, GA Res. 217A (III) and International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171, entered into force 23 March 1976. See Gregor Noll, “Return of persons to States of Origin and Third States,” in Aleinikoff, *Migration and International Legal Norms*, pp. 61-74.

⁶ See Kate Jastram, “Family Unity,” in Aleinikoff, *Migration and International Legal Norms*, pp. 185-201.

⁷ See Kay Hailbronner, “Nationality,” in Aleinikoff, *Migration and International Legal Norms*, pp. 80-82.

⁸ See Walter Kälin, “Human Rights and the Integration of Migrants,” in Aleinikoff, *Migration and International Legal Norms*, pp. 271-288.

Aleinikoff notes that too often the debate about international migration tries to pit State authority and interest in regulating migration against the fundamental human rights of migrants that States cannot abridge. This framework is too rigid and simple, however, missing the “possibility for cooperative efforts at managing migration in the interest of both states and migrants”⁹. In fact, existing international law provides useful contributions to a normative and legal framework regarding:

- The powers and responsibilities of individual States to manage movements of people across their borders,
- The rights and responsibilities of international migrants, and
- State cooperation in managing international movements of people.

Nevertheless, the gaps in international law and norms, particularly related to migration for family and economic reasons, make State cooperation in managing international flows of people all the more difficult. This paper reviews the legal framework in these three areas and identifies gaps that the Global Commission on International Migration may wish to address.

STATE POWERS AND RESPONSIBILITIES

States possess broad authority to regulate the movement of foreign nationals across their borders¹⁰. Although these authorities are not absolute, as discussed in the next section, States generally are able to exercise their sovereign powers to determine who will be admitted and for what period. In support of these powers, States may enact “internal law and regulations on such matters as passports, admissions, exclusion and expulsion of aliens and frontier control”¹¹. States vary in the types of laws and regulations adopted, with some being more restrictive than others are, but all States adopt rules that govern entry into and exit from their territories.

National security

Even when States recognize the rights of certain foreign nationals to remain in their territory, concerns about national security often trump any exercise of migrant rights. Security exceptions may take explicit form, for example, in the form of limitation clauses, or ‘clawbacks’ and derogation clauses. Clawbacks appear immediately after a phrase guaranteeing a right, typically allowing exception to the right as long as the restrictions are “provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the

⁹ Aleinikoff, *Migration and International Legal Norms*, p. 1.

¹⁰ See David Martin, “The Authority and Responsibility of States,” in Aleinikoff, *Migration and International Legal Norms*, pp. 31-45.

¹¹ Sohn and Buergenthal, *Movement of Persons*, p. 3.

other rights recognized” in the applicable treaty¹². Derogations permit States to abrogate otherwise protected rights in exceptional circumstances. Derogations generally are temporary, required by the exigencies of the situation and must be applied in a non-discriminatory manner¹³. As a measure of the importance of national security exceptions, states’ needs for security-related information about aliens applying for admission generally trumps migrant rights, such as the right to privacy, that may otherwise be protected¹⁴.

Entry, stay, and exit

In developing rules to regulate movements across borders, States have full authority to apply different laws and regulations, depending on the reason for entry and exit and the nationality of the persons moving across the border¹⁵. In effect, the rules fall into four categories: citizens leaving the State of their nationality, aliens leaving a foreign State, citizens returning to the State of their nationality, and aliens seeking admission to the territory of a foreign State. Often, States treat foreign nationals who are permanent residents of the country in a manner that falls between the treatment of citizens and other aliens.

State authority is more constrained in regulating the movement of its own nationals across its borders than it is in regulating the movement of non-nationals. The Universal Declaration of Human Rights (UDHR), as well as the International Covenant on Civil and Political Rights (ICCPR), specifies that nationals have the right to leave and re-enter their countries. Significantly, they do not have the right to enter into another country, limiting the actual ability of persons to exercise the rights. Moreover, even in this respect, States have authority under the ICCPR to place reasonable limitations on exit if related to national security, public order, public health or morals or the proper administration of justice¹⁶. The ICCPR provides, however, that States may not arbitrarily deny nationals the right to re-enter. The Human Rights Committee held that “there are few, if any circumstances in which deprivation of the right to enter one’s own country could be reasonable”¹⁷.

States may impose different rules and expectations on foreign nationals based on the purpose of their entry, with different rules, for example, for persons who are working, studying, conducting business or touring the country. States may establish special rules based on treaty relations or traditional or cultural ties that effectively give preference or greater access to admissions of nationals of certain other States. States are limited,

¹² David Fisher, Susan Martin, and Andrew Schoenholtz, “Migration and Security in International Law,” in Aleinikoff, *Migration and International Legal Norms*, pp 97-99

¹³ Ibid.

¹⁴ Ibid, p. 99.

¹⁵ Sohn and Buergenthal, *Movement of Persons*, p. 13.

¹⁶ Sohn and Buergenthal, *Movement of Persons*, pp. 6-7; See also Fisher et al. , “Migration and Security in International Law,” pp. 111-112 (right to exit) and 104-105 (right to enter).

¹⁷ Fisher et al. , “Migration and Security in International Law , p. 105.

however, in applying entry and exit rules in a manner that discriminates on such grounds as race, sex, language or religion¹⁸.

Generally, States have broad authority to exclude foreign nationals from entering their territory and expel or deport persons already in their countries¹⁹. Grounds for exclusion and deportation may be similar: public health, criminal convictions or activities, earlier violations of immigration law, economic reasons, for example, in addition to the national security grounds discussed previously. Procedures may differ substantially, however, and States generally provide more rights to persons already in the countries to contest the deportation or expulsion. This stance is consistent with international law. Article 13 of the ICCPR provides that aliens lawfully present in a State are entitled to procedural protections prior to being expelled, including review by a competent authority and the opportunity to submit reasons against the expulsion. These procedural rights may be denied, however, if national security so requires²⁰. Clearly, those unlawfully present would not be entitled to the same level of procedural protection, although many States recognize that individuals gain equities and rights the longer they are present on their territory. Moreover, States need to establish a procedure to determine if the alien falls into a category protected against return (e. g. , persons fearing persecution or torture).

Consular protection and assistance

States have broad authority, if not obligation, to represent the interest of their nationals who visit or reside in other States. Under the Vienna Convention on Consular Relations, States may establish consular posts in other countries. Consular functions include:

- Protecting the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
- Helping and assisting nationals, both individuals and bodies corporate, of the sending State;
- Issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State; and
- Representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State ...where, because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests²¹.

¹⁸ Ibid. , p. 17.

¹⁹ Martin, "The Authority and Responsibility of States," p. 34. The authority to expel or deport its own citizens is far more limited.

²⁰ Fisher et al. , "Migration and Security in International Law," p. 117.

²¹ Vienna Convention on Consular Relations, Article 5.

RIGHTS OF PERSONS MOVING ACROSS BORDERS

Internationally recognized standards applicable to all migrants

Non-nationals enjoy all of the unalienable rights applicable in international law²². The International Covenant on Civil and Political Rights (ICCPR) defines such basic rights of all persons as: the right to life, liberty and security; the right not to be held in slavery or servitude; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest, detention or exile; the right to marry and to found a family. Article 2 specifies that such rights are provided without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the right to work, free choice of employment and just and favourable conditions of work. State parties undertake to ensure the right to form and join trade unions and recognize the right to social security, including social insurance, an adequate standard of living, the highest attainable standard of physical and mental health, education (compulsory and free at the primary level), and to take part in cultural life and benefit from scientific progress. ICESCR is aspirational in many respects, with State parties committing to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”²³. In a clause specifically referring to non-nationals, the ICESCR recognises that “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”²⁴.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) includes a number of provisions applicable to migrant women, including but not limited to the elimination of sex role stereotyping (Article 5), suppression of traffic in women and exploitation of prostitutes (Article 6), and an end of discrimination in the field of employment and citizenship (Articles 3, 9 and 11). Article 14 requires State Parties to act to eliminate gender discrimination in rural areas. Protection from such discrimination is important in helping to ensure that rural women need not migrate in search of their rights and employment opportunities.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) is a further instrument for protecting the rights of migrants, since many migrants

²² This section discusses five of the seven core human rights instruments. The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention Against Torture are discussed more fully below.

²³ Article II.

²⁴ Article II.

experience racial discrimination. The Convention on the Rights of the Child (CRC) includes several articles useful in protecting migrant children (for example, Article 11 proscribes trafficking of children under 18 years old; Article 19 requires States to protect children from violence, abuse, neglect, exploitation and sexual abuse).

Each of these instruments has a mechanism through which State parties report on their progress in observing the convention standards. The Treaty Monitoring Bodies (TMB) to which State parties report are the Human Rights Committee (which monitors implementation of the ICCPR), the Committee on Economic Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of the Child. A recent study published by the International Catholic Migration Commission and December 18 vzw found that about half of the conclusions of these bodies reference migrant-related issues²⁵. In some cases, the TMBs express concern over violations, particularly discriminatory treatment of non-nationals, racism and xenophobia, absence of labour protections, and human trafficking and other exploitation, particularly of women and children²⁶. The TMBs also report positive steps taken by State parties, including legislation to protect the rights of non-nationals, to regulate the actions of labour recruiters and employers of foreign workers, to regularise the status of those in irregular status, and to protect persons who have been trafficked²⁷. The report notes, however, that 50 percent of State reports do not include references to protection of migrant rights and identifies a number of issues covered in the Migrant Rights Convention but not in the other human rights instruments. The conclusions on migrant rights are often vague and provide too little guidance on steps that should be taken better to protect the rights of migrants²⁸.

