Introductory reading


Preliminary outline

1. States, sovereignty and nationality

A population – inhabitants – are an essential element in statehood, but not necessarily a law on nationality. This opening lecture looks at the relationship between the State and its nationals or citizens (the terms are used interchangeably), at the origins of sovereign powers in the matter of community membership, admission and exclusion, and at the human rights dimensions to nationality and statelessness.
2. **Freedom of movement: Ideal and reality**

The second lecture considers the ‘ideal’ of freedom of movement, with reference to its historical antecedents, but more particularly to State practice over the last 60 years or so in both constitutional and international law perspectives. This lecture will review the right of the individual to leave and to return to his or her country, and examine when and how the State may be obliged to admit certain individuals as a matter of international obligation, including within regional arrangements. The impact of such different phenomena as forced migration and migration regulation on a human right proclaimed in many international instruments, but rarely made complete, will also be considered.

3. **Labour migration**

Related to freedom of movement, labour migration often expresses some of the most fundamental interests of the individual – to survive, to advance, and to provide for family. It also touches on important economic interests of States and for that reason is a favoured object of ‘management’. Here, international organizations, such as the International Labour Organization (ILO) and the International Organization for Migration (IOM), play a role, but there is a tension between promoting the interests of States and setting and applying standards for the protection of individuals. Although for long considered a matter of unilateral competence, bilateral and regional agreements are also increasing, particularly in relation to movements of people outside favoured streams, as in the case of irregular migrants, smuggling and trafficking. Where States exercise extra-territorial measures of control, such as interdiction or interception, or where they apply measures without regard to individual circumstances, human rights face particularly difficult challenges.

4. **The principle of non-discrimination and its application to the migrant**

As was noted in the introductory lecture, international law appears to permit the State to maintain distinctions between nationals and non-nationals; indeed, such distinctions would seem to be inherent in the concepts of Statehood and citizenship. The principle of non-discrimination, however, considered within the general context of human rights clearly prohibits certain distinctions, many
of which may overlap the citizenship difference; the question is, where does international law draw the line?

5. **Expulsion and other forms of removal from State territory**

The State has traditionally insisted on its right to expel the foreign national as being essential to its vital interests. Measures to deal with the threat of terrorism or otherwise claimed to be necessary for national security tend in practice to have an exceptionally negative impact on the migrant non-citizen. Where once these matters may have fallen unarguably within the reserved domain of domestic jurisdiction, international and regional human rights law now provide a basis for questioning such exercises of authority.

6. **The concept of ‘protection’ in international law**

Taking account of and building on what has gone before, the final lecture examines the notion of ‘protection’ from the perspective of general international law. It will look at the institution and practice of diplomatic protection (and the recent work of the International Law Commission), at ‘treaty-based’ protection, and at human rights protection, from both a treaty perspective and within the broader concept of State responsibility. Particular attention will be paid also to United Nations and regional protection mechanisms, including the work of the Special Rapporteur on the Human Rights of Migrants, the Human Rights Committee, and the European Court of Human Rights.
Chapter 2
THE AUTHORITY AND RESPONSIBILITY OF STATES

David A. Martin*

THE STARTING POINT: BROAD STATE AUTHORITY

States possess broad discretion in deciding on the admission and sojourn of non-citizens. A typical judicial pronouncement states:

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

This underlying principle reflects the basic assumptions of an international system built on nation-states as the foundational units. Classically states have been considered to have complete sovereign authority over a defined territory and population. International human rights law and other treaty obligations, both bilateral and multilateral, have made inroads into the sweep of this sovereign authority-inroads

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1 Nishimura Ekiu v. United States, 142 U.S. 651, 658 (1892); compare Musgrove v. Chun Teoong Toy, 1891 AC 272. This highly permissive view of broad state authority dates most solidly to the late nineteenth century. Before that time, some classic writers, including Grotius, Vitoria, and Wolff, indicated a somewhat wider set of circumstances in which states might be obligated to admit aliens, or suggested a baseline rule of free movement, subject to specified exceptions within the discretion of states. These views, often set forth cryptically or without elaboration in the classic texts, are summarized and explained in J. Nafziger, "The General Admission of Aliens under International Law," 77 AJIL (1983) p. 804. Nafziger argues that the nineteenth century view represents a misreading of the earlier precedents and commentary; thus the baseline, he contends, still should be considered free movement subject to exceptions that states must justify. He does acknowledge, however, broad discretion in states to apply or give precise content to the exceptions (which include public safety, security, public welfare, or threat to essential institutions). In my view, whatever the initial correctness of the nineteenth century readings, their affirmation of sweeping state authority to control migration became so deeply rooted in state practice and popular understanding, at a critical historical moment when exploration, conquest, and settlement were reaching the limits of the frontiers, as to displace any earlier framework and to provide the appropriate starting point for modern legal analysis.
which are sketched below and in the other papers in this study.7

The underlying principle or default rule remains, and the restrictions on state authority arise by way of exception. Moreover, national populations, particularly in times of economic stress or security threat, tend to show strong devotion to the principle of broad state authority, and may frame demands for state action in response to such difficulties on the assumption of wide national discretion over the entry and residence of foreigners.

As a corollary to the organization of a global order wherein nation-states serve as the principal building blocks, states carry primary responsibility for securing the health, safety, security, and economic well-being of their populations, which consist in overwhelming proportions of their citizens. Although international law was classically indifferent to how a state treated its own citizen, the development of modern human rights law over the past half-century has significantly changed this situation. International law now requires the observance of a range of civil and political rights, as well as (through norms of less precise content) basic economic, social, and cultural rights. Importantly, most of these obligations extend to all persons, citizen or alien, within the jurisdiction of the state, but the norms do not significantly affect the ongoing authority of the state to set its own criteria for deciding who may enter or stay — and therefore who may remain within the circle of beneficiaries of the state’s primary human rights obligations. That is, most of the human rights norms affect the rights of migrants after entry, not rights respecting migration itself. The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, adopted by the UN General Assembly in 1985, reflects this division:

"Nothing in this Declaration shall be interpreted as legitimizing any alien’s illegal entry into and presence in a State, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights."

3 See, in particular, the contributions of Joan Fitzpatrick, Vincent Chennell, and Walter Kifin in the present volume.

4 L. Oppenheim, International Law: A Treatise, vol. I (8th edn. 1955) p. 640 (“a State is entitled to treat both its own nationals and stateless persons at discretion and ... the manner in which it treats them is not a matter with which International Law, as a rule, concerns itself”). In contrast, classical international law imposed responsibility on states for the treatment of nonstateless aliens - conceptually based on obligations owed to the state of nationality, not to the individual. A long-standing debate over whether the obligation was to assure treatment of aliens on a par with nationals or instead was to meet an international minimum standard, a debate that became intertwined with the struggle against colonialism, has significantly changed this situation.

5 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, UNGA Res. 40/114, Art. 2(1), 13 December 1985.

6 For a comprehensive discussion, see the contribution of David Fisher, Susan Martin, and Andrew Schoenholtz in this volume.
restrictions, or protections, covering migrants from the contracting states – relating both to permission to migrate and treatment of migrants after they enter the other state. Increasingly, regional treaties impose transnational regulation of these matters. The European Union treaties may be the best known and most extensive, but other regional treaties, such as the North American Free Trade Agreement, or the 1975 Treaty Establishing the West African Economic Community, also exemplify this trend. These focus primarily on business- or work-related grounds of admission.

Expulsion

States also have wide discretion in establishing grounds for deportation or expulsion of those who have made an entry into national territory. As a matter of practice, the grounds for expulsion are typically more limited than grounds for barring entry. Contracting a contagious disease while on national territory is less likely to be per se a ground for deportation, for example, even though the same illness might well have blocked initial admission if the disease had developed before entry. Moreover, the list of criminal convictions that might bar entry is typically more expansive than the list of later criminal acts that might result in deportation of a resident alien. Human rights norms, such as those protecting family life, have found more of a foothold in restricting expulsion than in constraining admission decisions, as reflected in other papers in this volume.

States typically provide for deportation if the person entered the territory in violation of the law, failed to comply with the terms of admission (for example, working without authorization or overstaying the permitted period), or has been involved in criminal activities. States may also employ grounds relating to national security or foreign policy reasons. Other grounds are not necessarily forbidden, and wide variety in the details of state practice exists. Municipal law in many states requires authorities to balance the interests of individuals, particularly those who have been longtime lawful residents, against the state’s interest in deporting, before decreeing expulsion. Other states either observe no such limitation, or provide for such balancing only in narrowly defined circumstances. This diversity indicates that general international law cannot be seen as requiring such individualized balancing.

The Anti-discrimination Norm

The general norm against discrimination may provide some restrictions on state action in the immigration realm, but it has not been applied to impose close scrutiny in evaluating the widely varied distinctions that states use for admission and expulsion grounds. In this field, the norm serves primarily to place a modest burden on the state to come forward with a plausible justification for any distinctions drawn in law or practice. Some scholars describe the test as requiring reasonableness and proportionality in judging a state’s distinctions – a standard that implies a somewhat more demanding inquiry into the state’s case, and thereby results in broader authority for the court, international committee, or body of scholars to second-guess the state’s distinction. But the American Society of International Law’s project on “The Movement of Persons Across International Borders,” headed by Professors Louis Sohn and Thomas Buergenthal, states that the government’s burden is to put forward “some rational basis for the differentiation relevant to the purpose that is sought to be achieved.” This formulation better reflects the real-world application of the anti-discrimination norm to immigration laws and restrictions, because domestic and international tribunals in fact tend to apply highly deferential review to such distinctions.

However the anti-discrimination test is understood, explicit racial distinctions would not today be judged to meet it. Distinctions applied on the basis of the migrant’s nationality, in contrast, are quite common and are generally accepted without quarrel. Often such distinctions reflect a state’s variant treaty obligations toward different countries. Traditional historical or cultural ties may also give rise to eased rules of admission in comparison with those imposed on citizens of other countries. Nationality-based distinctions may also be validly deployed in response to specific foreign-policy developments, such as the country-specific imposition or lifting of visa requirements, or even the suspension of visa processing or of migration altogether in response to foreign policy developments. (In some circumstances, Article 8 of the Convention relating to the Status of Refugees requires exemption of refugees who formally hold the nationality of their country of origin from such measures directed at that country).

Other Constraints on Exclusion and Expulsion

In some settings, other human rights norms may be seen as placing substantive limits on a state’s normally expansive powers to expel or exclude aliens. For example, several human rights instruments bar the collective expulsion of aliens. Furthermore, as a matter of practice that predates modern human rights instruments, most states privilege immigration by family members of citizens (especially spouses and minor children) and often relatives of persons with durable residence rights as well.

9 See, e.g., Joan Fitzpatrick in this volume.
11 See, e.g., Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16 September 1965, No. 4; European Convention on Human Rights (ACHR), Art. 22(9), 22 November 1969, 1144 UNTS 123.

34 CHAPTER 2 THE AUTHORITY AND RESPONSIBILITY OF STATES 35
In the deportation setting, states have typically considered family connections before decreeing expulsion. Recent years have seen rapid development of case law considering whether or to what extent explicit human rights norms relating to the family now constrain admission and expulsion decisions. The most extensive protections of this sort have developed under Article 8 of the European Convention for Human Rights (ECHR), which protects a person’s right to privacy, home, and family life. Several decisions of the European Court of Human Rights have applied this provision to forbid the expulsion of long-time alien residents (usually, but not always, considering whether or to what extent explicit human rights norms relating to the family proposed expulsion was the commission of serious crimes. State practice outside Europe, however, is far more accepting of the expulsion of long-time resident on the basis of crimes, even over objections based on family rights; and the UN Human Rights Committee has upheld such expulsions over claims based on the comparable provisions of the International Covenant on Civil and Political Rights (ICCPR). Later trends in the Human Rights Committee, however, may reflect a less deferential application of Covenant norms to expulsion. But the Committee’s practice remains rather undeveloped — it has had only a limited number of communications in this realm — and, in any event, the Committee has not been given the authority to provide binding interpretations of the Covenant. The ultimate test may prove to be the actual practice of states that are party to the Covenant. It remains far from certain that, outside Europe, state practice will yield so substantially to family protections in such cases.

13 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art. 8, 4 November 1950, 213 UNTS 221, 57 No. 5. 
15 ICCPR, Arts. 17, 23. See Stewart v. Canada, 538/1993, 1 November 1996, paras. 12-6. (UN Human Rights Committee) (commenting that the expulsion based on the criminal record was not arbitrary in part because “this disability was of his own making”); Ocampo v. Canada, 538/1993, 3 April 1997 (UN Human Rights Committee). A later decision by the Human Rights Committee, however, found a violation of family-related provisions of the Covenant in a situation where Australia proposed to remove the parents (themselves resident for fourteen years, most of it after the expiration of temporary visas) of a thirteen-year-old who had been born in Australia and had acquired Australian citizenship. Winata v. Australia, 950/2000, 27 July 2001 (UN Human Rights Committee). A more expansive view than my own of the weight of the family reunification norm in the context of admission and expulsion is presented in the contribution of Kate Jastram in the present volume.
16 See W. Kalín, “Limits to Expulsion under the International Covenant on Civil and Political Rights” (manuscript 2000).

Non-refoulement

A highly significant limitation on expulsion derives (initially) from the non-refoulement obligation in Article 33 of the widely accepted 1951 Convention relating to the Status of Refugees. Article 33 bans return or expulsion to a state where the refugee’s “life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Exceptions are permitted when the person may reasonably be regarded as a danger to the host state’s security or upon conviction of a “particularly serious crime.” This obligation may now be considered part of customary international law, and it trumps other normal grounds for expulsion, when the individual has shown that she comes within its field of application by demonstrating that she meets the refugee definition. Non-refoulement does not automatically lead to asylum, permanent residence, or other durable status — classifications which are generally considered to be within the discretionary prerogative of states. Nonetheless, many countries in the developed world have tended to grant asylum to those who met the refugee definition and therefore were protected by the non-refoulement obligation. (Although they could technically be sent to a third country consistently with the non-refoulement norm, well-to-do haven states found few such opportunities. Granting asylum or durable status was therefore both compassionate and sensible, helping the beneficiaries to resume a productive life in the territory where they were likely to stay for a considerable period.) Some departure from that trend, however, could be seen in the response to the Yugoslav crisis of the early 1990s. Many European states explicitly provided only temporary protection to those who fled the former Yugoslavia, even in a context where they were willing to concede that most of those so protected would meet the refugee definition.

Comparable non-return obligations have since developed under other treaty regimes. For example, the Convention Against Torture (CAT) bars return of a person “where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Article 3 of the European Convention of Human Rights, which bars torture or cruel, inhuman, or degrading treatment, has long been interpreted to bar return to another country if there is a “real risk” of torture or inhuman treatment there. Comparable provisions in other human rights treaties are beginning to be read to impose similar non-return obligations. How far such a non-return obligation extends, however, remains unclear. State practice also reflects frequent national decisions to avoid expelling people (who do not meet the 1951 Convention refugee definition) to countries in the midst of severe armed conflict, often through

18 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Art. 3, 10 December 1984, 1468 UNTS 85.
the use of some form of "temporary protection." But the practice varies, and debate persists whether most states involved see this abstention as a matter of legal obligation or instead as a sound use of their discretionary powers.22

Non-refoulement and Admission Obligations

Each version of the non-refoulement norm applies with clarity only in the setting of expulsion. Whether non-refoulement also mandates non-rejection at the frontiers of those who appear or claim to be refugees has long been contested. That it was not seen, through the 1960s at least, to encompass an absolute obligation of non-rejection is evidenced by the UN Declaration on Territorial Asylum, adopted by the General Assembly in 1967. Article 3(1) generally forbids rejection at the frontier, but Article 3(2) allows exception to that principle "for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons." There have been significant examples of pushbacks at the frontier, for example by Thailand and Malaysia during the peak years of the Vietnamese refugee exodus, but these usually drew international condemnation. The United States has employed Coast Guard interdiction to prevent the arrival of vessels bearing likely asylum-seekers—a mechanism that typically operates on the high seas before the vessel gets near to national frontiers. Most of the time the U.S. interdiction program has made provisions for some sort of refugee screening before returning interdicted passengers. However, for a period in the early 1990s, the instructions were changed to mandate immediate return to Haiti without such screening. The U.S. Supreme Court rejected a challenge to such returns, founded on Article 33 of the Refugee Convention and its implementing provisions in U.S. law, after a lengthy review of the treaty's language and drafting history.23

That decision remains controversial, but practice clearly establishes that the non-refoulement norm does not forbid the use of various procedural barriers and hurdles that operate beyond a state's frontiers—particularly the use of visa regimes and their enforcement through the use of carrier sanctions. Though some observers have strongly criticized these mechanisms, states have consistently used them, even in settings where there are serious problems of persecution in the source country involved. Indeed, states have commonly toughened visa requirements precisely when they begin to receive increased numbers of asylum-seekers from the source state at issue. Although this practice is hard to reconcile conceptually with the protective premises of the refugee treaties, such barriers may meet a practical need to reconcile the potentially broad coverage of the refugee definition with the political limits to the tolerance of growing numbers of asylum-seekers by the populace in receiving states. The travaux préparatoires of the 1951 Convention reveal a shared aversion voiced by many state representatives to granting a "blank cheque" for future migration through refugee guarantees.24 The use of visa regimes and other barriers to arrival appears to help meet that concern.

Procedural Requirements

International law imposes few procedural requirements on decisions regarding admission at the border or on the issuance and refusal of visas. States typically do provide procedural protections, however, and sometimes full adjudicative hearings, particularly with respect to exclusion decisions covering persons at a port of entry (as distinguished from decisions on visas). International human rights law does impose procedural requirements on expulsion decisions, but the careful limits placed on these obligations reveal the wide margin of discretion states retain even in this realm. Illustrative is Article 13 of the ICCPR, which provides:

"An alien lawfully in the territory ... may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."26

Note that this procedural guarantee applies only to those lawfully in the territory and does not in terms cover clandestine entrants or those at the border applying for admission.27 Moreover, the procedural protections under Article 13, although important, are far more modest than those that apply under ICCPR Article 14 to criminal trials. Article 13 requires only a procedure established by law and some opportunity to "submit the reasons against expulsion," with a modest requirement for review by and representation before the competent authority. Even these limited guarantees may be overridden if there are "compelling reasons of national security"—a provision which may make room for ex parte in camera procedures in terrorist cases. Other relevant provisions, such as the basic requirement to respect the "inherent dignity of the human person" whenever someone is deprived of liberty, or the right to an effective remedy,28 may call forth some additional procedural protections. And most developed nations in fact apply procedures that go far beyond these minimums.


23 Declaration on Territorial Asylum, UNGA Res. 2312 (XXII), 14 December 1967.


27 In Maroufids v. Sweden, 58/1979, 9 April 1981 (UN Human Rights Committee), the Human Rights Committee held that a woman granted a residency permit for the duration of her asylum proceedings was lawfully present for purposes of Art. 13 and therefore entitled to its procedural protections regarding expulsion proceedings.

28 ICCPR, Arts. 2(3), 10(1).
States enforce their migration controls through civil and criminal sanctions imposed on unlawful migrants, but increasing emphasis has been placed on criminal prosecution of those who organize or facilitate illegal migration. In keeping with this trend, states are turning to transnational efforts to thwart unauthorized migration, primarily through enhanced cooperation against human smuggling and trafficking. This is a salutary and logical development, because such criminal activity has proliferated and grown in sophistication, and the criminal organizations have benefited from their own transnational character and their ability to take advantage of locations where laws are lax or enforcement ineffective. Although there are some ongoing debates over definitions, in general one can say that smuggling involves the organized movement of persons into a national territory against the law of the receiving state. Trafficking is a subset of smuggling that further involves the use of force, fraud, coercion, or exploitation directed against the migrants. The growing international effort against traffickers partakes of both law enforcement and human rights motivations. Recent international action against trafficking has been energized by the movements to protect the rights of women and children, because women and children are the primary victims, particularly in connection with the sex trade. Bilateral cooperation against smugglers and traffickers, sometimes embodied in agreements of varying degrees of formality, is increasingly a feature of international practice. Receiving states now often assist in training the law enforcement or carrier personnel of transit or origin states, and may provide direct assistance to foreign governments who wish to modify their laws in order to establish or increase penalties for smuggling and trafficking. In December 2000, the UN General Assembly adopted the UN Convention Against Transnational Organized Crime. The Convention has two Protocols, one to suppress trafficking in persons and the second to suppress the smuggling of migrants. Both provisions require states to criminalize certain acts and to cooperate in prosecuting or extraditing violators. These instruments have not yet entered into force, but when opened for signature in December 2000, the trafficking protocol received eighty-one signatures and the smuggling protocol seventy-nine. Modest antecedents (of limited effectiveness) for these international efforts can be found in old treaties against the so-called white slave traffic and in the 1950 Convention for the Suppression of the Traffic in Persons.