Beyond these universal rights, the rights of persons moving across borders vary depending on the purposes of their movement and the circumstances they will face upon return to their home countries. The following sections discuss the rights of three categories of persons: migrant workers, including both legal and irregular migrants; refugees and displaced persons; and trafficked and smuggled persons. The section further discusses the right to family unity as it affects migrants. Also included in this section is a discussion of the rights of individuals to a nationality and the related issue of statelessness.

²⁵ Isabelle Slinckx, *The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat*, International Catholic Migration Commission and December 18 vzw, November 2004.

²⁶ *Ibid.*, pp. 14-16.

²⁷ *Ibid.*, pp. 12-14.

²⁸ *Ibid.*, p. 21.

Migrant workers

ILO conventions

A number of countries have ratified conventions sponsored by the International Labour Organisation (ILO) specifically protecting the rights of migrants. Forty-two countries have ratified the Convention concerning Migration for Employment (Revised) (No. 97), which obligates States to provide free and accurate information to migrants (Article 2), to prevent misleading propaganda (Article 3), to facilitate the departure, journey and reception of migrants (Article 4), to prevent discrimination against migrants (Article 6), and to permit remittances (Article 9). Eighteen countries have ratified the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143). This Convention requires States to respect the human rights of migrants (Article 1), to investigate, monitor and suppress trafficking (Article 2, 3, and 6), and to provide equality of opportunity and treatment for in the areas of employment, social security, unions, and cultural rights (Article 10).

Other relevant ILO conventions are the Convention concerning Forced or Compulsory Labour (No. 29), the Convention Concerning Abolition of Forced Labour (No. 105), the Equal Remuneration Convention (No. 100), and the Discrimination (Employment and Occupation) Convention (No. 100).

UN Convention on the Rights of All Migrant Workers on Members of their Family

The UN Migrant Workers Convention (MWC) builds on the International Labour Organisation's conventions as well as the core human rights instruments referenced above. It reaffirms basic human rights norms and embodies them in an instrument applicable to migrant workers and their families. The underlying goal of the Convention is to guarantee minimum rights for migrant workers and members of their families who are in legal or undocumented/ irregular situation. However, the number of states ratifying the convention is still disappointingly small²⁹. No major destination country of migrants has yet ratified it, raising further questions about its effectiveness³⁰.

The Convention defines the rights of migrant workers under two main headings: "The human rights of migrants workers and members of their families" (Part III), which reaffirms the human rights of all migrants regardless of their legal status, and "Other

²⁹ State parties are Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Kyrgyzstan, Lybian Arab Jamahiriya, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikstan, Timor Leste, Turkey, Uganda, and Uruguay.

³⁰ Some of the State parties do receive migrants and serve as a transit point for migration but they are primarily source countries. Mexico, for example, receives migrants from Central America, but it remains primarily a source country of millions of migrants residing in the United States.

rights of migrant workers” (Part IV) which sets out additional rights applicable only to migrant workers in a regular situation. Documented migrants are defined as those “authorized to enter, to stay and engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party” (Article 5).

A number of provisions focus on the right of all migrants, including those in irregular situations. Article 10 prohibits torture or cruel, inhuman or degrading treatment or punishment. Article 11 prohibits slavery or servitude and forced or compulsory labour. Article 12 provides for freedom of thought, religion and conscience, Article 13 provides for the right of expression, Article 14 prohibits arbitrary or unlawful interference with privacy or attacks on honour and reputation and Article 15 prohibits arbitrary denial of property. Article 16 entitles migrants “to effective protection by the State against violence, physical injury, threats, and intimidation, whether by public officials or by private individuals, groups or institutions”. Articles 17 to 21 pertain to the rights of migrants who have been detained by State authorities for immigration and criminal offences. Article 22 prohibits collective expulsion and sets out the rights of migrants in expulsion proceedings. Article 23 provides the right of all migrants to seek the protection and assistance of the consular or diplomatic officials of their countries of origin.

A number of other articles focus on the social and economic status of migrants. Article 25 entitles all migrant workers to “enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration” and other conditions of work. Article 26 pertains to the right to join trade unions. Article 27, regarding social security, recognises that States may limit benefits to migrant workers but encourages States “to examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances”. Article 28 sets out the right of migrants and their families to health care “that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health”, specifying that emergency medical care should not be refused to those in irregular status. Article 29 discusses the rights of the children of migrants to a name, birth registration, a nationality. Article 30 provides a right to basic education, which cannot be denied because of the child’s or his or her parents’ irregular status. Article 31 protects the cultural identity of migrants and members of their family.

Part IV of the MRC includes provisions related to the treatment and rights of documented migrant workers. As examples, Article 43 provides equal treatment of documented migrants with nationals with respect to access to education, vocational training, housing, and health services. [Article 45 confers the same rights for members of families]. Article 50 provides that in case of death or dissolution of marriage, State shall favourably consider granting authorization to stay to the families of documented migrants. Part V of the Convention spells out rights of specific categories of migrant workers, including frontier workers, seasonal workers, and self-employed workers.

Although the rights provided by the Convention apply to both men and women migrants and Article 45 specifically addresses the equality of the rights, the Convention fails to address expressly many needs that are particular to women. Many migrant women work in non-regulated sectors of the economy, including domestic work, which leaves them vulnerable to exploitation and abuse. Guaranteeing equal treatment with nationals will not help migrant workers in such situations because the regulatory structure is weak for both populations³¹.

In addition to spelling out the rights of migrant workers, the MRC also requires cooperation by States Parties in managing movements of persons. Part VI addresses the development of sound, equitable, humane and lawful conditions for migration. Article 64 says States Parties shall as appropriate consult and cooperate to promote sound, equitable and humane conditions, stating that “due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned”. Article 67 provides that States Parties shall cooperate in the “adoption of measures regarding the orderly return of migrant workers and members of their families when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation”. Article 68 requires States Parties to collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. Article 69 requires States Parties to take appropriate measures to ensure that, when migrant workers and members of their families are within their territory in an irregular situation, that such a situation does not persist.

The Migrant Workers Convention establishes a Committee on the Protection of Rights of All Migrant Workers and Members of Their Families, which consists of 14 experts of “high moral standing, impartiality and recognized competence in the field covered by the convention”. Committee members are elected from a list of nominees. State Parties (only those who have ratified the Convention) may nominate one person from among its own nationals. Elections are by secret ballot. The Convention reflects an intention that there be geographic diversity and diversity as between sending States and receiving states.

States ratifying the Convention “undertake to submit” to the Secretary-General of the UN for consideration by the Committee a report on the legislative, judicial, administrative and other measures to give effect to Convention within one year after entry into force and every five years thereafter. The Committee will examine the reports and will transmit comments to the State. The Committee may invite the specialized agencies and organs of the UN as well as intergovernmental organizations and “other concerned bodies” to

³¹See S. Hune, “Migrant Women in the Context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,” *International Migration Review*, 25/4, 1991 and R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford: Clarendon Press, 1997.

submit written information on matters that fall within the convention's scope for the Committee's consideration.

Article 76 sets forth a process for a State Party to complain about another State Party's failure to fulfil its obligations. Only States that are parties to the Convention and that have declared that they recognize the competence of the Committee may make complaints to the Committee. Article 77 provides that individuals of State Parties may bring complaints against State Parties only under certain circumstances. They are not involved in some other international settlement mechanism; they have exhausted domestic remedies; the State Party against which the complaint has been made has recognized the competence of the Committee to hear individual complaints; and 10 state parties declare that they recognize the competence of the Committee to receive and consider communications from or on behalf of individuals.

Limited ratification of the MWC

Only 27 countries have ratified the Migrant Workers Convention, with no major receiving country among them. Why are States reluctant to ratify the Convention? The obstacles are both practical and political. On the practical side, the MWC is extensive and complex, raising technical questions as well as financial obligations on State parties³². For example, Article 65 of the Convention requires States Parties "to maintain appropriate services to deal with questions concerning international migration of workers and members of their families. Their functions shall include, inter alia:

- (a) The formulation and implementation of policies regarding such migration;
- (b) An exchange of information, consultation and co-operation with the competent authorities of other States Parties involved in such migration;
- (c) The provision of appropriate information, particularly to employers, workers and their organizations on policies, laws and regulations relating to migration and employment, on agreements concluded with other States concerning migration and on other relevant matters;
- (d) The provision of information and appropriate assistance to migrant workers and members of their families regarding requisite authorizations and formalities and arrangements for departure, travel, arrival, stay, remunerated activities, exit and return, as well as on conditions of work and life in the State of employment and on customs, currency, tax and other relevant laws and regulations.

Further, although almost all States have some emigration and immigration, States with relatively low levels of migration may see no particular reasons to ratify the Convention.