32 Universal Declaration on Human Rights (UDHR), UNGA Res. 217(III), 10 December 1948.
34 See supra note 3, at 645-646. For a comprehensive discussion, see the paper of Gregor Noll in this volume.
zence. State practice generally does not support such a claim. The UN Human Rights Committee rejected the latter argument in Stewart v. Canada, at least in the context of an individual claimant who had not naturalized even though the state imposed no unreasonable barriers to naturalization.\textsuperscript{38}

In any event, it is clear that a country of transit (as distinguished from a country where the individual had enjoyed a significant period of lawful residence) is not obligated by general international law to accept return of someone who passed through that territory, or even who remained for a fairly lengthy period. Nonetheless, in recent decades states have increasingly negotiated bilateral or regional readmission treaties applicable to such transit situations, often in connection with broader regimes determining the state responsible for considering an asylum application. An important example is the Dublin Convention of 1990.\textsuperscript{39} Sometimes these arrangements are viewed as helping to enforce an asserted principle of the country of first asylum, but no clear principle of this type is supported by state practice. Nonetheless, even in the absence of a readmission agreement, a state may take an asylum applicant's prior stay in a third state into account in deciding whether to grant asylum (such grant decisions are ultimately discretionary). That is, State C, asked to provide asylum to a national who is at risk of persecution in State A, might properly take into account that person's sojourn and apparent protection in State B, and could deny asylum on that ground. But in these circumstances, State B is under no obligation, absent some other specific readmission pledge, to accept return. The principle of non-refoulement, as embodied in Article 33 of the Convention relating to the Status of Refugees, would not permit State C to return the individual to State A. He may well wind up remaining indefinitely on the territory of C, despite the refusal of asylum.


\textsuperscript{39} Stewart v. Canada, 538/1995, paras. 12.2-12.5, 1 November 1996 (UN Human Rights Committee); see also Canepa v. Canada, 358/1993, para. 11.3, 3 April 1997 (UN Human Rights Committee). Some observers suggest that the Human Rights Committee, in the subsequently adopted General Comment No. 27, Freedom of Movement, U.N. Doc. CCPR/C/21/Rev.1/Add.9, para. 20 (1999), has taken a broader view than that reflected in Stewart and Canepa of when resident aliens may count the country of residence as their "own country" for purposes of Art. 12(4). In fact, the General Comment's language on this point, while modestly suggestive, is quite cautious, largely inviting states to include additional information on state practice in this regard in future periodic reports.


\textsuperscript{41} Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 12 April 1930, Art. 179 UNTS 89.

\textsuperscript{42} Nottebohm Case, 1955 ICR Reports 4, 23. See the contribution of Kay Hailbronner in this volume.

\textsuperscript{43} A nearly identical provision, substituting "stateless persons" for "refugees," appears in the Convention relating to the Status of Stateless Persons, 28 September 1954, Art. 32, 996 UNTS 117.

\textsuperscript{44} Convention on the Reduction of Statelessness, 30 August 1961, 989 UNTS 175, C.f., ICCPR, Art. 24(4) ("Every child has the right to acquire a nationality").

\textsuperscript{45} Convention on the Reduction of Statelessness, 30 August 1961, 989 UNTS 175, C.f., ICCPR, Art. 24(4) ("Every child has the right to acquire a nationality").
Loss of Citizenship

States have fairly wide discretion in setting their own rules for the loss of citizenship, although Article 15(2) of the Universal Declaration on Human Rights does provide that "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." This norm may well be considered to have become part of customary international law, but concrete standards for assessing arbitrariness in this context have not been clearly defined.

CONCLUSION

Perceived ineffectiveness of immigration control often fuels political movements that support draconian limits on migration and even on refugee protections. The United States went through one such round in 1996, and the success of anti-immigrant parties in Europe in 2000-2002 reflects this phenomenon. If states could manage more effective deployment of existing controls -- for example by more systematically using their authority to remove persons who have been adjudged deportable after a full opportunity to put forward any defenses or claims, including refugee claims -- then negative popular reactions against aliens might be reduced. States tend to stop short of full use of the deportation authority they have -- for lack of resources or because individual violators of immigration rules present appealing cases when viewed in isolation. Immigration systems should build in the capacity to take measured accounts of those sympathetic human factors. But such account must not disable the visible continuation of genuine controls and of meaningful sanctions for violation. A balanced and comprehensive migration management regime must include a resolute commitment to enforce its provisions, fairly but firmly, against violators. Effective international cooperation, involving both source states and receiving states, to help assure effective enforcement of well-designed and humane migration controls, would go far toward diminishing such anti-foreigner backlash.

Selected Bibliography


UDHR, Art. 15(2).
Globalization, Sovereignty, and Regulation: Reshaping the Governance of International Migration

Henk Overbeek

Introduction

Today's international 'regime' covering the trans-border movement of people is inadequate in the face of the challenges posed by the new forms of migration of the past two decades. The legal framework for dealing with refugee movements was essentially a product of the Cold War, reflecting the world's experience with the (European) refugee problems of the 1930s and 1940s caused by Nazism and Stalinism. Policies dealing with labour migration and related issues of family reunification etc. are constructed in strictly national frameworks. Immigration is treated by most states as a threat to their national security or to their socio-economic stability.

If we wish to contemplate, as we should, the contours of a new and comprehensive set of policies and institutional arrangements to deal with transnational mobility of people, we must consider what changes have taken place in the nature of these movements and what the implications of those changes for such a new comprehensive framework. This chapter takes as its axiomatic point of departure the tenet that the global economic and political order is undergoing a far-reaching transformation, which is popularly called globalization, or global restructuring. It will be argued that the discussion of new directions in the development of transnational migration policies must take this transformation as its determining context.

This chapter will address the following themes in particular:

1. What is the nature of 'globalization'? What is the underlying dynamic, what are its main manifestations? What if anything is really new about it? How are globalization and regionalization related?

2. In the second section we turn to the question of people's mobility. How does globalization affect and shape contemporary mass movements of people?

Globalization

Contemporary movements of people, it is the contention of this chapter, are very intimately linked to the process of what is popularly called 'globalization'. Such developments as the large-scale uprooting of people leading to forced migration (internal displacement and international refugee movements), illegal migration of unskilled manual labour to the growth poles of the global economy, the increased role of criminal organizations in the trafficking of people, the rapidly increasing temporary international mobility of (often highly skilled) service providers, and the globalized management of transnational corporations, are all intimately related to the process of restructuring of the global political economy since the late 1970s.

In much of the literature, 'globalization' is defined in essentially quantitative terms as the increase in cross-border transactions, 'the intensification of economic, political, social, and cultural relationships across borders' (Holm and Sorensen 1995: 4). An approach in these terms invites easy empiricist cross-time comparisons which invariably lead to the conclusion that there is nothing very new about globalization: we have seen it all before, and in certain historical periods (e.g. the final decades of the nineteenth century) the world economy was more globalized than it is now.

In this chapter we take the view that globalization must be understood in terms of qualitative practices operating in the global space, rather than in quantitative terms. What is qualitatively new in the present era is above all the progressive incorporation of all of the world's population into interrelated, expanding, and overlapping networks of communication, exchange, and

1 The first contribution to this debate was David Gordon's seminal article (Gordon 1988). More recent contributions along the same line include Hirst and Thompson 1996 and Weiss 1998.
Commodification is a dialectical process, with a destabilizing tension between its two antagonistic poles, i.e. between privatization—the commodification of all spheres of human life, the competition of market forces, the individualization of people—and socialization—the progressive replacement of personal bonds by widening circles of impersonal dependence and coherence through division of labour.

The contradictions inherent to commodification and therefore to globalization account for the latter's uneven character through time and space. A deeper insight into the dialectics of globalization will help us to resolve the old/new dichotomy in the globalization literature: globalization is at the same time a familiar phenomenon where there is nothing new under the sun, and a qualitatively new phenomenon with commodification reaching into spheres of the social existence of humankind where the market has never penetrated before. It is therefore best to understand the history of globalization as a layered or phased process, with qualitative transformations concentrated in time and space—subsequently to be consolidated, to spread across the globe, and to encounter resistance and activate counter-tendencies. These contradictions gradually build up, eventually leading to crisis and transformation.

The major phases of globalization in the history of the world capitalist system have been marked by transformations in the spheres of production and trade relations, in the geographic reach and structure of the system, and in the configuration of governance.

The 'long sixteenth century' (Wallerstein 1974) of the years 1450-1650 saw the dissolution of the European feudal order. This led first of all to the liberation of the commercial classes in the towns and the rise (still in rather isolated instances) of capitalist production. The geographic scope of the European order was revolutionized by the spread of commercial capital from Western Europe to Asia (the spice trade), the Americas (which were colonized by the Europeans for the purpose of exploiting the gold and silver mines and subsequently for the establishment of the plantation system) and the western coasts of Africa (pursued for the slave trade). Finally, the dissolution of feudalism led to the rise in Europe of a multitude of sovereign territorial states. This system was consolidated by the Peace of Westphalia (1648).

The second half of the nineteenth century, or more precisely the period between the 1840s and the First World War, brought revolutionary changes in the structure of world capitalism. These changes were brought on by the rise of industrial capital and the new dynamics this created on the Continent, beginning in Britain, and later on in North America. First, the industrial revolution fundamentally transformed the predominant social relations of production in Europe, dissolving agricultural communities and setting in motion a process of large-scale urbanization. The new need for industrial raw materials from colonial territories and the competitive pressure of the newly emerging industrial rivals to Britain's monopoly provoked an intensification of exploitation in what later became known as the third world, through full colonization, the introduction of various forms of forced contract labour (on the Caribbean plantations as well as in the mining regions in Southern Africa), and the concomitant construction of typical colonial inland infrastructure. The incorporation of most parts of the world into the global market drove commodification to unprecedented heights. The sovereign territorial state, finally, in this period became a truly national state, or a 'socialised state' as Nigel Harris calls it (Harris 1995: 5-7). This is the age in which the European populations develop their national consciousness.

The current third phase of globalization is characterized by the rise of transnational capital. The antecedents for this phase can be traced to developments in early twentieth-century American capitalism and its post-1945 spread to Western Europe and Japan. This era combined liberalizing world trade and finance with the development of Keynesian welfare states within an essentially national framework, premised on restricted access to citizenship rights. Labour migration was intensively regulated in the form of national guest worker systems such as the Bracero programme for the recruitment of Mexican migrant workers in the USA or the West European recruitment schemes of the 1960s and early 1970s. Foreign direct investment in manufacturing became the leading method for the internationalization of capital.

A dramatic acceleration in the internationalization process followed the deep global recession of the mid-1970s. The response to the crisis on the part of Western capital was to intensify its outward orientation, which resulted in what was dubbed the New International Division of Labour: a single world market for labour power, a true world-wide industrial reserve army, and a single world market for production sites (Fröbel et al. 1977: 30; my translation). This new phase represents a qualitative transition from an international to a global world.

The emergence of finance capital (the 'merger' of industrial capital and banking capital) towards the end of the 19th century, as analysed by Hobson, Hilferding, and Lenin, did not undermine the fundamental pre-eminence of industrial capital; the rise of finance in the late 19th century, i.e. the increase in credit and insuranc as well as in portfolio and direct investments, was a corollary of the unprecedented growth and spread of industrial capital. That is fundamentally different in the present third phase of globalization.

2 This approach to globalization is inspired by such critical studies of the contemporary global political economy as those by Castells (1998), Cox (1987), Mittelman (1996), and van der Eijk (1998).
The importance of this new form of internationalization as contrasted with the earlier phases of globalization in which commercial capital and money capital moved across borders cannot be overstated. Whereas money capital imposes an abstract and indirect discipline on labour, direct investment abroad directly reproduces capitalist relations of production within the host countries (Poulantzas 1974). During the whole period since the mid-1980s (with the exception of the early 1990s), while international trade grew faster than global production, foreign direct investment (FDI) grew faster than trade and also outpaced world gross domestic investment (see Table 3.1).

Foreign direct investment has thus become by far the most important engine of accumulation in the global economy. After a slowdown in the early 1990s, direct investments are growing explosively in the most recent years: by 27 per cent in 1997 (UNCTAD 1998), by 39 per cent in 1998 (Financial Times, 23 June 1999). As a consequence the share of foreign investment inflows in world gross fixed capital formation has grown rapidly, from 1.1 per cent in 1960 to 2.0 per cent in 1980 and to 7.4 per cent in 1997 (UNCTAD 1994, 1998). By 1997, the total stock of FDI had reached the level of $3.5 trillion.

Foreign direct investment is not undertaken by countries, but by transnational corporations (TNCs, 53,000 of them at the latest count). By 1997 total assets of foreign affiliates of TNCs stood at $12.6 trillion. Sales by foreign subsidiaries reached $9.5 trillion (UNCTAD 1998: 2). In addition to FDI, through strategic alliances and other non-equity arrangements, transnational corporations gain control over assets and markets that are not reflected in the statistics for FDI flows.

The contribution by TNCs to further transnational socialization is greater than that of international trade: if world sales of foreign affiliates of TNCs in 1960 were still smaller than world exports, in 1997 they stood at 148 per cent of world exports (UNCTAD 1998: 2). One-third of worldwide exports are exports of foreign affiliates (ibid. 6). As OECD figures for 1992 indicate, 58 per cent of total US exports were exports by TNCs in the case of Japan that figure stood at 78 per cent. And the share of intra-firm trade in total trade was 23 per cent.

Financial globalization, i.e. the emergence and growth of global financial markets, is identified by many as the hallmark of globalization. From the perspective of the overall transnationalization of the circuits of productive capital, the role of global finance is in a sense secondary, namely to keep the system together and to lock the spatially dispersed sites of production and accumulation into one global system. However, global financial transactions have far outgrown the dimensions commensurate with this primary role. If we take into account all transactions between all the world's financial institutions (lending, currency transactions, etc.) their volume is now 100 times that of international trade ($4.4 trillion vs. $440 trillion). They have increased from $20 bn. per day in 1973, via $60 bn. in 1983 and $820 bn. in 1992, to $1,200 bn. in 1996 (Oman 1996: 13). Some of the implications of the autonomization of global finance will be taken into consideration below.

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---

**Table 3.1. Growth rates of world production, exports, and investments (in %)**

<table>
<thead>
<tr>
<th></th>
<th>1980-90</th>
<th>1990-97</th>
</tr>
</thead>
<tbody>
<tr>
<td>world gross domestic product</td>
<td>3.1</td>
<td>2.3</td>
</tr>
<tr>
<td>world exports</td>
<td>5.2</td>
<td>7.0</td>
</tr>
<tr>
<td>world gross domestic investment</td>
<td>12.5</td>
<td>2.6</td>
</tr>
<tr>
<td>foreign direct investment outflows</td>
<td>27.1</td>
<td>15.1</td>
</tr>
</tbody>
</table>


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5 Cross-border M&As are mostly concentrated within the developed world, thus tremendously reinforcing the process of transnationalization, i.e. the
made this relocation drive possible: Asia and Latin America, matching these countries' strategies of export-oriented industrialization. The conjuncture of three crucial developments

...removes the incentives for TNCs to establish regionally integrated production networks. Although many have been tempted in recent years to do so, it would be misleading to understand regionalization as negating globalization. Rather, the two processes are dimensions of a single, multifaceted, process of worldwide social transformation (see Chapter 9 in this volume). This transformation involves the restructuring of relations (economic, political, spatial, sometimes also military) between regional growth centres and their (semi-)peripheries. In the next section, we turn to an examination of the impact of this transformation on people's mobility.

Globalization and migration

At the height of the mid-1970s recession in the Western economies, the phenomenon of runaway industries seemed to herald the end of Fordism, of the welfare state and of full employment. This, in any case, was the prediction made by three German researchers in their study of the new international division of labour (NIDL) (Fröbel et al. 1977). They observed an accelerating relocation of labour-intensive production processes to low-wage countries in Asia and Latin America, matching these countries' strategies of export-oriented industrialization. The conjuncture of three crucial developments made this relocation drive possible:

- an inexhaustible reservoir of cheap labour, which is continuously replenished by an intense rural-urban migration;
- developments in production technology making it possible to separate the labour-intensive parts of the production process from the capital-intensive parts;
- developments in transport and communication technology facilitating the coordination of dispersed production and assembly establishments.

In the words of the authors themselves, "The conjuncture of these three conditions . . . has created a single world market for labour power, a true world-wide industrial reserve army, and a single world market for production sites" (Fröbel et al. 1977: 30; my translation). The NIDL thesis has attracted a lot of criticism (e.g. Gordon 1988), and subsequent developments have borne out that it is risky to extrapolate on the basis of data from a limited time span. The expectation that industrial production would eventually disappear from the North has not come true. This however does not obliterate the importance of other elements of the work of Fröbel, Heinrichs, and Kreye which are of immediate relevance to this chapter. The work on the NIDL has also drawn attention to the fact that migration is not the only, and for that matter numerically not the most important, way in which national labour forces directly compete with each other: in certain sectors trade, capital flows, and labour migration are feasible alternative modes of accessing the cheap labour power in selected Third World countries (Harris 1995: 21, 160 ff.). This state of affairs is in sharp contrast with the predominant situation from the 1930s until the early 1970s in which labour markets were nationally demarcated and labour could only compete by physically crossing borders. In the age of information and communication technology many sectors of industrial production and commercial service provision can tap labour forces in various parts of the world without the need for migration.5

In the core of the global system, in the OECD countries, this development goes hand in hand with a neoliberal offensive of deregulation, liberalization, and flexibilization. While undermining the bargaining power of organized labour and helping to depress wage demands, it simultaneously creates and/or reinforces the demand for various forms of unskilled and semi-skilled workers who are employed under increasingly precarious conditions (Cox 1987; Sassen 1996c; Castells 1998). Governments in the core areas of the global economy seek to compensate for their weaker control over the forces of the market by pursuing projects of 'open regionalism', i.e. forms of

5 In this sense, to give just one concrete example, the threat of KLM to shift its entire automation centre to India, where the necessary specialized labour is available at a tenth of the price in Western Europe, is not a hollow threat but a technically speaking perfectly feasible strategic option. It is the political price involved which has so far constrained KLM, but the disciplining effect on KLM's Dutch labour force is considerable.
In more peripheral areas of the world (e.g. Africa, Eastern Europe, Central America), the two most important changes since the mid-1970s (often interacting) have been the debt crisis and the ensuing imposition of structural adjustment policies, and the end of the Cold War. The Structural Adjustment Programmes of the IMF and the World Bank, and the withdrawal of, or cutbacks in, military and economic assistance by the superpowers, both resulted in a substantial reduction of external financial resources available for redistribution by the state. This, in turn, seriously affected the ability of governments in many third world states to co-opt rivaling elites into the power structure. In many cases the result was serious social and political crisis, economic disaster, and regime change or state collapse. These complex processes largely explain the surge in forced movements of people since the mid-1970s across the globe, in search of protection and in search of a new and better life (Cohen and Deng 1998; Loescher 1993; UNHCR 1997; Zolberg et al. 1989).