On the political level, the Convention raises basic questions about State sovereignty, particularly regarding the capacity of States to deter irregular migration. Even though the Convention requires States Parties to cooperate in curbing irregular migration and

³² Cholewinski, pp. 199-200.

returning those without authorization to remain in a destination State, many receiving countries are concerned that the rights granted to irregular migrants will hinder their ability to control such movements. Some States are concerned that specifying the rights of irregular migrants will serve as a magnet, drawing them to their territory. A Dutch government paper on the Convention explains the reluctance of the Netherlands to ratify: “The granting of certain social and economic rights on the part of the state is considered to be more of an encouragement for illegal residence and employment than a deterrent”³³. As one expert notes:

However much actual effort a state expends on immigration control measures, “illegal aliens,” as they are often called, are treated as symbols of the state's violated sovereignty. It is one thing to require that these migrants be provided with basic procedural protections in the deportation context, and to ensure that they are protected by those limited rights recognized as customary under international law. But can the Convention's supporters hope to require that states provide undocumented immigrants with guarantees to extensive labor rights and to civil and cultural rights while purporting to acknowledge the states' vital interests in territorial integrity?

As a political matter, the answer to this question is almost certainly “no”³⁴.

Even with regard to documented migrants, “the Convention’s central concept of non-discrimination interferes with explorations of other forms of temporary immigration in which this principle would not be fully abided by”³⁵. In effect, States often see a trade-off between the number of migrants admitted and the generosity of rights bestowed upon them. Providing rights equivalent to nationals, particularly when such rights entail financial obligations on the part of receiving States, may severely limit the number of migrants to be admitted. Otherwise, States fear, there will be a public backlash against migrants who are perceived as being costly to taxpayers. Even when there is little factual basis to such charges, and migrants can be seen to be contributing to the economy, publics may perceive migrants to be competitors for limited jobs and resources.

Some States see no need to ratify the Convention, arguing that other human rights instruments already provide protection of the most fundamental rights outlined in the Migrant Rights Convention. Or, they argue, national laws provide adequate protection. Other States, however, see the MRC as promoting rights not specified elsewhere and not necessarily in their national interest. The Dutch paper discussed above holds that the MRC “contains a number of new provisions that were not previously included in broadly ratified treaties”³⁶. In particular, the Dutch paper argues, the Convention grants a right to

³³ “The UN International Convention on the Protection of All Migrant Workers and Members of their Families of 1991,” prepared for the Global Commission on International Migration, January 2005, p. 3.

³⁴ Linda S. Bosniak, *State Sovereignty, Human Rights and the New U. N. Migrant Workers Convention*, 86 *American Society for International Law, Proc.* 623 (1992)

³⁵ *Ibid.*

³⁶ *Ibid.*

family reunification not only to legally resident migrants but also to illegally resident ones³⁷.

In 1998, a campaign to promote ratification of the Convention was launched in Geneva. The campaign's Steering Committee includes 14 organisations, including three UN agencies (UNHCHR, ILO and UNESCO), the International Organization for Migration, trade unions, NGOs, human rights organizations, religious groups and other international organisations. The campaign has worked to raise awareness of the need better to protect migrant rights as well as the provisions of the Convention itself. It works through public information and education activities, building coalitions of groups concerned about the situation of migrant workers, promoting media coverage of the Convention, building institutional support within organizations concerned with migrant rights, and advocating with government officials to sign and then ratify the Convention. The Campaign has also set out post-ratification activities, including adoption of national legislation consistent with the Convention and monitoring of compliance with the Convention's provisions³⁸. The Campaign also encourages supporters to ensure that migrant rights issues are taken up in reports to the MTBs, as discussed above.

Advocacy at the national and local levels appears to be the most likely inducement to State ratification. To the extent that there is a vocal and well-organised constituency in support of migrant rights, States are more likely to overcome their concerns about the Convention. States may also re-think ratification if the provisions in the Convention relating to inter-state cooperation in combating irregular migration can be operationalised into concrete actions. States may be more willing to extend rights to migrants if they believe they are able to effectively control who and how many persons migrate.

In the meantime, advocacy to incorporate migrant rights into regional conventions and agreements and, particularly, national legislation and policies may be a more effective way to protect these rights, as discussed below. In this respect, the work of the Special Rapporteur on the Rights of Migrant Workers has been useful in identifying problems and best practices in overcoming them.

Special Rapporteur on the human rights of migrant workers

In 1999, the UN Commission on Human Rights mandated appointment of a special rapporteur on the human rights of migrants for a three year term, "to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of this vulnerable group, including obstacles and difficulties for the return of migrants who are nondocumented or in an irregular situation, with the following functions:

³⁷ Ibid.

³⁸International Migrant Rights Watch Committee, *Achieving Dignity: Campaigners' Handbook for the Migrant Rights Convention*, 19 August 1998 (<http://www.migrantsrights.org/LAYHNDBK.INDEX.htm>)

- (a) To request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families;
- (b) To formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants, wherever they may occur;
- (c) To promote the effective application of relevant international norms and standards on the issue;
- (d) To recommend actions and measures applicable at the national, regional and international levels to eliminate violations of the human rights of migrants;
- (e) To take into account a gender perspective when requesting and analysing information, as well as to give special attention to the occurrence of multiple discrimination and violence against migrant women.

The mandate was extended in 2002 for a further three-year term.

The Special Rapporteur has issued reports each year since 2000. Based on information she receives about actual and potential human rights abuses of migrants, she sends urgent appeals to governments. The information generally comes from nongovernmental organizations or directly from migrants. The Special Rapporteur has referenced sending appeals to the Governments of the Argentine Republic, Bahrain, Canada, Indonesia, Islamic Republic of Iran, Lebanon, Saudi Arabia, Spain, Togo, Turkey, the United Arab Emirates and the United States, drawing their urgent attention to information received on alleged violations of the human rights of migrants³⁹. These urgent appeals generally involved reports of executions, detention, deportation, and violence against migrants. In some cases, the appeals were made jointly with the Special Rapporteur on extrajudicial, summary or arbitrary executions.

In addition to these communications with States, the Special Rapporteur identifies systemic issues that need to be addressed by States. Her reports have focused on human trafficking, migrants employed as domestic workers, the implications of anti-terrorism actions for migrants, and other similar issues. She has made official visits to Canada, the U. S. -Mexico border, Mexico, Ecuador, the Philippines. In addition to pointing out problems, her reports also include best practices that other States should consider adopting.

Regional legal instruments and activities

Regional conventions offer rights to migrant workers. The European Convention on the Legal Status of Migrant Workers focuses primarily on migrants in legal work situations. A minority of States in Europe have ratified it. The European Convention on Human Rights (ECHR) and the European Social Charter (ESC) are broader instruments. The

³⁹ Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2000/48, E/CN. 4/2001/83 and Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2001/52, E/CN. 4/2002/94

ECHR, focusing on political and civil rights, affords the same absolute (that is, nonderogable) rights to foreign nationals as to European nationals, including the right to life and to be free from torture. The ESC covers social, economic and cultural rights. For example, it provides equal access to social housing for foreigners; accessible, effective health care facilities for the entire population; prohibition of forced labour; the right to social security, social welfare and social services; a limited right to family reunion; procedural safeguards in the event of expulsion; and the right of women and men to equal treatment and equal opportunities in employment. The ESC guarantees to all nationals and foreigners legally resident and/or working that all the rights set out in the Charter apply regardless of race, sex, age, colour, language, religion, opinions, national origin, social background, state of health or association with a national minority.

In the Americas, the Inter-American Commission on Human Rights (IACHR) monitors the status of the human rights of migrants through its own Special Rapporteur on Migrant Workers and their Families. The Inter-American Commission on Human Rights and the Inter-American Court on Human Rights were established pursuant to the American Convention on Human Rights. The American Convention on Human Rights provides a right to human treatment (Article 5), a right to seek and be granted asylum (Article 22), a right to equal protection (Article 24), and a right to judicial protection (Article 25) that applies to non-nationals.

National laws and procedures

For most migrant workers, national laws and procedures remain the principal support or barrier to the exercise of rights. These laws vary significantly, however, in the extent to which they protect the rights of migrant workers. A range of activities will help migrant workers better protect their rights. These include 'know your rights' training programs for workers who migrate. The better-informed workers are prior to migrating, the better able they are to assert their rights. This is particularly the case for contract labourers who may have little idea of the wages or working conditions to which they are entitled. Similarly, workers migrating to join family members need to know and understand their rights, both in relationship to their spouses or children (particularly regarding domestic violence) and in relationship to their immigration status. Access to language training courses in destination countries will also help migrant workers to learn of and assert their rights when employers or family members violate them. Often, highly restrictive and detrimental contracts signed by migrant workers are in a language they do not understand⁴⁰.

Monitoring recruitment agencies and employers is essential to the protection of migrant workers. This is particularly the case when migrant workers are working in domestic labour or other activities that keep them out of public view. The Government of

⁴⁰ *Migrant Workers: Report of the Special Rapporteur on Migrant Workers*, U. N. ESCOR, 60 Sess. , Agenda Item 14(a), 40, U. N. Doc. E/CN. 4/2004/76.

Singapore provides a telephone number which migrant domestic workers can call free of charge to obtain information on their rights and on the procedure for changing employers⁴¹. In Costa Rica, the Ministry of Employment carries out inspections and can receive complaints from female migrant domestic workers. The National Institute of Women has set up training programmes for female migrant domestic workers working in the country⁴². Training for government officials, employers and others as to the rights of migrant workers and their obligations under international and national law will also help curb abuses.

When abuses occur, legal representation for migrant workers can help them fight against discrimination, sexual harassment, lost wages and other violations of their labour rights. Consular protection can extend to covering the costs of such representation. The Philippines embassies, for example, will pay legal costs if a case alleging abuse goes to court. Destination countries also provide legal aid. Destination countries also pay costs of representation. In Bahrain, for example, if a contract dispute involving a domestic worker cannot be resolved and goes to court, the court will appoint a lawyer for the migrant worker⁴³. At times, public interest or class action lawsuits may help ensure that an entire class of workers migrants obtain their rights. Nongovernmental organisations and trade unions play important roles in providing legal support in such cases. Associations of migrant workers can be useful rallying points for identifying problems and seeking legal redress.

Finally, programmes that provide shelter and social services to migrant workers who have experienced abuse are essential to protecting their rights. Migrant workers who decide to return home after escaping abusive conditions may also need assistance in repatriation and reintegration. Nongovernmental organizations, religious institutions and trade unions provide such assistance in a number of countries.

Consular protection can play an important role in ensuring that migrant workers do not face abusive situations. Consular officers can monitor the security of migrant workers in potentially vulnerable positions, using their diplomatic positions to engage the host country in interceding in favor of the migrant worker. Too often, however, there are too few consular offices and officials to be able to carry out these activities.

Refugees

International legal standards for the protection of forced migrants are in refugee, human rights and humanitarian law. The most developed of these frameworks applies to refugees as defined by the 1951 UN Convention—that is, persons who have a well-founded fear of persecution—and persons who would be tortured if they were returned to their home countries. There is a growing international consensus, however, about the

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

rights of persons who have been displaced by conflict and other situations that are likely to pose serious harm if return takes place.

The 1951 UN Convention Relating to the Status of Refugees emerged in the early days of the Cold War particularly to resolve the situation of some hundreds of thousands of refugees who still remained displaced by World War II and fascist/Nazi persecution⁴⁴. At its core, this treaty substitutes the protection of the international community (in the form of a host government) for that of an unable or unwilling sovereign. The treaty limits this stand-in protection to those who were unable or unwilling to avail themselves of the protection of their home countries because of a “well-founded fear of persecution based on their race, religion, nationality, political opinion or membership in a particular social group”. The Convention had time limits (refugees displaced by 1951) and geographic restrictions (Europe) that were lifted in the 1967 Protocol Relating to the Status of Refugees.

The core legal obligation of States pursuant to the Convention/Protocol is *non-refoulement*--to refrain from forcibly returning refugees to countries in which they would face persecution⁴⁵. States do not have the obligation to provide asylum or admit refugees for permanent settlement, and they may relocate refugees in safe third countries that are willing to accept them. The Convention has been interpreted to require States to undertake status determinations, however, for asylum applicants at their frontiers or inside their territories in order to determine if they have valid claims to refugee protection. In practice, this has often meant admission and asylum in the host country. The Convention also ensures that states cannot impose penalties on refugees if they enter or stay illegally, as long as the refugees “present themselves without delay to the authorities and show good cause for their illegal entry or presence” (Article 31).

The Convention drafters recognized that among refugee populations would be found individuals whose actions made them undeserving of international protection. The so-called “exclusion” clauses of the Convention set forth two major kinds of such individuals—human rights violators and serious criminals. Thus, those who have committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime are excluded from international protection. That is, they are not to be granted refugee status and its attendant benefits.

Separately, there are two exceptions to a state’s *non-refoulement* obligation under Article 33. States may return to a country of persecution an individual regarded “as a danger to

⁴⁴ United Nations High Commissioner for Refugees (UNHCR), *The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action* (New York: Oxford University Press, 2000), 17.

⁴⁵ According to the UN High Commissioner for Refugees, “There is no universally accepted definition of “persecution,” and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights--for the same reasons--would also constitute persecution. “ See *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (Geneva: UNHCR, January 1992), para. 51.

the security of the country” of refuge, as well as someone who “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”,⁴⁶.

The Convention also sets out the rights of refugees who have been admitted into the territory of another country. Certain fundamental human rights such as freedom of religion (Article 4) and access to courts (Article 16) are guaranteed to be at least those accorded to the citizens of the state hosting the refugee. Thus if legal assistance is provided to citizens, the same must be accorded to refugees (Article 16(2)). Elementary education is also accorded to refugees as it is to citizens (Article 22(1)). Refugees lawfully residing in a host country are guaranteed public relief in this way as well (Article 23). In addition, the Convention cannot be applied in a discriminatory way regarding race, religion, and country of origin (Article 3).

Many important rights accorded recognized refugees, however, do not need to match those of citizens. Rights as fundamental as the right of association (Article 15) and freedom of movement (Article 26) are accorded to refugees to the same degree that they are accorded to nationals of other countries. Rights regarding employment (Article 17), property (Article 13), public education beyond elementary school (Article 22(2)), and housing (Article 21) are also accorded to refugees in a manner no less favourable than those accorded to citizens of other countries. However, with regard to wage-earning employment, refugees are accorded national treatment after three years of residence in the host country (Article 17(2)(a)). Certain legal matters are left completely to the host state. States are encouraged to facilitate the naturalization of refugees, though they are not required to match any naturalization rights provided to other non-citizens (Article 34).

Conflict-induced displacement

The 1951 Refugee Convention’s focus on persecution as the cause of forced migration limits its applicability⁴⁷. The causes of flight of most refugees are war and civil strife⁴⁸. In recognition of the actual forced movements occurring regularly in Africa, the Organization of African Unity (OAU) adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969. While acknowledging the UN Refugee Convention as the basic and universal instrument regarding the protection of refugees, the OAU Convention broadened the definition and set out other important protection provisions. In addition to protecting one who flees persecution, this regional treaty protects an individual who “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of

⁴⁶ UN Convention relating to the Status of Refugees, Art. 33(2), July 28, 1951.

⁴⁷ See Louise W. Holborn, *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951-1972* (Metuchen, N. J. : Scarecrow Press, 1975).

⁴⁸ James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 10.

origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”⁴⁹.

In a similar vein, the 1984 Cartagena Declaration on Refugees expanded the definition of protected refugees in the Latin American region. Like the OAU definition, it supports the 1951 Convention and adds protection to those who have fled their country “because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have seriously disturbed public order”. More recently, the forty-five-member state Asian-African Legal Consultative Organization adopted the OAU refugee definition in its revision of the Bangkok Principles on the Status and Treatment of Refugees⁵⁰. As with the Latin American expansion of the refugee definition, the Bangkok Principles are declaratory in nature.

The United States and European nations have developed more limited policies on protecting civil war refugees and others covered by the OAU Convention and the Cartagena Declaration. In 1990, the United States adopted legislation granting Temporary Protected Status (TPS) to persons fleeing armed conflict and natural disasters. While this type of protection is established by statute, Congress gave the Attorney General significant discretion in determining which nationals qualify for TPS, and these officials have exercised their discretion by selecting only some of the many countries experiencing conflict for this status. Most importantly, even when the Attorney General provides TPS to certain nationals, this status is limited to those who have already reached the U. S. at the time of the Attorney General’s proclamation. On limited occasions, however, an Attorney General has moved the qualifying date forward to allow those nationals who arrived after the initial qualifying date to become eligible for TPS. Except for a belated use as the civil wars in Central America were winding down in the early 1990s, the numbers provided this type of temporary protection have been relatively small.

Those protected under TPS are allowed to work and attend public school but are generally not eligible for public assistance⁵¹. TPS status does not provide for family reunification. It is awarded on a group basis. The United States does not offer any complementary humanitarian status in individual determinations, though experts have proposed such policies⁵².

The Council of the European Communities adopted a Directive in 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced

⁴⁹ 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, UNTS No. 14 691.

⁵⁰ Asian-African Legal Consultative Organization Resolution 40/3, June 24, 2001, New Delhi.

⁵¹ Susan Martin, Andrew I. Schoenholtz and Deborah Waller Meyers, “Temporary Protection: Towards a New Regional and Domestic Framework,” 12 *Georgetown Immigration Law Journal* 543, 1998.

⁵² Martin, Schoenholtz and Waller Meyers, “Temporary Protection,” 569-570.

persons (Directive)⁵³. The protection is granted in situations of mass influx if the Council, upon recommendation by the Commission and taking into account reception capacities of the Member States, so decides by a qualified majority. Temporary protection may last up to a maximum of three years and obliges Member States to grant beneficiaries a residence permit, employment authorization, access to suitable accommodation, social welfare and medical assistance, access to education for those under the age of 18, and nuclear family reunification⁵⁴. The Directive requires States to allow beneficiaries to lodge an asylum application, but allows States to suspend the examination of such applications until after the end of temporary protection⁵⁵. According to a leading expert, the Directive is, in principle, compatible with the requirements of international refugee law, although much will depend on the quality of the asylum procedure when temporary protection ends and most beneficiaries can return home in safety and with dignity⁵⁶.