Globalization, in sum, has the double effect of bringing a growing proportion of the world population directly into the capitalist labour markets, and of increasingly locking the national and regional labour markets into an integrated global labour market. The mechanisms by which this formation of an integrated global labour market takes place are the following:

- incorporation of previously disconnected areas (China, Soviet Union, Eastern Europe, Vietnam) or populations ('indigenous peoples') into the capitalist world market;
- commodification of economic activities previously organized outside the market (through liberalization, privatization, deregulation);
- growing demand for irregular labour in 'post-industrial' economies;
- further proletarianization of the world population (urbanization in the third world, increasing labour market participation rates in the industrial economies); and
- transnational migration (labour migration including brain drain, family reunification and formation, refugee movements); all these forms of migration are enhanced globally by the dramatic fall in the costs of international, and even intercontinental, travel, and by the effects of the newly developed means of communication such as satellite television etc.

Whereas the overall growth of the number of international migrants has followed a fairly even path over time, the growth has been unevenly distributed between developing countries and developed countries. The more rapid growth of the migrant population in the North took place primarily in the decade 1965–75, i.e. the last decade of organized guest worker recruitment. After 1975, growth rates in North and South were approximately equal. The difference between North and South is significant, however, in terms of the higher proportion represented by migrants in the overall population of the North (see Table 3.2).

The number of people in search of political asylum has not followed an even growth path over time. In the OECD countries, as the following figure shows, there was a sharp increase in the number of asylum applications in the years 1989–92, and although the numbers have dropped since then, they seem to be stabilizing at a level much higher than before the 'hump' in the early 1990s (see Table 3.3).

Worldwide, people of concern to the United Nations High Commissioner for Refugees numbered 22.7 million at the start of 1997: of these, 58 per cent were refugees, 21 per cent were internally displaced people, and 21 per cent were returnees or 'others of concern' (UNHCR 1997: 2). Of these, 35 per cent are in sub-Saharan Africa, a quarter in North Africa, the Middle East, and Central Asia, and 31 per cent in Europe (a great deal of them from former Yugoslavia) (ibid. 3).

The patterns of regional concentration in the globalization process simultaneously create a framework for the consolidation and intensification of regional migration networks (see also Ghosh, Chapter 9 in this connection). Movements of people are partly occurring in regional contexts as well, not just as a reflection of the emerging new production and labour market structures,
but also for a series of factors that are migration specific, such as geographic proximity, cultural affinity, historical linkages, and migration chains.

In the case of the United States (see Table 3.4) the twentieth century has shown a very strong tendency towards regional concentration of immigration: immigrants come from neighbouring regions, first of all Mexico, in increasing proportion, while immigration from Europe declined steadily until the 1990s. Immigration from Asia, while rising after the 1940s, reached its peak in the 1980s. In Western Europe the situation is similar (see Table 3.5). There, more than a third of the foreign residents come from other West European countries, and some 36 per cent come from the Mediterranean countries that were the traditional suppliers of 'guest workers' during the post-war decades. Some 5 per cent come from Central and Eastern Europe, leaving less than one in four who come from further away.

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Finally, in Japan, the same situation pertains (Table 3.6). There almost half of the foreign residents are Korean. One-quarter have come from China, Taiwan, and South-East Asia, while one-sixth are immigrants from South America of Japanese descent. All together, less than one-eighth of the foreign residents in Japan are neither from the region nor of Japanese descent.

This relative regional concentration of migration patterns in line with the regionalization of trade, investment, and political relations suggests (a point to which I return later) that the regional context is extremely important when

| Table 3.4. Region of last residence of legal immigrants to the USA, 1901–1996 |
|---------------------------------|-----------|---------|-----------|-----------|
| Decade  | Europe | Asia | Western hemisphere | Other |
| 1901–10 | 92     | 4     | 4          | –         |
| 1911–20 | 75     | 4     | 20         | 1         |
| 1921–30 | 60     | 3     | 37         | –         |
| 1931–40 | 66     | 3     | 30         | 1         |
| 1941–50 | 60     | 4     | 34         | 2         |
| 1951–60 | 53     | 6     | 40         | 1         |
| 1961–70 | 34     | 13    | 52         | 2         |
| 1971–80 | 18     | 35    | 44         | 3         |
| 1981–90 | 10     | 37    | 49         | 3         |
| 1991–96 | 14     | 32    | 50         | 4         |


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6 When reading the table, it must be kept in mind that data for the year 1989–92 are distorted by the fact that under the provisions of the Immigration Reform and Control Act of 1986 some 1.8 million undocumented Mexican residents were granted permanent residence in the USA.
TABLE 3.5. Foreign residents of Western Europe, 1995 (000s and %)

<table>
<thead>
<tr>
<th>Country of residence</th>
<th>European Uniona</th>
<th>Western Europeb</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>000s</td>
<td>%</td>
</tr>
<tr>
<td>Total</td>
<td>369,408.2</td>
<td>100.0</td>
</tr>
<tr>
<td>Nationals</td>
<td>351,831.4</td>
<td>95.2</td>
</tr>
<tr>
<td>Non-nationals</td>
<td>17,576.8</td>
<td>4.8</td>
</tr>
<tr>
<td>Western Europe</td>
<td></td>
<td></td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>EU-15</td>
<td>9,609.7</td>
<td>3.2</td>
</tr>
<tr>
<td>Other</td>
<td>177.2</td>
<td>1.0</td>
</tr>
<tr>
<td>Mediterranean</td>
<td>6,492.6</td>
<td>3.6</td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Turkey</td>
<td>2,668.8</td>
<td>15.2</td>
</tr>
<tr>
<td>ex-Yugoslavia</td>
<td>1,891.7</td>
<td>16.8</td>
</tr>
<tr>
<td>Morocco</td>
<td>1,034.4</td>
<td>6.9</td>
</tr>
<tr>
<td>Algeria</td>
<td>652.8</td>
<td>3.7</td>
</tr>
<tr>
<td>Tunisia</td>
<td>244.9</td>
<td>1.4</td>
</tr>
<tr>
<td>Central and Eastern Europe</td>
<td>983.9</td>
<td>5.6</td>
</tr>
<tr>
<td>of which ex-USSR</td>
<td>197.0</td>
<td>1.1</td>
</tr>
<tr>
<td>Others</td>
<td>4,313.4</td>
<td>24.5</td>
</tr>
</tbody>
</table>

aThe member states of the European Union are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.
bWestern Europe is defined here as consisting of Switzerland plus the member states of the European Economic Area, i.e. the fifteen member states of the EU plus Iceland, Liechtenstein, and Norway.


TABLE 3.6 Foreign population in Japan, 1985–1996 (in 000s and %)

<table>
<thead>
<tr>
<th>Country of origin</th>
<th>1985</th>
<th>1996</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>000s</td>
<td>%</td>
</tr>
<tr>
<td>Korea</td>
<td>683.3</td>
<td>80.3</td>
</tr>
<tr>
<td>China/Taiwan</td>
<td>74.9</td>
<td>8.8</td>
</tr>
<tr>
<td>South-east Asia</td>
<td>20.7</td>
<td>2.4</td>
</tr>
<tr>
<td>Brazil &amp; Peru</td>
<td>2.5</td>
<td>0.3</td>
</tr>
<tr>
<td>USA</td>
<td>29.0</td>
<td>3.4</td>
</tr>
<tr>
<td>Others</td>
<td>40.2</td>
<td>4.7</td>
</tr>
<tr>
<td>Total</td>
<td>850.6</td>
<td>100.0</td>
</tr>
</tbody>
</table>


Globalization, Sovereignty, and Regulation

The impact of globalization processes on the state has unleashed a debate about the question whether the state still matters. Some tend to argue that the end of the nation state is at hand, others have argued that the state has actually been one of the main 'authors' of globalization (Panitch 1996: 84–5). In both cases the issue of state 'sovereignty' is central.

The territorially defined 'sovereign' state in Europe emerged in the seventeenth century: it is a historical phenomenon, specific to place and time. And in contradiction with the claims of most rulers (and of realist theory), sovereignty has never been absolute and indivisible. The sovereign state arose out of a situation in which sovereignty over territory and population was shared between the monarchy, the Church, and nobility. From the very moment that the European space was divided into distinct and exclusive territorial sovereignities (states) after the Peace of Westphalia in 1648, these states and their rulers accepted that their sovereignty was less than absolute. It was restrained by international obligations which were deemed necessary to the survival and consolidation of the state system (as they are today through the United Nations Charter, for instance). The idea therefore that sovereignty is total, and is the inalienable eternal right of every state, is a myth: state sovereignty is a historical construct, changing over time and never absolute and indivisible.

In the words of E. H. Carr,

The concept of sovereignty is likely to become in the future even more blurred than it is at present. The term was invented after the break-up of the medieval system to describe the independent character of the authority claimed and exercised by states which no longer recognised even the formal overlordship of the Empire. It was never more than a convenient label; and when distinctions began to be made between political, legal and economic sovereignty or between internal and external sovereignty, it was clear that the label had ceased to perform its proper function as a distinguishing mark for a single category of phenomena. (Carr 1964: 230–1)

The critique of the realist conception of sovereignty must be taken a step further by bringing in not only the external dimension, but also the internal
The state is not a black box, but a complex set of institutions which emerged out of and is fundamentally part of, a larger social structure. The state’s raison d’être is not some eternal, transhistorical given, but a social construct, underpinned by a particular historic bloc (a configuration of class forces) whose uniting ideology defines the general direction of state intervention (Cox 1987), or its ‘social purpose’ (Ruggie 1998).

The historical rise of the sovereign state is thus one aspect of a comprehensive reorganization of the forms of social power. [...] under this new arrangement, while relations of citizenship and jurisdiction define state borders, any aspects of social life which are mediated by relations of exchange in principle no longer receive a political definition (though they are still overseen by the state in various ways) and hence may extend across these borders. (Rosenberg 1994: 129)

With the rise of capitalism social relations assume a border-crossing, transnational, character in a way that was impossible in the pre-capitalist world where the public and the private were one. In fact, what is presently called ‘globalization’ represents a new stage in the separation between the public and the private, with exchange relations and the discipline of the market being extended to spheres which were hitherto governed by the public organs of the state. As the economy and with it social relations of production are increasingly dominated by transnational processes, so must the functions of the state dealing with those processes increasingly be performed transnationally to be effective.

The public sphere develops into a power structure with multiple dimensions and functions, not all of which are necessarily linked to the exclusive territoriality of the ‘sovereign’ state. John Ruggie has called this process ‘unbundling’ of territoriality:

In the modern international polity an institutional negation of exclusive territoriality serves as the means of situating and dealing with those dimensions of collective existence that territorial rulers recognise to be irreducibly transterritorial in character. Nonterritorial functional space is the place wherein international society is anchored. (Ruggie 1993: 165).

Unbundling of territoriality creates a multiplicity of functional systems at different levels which replace the exclusive and unitary state-centred form of territorial sovereignty which had come to define our very conception of state sovereignty. Nowhere is this unbundling further advanced than in the European Union, where the Treaties of Maastricht (1991) and of Amsterdam (1997) have created a multi-layered governance structure with specific roles for supranational, intergovernmental, national, and regional institutions and authorities.

In other regional contexts and at the global level, too, similar developments are transpiring. Institutions such as the International Monetary Fund and the World Trade Organization have achieved a considerable degree of autonomy from the national governments that nominally control their executives, while more informal organizations such as the G7 play a crucial role in influencing longer-term strategic policy orientations. The emergence of these new structures, often combining public and private forces, inspired Robert Cox’s famous phrase of a ‘global nebuleuse’ (Cox 1996: 26–7).

The process of unbundling of territoriality also reinforces the increasing difficulty for political leaders in parliamentary democracies to legitimize the policies to which they are committing themselves and their countries in the transnational arena (Zörn 1995: 154). The reduction of democratic control that is implied by the unbundling of territoriality is called by Stephen Gill the ‘New Constitutionalism’, ‘the move towards construction of legal or constitutional devices to remove or insulate substantially the new economic institutions from popular scrutiny or democratic accountability’ (Gill 1992: 165).

This discussion has made it clear that state sovereignty is historically specific: its meaning changes over time and space. It is no longer, and really never was, absolute and indivisible. The concept of the sovereignty of the state continues to be important, if for no other reason than that state leaders invoke it, but we must distinguish myth from reality: sovereign authority increasingly resides in a multitude of institutions, some complementing each other, some contesting the authority of others. The state remains crucial, but if states are to reassert their authority over the sphere of private exchanges (‘the market’) they will have to do so in concert. This is one poignant meaning of the concept of multilateralism (Cox and Sinclair 1996).

Globalization, Sovereignty, and Regulation

As observed in the introduction to this chapter, global migration is hardly regulated notwithstanding the activities of such organizations as the International Labour Organisation (ILO), the International Organization for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR) and the Inter-Governmental Consultations on Asylum, Refugees and Migration (IGC). There are several explanations for this perhaps surprising absence:

- the ‘sovereignty’ of the state: the sovereign state is assumed to be unwilling to relinquish control over those who cross its borders: ‘Since the development of the modern state from the fifteenth century onward, governments have regarded control over their borders as the core of sovereignty’ (Weiner 1995: 9);
- the modest scale of international migration: an estimate by the United Nations puts the world’s foreign-born population for 1994 at 125 million or 2 per cent of the world’s population (see Table 3.2; also chapter 1);
as explained above, unlike other commodities, labour of different countries often does not have to move across borders to compete (Pröbel et al. 1977; Harris 1995);

- finally, during the decades of 'embedded liberalism' states did not need to compete for scarce sources of labour, which was available in surplus quantities (Zolberg 1991: 309, 313–14).

The relative exception to this rule of course is the asylum framework circumcribed by the 1951 Geneva Convention and the 1967 Protocol (Loescher, Chapter 8 in this volume). The approach in the Geneva Convention clearly echoes the circumstances of the immediate post-war years in Europe, coloured as they were by the horrific experiences of Nazism and Stalinism. It replaced the post-First World War emphasis in refugee law on collective refugee problems (persecuted nationalities in the remains of the broken-up multinational empires of Russia, Austria-Hungary, and the Ottoman Empire) by the typically bourgeois liberal emphasis on individual persecution on the basis of ethnic origin, religious belief, and especially political conviction (Zolberg et al. 1989).

Since the beginning of the 1990s, there has been a dramatic change in the international system as compared to the years between 1945 and 1989. Global restructuring has eroded the inviolability of state sovereignty, the number of international migrants (especially refugees) rose dramatically after 1989, and global competition between labour forces and between states has rapidly increased as a reflection of intensifying global competition among the world's leading TNCs. The existing asylum framework was not equipped to deal with the consequences of state formation and the massive return to the persecution of newly created 'minorities' (Zolberg et al. 1989; Loescher 1993).

In the wake of these changes we can observe a growing trend towards convergence in the modes of migration regulation. This is true first of all because 'all of the world's various migratory streams are interconnected, and the policies of the various states pertaining to them are of necessity interactive' (Zolberg 1993: 54). Likewise, Saskia Sassen concludes that 'we are seeing a de facto transnationalising of immigration policy' (Sassen 1996a: 1), in which there is 'a displacement of government functions on to non-governmental or quasi-governmental institutions and criteria for legitimacy' (ibid. 24). Elsewhere, I have called this mode of governance transnational regulation, i.e. the governance of transnational activities and processes in ways and through means not reducible to (inter-)state activity alone, and involving a range of private and (semi-)public actors operating in a transnational arena, that is beyond rather than across (international) or above (supranational) national borders (Overbeek 1998: 90–1).

There are, however, no institutionalized governance structures (neither global, nor regional) for the effective regulation of transnational migration. For instance, although Mexican migration to the USA is a crucial ingredient in the regional political economy and a very sensitive political issue between the two countries, and although the migration question was implicitly at the heart of the initiative to create the North American Free Trade Area (NAFTA), the NAFTA agreement contains only very weak references to the problems of migration (Martin et al., Chapter 6 in this volume). In other regions, too, the seeds of regionalized migration policies are being sown. In South-East Asia calls for regional migration policies are regularly heard in ASEAN, in South America similar concerns are raised in Mercosur, and in Southern Africa the member states of the Southern Africa Development Community have formulated a Protocol on the Facilitation of Movement of Persons (second draft, January 1997). However, these initiatives have yet to produce any tangible results.

Until now, the only operational regional frameworks are the emerging 'Puebla' framework in North and Central America and the more developed one in Europe. The European framework is a hybrid form, combining elements of intergovernmental regulation and more informal transnational coordination (for more detail, see Overbeek 1995, 1996). Let us briefly look at these frameworks in order to gain a better understanding of the direction in which developments are going.

Globalization, as we saw above, is an ambiguous and contradictory process: it produces universalizing as well as localizing tendencies, and in fact implies 'regionalization', i.e. the restructuring of the global political economy into macro-regions. Neoliberal regionalism in fact precisely highlights the essence of these developments: the combination of new forms of 'open regionalism' and neoliberal economic restructuring.

In the case of Europe, regionalism in the sphere of the regulation of migration has taken the form of a sharply restrictive (yet clearly selectively so) immigration regime. In fact, unwanted would-be immigrants travelling from or through states sharing borders with the EU are increasingly faced with a cordon sanitaire erected along the outer limits of the Union. To the south, the EU is constructing such a fence via the Euro-Mediterranean Partnership agreements concluded in Barcelona in late 1995, which include readmission agreements, border control cooperation, and aid. To the east, the Central and East European countries (Poland, Czech Republic, Slovakia, Hungary, and Slovenia, as well as Romania and Bulgaria and the Baltic states) have also signed readmission agreements with the EU, incorporated into the Euro Agreements. In exchange, the western states assist their neighbours both technically and financially to cope with the consequences of this policy. The result of this policy is rapidly becoming visible. The number of asylum applications in the countries of the European Union has fallen sharply since 1992. The countries in Central Europe, particularly the economically successful Czech Republic and Poland, have now themselves become attractive to
tens of thousands of labour migrants from the Ukraine, Belarus, and beyond (Ghosh 1998).

The next stage in the regionalization process may well be the creation of a European Migration Convention as proposed by Austria (Meissner 1993: 65). A first step was taken in October 1991 in Berlin, when representatives of the European Union and the Visegrad countries, Bulgaria and Romania, agreed to closer cooperation on clandestine migration. This conference was followed by a second ministerial conference on illegal migration in the region held in Budapest in February 1993. As a follow-up to this 'Budapest process' Switzerland and Austria set up the International Centre for Migration Policy Development (ICMPD), located in Vienna (Widgren 1994: 53). The ICMPD serves as the Secretariat for the Budapest Group and prepared the agenda for the third Ministerial Conference of the Budapest Group held in October 1997 in Prague. This conference was attended by thirty-seven European states, the USA, and representatives of ten international organizations concerned in one way or another with the combating of illegal migration and human trafficking. The Budapest process furthermore entails countless informal meetings by Working Groups, Expert Meetings, etc. Although formally an intergovernmental process, the secrecy involved allows the governments concerned considerable freedom of manoeuvre (Overbeck 1999).

The 'Puebla Process' started with the 1996 Regional Conference on Migration held at Puebla (Mexico), in which ten North and Central American countries took part (with others present as observers). The initiative dates back to earlier discussion in the region in 1990 (the Punto Arenas agreement) and to the NAFTA agreement. Just as the Budapest Process, the Puebla Process central concern is the issue of illegal migration and trafficking of migrants. Puebla is linked to the initiative to extend NAFTA into a Free Trade Area of the Americas (FTAA) (see Pellerin 1999).

Immigration policies, it becomes clear, take shape at the intersection of economic and political considerations. If one of the essential functions of the modern state is to 'govern the economy' in order to guarantee the conditions for capital accumulation and the supply of sufficient employment and income opportunities to its population, then the process of global restructuring has made the state into a less and less effective guarantor. At the same time, this growing inability of the national state to provide sufficient employment and income undermines the legitimacy of the political structures. Governments are increasingly subject to contradictory forces and tendencies as a result.