In addition to temporary protection in the event of mass forced migration, European states provide complementary or subsidiary protection to individuals who do not qualify for refugee status under the 1951 Convention but still need protection from return to their home countries. In 2000-2002, for example, European states granted protection complementary to Convention protection to an average of 70,000 applicants each year⁵⁷. About 57,000 individuals received asylum in those same states in each of those years⁵⁸. European Union Council Directive 2004/83/EC of 29 April 2004 directs that subsidiary protection shall be accorded to any person who cannot return to the country of origin because of serious harm, which consists of (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict⁵⁹.

Torture victims

State parties to the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) commit themselves not to return a person “where there are substantial grounds for believing that he would be in danger of being subject to torture (Art. 3)”. A similar provision is included in the European Convention

⁵³ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of efforts between Member states in receiving such persons and bearing the consequences thereof, O. J. 2001 L 212/12.

⁵⁴ Council Directive 2001/55/EC of 20 July 2001, 8, 12, 13, 14, 15.

⁵⁵ Council Directive 2001/55/EC of 20 July 2001, Article 17.

⁵⁶ Walter Kalin, *Temporary Protection in the EC: Refugee Law, Human Rights and the Temptations of Pragmatism*, 44 German Yearbook of International Law 202, 220 (2001).

⁵⁷ UNHCR, Population Data Unit, *Asylum applications and refugee status determination in selected European countries, 2000-2002*, Table 2 (20 February 2004).

⁵⁸ *Id.*

⁵⁹ COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

on Human Rights and Fundamental Freedoms, which has been interpreted to prohibit the return to a State where there is a “real risk” that the person will be subject to inhuman or degrading treatment and punishment⁶⁰. Unlike the Refugee Convention’s *refoulement* provision, CAT contains no exceptions on the basis of national security.

Implementation at the national level

While the norms and international legal frameworks are well accepted, serious problems of implementation continue. These legal frameworks must be seen in the context of growing confusion about the nexus between asylum and other forms of migration. No international treaty provides for a right to asylum—only a right to seek asylum⁶¹. Determining who is a refugee, as compared to an economic migrant, can be an extremely difficult task, particularly when individuals migrate for a complex variety of reasons. For example, an individual may leave his or her home because of persecution or life-endangering conflict, but he or she may choose a destination because of family connections or employment opportunities or, even, the decision may be made for the individual by a smuggler.

States have adopted various policies to deter asylum seekers from reaching their territory or to shift the burden for making refugee status determinations to other States. Policies that fall short of actual *refoulement* nevertheless deter *bonafide* refugees from seeking protection⁶². These include visa restrictions imposed on nationals of certain States, sanctions against carriers that transport persons without proper documentation, safe third country and safe country of origin provisions through which States return asylum seekers without hearing their applications, transfer of asylum seekers interdicted on the high seas to processing centres in other countries, expedited processing provisions that turn away certain applicants (those judged to have no credible claim or a manifestly unfounded claim) without benefit of a full asylum hearing, and mandatory detention of asylum seekers.

States and forced migrants will benefit when asylum systems provide for meaningful access, are operated fairly and efficiently, and minimize abuse. National and regional approaches based on the OAU Convention definition of a refugee are the best ways to ensure legal protection for the vast majority of today’s refugees who flee conflict and other forms of serious harm. Finally, to help ensure the effective protection of refugees in their region of origin, the international community should find ways to get important

⁶⁰ Aleinikoff, *Migration and International Legal Norms*, p. 13.

⁶¹ Attempts to secure a right to asylum in the 1960’s and 1970’s were rejected by the United Nations Conference on Territorial Asylum in 1977. Given the lack of consensus on this issue, the Conference simply recommended that the General Assembly consider its reconvening at a suitable time. The Conference has never been reconvened. ⁶¹ Sovereign states have consistently chosen to retain their discretion over asylum.

⁶² The policies sometimes include actual *refoulement*. The US Supreme Court in *Haitian Refugee Center versus Sales* determined that the government could return Haitians directly to Haiti, without access to a refugee determination, if the Haitians were interdicted on the high seas.

refugee receiving states to become parties to the 1951 Refugee Convention and 1967 Protocol.

Human trafficking and smuggling

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, both of which supplement the United Nations Convention against Transnational Organized Crime, went into force in December 2003 and January 2004, respectively. Within a few years of their adoption, the trafficking and smuggling protocols have garnished considerable support, with more than 100 signatories and 67 and 59 parties, respectively.

The Trafficking Protocol requires States to adopt measures to criminalize trafficking (Article 5), to provide assistance and protection to victims of trafficking (Article 6), to provide repatriation assistance to victims of trafficking (Article 8), and to prevent and combat trafficking (Article 9). Trafficking is defined as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”⁶³.

The Smuggling Protocol requires States to adopt measures to criminalize smuggling and to prevent smuggling (Article 7, 8, 11, 15), requires States to preserve and protect the rights of migrants who have been smuggled (Article 16) and requires States to facilitate the return of migrants (Article 18). These instruments require international cooperation in combating smuggling and trafficking, an issue that will be further discussed below.

The adoption of separate protocols on trafficking and smuggling reflects the need to clearly distinguish these two activities. Whilst undocumented migrants willingly accept to pay and take risks to be transported across borders in search of better life prospects, trafficked persons are victims of criminal groups. Yet, the sometimes overlapping nature of trafficking in humans, labour migration into exploitative situations, and debt bondage to pay off smuggling fees calls for a careful use of these terms. Persons might volunteer to migrate but then find themselves subject to violence, coercion and exploitation after leaving their home communities. Trafficking is defined by such exploitation, coercion and abuse, not the original motivation for migration. For example, migrants may agree to pay smugglers to bring them across borders. If they are unable to pay all of the costs, the smugglers may “sell” the migrants to businesses that cover the fees in exchange for indentured labour. This debt bondage can amount to virtual slavery, particularly for

⁶³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime.

women and children forced into sexually exploitive occupations. Such a person has been trafficked, even if she initially consented to the smuggling arrangement.

Trafficking and smuggling must be addressed at three levels. First is the supply of trafficked and smuggled persons. Second is the demand side—those who ultimately use or benefit from the services provided by trafficked or smuggled persons. Third are the traffickers and smugglers themselves as well as the corrupt officials who enable them to operate with impunity.

The Trafficking Protocol focuses most concretely on the third element, particularly the prosecution of traffickers. Yet, the Protocol recognizes that there is need to balance crime prevention/prosecution with protection of the rights of the trafficked persons. The Protocol states a purpose of “protecting and assisting victims of trafficking, “with full respect for their human rights” (Art 2). State parties are to take steps to protect the physical safety, privacy and identity of victims, assist them in legal proceedings, and consider measures to provide for the physical, psychological and social recovery of survivors (Art 6). It also urges States to consider adopting laws or regulations that permit victims to remain in the territory for a temporary or permanent basis (Art 7).

The Protocol recognizes that prosecution and protection of victims are mutually supportive goals. The testimony of trafficking survivors is generally invaluable to the prosecution of cases against traffickers. Trafficking is a difficult crime to investigate and highly dependent on the willingness of victims to cooperate with law enforcement. Such cooperation can be highly dangerous for the trafficked persons, however. They will be too afraid to testify unless there are effective ways to prevent retaliation against them or their families at home.

The United Nations recommends that law enforcement officials work in partnership with non-governmental organizations to help ensure greater protection of the victims of traffickers. Law enforcement should also implement measures to “ensure that ‘rescue’ operations do not further harm the rights and dignity of trafficked persons. Such operations should only take place once appropriate and adequate procedures for responding to the needs of trafficked persons released in this way have been put in place”⁶⁴.

Identification of trafficking victims is exceedingly difficult, requiring a multi-sector approach, rather than reliance on law enforcement. When trafficking victims come to the attention of authorities through raids on brothels and other places of employment, the victims are often afraid to reveal their situation. They may fear retaliation by the traffickers, who often have paid police for their cooperation, or they may fear that they will be imprisoned or deported. Social service agencies, hospitals and clinics, schools,

⁶⁴ UN High Commissioner for Human Rights. Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, E/2002/68/Add. 1

labour inspectorates, trade unions, ethnic associations and other parts of civil society must be involved in the identification of women and children who have been trafficked.

Laws in some countries provide for temporary or permanent legal status to trafficking victims. Often the legislation requires cooperation with law enforcement agencies in the capture or prosecution of the traffickers. In some cases, family members still in the country of origin will be admitted to the country of destination if the traffickers are likely to retaliate against them. The United States Victims of Trafficking and Violence Protection Act, enacted in 2000, in addition to increasing criminal penalties for traffickers, provides immigration benefits to victims of severe trafficking who cooperate in the prosecution of traffickers, including a special visa and access to benefits granted to refugees. A number of European countries have similar provisions that grant residency status to victims who cooperate with law enforcement. Such countries as Germany and the Netherlands have official 'reflection periods' during which victims are given time to decide whether to cooperate in the prosecution of their traffickers. In 2004, the European Union adopted a Council Directive on short-term residence permits to those victims who cooperate with the authorities.

Nationality

The Universal Declaration of Human Rights provides that "everyone has the right to a nationality". In general, citizenship is confirmed by birth (*jus solis*), by descent (*jus sanguinis*) and/or by naturalization. Many countries permit a combination of these mechanisms to grant citizenship, but some countries rely primarily on birth or on descent, and some make naturalization very difficult to obtain for most foreign nationals.

Although most persons are citizens of a single country, international migration creates exceptions to the rule. In one direction, migration produces opportunities for multiple nationalities. For example, an immigrant might naturalize, becoming a citizen of her new country, but she will not necessarily lose the citizenship of her country of birth. If her country of origin provides for citizenship by descent, and her country of residence provides citizenship by birth on its territory, her children might be dual nationals. If the child's father is a citizen of a third country that offers citizenship by descent, the children might have citizenship in three countries. The reverse can happen as well. If the country of the migrant's birth only provides citizenship to those born on its territory, and the country in which she gives birth provides citizenship only by descent, her children might be stateless unless she is able to naturalize. The Convention on the Reduction of Statelessness mandates that State parties grant nationality to persons born in their territories who would otherwise be stateless, but only 26 States have become parties to this instrument⁶⁵.

⁶⁵ Aleinikoff, *Migration and International Legal Norms*, p. 21.

Naturalization policies differ significantly by country. A study of the naturalization laws of 25 countries⁶⁶ found the required period of residence for immigrants prior to naturalization varied from as little as three years to as many as ten years. In some States, the required period of residence is reduced for spouses of citizens. Ten countries required that naturalization applicants show they were of good character; and seven required renunciation of prior citizenship. A majority of countries required that naturalizing citizens demonstrate knowledge of their new country's language, with a smaller number also requiring knowledge of the history of the new country. Sufficient income requirements were found in ten countries.

While States have considerable discretion in determining who is a national, certain human rights norms, such as non-discrimination, apply. Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women specifies that State parties "shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. " It also says: "State parties shall grant women equal rights with men with respect to the nationality of their children".

The issue of multiple nationalities has come to the fore as increasing numbers of persons hold the citizenship of more than one country. Increased mobility creates the potential for dual nationality as cross-national marriages occurs and children are born with the nationality of both parents. Increased migration has also created greater likelihood of dual nationality when persons who naturalize obtain new citizenship, often without relinquishing their old nationality. Further, State practice has shifted from a general reluctance to permit dual nationality to recognition of its inevitability and, even, benefits. As a growing and relatively new issue for many States, "sorting out rights and duties for dual nationals would be an appropriate area for interstate deliberation and cooperation"⁶⁷.

Family unity

The right to family unity remains a controversial issue. The right is enshrined in international law; Article 16(3) of the Universal Declaration of Human Rights states clearly that: "the family is the natural and fundamental group unit of society and is entitled to protection by the society and the state". Splitting families apart deprives each member of the fundamental right to respect of his or her family life. Whether the principle of family unity *requires* a State to admit the non-national family members of someone residing legally on its territory is the point of contention. Many States do, in fact, permit the entry of spouses and minor children to join a lawfully resident immigrant,

⁶⁶ Patrick Weil, Access to citizenship: A comparison of twenty-five nationality laws, in T. A. Aleinikoff and D. Klusmeyer, eds. , *Citizenship Today: Global Perspectives and Practices*, Washington, D. C. : Carnegie Endowment for International Peace, 2001.

⁶⁷ Aleinikoff and Chetail, *International Legal Norms and Migration*, p.

but many also place serious restrictions of the ability of families to enter. Contract labour arrangements, in particular, often preclude admission of family members. Admission rules often restrict family reunification for asylum seekers and those granted temporary protection. Often, only after obtaining asylum can applicants apply for family reunification.

In addition, governments impose financial restrictions on persons seeking to sponsor family members to ensure that they have sufficient income to support the new arrivals. Such policies can have disproportionately negative impact on women seeking to sponsor their families since women often have lower earnings than men. Definitions of family vary for the purposes of immigration admission. In the United States, for example, parents and siblings of US citizens are eligible as well as spouses and children of both citizens and legal permanent residents. The European Union directive on family reunification covers spouses and minor children, allowing member States to set policies individually on other family members. The directive permits States to restrict the admission of minor children over the age of twelve. The directive explains: “The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school” (European Union 2003:13). Many States also restrict the admission of more than one spouse in a polygamous marriage. States vary in whether non-married partners and spouses in same sex unions are admissible.

States also adopt rules to guard against marriage fraud. The European Union defines a “marriage of convenience” as a:

Marriage concluded between a national of a Member State or a third-country national legally resident in a Member State and a third-country national with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State (EU Council Resolution 97/C 382/01 of 4 December 1997:1).

Where there is well-founded reason to believe the marriage fits this definition, Member States may be required to interview the spouses separately to validate the application for admission. To combat the potential for fraud in marriage cases, the United States offers conditional status to the immigrating spouse in recent marriages and reviews the case after two years to make sure that the marriage is valid before granting permanent status.

Arranged and forced marriages also are receiving scrutiny in a number of countries. Of particular concern are marriages between or with minors. The European Union determined “In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her” (EU Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Art. 4). Denmark requires that both spouses be at least 24 years of age before the non-Danish

spouse can apply for admission; the spouse in Denmark must have been residing in the country for at least eight years and demonstrate that the couple has a stronger attachment to Denmark than to non-Danish spouse's country of origin. Such policies hold the potential for harming those in *bonafide* marriages while trying to address concerns about forced marriages.

INTERNATIONAL COOPERATION

A weak but growing component of international law defines areas in which States agree to cooperate in the management of international migration⁶⁸. This section discusses three quite different examples of international cooperation: state to state cooperation in the prevention of human smuggling and human trafficking; responsibility-sharing in protecting and assisting forced migrants, and State commitments under Mode 4 of the General Agreement on Trade with regard to admission of persons providing trade in services.

State-state cooperation on human smuggling and trafficking

State Parties to the Protocols on Human Trafficking and Human Smuggling make explicit commitments to cooperate with other States in combating smuggling and trafficking. Cooperation in the exchange of information is emphasized in both Protocols. For example, Article 10 of the Trafficking Protocol specifies that:

law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine: (a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

⁶⁸ The institutional venues for promoting inter-State cooperation in managing migration are discussed in a companion paper by Kathleen Newland at the Migration Policy Institute. The past decade has seen the growth of regional consultative mechanisms in which States convene to discuss international migration within and to their regions. More recently, the Berne Initiative, a State sponsored process, has sought to develop consensus on best practices internationally in managing international migration.

Article 13 provides that “at the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons”.

Similarly, Article 10 of the Smuggling Protocol requires State Parties to share information on a long list of issues relevant to combating smuggling:

- (a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organized criminal group engaged in conduct set forth in article 6 of this Protocol;
- (b) The identity and methods of organizations or organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol;
- (c) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;
- (d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents used in conduct set forth in article 6 of this Protocol and ways of detecting them;
- (e) Legislative experiences and practices and measures to prevent and combat the conduct set forth in article 6 of this Protocol; and
- (f) Scientific and technological information useful to law enforcement, so as to enhance each other’s ability to prevent, detect and investigate the conduct set forth in article 6⁶⁹ of this Protocol and to prosecute those involved.

In Article 14, Parties to the Smuggling Protocol also commit “cooperate with each other and with competent international organizations, non-governmental organizations, other relevant organizations and other elements of civil society”. Training should cover such areas as: improving the security and quality of travel documents; recognizing and detecting fraudulent travel or identity documents; gathering criminal intelligence, relating in particular to the identification of organized criminal groups, the methods used to transport smuggled migrants, the misuse of travel or identity documents and the means of concealment used in the smuggling of migrants; improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and the humane treatment of migrants and the protection of their rights as set forth in the Protocol.

The Protocols break new ground in identifying areas of cooperation that go well beyond law enforcement to prevention and protection of the victims of these forms of organized crime. Article 15 of the Smuggling Protocol commits States to “cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups”. It also specifies “Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national,

⁶⁹ Article 6 specifies smuggling activities that should be considered as criminal offenses.

regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment”. Similarly, Article 9 of the Trafficking Protocol states “States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity”.

Responsibility sharing for refugees and displaced persons

A second mode of international cooperation emanates from international and regional legal instruments pertaining to refugees. The UN Convention Relating to the Status of Refugees begins with the recognition that “the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation”.

The Convention explicitly mandates that States Parties cooperate with the United Nations High Commissioner for Refugees, including providing information on the conditions of refugees, the implementation of the Convention, and laws, regulations and decrees related to refugees. Cooperation on “international solidarity, burden sharing and duties of States” has been spelled out in Conclusions of the Executive Committee of the UNHCR. Conclusion 22, for example, states that “action with a view to burden-sharing should be directed towards facilitating voluntary repatriation, promoting local settlement in the receiving country, providing resettlement opportunities in third countries, as appropriate”. Among the modes of responsibility sharing listed in the conclusion are “financial and technical assistance” and joint efforts to address the causes of large-scale influxes of asylum seekers. Conclusion 52 “stressed that the principle of international solidarity has a fundamental role to play in encouraging a humanitarian approach to the grant of asylum and in the effective implementation of international protection in general”.

For the most part, cooperation takes the form of financial support from wealthier countries for the protection, care and maintenance of refugees in poorer countries which house the majority of refugees. Resettlement, in which refugees are moved from countries of first asylum to third countries where they are able to reside permanently, is another form of international cooperation that affects only a small minority of refugees.