The economic imperatives of global restructuring and competition dictate new structures of 'flexible accumulation', with a reduction in the power of organized labour and a deregulation of labour markets. A certain level of irregular immigration is functional for this purpose, which explains why governments are reluctant to sanction the employers of illegal labour (Harris 1995: 25-49). In Germany studies have shown that a 1 per cent increase in the share of less-skilled foreign workers in the labour force leads to a 5.9 per cent fall in the wages of blue-collar workers, and a 3.5 per cent increase in white-collar wages. Similar results emerge from studies in the USA (Ghosh 1998: 18). On the political side, the logic of democratic welfare state politics induces politicians to close the borders more tightly in fear of electoral losses. The contradiction is grasped eloquently by Gary Freeman who wrote:

National welfare states are compelled by their logic to be closed systems that seek to insulate themselves from external pressures and that restrict rights and benefits to members. They nonetheless fail to be perfectly bounded in a global economy marked by competition, interdependence and extreme inequality, ... relatively free movement of labour across national frontiers exposes the tension between closed welfare states and open economies and ... ultimately, national welfare states cannot coexist with the free movement of labour.' (Freeman 1986: 51)

The consequences of 'open regionalism' and neoliberal restructuring in terms of the degree of democratic control with respect to these developments are worrying, as a small digression on European asylum policies makes clear. The main European instruments developed to deal with the migration 'crisis' of 1989–92 were the Schengen Treaty and the Dublin Convention. The Schengen Execution Agreement of 1990 (which came into effect in March 1995) purports to determine the responsibility for examining asylum requests within Schengenland, which is assigned as a rule to the country of first entry into the EU. The Dublin 'Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities' does the same, but in this case for all members of the European Union.

These 'common policies were essentially constituted outside the framework of the European Union: European policy in this field was not supranational (communitarian), but intergovernmental. This approach was confirmed in the Treaty on European Union (Maastricht Treaty), where only visa policy was brought under the 'first pillar', the community regime. All other matters concerning immigration and asylum were placed under the Third Pillar, the intergovernmental mechanisms for dealing with matters of domestic security, police, terrorism, etc. (while the Second Pillar, also intergovernmental, deals with foreign policy and defence issues) (Collinson 1993: 110–15). The Treaty of Amsterdam has brought a cosmetic change, but no more than that: immigration and asylum matters have been moved to a separate title on 'Free movement of persons, asylum and immigration' in which Community institutions will have a role. However, decision-making will be subjected to the require-

7 The Schengen agreement was initially concluded between five states (the Benelux, France, and Germany) and has now been joined by all but two EU members (Britain and Ireland will stay out of Schengenland) and also by Norway and Iceland.
ment of unanimity which may be changed after five years to a qualified major-
ity rule only if there is unanimity on that change. In fact therefore, the strictly
intergovernmental mode of decision-making has been prolonged for at least
another five years (see van Selm 1998 for details).

Neoliberal restructuring of the global economy involves both the furthering
of the 'free movement' of goods, services, and capital, and the disciplining
of labour. When considering the question of the governance of migration we
are therefore confronted with a paradox: the free movement of production
factors in liberal practice does not extend to labour (Hollifield, chapter 3 in
this volume); its movement is strictly regulated by the state. This contradic-
tion is compellingly caught by Stephen Gill's phrase 'disciplinary neoliberal­
ism' (Gill 1995). There is clearly a tension here between regulating migration
under the auspices of global neoliberalism on the one hand, and upholding
the values of democratic governance on the other. When we turn to discuss
the contours of a possible new comprehensive framework for the regulation
of global migration in the next section, we shall therefore emphasize the
importance of democratic multilateralism as a safeguard against downward
harmonization through disciplinary neoliberal policy competition.

Reshaping the governance of international migration

The foundation-stone [of this work] is and must remain the State. Respect for its
fundamental sovereignty and integrity are crucial to any common international
progress. The time of absolute and exclusive sovereignty, however, has passed; its
theory was never matched by its reality. It is the task of leaders of States today to
understand this and to find a balance between the needs of good internal governance
and the requirements of an ever more interdependent world. (Boutros Boutros-Ghali,
An Agenda for Peace, 1992)

There are good reasons to be very negative about the prospects for the develop-
ment of a more equitable code of conduct in the sphere of international
migrations' (Zolberg 1991: 320). But even if in the short run the prospects are
not good, it is still worthwhile to reflect on what the analysis presented in this
chapter implies for attempts to find the balance that Boutros-Ghali spoke of.

First, although this volume focuses on ideas for an international migration
policy, it must be made clear that unless such an effort is embedded in a more
general effort to address the underlying causes especially of all forms of invol-
untary migration, any such effort will inevitably result in the codification of
the existing extremely restrictive immigration practices of most of the coun-
tries of immigration. More concretely, this would imply that the international
community must address

- the structural inequities in the global political economy producing
and/or reproducing poverty among two-thirds of the world's population
(such as unequal exchange, the dumping of agricultural surpluses, etc.);
- the global arms trade which fuels many of the refugee-producing
conflicts around the globe;
- the neo-colonial political interference in (if not initiation of) regional
and local conflicts by major powers.

Second, at the level of the global community as a whole, a comprehensive
International Migration Framework Convention must be created to set forth
and guarantee the general principles governing the regulation of transnational
migrations, to ensure a sufficient degree of coordination between regional
migration regimes, and to deal with those migratory movements that cannot
be covered in a regional setting. There are three major components in such a
regime.

The institutional framework to be developed at the world (and regional)
level must be democratic, i.e. transparent and responsive to the needs of
migrants as well as to those of the participating states. This might be accom-
plished by involving, besides the institution most obviously suited to play a
key role here, namely the International Organization for Migration, interna-
tional non-governmental organizations (humanitarian organizations,
representative associations of migrants and refugees, etc.) in the formul-
ation of norms and rules and in the processes of supervision and control
(advocacy councils, boards of governors, etc.). The Charter of the United
Nations provides us with a model: article 71 creates the possibility for
ECOSOC to collaborate with NGOs, and the practices developed under this
provision of the UN Charter may be adapted to suit the global migration
framework.

The asylum and refugee framework providing the basis for the existing
international refugee regime (i.e. the 1951 Geneva Convention and the 1967
New York Protocol) must be amended to take into account the altered nature
of international refugee movements. Here the proposals put forward by
Zolberg, Suhrie, and Aguayo (1989) may serve as a starting point. They
propose to introduce as the central principle 'the immediacy and degree of
life-threatening violence' (p. 270) in order to afford protection to the 'victims'
on an equal footing with the more common subjects of present asylum law,
the 'activists' and the 'targets'. The United Nations High Commissioner for
Refugees (UNHCR) is destined to be the lead global institution here. As
regards asylum policies of the OECD countries in particular (this in light of
their recent record), it must be emphasized that asylum seekers who are
denied recognition as refugees yet are not returned to their home country
must be given a legal status enabling them to build a new life rather than be
forced to go underground. Otherwise the governments themselves 'produce'
illegal migrants.
An equivalent framework for voluntary migration (permanent and temporary) must be created in which states undertake to bring their national immigration policies in accordance with an internationally negotiated harmonized set of criteria formulated to safeguard the interests of migrants as well as the interests of the signatory states. The existing provisions of ILO Conventions and the GATS should be incorporated into such a framework, which might also borrow relevant provisions from the Conventions concluded under the authority of the Council of Europe. Although its early conclusion seems increasingly uncertain, the draft Multilateral Agreement on Investments (MAI) contains provisions that have a bearing on the movement of people and consequently further negotiations of an MAI should take into account what has already been achieved in the migration field. Leading roles in this area are for the International Labour Organisation and the International Organization for Migration. One important principle to be followed here is that the legal position of long-term residents must be improved. Both the return of migrants to their home countries and their effective integration into the host society are obstructed by their insecure status (i.e. by the difficulty in many host countries to gain full membership in the welfare state and by the difficulties they encounter upon return to their home country). These problems could be substantially reduced, for instance, by expanding the possibilities for dual citizenship or by allowing reimmigration with full retention of rights in case of failed return migration. Several countries have recently increased these possibilities (e.g. Mexico, Turkey, France, Great Britain, and Brazil) while others contemplate doing so (South Korea, the Philippines), and discussion about these themes especially in the major countries of immigration (the USA and Germany in particular) make it clear that a multilateral approach with a balanced distribution of advantages and costs would greatly enhance the chances of success.

Third, Regional Migration Conventions must provide the institutional and operational settings in which to specify and operationalize the general principles set out in the global frameworks. It would seem that only in regional settings will it be possible to formulate effective instruments to deal with such undesirable developments as the increasing role of organized crime in the trafficking of people (and drugs and arms). As with the Prohibition in the 1930s, an exclusively repressive policy only raises the price of the prohibited good (in this case access to the labour markets of the OECD countries) without substantially reducing the flow.

These regional regimes may be embodied in Regional Migration Conventions, incorporating

- regional development, educational and employment initiatives
- preferential trade agreements
- effective measures against human trafficking

In the light of the analysis in earlier sections of this chapter it is important to emphasize the importance of an integral and comprehensive approach. If certain elements, such as the provisions relating to the entry of temporary labour, are realized in isolation from the other elements and principles, this is bound to serve only the interests of the employers looking for cheap workers. Public governance of these processes must guarantee the balance between the various elements of the Conventions.

Finally, let us return to the point of departure of this contribution: commodification. This chapter's unspoken thesis has been that there is a possibly irreconcilable tension between unchecked commodification on the one hand and humankind's emancipation from bondage and deprivation on the other. To guard against the risk that orderly regulation of migration privileges further commodification over emancipation, it is essential to stress the need for transparency and accountability in the institutional set-up and for consensual multilateralism instead of de facto bilateralism. Karl Polanyi was right to see that capitalism oscillates between laissez-faire and social protection (Polanyi 1957). The forces profiting from laissez-faire as we have seen can fend for themselves. It is the ordinary people of the world who need the protection of democratic public institutions, both at the national and at the global level.

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Henk Overbeek


Chapter 13
THE PROTECTION OF NON-CITIZENS IN INTERNATIONAL HUMAN RIGHTS LAW

David Weissbrodt

1. INTRODUCTION

Globalization and the growth of the world economy have increased international trade in goods and services as well as facilitated international financial transfers. While Adam Smith prescribed the free movement of goods, capital, and people as the hallmark of the market system, nations have been far less receptive to the last of these three than to the first two. Despite this unease, the population in developed nations is aging and there is an increased need for workers—many of whom must come from other countries. Modern forms of transportation have made travel much easier. Persistent unemployment, underemployment, poverty, and economic insecurity in developing countries have impelled millions to seek work in developed nations. They arrive through regular migration procedures, irregular methods, or trafficking. Also, armed conflicts, human rights abuses, and environmental disasters cause more people to leave their homes in search of safer places to live. From 1975 to 2000 the number of migrants in the world increased, under the various different pressures of globalization, from 75 million to 175 million. Accordingly, countries must come to terms with having many non-citizens on their territory.

1 See generally A. Smith, The Wealth of Nations (1776) (Homewood, Illinois, R.D. Irwin 1963). The Internet revolution has made it much less necessary for individuals to travel in order to make productive contributions to the world economy and to seek a better way of life. One can be inventive and well compensated in Bangalore or in Shanghai these days without travelling to Berlin, Chicago, or Tokyo. Despite the implications of these new economic and technical developments, however, skilled and unskilled migrants continue to move from nation to nation in search of prosperity.

2. **WHO IS A NON-CITIZEN?**

Approximately 175 million individuals — or three per cent of the world's population — currently reside in a country other than the one in which they were born. They include migrants, that is, individuals who are engaged in a remunerated activity in a state of which they are not a national. Non-citizens also include refugees, asylum seekers, and immigrants who have entered a new country for reasons of family reunification. There are also non-immigrants, that is, individuals who enter the country without the intent to remain on a permanent basis. For example, foreign workers, who have temporary permission to remain, foreign students, business visitors, tourists, and unsuccessful asylum seekers. In many countries there are individuals who entered or remained without permission, have been subjected to trafficking, or who otherwise lack the requisite documentation to remain. Not all non-citizens, however, are born abroad. A large number are stateless persons — those who either never acquired citizenship of the country of their birth or lost their citizenship, and have no claim to that of another state. Such persons include individuals native to the country of their residence who failed to register for citizenship during a specified period and have been since denied it. There are also persons who lost their citizenship after acquiring the nationality of their non-citizen spouses, only to lose their adopted citizenship upon divorce; and children born in states that recognize only the jus sanguinis principle (under which children acquire their parents' citizenship) to non-citizen nationals of states that recognize only jus soli (in which children acquire the citizenship of their country of birth).

3. **SYNTHESIS OF THE RIGHTS OF NON-CITIZENS**

International human rights law is grounded upon the premise that all persons, by virtue of their humanity, have fundamental rights. Accordingly, international human rights law generally requires the equal treatment of citizens and non-citizens. Exceptions may be made to this general principle only if they are to serve a legitimate state objective and are proportional to the achievement of that objective.

With regard to civil and political rights, the Human Rights Committee — which is responsible for monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR) — explained in its General Comment 15 that almost all rights protected by the Covenant must be guaranteed without discrimination between citizens and non-citizens. Among these rights are freedom from racial discrimination, freedom of thought, conscience, and religion; freedom of opinion and expression; the right to peaceful assembly; and the right to form associations. The committee has also held that states are under an obligation to provide non-citizens with the same protection against discrimination as they provide to citizens. The committee has further noted that states are under an obligation to ensure that non-citizens have access to justice and that their rights are respected by the state.

Of particular importance in this context is the right to equality before the law. The committee has held that states are under an obligation to ensure that non-citizens have access to justice and that their rights are respected by the state. This right is particularly important in the context of non-citizens who are subjected to trafficking or other forms of abuse. The committee has held that states are under an obligation to ensure that non-citizens have access to justice and that their rights are respected by the state.

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arbitrary killing and detention; freedom from torture or cruel, inhuman or degrading treatment or punishment; equality before courts and tribunals; and freedom of thought, conscience and religion. Furthermore, non-citizens should have the right to marry; to receive protection as minors; and to peaceful association and assembly. The ICCPR contains a narrow exception to the general principle of equality for non-citizens with respect to two categories of rights – political rights that are explicitly guaranteed to citizens, such as the right to vote; and freedom of movement, such as the right to choose one’s place of residence, which may be denied to undocumented immigrants.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes that states shall, in general, protect the rights of all individuals – regardless of citizenship – to work; just and favourable working conditions; an adequate standard of living; good health; education; and other economic, social and cultural rights. Article 2(3) of the ICESCR allows developing countries, ‘with due regard to human rights and their national economy’, to ‘determine to what extent they would guarantee the economic rights recognized in the ICESCR to non-nationals’. This exception may be made only with respect to economic rights and not to social and cultural rights. Further, like all exceptions, those provisions must be narrowly construed so as to maintain the overall thrust of the human rights protections.

Under Article 1(3) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), states may not discriminate against persons of any particular nationality. The Committee on the Elimination of Racial Discrimination, tasked with monitoring the implementation of this Convention, has indicated that states may draw distinctions between citizens and non-citizens as long as such distinctions do not have the effect of limiting non-citizens’ enjoyment of rights enshrined in other instruments, such as the Universal Declaration of Human Rights (UDHR), the ICCPR and the ICESCR, and all non-citizens are treated equally. The Committee has also determined that differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation are inconsistent with the objectives and purposes of the Convention; are not proportional to the achievement of those objectives and purposes; or do not fall within the scope of Article 1(4) of the Convention relating to special measures, that is, what is popularly known as “affirmative action”.

There are several major treaties specifically protecting the rights of migrant workers, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) – which came into force in July 2003 and has been ratified by 34 nations – and ILO Conventions 97 and 143, which have been ratified by 43 and 18 nations respectively.

The ICRMW provides for the following list of rights and liberties for all migrant workers and their families, regardless of immigration status: non-discrimination, freedom to leave any country and to enter their country of origin, the right to life, freedom from torture and ill-treatment, freedom from slavery or forced labour, freedom of thought, conscience, and religion, freedom of opinion and expression, freedom from arbitrary or unlawful interference with privacy, family, home, correspondence, or other communications, property rights, liberty and security of person, the right of migrants deprived of their liberty to be treated with humanity, the right to a fair and public hearing by a competent, independent, and impartial tribunal, prohibition of retroactive application of criminal laws, no imprisonment for failure to fulfil a contract, no destruction of travel or identity documents, no expulsion on a collective basis or without
fair procedures; the right to consular or diplomatic assistance; the right to recognize oneself as a person before the law; equality of treatment between nationals and migrant workers as to work conditions and pay; the right to participate in trade unions; equal access to social security; the right to emergency medical care; the right of a child to a name, birth registration, and nationality; and equality of access to public education. In addition, States Parties must ensure respect for migrants' cultural identity; the right to repatriate earnings, savings, and belongings; and the right to information about rights under the ICRMW.

In an attempt to discourage irregular migration, the ICRMW provides additional rights to migrant workers who are documented or in a regular situation. Indeed, for migrant workers and their families in a documented or regular situation, the ICRMW provides for the right to liberty of movement in the territory of the state of employment; equal access to education, vocational guidance, housing, social and health services, and cultural rights; equality of treatment with nationals in respect of protection against dismissal and access to unemployment benefits; the right to vote, be elected, and participate in the public affairs of the state of origin; and the right to have a family.

In general, the ICRMW does not create new rights for migrants, but instead reaffirms basic human rights norms found in existing treaties and embodies them in an instrument applicable to migrant workers and their families. The Convention takes into account relevant international labour standards such as ILO Conventions 97 and 143, as well as the Slavery Conventions. The Convention also refers to other instruments, such as the ICESCR, the ICCPR, UNESCO's Convention against Discrimination in Education, and the Convention on the Rights of the Child (CRC).

The ICRMW innovates by defining the rights that apply to specific categories of migrant workers and their families, and presents a division of migrant workers into sub-categories: 'frontier workers'; seasonal workers; seafarers employed on vessels registered in a state other than their own; workers on offshore installations which are under the jurisdiction of a state other than their own; itinerant workers; migrants employed for a specific project, and self-employed workers.

In an Opinion of 17 September 2003, the Inter-American Court of Human Rights issued one of the most important international judicial reaffirmations of the rights of migrants when it declared

that non-discrimination and the right of equality are jus cogens (that is, peremptory norms of international law) applicable to all residents regardless of immigration status... The Court acknowledged that governments have the right (within the bounds of other applicable human rights norms) to deport individuals and to refuse to offer jobs to people without employment documents. However, the Court said, once the employment relationship is initiated, unauthorized workers become rights holders entitled to the full panoply of labor and employment rights available to authorized workers.

For the 192 nations that have ratified the CRC, children of non-citizens shall have the right to a name and to acquire a nationality, and should not be excluded from schools - even if they lack legal status. In general, children should have the right to acquire citizenship of the country in which they are born - particularly where they would otherwise be stateless. Similar provisions ensuring ac-


ICESCR, loc. cit. n. 19.

ICPR, loc. cit. n. 11.


CRC, loc. cit. n. 69.


See A. Eide, 'Citizenship and International Human Rights Law: Status, Evolution, and Chal-
Non-citizens continue to suffer discrimination. For example, the Committee on the Elimination of Racial Discrimination found that, in Norway, a list of housing accommodation contained discriminatory requirements such as "no foreigners desired", 'whites only' and 'Norwegians with permanent jobs' only. A study in South Africa found that people were being detained on suspicion of being illegal immigrants simply because of the colour of their skins and their accents. Because non-citizens are often of both a different race and a different culture, they become the victims of both racism and xenophobia.

In addition to discrimination, non-citizens often face outright abuse. For example, those women of Asian origin working as domestic servants in Kuwait were frequently subjected to debt bondage, passport deprivation, illegal confinement, rape, and other physical assault.

At the same time, it is usually the case that non-citizens cannot assert their rights for fear of retribution, and have no way of participating in the political process so as to assure legal protection. As a result, they are left without the effective means to challenge or have remedied violations of their human rights.