Regional accords also seek to promote international cooperation. The OAU Refugee Convention contains similar language to the 1951 Convention but in addition to committing to cooperation with UNHCR, States Parties also commit to cooperate with the Organization for African Unity. The European Union Directive on Temporary Protection includes provisions calling for member State solidarity. “The Member States may call on the European Refugee Fund to finance the measures provided for in the Directive (financial solidarity). In a declaration acknowledging a massive influx,

attached to the Council decision, each Member State indicates either its capacity to receive displaced persons, in numerical terms or in general. At any time after the Council decision has been adopted, the Member States may indicate any additional capacity by informing the Council and the Commission. Throughout the period of temporary protection, the Member States will cooperate with each other with a view to transferring the persons concerned, where appropriate, to another Member State. Such transfers will take place on a voluntary basis”.

Negotiated commitments in trade agreements

Another form of international cooperation can be seen in trade agreements⁷⁰. The General Agreement on Trade in Services (GATS), particularly Mode 4 movement of natural persons, provides a framework for States to make commitments that govern temporary movement of certain service providers. GATS is not a migration agreement per se, but it does recognize that persons who provide services in another country must have access to that country in order to perform their services. GATS confers no right to movement. The Annex on Movement of Natural Persons makes clear that States retain the right to regulate the entry of persons into their territory and States have complete discretion in determining what commitments they will make under GATS.

The national commitments under Mode 4 of GATS vary considerably. Over one hundred countries made commitments. Most commitments pertain to highly skilled persons, including intra-company transfers, executives, managers and specialists⁷¹. States also made commitments to admit persons engaged in sales negotiations and other business visitors⁷². The period of admission may vary from several years for intracompany transfers to 90 days for business travelers.

In some cases, particularly in the few instances in which States commit to admission of lesser-skilled personnel, they provide for economic needs tests that require a showing that qualified domestic workers are not available. Other restrictions include requirements that the person be pre-employed by the company requesting his or her admission; limits on the freedom of the worker to move within the country or into another position; requirements that the workers be paid the prevailing wages for that occupation; and provisions to suspend the commitments in the event of a labor-management dispute⁷³.

Although GATS has not yet proved to be a robust framework for international cooperation, and is limited to only one class of migrants—those providing services—it could potentially be an important model for gaining agreement among States on international migration. Perhaps the most important role that agreements such as GATS

⁷⁰ This section focuses on the principal multilateral trade agreement, but similar points could be made about such regional agreements as the North American Free Trade Agreement.

⁷¹ Steve Charnovitz, “Trade Law Norms on International Migration,” in Aleinikoff and Chetail, *Migration and International Legal Norms*, p. 248.

⁷² *Ibid.*

⁷³ *Ibid.*

can play is providing transparency on the rules used by States in determining who can be admitted for what period. Such negotiations can also help define admission categories and harmonize standards for admission. For example, at present, States often use different definitions in determining what constitutes an ‘executive’ or ‘manager’ or person with ‘specialized knowledge.’ Moreover, each country establishes its own tests of its labor market, which are generally not well understood by other States, businesses or persons seeking admission.

A cautionary note, however, about the use of trade agreements to define immigration commitments. The movement of persons, particularly when they migrate for extended periods, creates far different and greater impacts on source and destination countries than do, for example, the movement of goods. Migrants have rights and they and their families have need for healthcare, education, and other services. Those whom they leave behind also have rights and may be highly dependent on them for financial assistance through remittances. As such, movement of persons affects not only the migrants but also the communities in which they reside and from which they come. Trade agreements are not necessarily the best way to negotiate commitments that take into account the full range of issues arising from movement of persons.

TOWARDS A NORMATIVE FRAMEWORK

The body of international law that has developed on international migration, in conjunction with best practices at the regional and national level, provides a normative framework—or accepted set of standards—for managing migration. As discussed in this paper, managing migration requires three components: state rights and responsibilities; migrant rights and responsibilities; and inter-State cooperation. During the past few years, there have been a number of attempts to identify existing best practices, consistent with international law, and to recommend policies that would fill in gaps without the promulgation of new law. This section discusses two such efforts: the Berne Initiative and the Hague Declaration. These are bottom-up attempts to build consensus among governments and within civil society, respectively.

The Berne Initiative, launched by the Swiss government in 2001, is “a States-owned consultative process with the goal of obtaining better management of migration at the regional and global level through co-operation between States. As a process, the Berne Initiative enables governments from all world regions to share their different policy priorities and identify their longer-term interests in migration, and offers the opportunity of developing a common orientation to migration management, based on notions of co-operation, partnership, comprehensiveness, balance and predictability”⁷⁴. Through regional and international consultations, the Berne Initiative has developed an International Agenda for Migration Management, which includes a “common understandings for the management of international migration” and “Effective Practices

⁷⁴ The Goal of the Berne Initiative, April 2003 (http://www.iom.int//DOCUMENTS/OFFICIALTXT/EN/Goal_E.pdf)

for a Planned, Balanced, and Comprehensive Approach to Management of Migration”. Twenty common understandings are listed:

1. The movement of people across borders is a feature of modern life.
2. Orderly and humane management of migration benefits both states and migrants.
3. All states share a common interest in strengthening co-operation on international migration in order to maximise mutual benefits.
4. The prime responsibility for the management of migration lies with states: each State has the right to develop its own legal framework on migration and to protect the security of its population, consistent with existing international principles and norms.
5. The implementation of comprehensive and coherent national migration policies is a prerequisite to effective international migration policy and co-operation in this field. Support for capacity-building in those states lacking adequate resources, infrastructure or expertise can make a useful contribution in this regard.
6. According to customary international law, states are bound to protect and respect the fundamental human rights of all migrants, irrespective of their status; the special needs of women and children, the elderly and the disabled require particular attention. Such protection and respect are central to the development of effective migration management systems.
7. Relevant international and regional instruments provide a solid starting point for the development of co-operative approaches to migration management.
8. Compliance with applicable principles of international human rights, refugee, humanitarian, migrant workers and crime control law is an integral component of any migration management system, at the national, regional and international levels.
9. Co-operation and dialogue among all interested stakeholders including states, international organisations, non-governmental organisations, the private sector, civil society, including migrant associations, employer and worker organisations, are important elements for effective migration management partnerships and the development of comprehensive and balanced migration management policies.
10. Bilateral, regional and inter-regional consultative processes are key to the development of co-operative migration management and contribute to co-operation at the global level.
11. Effective migration management is achieved through balanced consideration of economic, social, political, humanitarian, developmental and environmental factors, taking into account the root causes of migratory flows.
12. There is a close relationship between migration and development; properly managed, that relationship can reap benefits for the development of states.
13. Providing adequate channels for legal migration is an essential element of a comprehensive approach to migration management.
14. Reduction of irregular migration is a shared responsibility among all states.

15. Enhanced efforts are needed at all levels to combat human trafficking, organised migrant smuggling and other forms of international criminality affecting migrants and to provide support to victims of trafficking.
16. The family is the basic unit of society and as such deserves special attention. In the context of migration, family separation has to be avoided. Facilitation of family reunion can contribute to maximising the positive effects of social and cultural integration of migrants in the host community.
17. Integration of migrants is essential to foster social and political stability, to maximise the contributions migrants can make, and to reduce instances of racism and xenophobia.
18. The dissemination of accurate, objective and detailed information on migration policies and procedures enables migrants to make informed decisions. It is necessary for informed public opinion and support for migration and migrants.
19. The systematic collection, analysis and exchange of timely, accurate and comparable data on all aspects of migration, while respecting the right to privacy, are important for migration management at national, regional and international levels.
20. Research on all aspects of migration is needed to better understand the causes and consequences of international migration.

The effective practices focus on mechanisms to promote international cooperation; specific policies to regulate entry and stay for work purposes, family union, study, humanitarian resettlement; prevent irregular migration; protect human rights of migrants; protect refugees from refoulement; integrate immigrants; regulate naturalisation and citizenship; and manage return. The effective practices also address the nexus between migration and such issues as development, trade, security, health and the environment.

The strength of the Berne Initiative is its consultative process that has brought source, transit and destination countries together to build consensus on the common understandings and effective practices. The Common Understandings briefly restate or give adherence to international law, but they go well beyond conventions to achieve consensus on a framework for international cooperation. This framework recognises the benefits of legal avenues of migration and the integration of immigrants, but also emphasises the need to reduce irregular migration and curb such abuses as smuggling and trafficking as well as racism and xenophobia.

The weakness of the Berne Initiative is its emphasis on State participation in the consultations. Although nongovernmental organisations and academic experts participated in the international and regional meetings, the process has been dominated—purposefully—by States. Since the State participants usually have a vested interest in the issues (coming from Ministries with specific responsibilities for migration), convincing the broader political spectrum as well as public opinion as to the wisdom of the common understandings and effective practices may be difficult.