Two particularly vulnerable groups of non-citizens are undocumented, or 'illegal', immigrants and irregular migrants. Undocumented immigrants are individuals who enter without following the required immigration procedures or who enter as non-immigrants and then remain beyond the limits of their permission to remain. Irregular migrants are smuggled or trafficked into the country or otherwise enter through irregular means. Undocumented immigrants may live under substandard conditions, and face raids on homes and workplaces, and interrogations in which they may be subjected to abuse, inhumane or degrading treatment, and violations of their right to privacy. Their encounters with the police may not

...
be noticed because they have no relatives close by to raise questions about their detention or even death. Even when they suffer violations of their human rights, they may not seek judicial remedies because they fear deportation. If they can find work, they are often employed in the informal economy, in which their employers exploit their fear of being reported to the authorities and may subject them to conditions that resemble slavery. Without documentation, they also cannot obtain basic government services like health care and education.

Persons who emigrate through irregular channels – such as smuggling and trafficking networks – risk dying of suffocation in containers or drowning when an overloaded ship sinks. There have been cases where sexual favours have been demanded of trafficked women in order to let them continue on their way, as well as cases of rape. Where they are intercepted by the authorities, irregular migrants are vulnerable to excessive use of force and cruel or degrading treatment, and are at times accused of being smugglers and traffickers themselves. Unfortunately, countries of origin are often unwilling to acknowledge the nationality of their citizens who have been trafficked and then try to return home; as a result, they also refuse to represent such trafficked persons or act on their behalf.

Non-citizens are frequently caught in the mesh of differing rules on determining nationality, and have been rendered stateless as a result. In 2005, the Inter-American Court of Human Rights issued its landmark decision in *Bosico v. Dominican Republic*, forbidding racial discrimination in the granting of citizenship and thus diminishing the likelihood of statelessness. This case was brought by two children of Haitian descent, who were born and had resided in the Dominican Republic their entire lives, but who had nonetheless been denied birth certificates, barred from acquiring Dominican nationality, and exposed to possible expulsion. The Inter-American Court found that the Dominican Republic’s discriminatory application of birth registration and nationality laws rendered children of Haitian descent stateless and effectively deprived them of a number of essential human rights, such as the right to a name, the right to equal protection before the law, and the right to education. The Court determined that the Dominican Government should create an effective procedure to ensure that all children born on the territory of the State were granted birth certificates regardless of parental citizenship or migratory status, and that they had equal access to State education. Furthermore, the Court ruled that the Government should compensate the parties and their families for the injuries they had suffered.

A major problem that non-citizens continue to face is arbitrary detention, even though it is prohibited by the ICCPR. For example, in *A v. Australia*, the Human Rights Committee found that Australia’s practice of detaining Southeast Asian ‘boat people’ violated the Covenant. In 1989, a Cambodian national arrived in Australia by boat, applied for refugee status, and was kept in detention for four years. The Human Rights Committee found that his detention violated Article 9(1) of the ICCPR (prohibiting arbitrary detention), because there were no specific grounds justifying detention for that length of time. The Committee further noted that detention of immigrants must be open to periodic review. In addition, the Committee found that Australia had violated Article 9(4) of the ICCPR (guaranteeing access to a court), because Australian law did not allow courts to order the release of ‘boat people’.

Nonetheless, non-citizens – especially asylum seekers, undocumented immigrants, and victims of trafficking – continue to be placed in detention for indefinite periods. These persons, who have often been traumatized by experiences of persecution or abuse, are detained side-by-side with criminals in the same prison facilities, which are frequently overcrowded and unhygienic. They are denied contact with their families and access to legal assistance, and the opportunity to challenge their detention. Even unaccompanied children and families are placed in arbitrary detention, and, in the case of families, children are separated from their parents and taken to other facilities. Detained children are deprived of the...
special care they require, and are not afforded the right to education. A pregnant woman in detention in Australia complained to the authorities for a fortnight about pain and bleeding she was experiencing when she was finally admitted to hospital, she was found to have miscarried.

This situation has worsened since 11 September 2001, as several countries have invoked anti-terrorism measures in order to justify indefinite detention or otherwise violate the rights of non-citizens, on the basis of unspecified allegations related to terrorism or national security. The Government of the United States has detained and summarily deported thousands of immigrants and non-immigrants who were from certain Middle Eastern and Asian nations.

Where non-citizens face expulsion orders, they are frequently denied the right to challenge those orders in court. They may also be faced with *refoulement* — expulsion to countries of origin where they may be subjected to persecution or abuse.

5. **RECOMMENDATIONS FOR THE PROTECTION OF NON-CITIZENS**

The continuing discriminatory treatment of non-citizens in contravention of relevant human rights instruments demonstrates the need for clear, comprehensive standards governing the rights of non-citizens, their implementation by states, and more effective monitoring of compliance.

Since the seven core human rights treaties deal with many of the problems encountered by non-citizens, states should push for the universal ratification and implementation of those treaties, including the ICRMW. In addition, states should be encouraged to ratify the additional international agreements addressing the problems of non-citizens, including the Protocol Relating to the Status of Refugees; the Conventions on the Reduction of Statelessness and relating to the Status of Stateless Persons; the Convention against Transnational Organized Crime; the Protocol to Prevent, Suppress and Punish Traffic in Persons, Especially Women and Children; and the Protocol against the smuggling of Migrants by Land, Sea and Air, which supplement the Convention; and the Vienna Convention on Consular Relations and its Protocols. States should further ratify, as appropriate, Protocol Nos. 4 and 7 to the European Convention on Human Rights (ECHR) and the European Framework Convention for the Protection of National Minorities. Moreover, they should also be encouraged to abide by the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live.

Since many problems frequently faced by non-citizens are covered by more than one treaty, it would be desirable for each of the treaty bodies to take into account the jurisprudence of their counterparts, in order to establish a consistent, structured approach to the protection of the rights of non-citizens. At a minimum, this should be done by those treaty bodies that have adopted specific standards, following the example of the Committee on the Elimination of Racial Discrimination, which has updated its General Recommendation providing interpretive guidance relating to non-citizens in such a way as to establish a comprehensive and integrated approach to the rights of non-citizens. In addition, treaty bodies should intensify their dialogues with States Parties regarding the rights accorded to, and the actual situation faced by, non-citizens.
The UN Special Rapporteurs on the human rights of migrants and on trafficking in persons, appointed by the Commission on Human Rights, play important roles in continuing their reviews of the situations facing migrants and trafficked persons throughout the world, visiting countries of particular concern, receiving communications about human rights problems, and reporting to the Commission on Human Rights. Governments, NGOs, representatives of non-citizens, and others should be encouraged to support the work of the Special Rapporteurs and to submit relevant information to them.

States should take actions to counter any tendency to target, stigmatize, stereotype, or profile, on the basis of race, members of particular population groups such as non-citizens—both by officials and by the media and society at large. They should ensure that all officials dealing with so-called ‘irregular migrants’ receive special training, including education in human rights obligations, and do not engage in discriminatory behaviour. Racist or xenophobic propaganda by political parties against non-citizens should be discouraged. Complaints made against officials, notably those concerning discriminatory or racist behaviour, should be subject to independent and effective scrutiny.

One of the most impressive advances in this regard was evident when the UK House of Lords, in December 2004, forbade discrimination against non-citizens who were detained because they were suspected of terrorism. The House of Lords examined the Anti-Terrorism, Crime and Security Act 2001, adopted by the United Kingdom after 11 September 2001, which provided that non-UK nationals suspected of terrorism could be indefinitely detained if they could not be deported. In A (FC) and Others v. Secretary of State for the Home Department, nine terrorism suspects successfully challenged their detention under the Act, alleging that the UK had violated Article 5 (the right to liberty and security) of the ECHR. In its judgment, the House of Lords relied predominantly upon European human rights law, and upon General Recommendation 30 issued by the Committee on the Elimination of Racial Discrimination.

6. CONCLUSION

While non-citizens may have different reasons for leaving their countries of birth and living abroad, and even though there are different legal regimes for migrants, refugees, stateless persons, and others, they all share common experiences of discrimination and abuse that must be addressed. Unfortunately, different communities of non-citizens often do not see their common interests. Intergovernmental and non-governmental organizations focus narrowly on distinct groups, without perceiving the need for global responses that might benefit all those concerned in general. Although international human rights law offers some protection for the rights of non-citizens, much needs to be done to define more broadly the relevant rights, and to implement those rights in practice.

SELECTED BIBLIOGRAPHY


134 Ibid.

135 The House of Lords also found that indefinite detention constituted a disproportionate derogation under Art. 5 from the right to liberty and security of person in Art. 3. See ibid., e.g., paras. 124-134.
The international human rights regime shapes the normative framework in which state activity occurs, and virtually all migration policies affect the enjoyment of recognized human rights. The focus of this chapter is the permissible extent to which states may take alienage into account in policy matters. The vast and varied topic of the human rights of migrants includes such broad issues, important to contemporary migration control, as the following:

- customary law doctrines concerning the rights of aliens;
- non-discrimination norms, including protection from racism and xenophobia;
- human rights of migrant workers;
- rights in the immigration context, including substantive limits on expulsion, procedural protections, and detention;
- economic, social, and cultural rights of non-citizens.

This chapter focuses exclusively on the rights of non-nationals (international migrants); the human rights of internal migrants are not analyzed.

THE RIGHTS OF ALIENS/MIGRANTS

Traditional doctrines of sovereignty emphasized the link to nationality and permitted distinctive treatment of aliens. However, customary norms concerning state responsibility for injuries to aliens became the topic of heated debate. Controversy centered on the property and procedural rights of aliens, especially foreign investors, and a sharp division of opinion existed whether aliens were entitled to national treatment in these matters, or whether there was a higher minimum international standard.
of fair treatment. Especially in the Americas, diplomatic protection became a controversial element linked to these customary norms. In a series of drafts written for the International Law Commission (ILC), Francisco V. García-Amador attempted to synthesize competing approaches by using emerging international human rights norms to articulate an international standard to protect nationals and aliens equally. Since García-Amador’s approach proved divisive, the ILC’s work on state responsibility essentially jettisoned the rights of aliens as a focus and the ILC undertook a separate study on diplomatic protection.

No general codification of the human rights of aliens has been achieved. Concerns over mass expulsions of non-nationals prompted a study by Baroness Ellen for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, which, in 1985, led to a rather compromised and limited General Assembly Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in which They Live. The Declaration addressed several aspects of the treatment of lawfully resident non-nationals, such as the right to social security or the right to equal remuneration for work of equal value, but it has apparently had little influence on state practice.

The recent appointments of the UN Special Rapporteur on the Human Rights of Migrants and the Special Rapporteurship on Migrant Workers and Members of Their Families of the Inter-American Commission on Human Rights (IACHR) provide a focal point for clarifying the human rights of migrants. The General Assembly has declared 18 December to be International Migrants Day in order to bring greater visibility to the special situation of migrants, including their grave human rights problems.

Migrants are treated variously by general human rights instruments that do not always explicitly address citizenship status. Certain human rights instruments, especially those concerning migrant workers, deal exclusively with the rights of non-nationals. To a limited extent, migrants are privileged in international law, for example, with respect to the right to diplomatic protection and consular access. These rights, however, can also be seen as compensatory for disadvantages faced by foreigners. Settled, temporary, and undocumented migrants may sometimes enjoy differential rights, although there is no comprehensive codification of these categories and their accompanying rights. With narrow exceptions relating to citizens’ rights to political participation and exemption from immigration measures, the denial or limitation of migrants’ human rights must be justified as serving legitimate state aims pursuant to measures that are proportionately linked to their migration status.

NON-DISCRIMINATION, INCLUDING RACISM AND XENOPHOBIA

The ancient confusion between strangers and enemies still prevails in some quarters. While racism and xenophobia are distinct concepts, demands for strict migration controls may arise from a linkage of these attitudes. In some states, the manifestation of racism primarily involves intolerance of and violence against migrants, a phenomenon noted at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

The non-discrimination norm plays a central role in defining the human rights of migrants. The widely ratified human rights treaties are of general application, rather than instruments that specifically define migrants’ rights. The major universal and regional human rights treaties prohibit discrimination, and, in general, permit only reasonable and proportionate differences in treatment. Non-discrimination is also notable for being included in the United Nations Charter and, at least as it applies to race, the norm is ius cogens.

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5 “Aliens” is the traditional term for designating non-nationals in customary international law, but it has many negative connotations. This paper uses the term “migrants,” but the author wishes to emphasize that in the contemporary human rights context this term may suggest a limitation to migrant workers, which is not intended here. This chapter examines the human rights of persons who are not nationals of the state whose conduct toward them is in question, and the extent to which the absence of these persons may justify differential treatment as compared to nationals. One further drawback to the term “migrants” is that it encompasses naturalized citizens, as well as internal migrants; neither meaning is intended in this chapter.


8 The Special Rapporteur was appointed pursuant to UN Commission on Human Rights Resolution 1996/44 of 27 April 1999. The Special Rapporteur replaced a Working Group of intergovernmental experts relating more generally to the human rights of migrants, which had been convened pursuant to Commission Resolution 1997/15 of 3 April 1997.


12 Durban Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 8 September 2001, para. 24-33 (addressing the situation of migrants), reprinted in 9 HRR 578 (2002).

13 UN Charter art. 1(3) includes among the purposes of the UN “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . .” Art. 25(c) commits the UN to promote non-discrimination.

14 International Court of Justice, Case Concerning Barcelona Traction, Light and Power Company,
However, human rights law does not forbid all distinctions between nationals and migrants. International rules concerning discrimination against migrants are nuanced, and require careful delineation. The terminology of the Universal Declaration on Human Rights (UDHR) is notable, with references throughout to “everyone” and “no one.” Article 2 of the UDHR expresses an open-ended non-discrimination principle, but neither “nationality” nor “alienage” is specifically listed. The UDHR does not clearly delineate permissible and impermissible discrimination against migrants, and further illumination must be sought from the more precise and binding provisions of universal and regional human rights treaties.

The non-discrimination provisions of three United Nations treaties and three regional treaties are especially relevant: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples’ Rights (African Charter). Each provides substantial protection for the human rights of migrants, though none contains a categorical bar on distinctions against non-nationals and several include problematic provisions that create confusion concerning the scope of state obligations.

In general, differential treatment is permissible where the distinction is made pursuant to a legitimate aim, the distinction has an objective justification, and reasonable proportionality exists between the means employed and the aims sought to be realized. The particular immigration status of a non-citizen may be relevant to the application of the proportionality principle. with greater rights adhering to settled migrants than to temporary visitors or to undocumented persons. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are especially relevant in regard to gender-based violence and family unification, special areas of vulnerability for migrants.

The ICCPR, although not as widely ratified as other human rights treaties, is particularly important. The ICCPR protects many rights affected by migration control measures, addresses discrimination in detail, and specifies non-derogable rights that are possessed by all human beings. Further, General Comment No. 15 of the Human Rights Committee provides guidance on the “position of aliens under the Covenant.” The following discussion of the ICCPR is also largely applicable to the three regional treaties, but noteworthy variations in the regional instruments are discussed below.

A State Party must ensure rights in the ICCPR to “all individuals within its territory and subject to its jurisdiction” (Article 2(1)), without mentioning reciprocity and nationality. The general non-discrimination provisions in the same article and in Article 26 are open-ended (being illustrative and including “other status”), but do not specifically list nationality or alienage among the prohibited grounds of distinction. The non-discrimination provision in Article 4(1), relating to derogation, does not prohibit distinctions against non-nationals, but derogation is subject to a strict rule of proportionality. The rights in the ICCPR can be divided into five categories, as they relate to distinctions against migrants:

1. Some rights must be provided on an equal basis to nationals and migrants, either because the right is absolute or because selective denial would never be reasonable or proportionate: the right to life (Article 6); the prohibition on torture and cruel, inhuman, or degrading treatment or punishment (Article 7); the prohibition on slavery, servitude, and forced or compulsory labor (Article 8); the humane treatment of prisoners (Article 10); imprisonment for contractual debt (Article 11); the right to leave the country (Article 12(2)); equality before the law and fair trial rights (Article 14); prohibition on retroactive criminal penalties (Article 15); right to recognition as a person before the law (Article 16); freedom of thought, conscience, and religion (Article 18) freedom of opinion (Article 19(1)); the right to marry (Article 23); the right of children to measures of protection (Article 24); and the right of minorities to culture, religion, and language (Article 27). Some of these rights are non-derogable under Article 4. Harsh migration control mea-

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19 Human Rights Committee, General Comment No. 15 (The position of aliens under the Covenant) (1980).
20 The Convention on the Rights of the Child (CRC) provides for the rights of the child, including the right to protection, non-discrimination, and non-derogation. (CRC, Art. 23).
24 Some scholars argue that these protections are limited to national minorities.
sures may imperil the lives of migrants, and an important aspect of the right to life relates to disproportionate use of force in law enforcement. Required measures to prohibit advocacy of national and racial hatred (Article 20) must protect nationals and migrants alike.

2. Certain articles prohibit arbitrary state action that may permit narrow distinctions between nationals and migrants. For example, the prohibition on arbitrary arrest and detention does not include immigration detention only of migrants, but it limits detention and does not permit migrants to be treated differently in the criminal context. The right to judicial proceedings to challenge the lawfulness of detention applies in all contexts and is non-derogable. The family is protected against “arbitrary or unlawful interference” (Article 17), and in certain (but not all) circumstances this may preclude deportation of family members. A balance between state interests and family unity must be struck, similar to that which prevails in the application of Article 8 of the ECHR. The fact that a migrant is settled, rather than temporary or undocumented, will enter into this balance.

3. Distinctions against migrants may sometimes be justified under limitations clauses permitting restriction on grounds such as national security or public order, if legitimate state aims and proportional means exist. The rights affected include manifestation of religion (Article 18), freedom of expression (Article 19), and freedom of association (Article 22). Where migrants are subjected to expulsion in retaliation for their exercise of these human rights, the same rule of legitimate aims and proportional means should apply, although this issue is not clearly resolved.

4. Certain political rights are explicitly limited to citizens, such as the right to take part in public affairs, to vote, and to have access to public service (Article 25). The right of the child to acquire a nationality (Article 24(3)) cannot reasonably be excluded from the application of jus sanguinis principles that deny citizenship to children born to migrants in the State Party's territory.

5. Some provisions specifically protect migrants (Article 13 on expulsion), while others protect only nationals and lawfully present migrants (such as the right to internal freedom of movement in Article 12(1)). The debate as to whether the right to enter “his own country” (Article 12(4)) applies to long-resident migrants is unresolved. Certain equal rights are of special value to migrants, such as the right to an interpreter in criminal proceedings (Article 14(3)(f)) and the right to recognition as a person (Article 16).

It is not possible here to note all the subtle variations in the civil and political provisions of the regional treaties. ECHR Article 16 is a rare instance of authorized discrimination against migrants; it enables State Parties to limit aliens' freedom of expression, association, and assembly by restricting the political activity of aliens. This political activity may apparently concern both the home and the host state. However, Article 16 has been given a narrow reading. African notions of solidarity and friendly relations between states underlie provisions that permit restrictions on the political activity of migrants. European regional trends appear to be in the direction of facilitating political participation by some migrants, for example through the Convention on the Participation of Foreigners in Public Life at the Local Level, but ratification is too limited to permit any general conclusions regarding emerging norms against traditional preferences for nationals in the enjoyment of political rights. To the extent that political rights for migrants are recognized, they concern settled migrants and political activity at the local level.

Antiterrorism measures are sometimes targeted differentially at migrants. The application of non-discrimination norms to the expressive and associational activities of non-nationals is thus an important policy issue facing states. At the same time, the equality principle mandates that migrants be entitled to national treatment regarding physical security and fair trial. Rules on detention and expulsion, discussed below, also constrain antiterrorist measures. While derogation norms do not exclude all distinctions between nationals and migrants, they do prohibit racial and religious discrimination and impose strict rules of proportionality.