By contrast, the Hague process has been a nongovernmental effort launched by the Society for International Development's Netherlands chapter in 2000. Bringing together

about 500 persons from government, intergovernmental organizations, nongovernmental organizations and academia. The Declaration presents twenty-one principles for managing migration. It begins recognising that the primary responsibility for migration and refugee policy rests with States, but it asserts that States cannot act alone and succeed in managing migration. The Declaration emphasises that “coherent orderly migration programmes are key instruments in a new approach to migration” because they clarify rights and obligations of migrants, strengthen public confidence, and reduce the constraints and costs of unauthorised migration. Placing great focus on refugees and displaced persons, the Declaration calls for conflict prevention measures, respect for human rights and international humanitarian law, adherence to the UN Convention Relating to the Status of Refugees and the Guiding Principles on Internal Displacement, and “new, inclusive, bottom-up approaches to post-conflict situations. “ The Declaration also promotes integration and social inclusion of migrants, emphasising that “refugees and migrants have skills, knowledge, experience and strong aspirations for a better life”. Accordingly, the Declaration includes a specific reference to the corporate sector, calling on business leaders to “actively ensure the inclusion into the labour force of refugees and migrants in host countries and thereby reinforce the integration process”. The Declaration’s 20th Principle recognises that “powerful instruments of human rights, international humanitarian law and refugee law already exist to protect refugee, and to a lesser extent migrants. The priority for the future is to ensure their effective implementation”. The Declaration ends with a call for re-examination of the institutional arrangements for population movements at the global and regional levels.

INSTITUTIONAL IMPLICATIONS

Weak institutional arrangements make international cooperation in managing international migration all the more difficult to achieve and retard the development of effective legal and normative frameworks to handle the full range of issues discussed in this paper. Institutional responsibilities are spread across many organizations, none having a clear mandate to work with States to manage flows of people across borders, enhance compliance with existing international law or to fill gaps where they exist.

To date, much of the consensus building has taken place through ad hoc, informal mechanisms such as the Berne Initiative, at the international level, and the various consultative mechanisms established at the regional level. These mechanisms provide useful forums for discussion but they do not seek to enforce norms of behaviour on their members. They may identify gaps in international law and even set out normative frameworks (or common understandings, as in the Berne Initiative), but members may choose to ignore the norms.

Moving from the current arrangements to a more robust international regime may be premature, however. While there has been progress in setting out common understandings, there continue to be fundamental disagreements among States as to causes and consequences of international migration and the extent to which it is in the interests of States to liberalize or restrict flows of migrants. This situation contrasts

sharply with the general consensus that governs movements of goods, capital and services—that it is in the ultimate interest of all States to lessen barriers to the movements of these factors.

Yet, there does appear to be growing consensus that managing migration—whether in a more liberal or restrictive direction—is in the best interests of States. Uncontrolled movements—particularly when dominated by organised criminal smuggling and trafficking networks—harm States as well as those migrating via these unauthorised channels. In this context, there also appears to be growing consensus—as witnessed by the broad ratification of the Refugee Convention, Smuggling and Trafficking Protocols, and even the less impressive ratification of the Migrant Rights Convention—that persons crossing borders have special needs and that the protection of their rights is of international concern. However, with the exception of the UN High Commissioner for Refugees in relationship to refugees, there is no international organization with a clear mandate to help States manage the movements or to protect the rights of the migrants.

Should one international organization seek to cover all of the issues raised by international migration? The international legal framework would argue for keeping the institutional arrangements for refugees distinct from those for voluntary migrants. The Refugee Convention covers individuals who cannot or will not accept the protection of their own countries because of a well-founded fear of persecution on the basis of one of five protected grounds. By contrast, labour or family migrants can presumably call upon their own country's protection, either via consular protection or by return to their home territory. The role of the international community is far more limited in the case of voluntary migrants than it is in the case of refugees because of these distinctions. Yet, it is also true that the line between migration and asylum is often blurred and States have difficulties determining who qualifies for international protection.

One possible option arising from the differences in international law would be to continue to assign responsibility for protection and assistance to refugees to the UN High Commissioner for Refugees while identifying and assigning to a separate organization or set of organizations (for example, the International Organization for Migration (IOM), International Labour Organisation (ILO) and UN High Commissioner for Human Rights (UNHCHR) responsibility for helping States manage migration and protect the rights of migrants⁷⁵. IOM already provides technical assistance to States in the management of immigration and development of policies and programs, while ILO and UNHCHR already have mechanisms in place to address violations of the rights of migrants. A coordination mechanism could then be established to address issues that arise at the nexus between refugee and migration issues.

⁷⁵ In other writings, this author has recommended that a single international organization—dubbed the UN High Commissioner for Forced Migrants—take responsibility for both refugees and internally displaced persons who share similar characteristics with refugees—that is, a need for international protection because their own countries are unwilling or unable to protect them.

CONCLUSION

During the past decade, there has been significant progress in establishing an international legal and normative framework for managing the movement of people across borders and for protecting the rights of international migrants. Just in the past two years, three international agreements affecting international migration went into force: the Convention on the Rights of Migrant Workers and Members of their Families and the Protocols on Human Smuggling and Human Trafficking. Although ratification of the migrant rights convention has been disappointing, the document provides a useful compilation of norms, most of which exist in more broadly ratified international law. The smuggling and trafficking protocols broke new ground in setting out standards by which States can be held accountable in terms of their actions in preventing smuggling and trafficking, prosecuting smugglers and traffickers, protecting those who have been smuggled and trafficked, and cooperating with other States to accomplish the goals of these agreements.

Progress has also been made at the regional level in setting out agreements among States to manage international movements of persons. The European Union has issued directives in such areas as temporary protection, rights of third country nationals, visa policy, family reunification and asylum. The various Regional Conferences on Migration (RCM) have established plans of action for cooperation in managing migration within their regions. The RCM for the Americas, for example, adopted a plan of action in three areas: migration policies and management, human rights, and the linkages between migration and development. The Berne Initiative in turn brought the regional perspectives together into a framework based on effective practices and common understandings.

This is not to downplay the gaps that remain in the international and regional legal and normative frameworks. As discussed in this paper, international law is particularly weak in setting out norms for regulating the movement of persons for family unity purposes. There are also major gaps in addressing the movement of persons who are at the nexus of the asylum and migration systems, particularly those leaving countries in conflict and seeking entry to countries with greater economic opportunities. The international frameworks to prevent irregular migration are new and untested (in the case of smuggling and trafficking) and lacking altogether with regard to other unlawful movements for economic reasons. At the same times, State systems for implementing existing laws are weak and fail to convince policymakers or the public in the ability of governments to manage migration pressures or patterns. Too often, migration appears to be out of the control of State authorities.

A well-regulated and more comprehensive legal framework for managing international migration would be in the best interest of both States and migrants. As discussed in the introduction to this paper, there is no inherent conflict between policies that protect State interests and security and those that protect the rights of migrants. In fact, to be sustainable, international migration laws and policies must address a wide range of issues, including but not limited to the following:

- Legal channels for migration of persons seeking work opportunities in other countries;
- Protection of the rights of migrants and their families, including persons who have been smuggled or trafficked;
- Protection of refugees and durable solutions to refugee problems;
- Prevention and prosecution of human smuggling and human trafficking operations; and
- Return, readmission and reintegration of persons who do not have, or no longer have, authorization to remain in a destination country.

A well-regulated system must also provide avenues for international cooperation in managing the flows of people from source, through transit, to destination countries and, often, back to the source country or onto another destination country.

As described above, there are a number of models through which international cooperation has been advanced. Each serves different purposes and has a role in improving management of migration. GATS-like negotiated commitments follow the ways in which States interact in regulating movement of goods and services. Here, a State voluntarily sets rules for the admission of certain categories of migrants. If the commitments are made as part of a treaty, the State foregoes the right to change the rules unilaterally. This approach provides transparency and consistency. However, it limits flexibility. For example, if a State commits to admitting a minimum number of workers⁷⁶, it cannot reduce this commitment should economic conditions change and concerns about competition with domestic workers emerge. Using the GATS example as a model, an international body, such as the World Trade Organization, would monitor implementation and hear complaints that States are violating their commitments.

The Trafficking and Smuggling Protocols is more explicit in setting out specific areas in which State Parties agree to cooperate with each other. The protocols emphasize information exchange, training, public information and other joint efforts to prevent smuggling and trafficking. Implicit in this model is the recognition that unilateral actions on the parts of States will be ineffective in addressing transnational problems that affect all countries. The 1951 UN Refugee Convention and regional agreements on forced migration promote international cooperation as a way to share responsibility for assisting, protecting and finding solutions for persons who cannot rely on their own governments. Again, implicit in this approach is the need for international cooperation to address a phenomenon that is beyond the capacity of any one country. The forms of international cooperation include the sharing of financial resources and the potential movement of refugees and others in need of protection from one country to another. A key role is assigned to the United Nations, particularly the UNHCR, not only in protecting the rights of the refugees but also promoting cooperation among States.

⁷⁶ For example, in the Uruguay Round of GATS, the United States committed to admit no fewer than 65,000 professionals and speciality workers per year.

No one legal or normative model appears perfect in eliciting the type of cooperation needed to manage international migration more effectively. It is likely that a combination will be needed. Existing international law, in combination with best practices in national and regional law and policies, provide an excellent starting point for the development of a well-regulated international system. At present, however, the legal framework is spread across so many different instruments that it confuses rather than illuminates the situation. Compiling the rules and best practices into a single set of guidance for States would increase understanding of the legal and normative framework and improve its implementation. Ultimately, however, States will need to develop more effective mechanisms to promote consultation and cooperation in managing a phenomenon that is here to stay.