The economic, social, and cultural rights of migrants are addressed in more detail below, but it appears that non-discrimination principles operate more weakly for migrants regarding these rights than for many civil and political rights. As Ryszard Cholewinski notes, the “ICESCR affords less protection to aliens in comparison with the UDHR and the ICCPR.” The ICESCR includes an open-ended non-discrimination clause (Article 2(2), but permits limitations for the “general welfare” (Article 4). Economic rights may be limited for non-nationals by “developing countries,” in an especially opaque provision (Article 2(3)). Migrants may, however, “have a right to the enjoyment of the minimum core content of rights guaranteed by the ICESCR.” Categorical exclusion of migrants from all economic, social, and cultural rights is not authorized. The proportionality principle would support some distinctions between different groups of non-citizens, for example with respect to the right to work.

Norms against racial and ethnic discrimination are especially relevant to migrants who compose minorities in their host state, but the ICERD introduces an “unfortunate” ambiguity in Article 1(2), which disclaims application to “distinctions,
exclusions, restrictions or preferences ... between citizens and non-citizens.” However, migrants who are victims of racial or ethnic discrimination may claim ICERD’s protection despite their alienage, as indicated in the sparse jurisprudence of the Committee on the Elimination of Racial Discrimination.18 Under Article 1(3), laws governing citizenship may not discriminate against persons of a particular nationality.

Violence against women implicates human rights norms of special relevance to women migrants, who suffer from a double vulnerability. Norms prohibiting gender-based discrimination and requiring action to combat violence against women apply to women migrants as well as to citizens. Migration control measures may inadvertently facilitate or aggravate violence against women (for example, by discouraging trafficking victims from contacting authorities).

In summary, migrants are entitled to equal protection with respect to many civil and political human rights, especially those relating to security of the person and fair process. All non-derogable rights demand equality, but others (such as the right to a fair trial) do as well. Migration control measures must not encourage official and private anti-migrant violence. The strong link between racism, xenophobia, and human rights violations against migrants poses a significant challenge for states in devising migration policies that meet basic human rights standards. Migrants who are members of racial and ethnic minorities are entitled to protection from discrimination on those bases.

Alienage is a protected “other status” subject to non-discrimination norms, but reasonable and proportional distinctions may be drawn between nationals and migrants with respect to some rights, in particular political and expressive rights, some freedom of movement norms, and certain aspects of the right to family life. Non-discrimination norms appear to be a less powerful instrument regarding unequal treatment of migrants in the enjoyment of economic, social, and cultural (ESC) rights. However, states may be required to draw distinctions between groups of migrants who enjoy different levels of protection, and not all ESC rights permit categorical denial to migrants.

HUMAN RIGHTS OF MIGRANT WORKERS

The imminent entry into force of the 1990 International Convention of the Rights of All Migrant Workers and Members of Their Families (ICMW),19 following a concerted effort to promote ratification, has given prominence to that sub-group of migrants who are migrant workers or members of their families.20 The International Labor Organization (ILO) estimates that, of the roughly 150 million migrants in the world, between 36–42 million persons are migrant workers, and an additional 44–55 million are members of their families.21 Key ILO conventions include the Convention Concerning Migration for Employment (No. 97) of 1949 and the Convention Concerning Migration in Abusive Conditions and the Promotion of Equality in Opportunity and Treatment of Migrant Workers (No. 143) of 1975, which preceded UN codification in this field.22

Only a sketch of this important topic is possible here. Five issues merit emphasis. First, the migrant workers conventions are not widely ratified and a striking disparity in ratifications exists between sending states and receiving states. Second, these instruments are unique in treating nationality explicitly as a prohibited basis of distinction.41 Equality is guaranteed especially in work-related matters such as remuneration and hours of work,22 but equality is promoted in broader areas such as social security, access to employment, trade union freedoms, and cultural rights.23 Third, migrant workers comprise several distinct groups with varying human rights issues, from multinational executives, to legally admitted skilled and unskilled workers in a range of occupations, to irregular migrants who occupy the lowest employment rungs. Fourth, the rights of irregular migrants are especially controversial, as they are issues of family unity. Fifth, these conventions simultaneously promote measures to combat illegal migration.24

The breadth and complexity of the migrant workers conventions are sometimes cited as an explanation for their low rate of ratification. The ICMW pointedly encompasses all migrant workers—legal and illegal—and their family members. Resistance to legal obligations that might impede enforcement measures to combat illegal migration and preferences for nationals in economic matters also deter ratification. Briefly, the ICMW, in Part III, guarantees rights to all migrant workers and their families, ranging from protection during migration (Article 25); trade union rights (Article 26); social security (Article 27); and basic education (Article 28); dealing with matters of special concern to migrants, such as preservation of cultural identity (Article 31); and repatriation of savings (Article 32). Part IV provides more extensive guarantees, although not always national treatment, for migrants in a documented or regular situation, in matters ranging from liberty of movement (Articles 38–39) to access to employment (Articles 51–54). A Committee on the Protection of the Rights of All Migrant Workers and Members of...
Their Families will be established under Part VII of the ICMW, following its entry into force.

IMMIGRATION CONTROL MEASURES AND HUMAN RIGHTS

Distinctions between citizens and migrants are clearly permissible in the regulation of admission and expulsion. However, immigration control is constrained by human rights norms.

Substantive Human Rights Bars to Expulsion

Human rights treaties forbid the return (refoulement) of migrants to states where they would face certain violations of their rights. Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment and Article 22 of the Convention on the Rights of the Child explicitly prohibit refoulement under specified conditions. The ban on returning migrants to torture may form an aspect of the customary law prohibition on torture, in light of general rules on state responsibility. Some provisions of human rights treaties impose implicit non-refoulement obligations of an absolute character; most prominent among these are ICCPR Article 7 and ECHR Article 3 (concerning torture and cruel, inhuman, or degrading treatment or punishment).

Other provisions may implicitly limit the power of states to deport where the deprivation of rights outweighs the state’s interest in migration control or public safety. The right to family life is especially relevant (ICCPR Articles 17 and 23; ECHR Article 8; ACHR Articles 17 and 19; African Charter Article 18, CRC Articles 3, 9, 10, and 16). Furthermore, the logic of the family life jurisprudence may extend to broader provision of subsidiary protection.

Procedural Rights, Especially Relating to Expulsion and Consular Access

Human rights norms relating to expulsion of migrants are essentially procedural (for example, ICCPR Article 13), and provide that expulsion must be by a competent authority in accordance with law and that individuals should be permitted to give reasons why they should not be expelled. The European Court of Human Rights has demanded compliance with procedural fairness in the expulsion of irregular migrants under ECHR Protocol 4 Article 4; Protocol 7 Article 1 provides additional procedural protections for lawfully resident migrants. The IACHR Special Rapporteur has examined procedural rights related to expulsion. While expulsion of enemy aliens was a traditional practice, modern norms may impose individualized procedural requirements. The right to challenge an expulsion is vital to the right to seek asylum and to the human rights bars to refoulement, as well as to fundamental fairness.

Irregular migration is itself criminalized, increased international efforts are devoted to combating migrant smuggling, and many migrants are charged with ordinary criminal offenses. Migrants may be at a cultural disadvantage when involved in criminal proceedings. The right to consular notification and access guaranteed by the 1963 Vienna Convention on Consular Relations is a right of individuals that may also be asserted by means of diplomatic protection. The Inter-American Court of Human Rights has characterized consular access as a human right.

Detention

Migrants are differentially subject to immigration controls that often include a detention component. The Human Rights Committee has indicated that, under the principle of proportionality, prolonged detention of migrants without a showing of necessity and periodic review may be arbitrary in violation of Article 9 of the ICCPR. The Working Group on Arbitrary Detention of the UN Commission on Human Rights has adopted a set of ten principles relating to the detention of migrants, but these largely concern treatment of detainees rather than the basis for detention. States have increasingly resorted to detention as a deterrent measure against irregular migration. The impact of these policies on asylum-seekers has been addressed by the UNHCR and scholars.

Detention in connection with interdiction of seaborne migrants may implicate additional legal rules relating to rescue at sea and disembarkation. The UNHCR has cautioned that ships should not be used as floating detention centers.
Indefinite detention without charge or trial is imposed selectively on non-citizens in some recent antiterrorism measures. Such policies can represent serious derogations from the prohibition on arbitrary detention, and are subject to searching review as to whether they are strictly required by the exigencies of an actual emergency threatening the life of the nation. The right to take judicial proceedings to challenge the lawfulness of detention is now widely regarded as non-derogable.57

Humanitarian law, including the Geneva Convention IV of 1949, regulates the internment of civilians who are nationals of enemy powers or who live in occupied territory, during armed conflict between states.

ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

This complex topic embraces a range of discrete rights. Different categories of migrants enjoy different levels of protection in relation to particular rights; and a number of specialized regional and bilateral treaties provide reciprocal guarantees, sometimes of great complexity. Variations exist regionally and in state practice.58 In general, categorical exclusions of migrants from economic, social, and cultural rights are impermissible and differential treatment must be justified. Article 2(3) of the ICESCR is unusual in authorizing categorical denial of “economic” rights to non-nationals in “developing countries,” but the meaning of these terms is uncertain. Justification for adverse treatment may be relatively easy in some circumstances (for example, denying tourists access to the labor market), or it may involve a difficult balancing process (for example, determining whether minor children of asylum-seekers may be educated separately from the children of citizens and settled migrants).

Citizens of states belonging to an economic union may receive national treatment in matters such as employment, while other settled and temporary migrants are treated less favorably. The reciprocal benefits guaranteed in economic unions and bilateral arrangements extend only to specified beneficiaries, but patterns discernable in such agreements provide evidence of emerging general principles of law and customary norms.

Here it is possible only to identify some key rights governed by international standards, although few have an absolute or universal character:

- **Work:** Equality of employment conditions for those in the work force, including irregular migrants, is perhaps the least controversial norm, although many employers recruit irregular migrants precisely in order to provide substandard wages and working conditions. Labor union rights are also more securely protected than many employment-related rights. Social security rights are complex; reciprocal rules (for example, among EU states) may result in differential guarantees for different groups of migrants. Access to work is least securely protected, and remains “one area where state sovereignty is prevalent and where countries are least inclined to realize equality between migrant workers and nationals.”59 Access to work is often linked closely to migration control, and some lawful migrants may be restricted to certain jobs or economic sectors while other migrants (asylum-seekers, for example, or family members of migrant workers), may face significant barriers. However, equality of treatment may exist within regional economic unions, and freedom of movement for employment is a major objective of such unions.

- **Education:** The right to primary education is perhaps the most compelling issue in this area, and universal entitlement appears protected by the ICESCR (Article 13; Convention on the Rights of the Child (Article 28); ECHR (Protocol 1 Article 2); the ICMW (Article 30); the OAS Charter (Article 47); and the American Declaration on the Rights and Duties of Man (Article XII). Reasonable and proportionate justification for denial of this right is difficult, because of the centrality of primary education to the child’s ability to develop and to enjoy other rights.60 Access to secondary, higher, and vocational education is addressed in these and other instruments as migrants may face discrimination. Equal access to financial assistance for education appears to be least securely protected.

- **Health and housing:** General economic, social, and cultural instruments protect these rights, and exclusion of migrants must be justified under their non-discrimination provisions. Irregular migrants comprise the most disadvantaged persons in respect of access to adequate housing, and may be the target of harsh enforcement measures (for example, forcible evictions) that implicate absolute rights, such as life and physical security. Denial of access to basic health care may also implicate these fundamental rights. Universal and regional migrant workers conventions address health and housing issues, and groups of migrants (nationals of certain favored states, lawful migrants, irregular migrants) may enjoy different levels of protection.

- **Cultural rights:** Migrants frequently differ in language, religion, dress, and other cultural practices from the societies in which they live. These variations may provoke intolerance in sectors of the host societies, and result in violations of basic civil and political rights discussed above. Freedoms of belief and thought are absolute, but manifestation may be subject to regulation. Non-discrimination principles require a reasonable and proportionate basis for state action that implicates freedom of religion, expression, association, and participation in minority cultural practices. The rights of parents to pass on cultural practices may raise difficult issues (ranging from the debate over education in the mother tongue and culture versus education in the mainstream, to the need to protect children from

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57 Human Rights Committee, General Comment No. 29, para. 16.
58 Cholewinski and Tiburcio include partial surveys of state practice.
59 Cholewinski, supra note 2, at 290.
60 Tiburcio, supra note 2, at 161, concludes that “international law does not establish a definite rule,” but this point is controversial.
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GAPS, OMISSIONS, AND AREAS FOR COOPERATION

The human rights treaty bodies have given relatively little attention to the human rights of migrants. Issuance of general comments could clarify many of the issues identified here. The human rights bars to expulsion are the subject of increasing adju­dication at the international, regional, and national level, and greater clarity to this topic may result from the EU’s harmonization of subsidiary protection. The human rights of migrant workers, especially the undocumented, remain contested and the pertinent ILO and UN treaties are still not widely ratified. The establishment of a Committee to implement the ICMW may provide a forum to help bridge this gap.

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In September 2003, five Britons released their "No One Is Illegal" manifesto. With the opening salvo, "For a world without borders! No Immigration controls!" they called for the elimination of all border controls, for opposition to all deportations and for a massive trade union campaign to organize undocumented workers. Their opposition to border controls is grounded in a conviction that immigration laws cannot be "reformed" in a way that will meaningfully sever them from what they label racist and fascist origins. The "No One Is Illegal" manifesto asserts the impossibility of grounding thoroughgoing reform in compassionate exceptions to the immigration laws, and the inability of liberalism to do more than reinforce a demarcation between inclusion and exclusion. Beginning in 2002, "No One Is Illegal" groups began to make their voices heard in a number of Canadian cities. The Canadian groups identify themselves as a "campaign" and, in a perhaps typically Canadian political posture, take a less ideologically articulated position than the British group. The Canadian groups do not, for example, highlight an opposition to all forms of immigration control. They instead focus on a broad integration of social justice issues:

The No One Is Illegal campaign is in full confrontation with Canadian colonial border policies, denouncing and taking action to combat racial profiling of immigrants and refugees, detention and deportation policies, and wage-slave conditions of migrant workers and non-status people.

We struggle for the right of our communities to maintain their livelihoods and resist war, occupation, and displacement, while building alliances and supporting indigenous sisters and brothers also fighting theft of land and displacement.

Similarly named groups have appeared in other European nations over the past few years, including Kein Mensch Ist Illegal in Germany, Ninguna Persona Es Illegal in Spain, Ingen Manniska Ar Illegal in Sweden, Geen Mens Is Illegal in Holland, and...
The globalization of illegal migration

Located just underneath the worldwide panic about illegal migration is an assumption that everyone everywhere is talking about the same thing. News stories rarely bother with precise definitions, but even statistical documentation by state agencies often does not define illegality. In Michael JANDI’s words, “[a]s most estimates do not specify their definition of ‘illegal migrant’ we have to assume a common-sense approach.” JANDI believes a commonsense approach is possible but rare. I am not certain I share JANDI’s optimism. The veneer of precision and neutrality embedded in the term “illegal” is an apt guise for assumption and stereotype. What is common in public discourse about illegal migration may not be sensible at all.

Moving toward precision, however, is not easy. By definition, those who are on the move without legal sanction attempt to avoid state surveillance. In general, migration statisticians are interested in “stocks” and “flows,” the former referring to ongoing population and the latter to border crossings per year. Methodologies for estimating the stock of illegal migrants involve extrapolating from census data, making assumptions based on known quantities such as legal migrant populations, surveying those—like employers—who might come in regular contact with illegal migrants, and calculating based on regularization statistics. Flows of illegal migrants are estimated based on border apprehension statistics as compared to related figures such as asylum claims. While these techniques yield more precise figures, in JANDI’s view they are generally less reliable. All of the methods, however, rest on making assumptions that embed an understanding of people and their behaviors in areas where this is notoriously difficult to do and where social scientists are, in any case, just beginning to work at figuring out these factors. Given the myriad difficulties, it is hardly surprising that the British Director of Enforcement and Removals in the Home Office Immigration and Nationality Directorate would state in May 2006 that he had not the “faintest idea” how many people were in Britain illegally.

The most straightforward way to define illegal migration is by reference to the migration law of the state doing the counting. Under this method, anyone who is currently in contravention of the law has an “illegal” status. This will include people who enter the country in breach of the law and those who overstay their permission to remain. More ambiguously, it may include those who intend to make an asylum claim but have not yet made one. Because refugees are not to be punished for extralegal entry, such a claim usually removes one from the illegal entry statistics, but it the claim is rejected the statistical assessment may shift again.


Migration, therefore, typically refers to change of usual residence that includes crossing a political boundary. Data can count the size of the movement in a given period, the flow, or the cumulative number of migrants, the stock. The stock can be increased or decreased in any period by in and out migration or deaths of previous migrants.


In most migration regimes it is possible to have legal permission to remain but restrictions on work rights. This is common with tourist and student visas and with some types of temporary residence permits. Those working in breach of their right to do so may or may not be captured by statistics based on estimates of migration law breaches, even though their contravention is clear. However it is defined, illegality is a creation of the law. Broad shifts in legal regimes make this point more clearly. While Dave Roberts was pilloried in the press for his “faertest idea” comment, there was a rational account available for those who followed this story beyond the sound bite. The most recent Home Office study of numbers had been conducted in 2001. Given the expansion of the European Union in 2004, nationals of ten additional states had some mobility rights in the United Kingdom. The effect of this shift had not been subject to government analysis by May 2006, providing some basis, but not political appeal, for the comment. A similar but more broadly stranded and rightless throughout the region. Newly emerging nationalities and rights have created pockets of illegality in many of the new states.

Despite all of this, estimates of illegal population numbers are still compelling. The respected Pew Hispanic Center estimated the “unauthorized” population of the United States at 11.5 to 12 million in March 2006. Of this number 7.4 million are Latin American, of which 5.9 million are Mexican. Journalists, some allegedly drawing on Pew Center data, report the illegal population of the United States as ranging from eleven to twelve million. The U.S. government estimates the figure to be seven to twelve million. The Russian press digest reported in January 2006 that there are up to fourteen million “illegal migrant workers” presently in Russia.14 International Organization for Migration (IOM) data published in 2005 indicates “up to ten million irregular migrants” in the Eastern Europe and Central Asia region.15 In 2006, the IOM estimated five to ten million irregular migrants in Russia alone.16 Novosti reports the Russian Interior Ministry giving figures of between 400,000 and 700,000 for illegal Chinese migrants in Russia’s Far East.17 The French illegal migrant population has been estimated at between 200,000 and 400,000.18 The Home Office study based on 2001 numbers, led to an average estimate of 450,000 in the United Kingdom, but other estimates put the number as high as one million.19 One estimate for Italy puts the illegal population at 150,000.20 In May 2006, reports from Spain estimated that “more than 9,000 Africans” had already reached the Canary Islands in the calendar year, all as illegal migrants.21 The IOM gave a total figure of three million illegal residents across Europe for 1998.22 Canada’s extralegal population is estimated at 200,000, and Australia’s is precisely rendered as 47,798.24

Concerns and estimates are not limited to prosperous Western countries. The extralegal population of India has been estimated at fifteen to sixteen million.25 Malaysia reports up to one million illegal “workers” and neighboring Thailand has an illegal population of two million, with another report suggesting one million new illegal entries to Thailand each year.26 Estimates of the illegal population in

10 At the 2004 expansion, the United Kingdom imposed a Worker’s Registration Scheme for nationals of eight of the ten new member states (excluding Cyprus and Malta), further complicating count. As of May 2006 when this had just recently been reversed. The Home Office made estimates of the illegal migrant stock available in 2005, but these were derived from applying the “indirect residual method” to 2001 census data.
South Africa have ranged from 500,000 to 8 million over the past decade. Fiji reported the arrival of "up to 7,000" illegal migrants from China in the two years leading up to October 2005. Paraguay has concerns about illegal migrants in its Brazilian population. Brazil, the Philippines, and Pakistan have each expressed concern about their nations' illegal residents elsewhere.

Although there is clearly a great deal of ambiguity and uncertainty underpinning these numbers, they portray an overall picture of a vast amount of population movement outside legal frameworks. The various estimates may total as many as fifty million people illegally resident somewhere at present. This compares with the aggregated UN estimate of just over 190,634,000 migrants in 2005. That is, currently about 2.9 percent of the world's population is living outside its country of birth for a period of at least a year. Given this number, illegal migration is an important part of the contemporary story of globalization. In the prosperous Western states that have been tracking these figures for a decade or more, it is perceptibly on the increase.

One factor that accounts for the growth of illegal migration is the law. Since the early 1990s, prosperous Western states have been engaged in a worldwide crackdown on illegal migration. This has included constitutional changes in Germany, a range of restrictions introduced in France by the notorious Pasqua laws, extensive reduction of asylum seeker rights in Britain, shifts in Italian law, moves toward European Union harmonization in matters of illegal migration and asylum law, and range of legal options deployed. Each extension of the law regulating migration increases illegal migration through defining increasingly larger categories as being outside the law. In addition, states have stepped up migration enforcement. This too increases the number of illegal migrants through technologies of surveillance.

Both these effects mean that the current "crackdown" on extralegal migration cannot help but increase it. It is impossible to "observe" illegal migration in any other way. In the absence of law, there can be no illegal migration. In the absence of state enforcement attempts, illegal migration is no more than the proverbial tree falling silently in the forest. The obvious implication of this is that illegal migration would be significantly reduced by halting all moves to enforce existing laws. It would be completely eliminated by repealing all laws regulating it. Neither of these options is politically possible at present, a topic addressed directly in Chapter 3. Both, however, reflect part of the rhetorical stance of the "No One Is Illegal Movement." Migration law is being used to make people "illegal" and this rhetoric is resonating as never before.

Meanings of illegality

The "illegality" of people is a new discursive turn in contemporary migration talk. People who transgressed migration law were recently referred to as "illegal aliens" or "illegal migrants." These labels are still current, but so is the simple descriptor "illegal." People themselves are now "illegal"; states are concerned about "illegals.

admission. Canada has introduced stricter penalties for migration infringements and has lowered thresholds for deporting permanent residents. The United States has increased border and inland scrutiny. Most innovatively, Australia has moved to exclude whole tracts of territory from its "migration zone," rendering parts of the state "nonterritory" for the purposes of claiming asylum. These are not the only changes of the past fifteen years, but they give a sense of the geographic breadth and range of legal options deployed. Each extension of the law regulating migration increases illegal migration through defining increasingly larger categories as being outside the law. In addition, states have stepped up migration enforcement. This too increases the number of illegal migrants through technologies of surveillance.
The lived quality of language means that correctness follows common usage. One of globalization’s markers is an ever-faster pace of change on all social, cultural, and economic fronts. This is another example.

This shift in discourses permits several important observations.42 Although the term “illegal” is precise in its relationship with the law, it is empty of content. It says even less than other identity markers in the migration hierarchy: resident, visitor, guest worker, or refugee. It circumscribes identity solely in terms of a relationship with law; those who are illegal have broken (our) law. Discourse about illegals gathers together a shared common meaning, some pejorative connotation, and a fixed idea of The Law. The minimal content of the term “illegal” obscures the identities of those to whom it is affixed. While any number of people may infringe migration laws and regulations, the label adheres better to some than to others. We imagine illegals as poor and brown and destitute. The backpacking tourist who overstays her visa and the businessperson who fails to renew papers on time are not who comes to mind. In Australia in 2005–06 the largest group of “illegals” was visitors who had outstayed their legal welcome, and among these the largest nationality group was American,43 hardly those who occupy our imaginary sweatshops and brothels. These data are not systematically available for other states, but there is no strong reason to expect wide variation.44 When we think of the boatloads in southern France, in the Timor Sea, or the Atlantic, of those running the Channel Tunnel or the Sonoma Desert, we imagine lean brown faces. Poverty, desperation. Despite persistent evidence that, for example, many fleeing Afghans were educated professionals or that remittances to Fujian province have moved families into China’s burgeoning middle class, the image of illegals persists.

The predominance of the term “illegal” also underscores a shift in perception regarding the moral worthiness of these migrants. While previously immigration infringements were not widely regarded as criminal, those who enter and remain without authorization are increasingly perceived as “criminal” in a moral sense. This identification as transgressor first and migrant second facilitates political and public acceptance of the broad range of crackdown measures currently being implemented, including stripping these individuals of procedural and substantive rights. The morality of immigration discourses is important to contemporary politics, as well as to efforts to shift these politics. Many citizens of prosperous states experience their right to enter and remain there as a morally imbued entitlement, rather than an accident of birth. Those who seek to enter can therefore be cast as “criminal” seeking to unjustly exploit the system or circumvent the (just) rules that confine them to poorer states with fewer life chances.

The term “illegal” also operates to move migration law’s “us-them” line in response to globalizing forces. Migration laws make national borders meaningful for people, determining who can enter and who must be turned away. Through this process such laws constitute the community of insiders, and also spell out degrees of belonging and entitlement through the hierarchical systems they establish. Globalization brings a range of pressures to national borders, and they are increasingly permeable to flows of money and ideas. Migration laws have long been a key site of national assertions—of power, of identity, of “nationness.” The central argument I am pursuing here is that this site is even more important now that “nationness” is threatened across a range of policy areas. One way to understand the present importance of the term “illegal” is to consider how it reinforces migration law’s exclusionary capability when faced with these threats.

Although it is evident that prosperous states would like to assert complete control over those who cross their borders, it is equally evident that this is not possible. Or, at least, that states (especially democratic capitalist ones) are not willing to undertake the trade-offs (mostly economic) that would be necessary to come anywhere close to achieving this goal. The labeling of part of the population as “illegal” accomplishes this exclusion when the border itself does not. Capturing the moral panic about extralegal migrants and engraining it in law allows governments control that their borders lack. When a part of the population is labeled “illegal” it is excluded from within. Despite their (sometimes long-term) presence and their contribution to the economy, debate about appropriate participation in the political and social community is all but silenced by the label “illegal.” This is markedly different from the tenor of debate that surrounds the entitlements of long-term guest workers, for example.46 The difference is underlined by the arguments that Legomsky musters to urge that restricting the sizable illegal population of the United States is counterproductive as illegals, they provide labor that Americans will not, receive no state benefits, and abide by the law to avoid deportation.47 When the nation is unable to assert its traditional sovereignty by closing its borders, it retains its power to separate “us” from “them” through this labeling, although the exclusion is now diffuse and no longer lines up neatly with the clear bright lines of


44 The universal visa requirement in Australia makes data collection feasible. In countries where visas are not required, they cannot be "overstayed." It would be nearly impossible to gather data on the number of individuals who enter to remain that is mostly stamped in their passport on arrival.


a map. Those excluded are outside The Law, regardless of which nation they enter or attempt to enter.

The desperation of the illegal other appears in contrast to our prosperity as a nation. We "have" and they "have not"; entitlement to membership is ours to bestow. One of the shifts occurring at present is that as "illegal" emerges as a globally meaningful identity label, the characteristics of all of those nations against which this other is imagined also tend to merge. The line between having and not having can no longer be easily conceived as fitting around the border of a nation and must instead fit around the border of all prosperous nations, creating a global understanding of "insiders" and "outsiders." This conception also resonates with the pedigree of the emotive term nation: prosperous Western nation-states are closer to the ideal of nation than others are. Their desirability as destination for extralegal migrants functions as a measure of their status and standing as nations. While globalization may bring some characteristics of the nation under threat, it also allows the exclusion that is essential to the existence of nations to expand. National actions designed to assert traditional sovereignty also contribute to a globalizing of sovereignty in this new way. Typically, the content of migration law—especially the most important parts for determining who will be admitted and who will not—is easily and frequently altered. As the label "illegal" has no content aside from being against the law, it accommodates similarly frequent changes. The law and the nation name the other in this way as not-us and not-legal.

Making people illegal reflects an increasingly globally coherent view that there are proper and improper reasons to migrate. The force of sanctions against extralegal migration is often aimed at "mere economic migrants." Being destitute, or even being poor or "average" and wanting a better life in return for abandoning all that is familiar and starting one's life over again, are insufficient reasons to migrate today. Those who are "merely" seeking a better life are the prime targets of the constricting global migration net. This is a key marker of migration regimes in the twenty-first century. The massive population movements of the nineteenth and twentieth centuries were made up in significant part of people seeking to better their life circumstances. Being poor and willing to start one's life again was formerly a primary reason to migrate, not to be excluded from doing so. People with an abundance of education, training, labor, and entrepreneurial experience are welcome and encouraged to migrate. Globalization has in this sense reframed traditional "class" lines. Although the basic contours of privilege remain, shifts are visible along the edges. Workers in the emerging IT industry servicing globalization's technology increasingly enjoy worldwide mobility despite comparatively low levels of education and no connections to traditional wealth. Knowledge workers such as academics are included in the global elite despite often being paid little enough that they may never own their own homes. It is common in both groups to develop career patterns that span the globe.

In addition to asserting sovereignty, this newest round of regulation against illegal migrants is also part of a new facet of the migration law—nation relationship. The

moral panic over illegal migration and the legal responses to it are not limited to one nation. Globalization gives both factors the appearance of happening all over the world, all at once. This is not true, of course, but that matters little to the mythologizing of globalization. It is equally not true that McDonald's restaurants exist the world over or that everyone can access the Internet—globalization is marked by uneven penetration. The impression that the problem of illegal migration is a global one, and the fact that those who seek to migrate outside the law have access to a geographically broader range of options than in earlier eras, contribute to the construction of an identity category of people named by the new noun "illegal." We create in this way the impression that the people who seek entry to Australia via Indonesia by boat are the same as those who attempt to walk the length of the Channel Tunnel or swim the Rio Grande. This allows talk of "illegals" in international and intranational discourses as though the term had some fixed meaning besides being an adjectival description of legal transgression.

The emergence of "the illegal" as a subject and object of migration law thus reflects features of the crackdown currently being pursued by prosperous Western states. The term, however, has moved well beyond its legal moorings. "Illegal" is now established as an identity of its own, homogenizing and obscuring the functioning of the law and replicating layers of disadvantage and exclusion. Even as it is difficult to accurately track numbers of extralegal migrants, the discursive phenomenon magnifies this difficulty and makes accurate social and political understandings of this migration near to impossible. For extralegal migrants seeking legal protection or redress for harms, the status of "illegal" has been almost insurmountable. This will eventually prove to be one of the most important tests of the global spread of human rights.

Countering illegality with the law

Living without legal migration status is precarious. Illegal migrant workers do not command minimum wage, have no social welfare protections, generally do not have health care or disability insurance, and lack job security. Of the potentially fifty million illegal migrants today, a considerable portion move to work. The work they do is often in the "three D" categories: dirty, dangerous, or degrading. It is now accepted that illegal migrant labor is an important support to prosperous economies because these workers are available on no notice and will simply "disappear" when the need for them passes. It is commonplace to argue that one of the great strengths of the massive American economy depends to a large extent on the perpetual availability of cheap, dispensable, illegal labor. Similarly, urban myth now has it that if all the illegal workers were rounded up and deported, London would

stop functioning overnight. While some illegal migrants are literally enslaved, the majority simply inhabit the margins of prosperous societies, invisible because of their illegality to the surveillance mechanisms of contemporary states.

In economic terms illegal migrants are not people but labor, an input for which demand waxes and wanes. Shifts in the globalizing economy have changed the parameters of work, facilitating demand for extralegal workers. 

An increasing number of jobs are part-time or seasonal; work is increasingly "outsourced." Each of these changes makes workers with no ties to the economy and no formal rights a more useful commodity. A good example of this trend is the importance of "just in time" delivery for supermarkets. Consumers in prosperous Western states have become accustomed to the perennial availability of fresh fruits and vegetables. In the United Kingdom, the 2004 tragedy of the Morcambe Bay cockle pickers brought public attention to the role of illegal migrants in keeping supermarkets in business. The British supermarket sector is now able to respond to fluctuations in demand that occur, for example, when the weather warms and more people decide they would like to eat as a result. On short notice, supermarkets order more lettuces — the name a descriptor of their work — facilitate the instant delivery of more produce by coordinating workers willing to pick and pack in pack houses for long hours on short notice and to find themselves without work the next day.

Saskia Sassen has written that the most important distinction in the contemporary era is the one between those with legal migration status and those without it. This is the result of a spread of human rights norms, in tandem with legal recognition in domestic courts, which combine to reduce the importance of citizenship as a determinant of life chances. David Jacobson makes a similar argument, asserting that human rights norms have overtaken citizenship status as the basic common denominator of human entitlement. In Chapter 7, I set out the argument for tempering this view of citizenship. Nevertheless, I am in full agreement with Sassen that the gulf between those with some kind of migration status and those without is vitally important. This is because the capacity of the law to span this gulf is sharply limited. Considering the limits of the law in this regard is crucial to unearthing the place of law in accounts of globalization, and to understanding both how and why globalizing forces are making people illegal.

The proliferation of human rights norms is an important marker of the contemporary era of globalization. From the rapid development of rights statements following the Second World War, to the more recent widespread attention to genocide and torture, human rights norms have become common currency. Mechanisms for human rights enforcement have also proliferated. The European Court of Human Rights has gained importance within its jurisdiction and influence beyond. Constitutional reform in South Africa, Canada, and emerging post-Soviet states has given prominence to human rights commitments at a national level. Key to Sassen and Jacobson's arguments is the persuasive evidence that domestic courts extend human rights protections to immigrants and nationals equally. Indeed, this trend is the key to Joppke's thesis that liberal states have lost control over immigration policy, because of liberal courts' interference with such a human rights basis.

Despite all of this, human rights norms have done little to assist illegal migrants. This is true for two reasons: ironically, because of law's power and its impotence. The power of the law is implicated in the failure of human rights norms to reach those who are most marginalized because of the tyranny of jurisdiction. Despite the "human" in human rights, being merely human is not enough to ensure legal standing in many instances. Only a handful of individuals have ever used the complaints procedures available in broad international human rights documents such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women, even for those few states that have accepted the optional obligation for individual complaints. A number of legal doctrines have developed that limit access of illegal people to the courts, such as the common law rule that an employment contract will not be binding contractually when the worker is "illegal" to begin with, or the conspicuous

49 Outsourcing has both domestic and international dimensions. In some cases, outsourced work moves from the factory to the home, such as piecework in the garment industry. In other cases, outsourced work crosses national borders. It is typical of the growing importance of India to northern IT interests.
50 On February 5, 2004, twenty-one illegal migrant workers drowned while picking cockles, a delicacy that must be consumed fresh, in Morcambe Bay, Lancashire. Although the Bay was notoriously dangerous, it appeared that no effort was made to warn those who were working there under supervision of a gangmaster. The public outcry following this mass drowning contributed to the passage of the Gangmasters Licensing Act 2004 (U.K.), 2004, c. 11.
57 The doctrine of illegality will usually render a contract, such as an employment contract, unenforceable. This is an important feature of the USSC decision in Hoffman Plastic Compounds v. National Labor Relations Board 535 U.S. 137 (2002). This doctrine has been deployed routinely to the detriment of migrant workers in the United Kingdom. See, for example, Sharma v. Hindu Temple and Others (1990) EA725/90.
absence in the Refugee Convention of any explicit right to enter another country. These doctrines mean that even when people without status find the resources to engage with rights seeking legal processes and overcome the fear of reprisal that publicly approaching the courts entails, they will often be unsuccessful. Law’s incapacity, on the other hand, means that securing a rights entitlement before the courts will not necessarily translate into a meaningful change of circumstances. This is a commonplace of rights discourse. Rights talk in the absence of other forms of privilege is often just talk.

For these reasons, despite the fact that “human” rights—of which a dizzying array have now been propagated—seem by definition to apply to “humans,” advocates for migrants at the margins have worked to establish special rights that apply only to them. The Refugee Convention is the first example of this phenomenon, and I consider its evolving relationship with human rights law as the principal subject of Chapter 4. The Refugee Convention does provide a type of remedy for illegality for those who seek and later obtain refugee status, but the number of people who benefit from this provision is a tiny fraction of those considered illegal migrants. At this point, I want to consider briefly the short history of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers’ Convention). The existence of this Convention attests to the inability of “human” rights to adequately extend to all “humans.” Even more revealing, however, is the steadfast attempt in this treaty to protect the rights of even those migrant workers who have no legal migration status. The result of this attempt is a text that demonstrates precisely how few rights these workers have, and how narrowly their entitlement to “human” rights has been read. The document in the end accords a greater place to sovereignty than to the rights of illegal migrants, and as such, is a paragon of the inabilities of law to address the new illegality of people. To examine this inability, I will first spell out my contentions about this Convention.

The Migrant Workers’ Convention came into force on July 1, 2003, twelve and a half years after it was opened for signature, accession, and ratification. At that time, twenty-two countries had ratified it. As of December 2007, the number of states party had climbed to thirty-seven, with an additional fifteen signatories. In addition to the length of time required to meet the comparatively low requisite number of ratifications, it is notable that the states party to this Convention are comprised entirely of countries who primarily send rather than receive migrants, with Chile, Mexico, Guatemala, and Turkey among the wealthiest states party. All the states party are in the lowest two-thirds of countries according to 2006 statistics for GDP per capita. The Convention does direct some provisions to obligations of sending states, such as an obligation to readmit nationals (Article 8), a right to vote and to be elected at home for those who are working elsewhere (Article 41, only for workers in a “regular” situation), and an obligation to provide appropriate information to potential migrants (Article 65). Furthermore, sending states are covered by the Convention because it explicitly addresses the entire migration trajectory from preparation to return (Article 1). Obviously, however, the majority of the provisions are aimed at receiving states, referred to as employment states in the Convention. The absence of major receiving states as signatories understates the present weakness of the Convention. This is further emphasized by considering the Convention’s contents.

The articles defining the Convention’s scope are cast in apparently broad language, opening with references to “all migrant workers . . . without distinction” and the “entire migration process” (Article 1). A migrant worker “. . . refers to a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national” (Article 2 (1)). In addition to the long migration trajectory, Article 1 also specifies that the Convention applies to “. . . all migrant workers and members of their families without distinction of any kind such as sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status” (Article 1 (1)). What is omitted here is crucial. Among the enumerated grounds of the nondiscrimination provision, migration status, or even more specifically, irregular or undocumented migration status is a conspicuous absence. This may yet be read into the “other status” category, but given the specific attention elsewhere in the Convention to lack of status it may also plausibly be argued that this omission was deliberate and ought to be read as an exclusion. Similarly, the definition of migrant worker does not include those seeking work. Possibly work seekers might be covered by the reference to “a person who is to be engaged . . . in a remunerated activity,” however, this interpretive
extension could only be made after that fact. That is, someone actively seeking work could not be protected by the Convention, although they might possibly, after finding work, be able to complain of their treatment along the way to attaining their position (if their state of employment had signed up to the individual complaints procedure\(^\text{65}\)). The Convention does not contain a right to cross borders to work.\(^\text{66}\) Each of these limitations constrains the Convention in its potential application to the most vulnerable migrants.

Most important, however, the scope of the Convention is defined by work itself. A specific rights document aimed at migrant workers and their families excludes those who might migrate for other reasons. In addition to those who would migrate in the hope of finding work but who may not do so. Refugees and stateless persons are explicitly excluded from the protections of this Convention (Article 2). This has several effects, all tied to the hegemony of economic discourses and rationales. In the first place, defining rights in this way subtly fosters a view that there are no other reasons to move. Legitimate human choices and motivations are reduced to this singular one. This is particularly important when we consider those for whom this Convention might possibly, at some distant future time, make a difference. For prosperous, sought-after, globetrotting migrants, the rights set out in this Convention go without saying. One would be hard pressed to find anywhere in the world an investment banker, software engineer, or law professor who would migrate without a prospect of freedom of speech and association or rights to consular services—the types of things set out here. Similarly, migration of the privileged may have some financial angle, but is rarely solely about the money. Those who are literally citizens of the world take into account conditions of life and work, family ties, where their children will be educated, retirement, cultural affinities, tax advantages, and countless other small and large factors. The assumption that decisions are not so complex for those without privilege is misleading.

Reducing migration to economic factors alone functions to reduce our capacity to think fully about the life experiences of those who are differently situated from us. This is one of the “othering” mechanisms that serve to facilitate migration decisions. This is particularly important when we consider those for whom this Convention might possibly, at some distant future time, make a difference. From this we can draw two conclusions. Either the Convention was never intended to extend new rights to those without legal status, or the rights protections generally available to all “humans” are inadequately available to extralegal workers without this additional reinforcement, as are the myriad of rights available to all “workers” set out in theplethora of international labor conventions. (Sadly, the drafters found it necessary to include in this Convention the right to “recognition everywhere as a person before the law” (Article 24).) Both these conclusions may be true. The drafters averted to the particular concerns of illegal migrant workers as evidenced by the Preamble, but these concerns were not reflected in the substantive text of the Convention.\(^\text{67}\) I do agree with Saskia Sassen that this is “one of the most important documents seeking functions are at the core of any understanding of the rapid changes of the past two decades. The trend toward making people illegal is linked to understanding people increasingly as labor, as ingredients in an economic process. The underlying rationale of human rights commitments goes against this trend, but any assessment of the Migrant Workers’ Convention demonstrates the significant hurdles involved in attempting to counter economic hegemony.

The Convention explicitly includes both legal migrant workers and those it defines as “nondocumented” or “in an irregular situation” because they are not “authorized to enter, to stay and to engage in a remunerated activity in the State of employment.” (Article 5). Part III of the Convention sets out rights for all migrant workers and Part IV addresses rights for those who are in a “regular situation.” The key difference between these sets of provisions is that the Part III rights are almost exclusively reiterations of commitments set out in other, generally applicable, human rights documents. These include a right to enter and remain in one’s state of origin (Article 8), right to life (Article 9), freedom from torture (Article 10), freedom from slavery (Article 11), freedom of thought and religion (Article 12). Some of the rights are expressed more explicitly than they are in other more generally applicable documents. For example, the Article 17 rights to security and liberty include specific remarks about immigration detention and costs of detention, and the trial rights discussed in Article 19 make specific reference to nonretroactive of criminal law and taking migration status into account in sentencing. The only provisions here that are related specifically to migration status include a prohibition on unauthorized destruction of identity and travel documents and a protection against collective expulsion (Articles 21 and 22). While these provisions are specifically related to migration status, they could possibly be read into early rights documents as a matter of interpretation. The Migrant Workers’ Convention does not offer illegal migrant workers much that is not already supposedly available to them. From this we can draw two conclusions. Either the Convention was never intended to extend new rights to those without legal status, or the rights protections generally available to all “humans” are inadequately available to extralegal workers without this additional reinforcement, as are the myriad of rights available to all “workers” set out in the plethora of international labor conventions. (Sadly, the drafters found it necessary to include in this Convention the right to “recognition everywhere as a person before the law” (Article 24).) Both these conclusions may be true. The drafters averted to the particular concerns of illegal migrant workers as evidenced by the Preamble, but these concerns were not reflected in the substantive text of the Convention.\(^\text{67}\)

\(^\text{65}\) Article 77 provides that States Party may declare that individuals under their jurisdiction may submit complaints to the oversight Committee of the Convention. The procedure will not enter into force until ten states have made declarations of acceptance. To date, no countries have joined in this procedure (The International Convention of Migrant Workers and its Committee: Fact Sheet Number 24 (Rev. I), Office of the United Nations High Commissioner for Human Rights (2005) at 12).

\(^\text{66}\) International law contains no border crossing rights, save that which can be read from the obligation of states to admit their own nationals. This is also important to the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force April 22, 1954), discussed in Chapter 4.

\(^\text{67}\) The Preamble contains the following statements:

"Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in..."
to protect the rights of migrants.68 But even if the Convention were universally ratified, her conclusion must be read with deep irony.

The Convention does offer an array of distinct rights for authorized migrant workers. Their rights of liberty of movement and freedom of association can only be restricted by concerns related to national security and public order (Articles 39 and 40). Migrant workers are guaranteed treatment equal to nationals in health and social services provided by the state (Article 43). States are to consider granting families the right to remain even after the death of a worker or a marriage breakdown (Article 50). Migrant workers have a right to transfer savings (Article 47) and protection from inequitable taxation and other deductions from income (Article 48). Restrictions on free choice of employment must be specified in legislation (Article 52). A number of other important rights are also spelled out. This is, therefore, a significant document for legal migrant workers, aiming to address specific vulnerabilities and validating migration controls. Article 68 reads:

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:

(a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;

In order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights, considering that workers who are undocumented or in an irregular situation are frequently employed under less favorable conditions of work than other workers and that certain employers find this an inducement to seek such labor in order to reap the benefits of unfair competition.

Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrant workers and employers to respect and comply with the laws and procedures established by the States concerned.

68 Supra note 52 at 94.

(b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;

(c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.

2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

These provisions indicate that states that commit to the Convention are also undertaking to implement a variety of crackdown measures, and to collaborate in doing so. Article 69 commits states to taking actions to ensure that irregular situations do not persist. Reference is also made to regularizing states, but this is clearly not the only option. Similarly, the threshold question of whether or not an individual's migration status is irregular is to be determined by domestic law. That is, sovereignty is reinforced by leaving states in firm control of who can be a migrant worker and under which conditions, and by requiring states to reinforce their borders.

Within the text of the Convention, illegality and sovereignty have a reciprocal relationship. Domestic legal attempts to crack down on illegal migration signal an assertion of sovereign power, which is extended within state territory by the label "illegal" itself. Within the text of the Convention, a similar relationship between illegal migration and sovereignty is present. The objective of addressing extralegal migration brings into being a strong positioning of the state. The definition of extralegal migrants depends on domestic law, and the aim of eliminating such migration conjures powerful state actions: "preventing," "eliminating," and "eradicating." In this way, the relationship between sovereignty and illegal migration parallels what happens in domestic law when migrants and potential migrants bring rights arguments to bolster their claims. Once an argument is shifted to the terrain of rights, the right of the nation to shut its borders tends to overshadow rights claims of individuals.69 In this instance, any attempt to make a discursive space for illegal migrants is hemmed in by its reference to the sovereign power to make migration illegal.

This points in two directions. The first is toward the difficulties of using law to alleviate illegality. The law is a necessary site for constructing illegality, but is much less apt for remedying it. The contents and current status of the Migrant...
Workers' Convention provide a key illustration of this. In the first instance, it is difficult or impossible for states to agree to any document creating new rights for illegal migrants because even naming such rights requires creating a space for those individuals whom states are exercising considerable resources to erase. Thus even while the Preamble may name the problems, the legal text itself cannot. The true remedy for illegality is an erasure of the law that creates it, not any rights within it that will always in a reciprocal fashion conjure the right of the state to create illegality in the first place. Rather than erasing laws, illegal status is sometimes pardoned through amnesty. This device, as we shall see in Chapter 7, is always framed outside of the law as an exception rather than a challenge. The exclusionary device of making people illegal is so complete that those so labeled scarcely even have human rights. Drawing on Agamben, we can say here that the contemporary trend toward making people illegal counters the modern move toward giving bare life a place in the political sphere. Illegality is exclusion from that sphere, to a status diminished even beyond bare life.70

The second direction indicated by the reciprocity of sovereignty and illegality is to search for the source of this intertwining. This, I believe, can be puzzled out by considering how migration law is positioned within the vortex of globalization. It is to this that I turn in Chapter 3. The contemporary crackdown on extralegal migration has changed the central preoccupations of migration law. There is a much greater emphasis in the law on security concerns and exclusions, even though these elements were present throughout migration law's first century. Heightened attention to illegality predates the terrorist assaults of September 11, 2001, and, at any rate, these events are part of the story of globalizing forces, not an isolated pressure on migration laws. The rallying cry "No One Is Illegal" only makes sense in a world where people increasingly are made "illegal." The remainder of this book analyzes the modes and mechanisms of this illegality and offers globalization as the explanation for its prevalence.

Chapter 26
INTERNATIONAL LEGAL NORMS ON MIGRATION:
SUBSTANCE WITHOUT ARCHITECTURE

T. Alexander Aleinikoff

1. INTRODUCTION

The chapters in this volume display three broad perspectives on law and international migration. The first examines migration through the lens of the regulation of labour flows — low-skilled and high-skilled, lawful and unlawful, pursuant to unilateral national laws and bilateral and multilateral agreements. The second adopts what is often termed a 'human rights approach', examining the causes of migration, the treatment of migrants in transit states, and discrimination and due process issues in the country of settlement. The third perspective focuses on state control and security; issues such as border control, smuggling and trafficking, illegal entry, and terrorism. The contributions also describe a variety of bilateral, regional and international agreements and processes that conceptualize, develop and promulgate norms and foster cooperation among states across the labour, human rights and security fields.

These three perspectives are not exhaustive. Legal norms from the fields of health and development, for example, have an impact on the international movement of persons. Furthermore, the chapters in this book often combine the three approaches. For example, low-skilled immigration may be seen from all three

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1 See the chapters by Cholewinski, Flores-Macias, Klein Solomon, Martens, Nonnenmacher, Santestevan, and Orozco.

2 See the chapters by Bagshaw, Byrne, Cholewinski, Grant, Legomsky, Perruchoud, Piotrowicz, Piper and Satterthwaite, Vohra, and Weissbrodt.

3 See the chapters by Legomsky, Peers, Redpath, Schoenholtz, and Vohra.

4 See the chapters by De Bruycker, Flores-Macias, Hailbronner, Klein Solomon, Martens, Nielsen, Nonnenmacher, Peers, and Santestevan.

5 Moreover, not all of the chapters in the volume fit into one of these three categories; see, for example, the contributions by Gelazis, de Hart and Groenendijk, and Wohler.


R. Cholewinski, R. Perruchoud and E. MacDonald, eds., International Migration Law
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The movement of skilled—and particularly professional—workers may also concern the third set of issues that look towards the free movement of skilled labour among Member States. The EU has the most advanced set of norms in this regard. In Africa, the Economic Community of West African States (ECOWAS) has taken significant steps toward free movement; the efforts of the South African Development Community have been less robust.

Likewise, the primary anti-trafficking norms—largely identified with the human rights approach—are located in a protocol to a security-based Convention. I thus recognize the limitations of my tripartite classification of the contributions to this volume. Nonetheless, I think that these broad groupings provide a useful way to summarize and compare the conclusions of the various chapters here.

2. MAJOR CONCLUSIONS

2.1 Labour migration

There is no comprehensive international regulation of labour flows. Policies and processes focus on three separate sets of issues. The first concerns the movement of unskilled and low-skilled migrants. At the national level, these workers generally enter through temporary worker programmes or are barred from admission altogether. The second is that of highly-skilled workers. There is growing competition among states for these migrants, and national programmes tend to facilitate their admission by providing either temporary or permanent status. The movement of skilled—and particularly professional—workers may also be included in multilateral trade agreements (such as the GATS and NAFTA).

The third set of issues concerns regional agreements that look towards the free movement of workers among Member States. The EU has the most advanced set of norms in this regard. In Africa, the Economic Community of West African States (ECOWAS) has taken significant steps toward free movement; the efforts of the South African Development Community have been less robust. In the Western Hemisphere, the MERCOSUR and Caribbean Community (CARICOM) states have discussed free movement as an objective but progress remains limited.

In recent years, there has been increased focus on the human rights of migrant workers. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which came into force on 1 December 2017, is a significant step forward. It recognizes the rights of migrant workers, including the right to work, the right to non-discrimination, and the right to be free from exploitation. This convention is a significant milestone in the protection of the rights of migrant workers and highlights the importance of a human rights-based approach to the regulation of labour flows.

2.2 Human rights

It is common to speak of a rights-based approach to international immigration, and a number of chapters in this volume note important ways in which human rights discourse now counterbalances traditional notions of state sovereignty, which view states as possessing unbridled authority to regulate immigration. The recommendations of the Global Commission on International Migration (GCIM) state the enlightened consensus:

1. States must protect the rights of migrants by strengthening the normative human rights framework affecting international migrants and by ensuring that its provisions are applied in a non-discriminatory manner.

2. All states must ensure that the principle of state responsibility to protect those on their territory is put into practice, so as to reduce the pressures that induce people to migrate, protect migrants who are in transit and safeguard the human rights of those in destination countries.

Each of the seven core human rights conventions extends protections to non-citizens as well as citizens, and a number of international organizations—among them the UNHCHR, the IOM, and the ILO—now embrace a ‘rights-based’ approach. Despite general agreement at the international level on the applicability of human rights to migrants, however, non-citizens around the world are subject to discriminatory treatment, violations of due process, arbitrary detention and other forms of abuse. The chapters in this volume make clear that these human rights problems result not from a lack of human rights norms, principles and processes (although, as Weissbrodt notes, treaty bodies might do more to adopt specific standards or guidance on how generally recognized rights apply to non-citizens), but from insufficient implementation and enforcement.


8 See the chapter by Heilbroner in this volume.

9 See the chapter by Maré in this volume.

10 Mercado Común del Sur [the Common Market of the South].

11 See the contributions to this volume by Santesteban and Nemeña-Chavez.


13 See the chapter by Cholewinski in this volume.

14 Klein Solomon notes, in her contribution to this volume, at p. 127, that ‘the pressure to conclude a trade agreement is usefully serving as a catalyst for the greater exploration of ways of creating a more efficient, fair and safe approach to the management of global labour mobility’.

15 See supra n. 2.


17 See the chapter by Weissbrodt in this volume at p. 233.
2.3 Security and control

Security and control issues are at the forefront of policy discussions for states for several reasons. First, legal routes for migration do not nearly exhaust either the demand for or supply of migrants. Thus, there are significant flows of unauthorized migrants in all regions of the world. Unauthorized migration is frequently seen as creating social, economic and cultural challenges in receiving states. Second, security concerns remain high in many states due to the perceived threat of international terrorist organizations. Finally, the trafficking of large numbers of migrants raises special problems of enforcement. States have cooperated on these issues at a number of levels – from the Palermo Protocol on Trafficking to the UN Convention against Transnational Organized Crime to regional processes (such as EU directives, the Budapest Group, and the Bali Process on Human Trafficking) to bi-national arrangements (such as US-Mexican efforts to prevent border smuggling).

The interest in increased control comes at the same time that many states are also recognizing the desirability of maintaining or increasing lawful levels of immigration, particularly in terms of high-skilled migrants. There is an obvious and deep tension here between facilitation and control – one that few states have successfully resolved.

One solution for states is to develop immigration agreements that allow free (or freer) movement for citizens from preferred states while adopting tougher enforcement measures against non-preferred states. These agreements are usually established among states within a region (examples include the EU and ECOWAS), but they may also be based on cultural or historical factors (consider Portugal’s arrangements with other Lusophone states and Germany’s policies regarding the Aussiedler).

Technological advances offer the promise of a different kind of solution – we might call it ‘smart enforcement’. Sensors and drone planes along the US southwest border can help border patrol agents identify routes of unauthorized migrants for targeted enforcement efforts. Further, as Redpath explains in her contribution to this volume, the increasing use of biometric information can provide benefits “for ensuring the security of national borders, the safety of international aviation, the security of travel documents, and the protection of the destination country’s border population”. At the same time, however, she notes that biometrics raise serious questions regarding protection of the right to privacy. This point can be made in terms of security and control issues more generally. First, it is an open question whether increased enforcement – be it more border patrol agents and boats patrolling the waters between West Africa and the Canary Islands or hi-tech cards and devices – can ultimately achieve the full control states desire. Second, even if greater control is possible, its benefits must be weighed against the burden on migrants' and citizens' rights. In this regard, Schoenholz’s contribution here argues for more targeted enforcement strategies that run a lower risk of violating rights and alienating community members whose support would otherwise be of value in anti-terrorism activities.

Taken together, the chapters provide both a comprehensive and sobering picture. They identify a wide range of conventions, norms, soft law and non-binding declarations that deal with various aspects of the sprawling set of issues that come under the general category of international migration; at the same time, they identify areas and issues in which further norm-development is advisable. Grant's chapter on 'stranded migrants' calls attention to an entire category of persons who 'find themselves outside any system of effective protection, and caught in a legal limbo'. Similarly, the complexities of dual nationality remain generally unregulated at the international level. The report of the GCIM notes other under- or unregulated topics of concern, such as principles of family unity and the actions of private agencies that recruit temporary workers across borders.

The chapters in this volume demonstrate that there is no single, coherent body of norms that might be termed a regime of international migration law. In addition, they make clear that expertise in the field demands facility with the many sources of international norms as well as knowledge of a diverse set of fields of law (e.g., human rights, criminal, trade, diplomatic) that extend beyond those that relate specifically to migrants.

3. The Architecture of International Migration Law

In what follows, I want to raise briefly two possible foci for greater coherence in international migration law. The first, which I will consider in this section, concerns the question of legal architecture: is it time to think about more formal structures for the global governance of migration? The second, in the next section below, concerns on attempts to bring together the various human rights norms that apply to migrants through the drafting of an International Bill of Rights for Migrants.

3.1 Modes of norm production, regime creation, and management

The papers in this volume identify a wide range of strategies for generating hard and soft norms, multilateral processes, and migration management tools. I will briefly outline a number of them here, moving from harder to softer.

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22 See Schoenholz’s contribution to this volume.
23 See Grant’s chapter on ‘Stranded Migrants’ in this volume, p. 46.
24 See, e.g., the chapter by de Hart and Groenendijk in this volume.
3.1.1 International conventions relating to migration and migrants

International agreements constitute the 'hardest' norms, and, as noted above, the migration field includes several leading examples. The 1951 Convention on the Status of Refugees is an important example.146 states have ratified either the Convention or its 1967 Protocol.27 Although the Convention provides no international adjudication structure, its norms defining refugee status and prohibited forms of discrimination against refugees have been widely adopted as a matter of national law (even if implementation of such norms at the national level has not been fully adequate). The Palermo Protocol on trafficking,28 which seeks to promote cooperation among states to prevent and combat trafficking and assist its victims, has been ratified by 111 states. And the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) entered into force in 2003,29 and has been ratified by 34 states.

3.1.2 Other international agreements

Several multilateral conventions have important implications for migrants. Most important are the major human rights treaties whose guarantees are not citizen-specific.30 There are numerous other agreements: for example, as detailed in Per­ruchoud's chapter, the Vienna Convention on Consular Relations mandates that foreign nationals arrested or imprisoned be informed of their right to notify consular officials and that consular officials have the right to visit and communicate with detained nationals.25 And although the GATS primarily concerns the cross-border provision of services, Mode 4 of the agreement concerns the movement of persons in the provision of services.32

3.1.3 Regional norms

Binding norms may be easier to establish among countries of a particular region that share similar histories, prospects and problems. The EU, of course, is the prime example here. The free movement regime for EU citizens among its Mem­

14 See Hailbronner's chapter in this volume.
15 See Martens', Nassenmaeker's and Santestevan's chapters in this volume. In particular, San­
16 See Martens', Nassenmaeker's and Santestevan's chapters in this volume. In particular, San­
17 See the chapter by Bagshaw, at p. 191.
18 See the chapter by Bagshaw, at p. 191.
19 See the chapter by Bagshaw, at p. 191.
organizations ‘to promote its contents and to observe the principles and guidelines embodied therein’. 40

3.1.6 National incorporation of international norms

International norms, whether they have the status of hard or soft law at the international level, may be adopted by states into their domestic law. An example of the former is the Refugee Convention, which has been implemented in many states through the enactment of national legislation. The Guiding Principles on Internal Displacement provide an example of the latter: although the Principles are soft law at the international level, several states have given them formally binding status within their domestic legal systems. 41 Domestic courts may also recognize customary and conventional international legal norms relating to migrants in appropriate cases. 42

3.1.7 Cooperation/state-based processes

The Nielsen chapter details a wide range of cooperative multi-state ‘processes’ both within and between regions. For example, the Berne Initiative has led to the development of an International Agenda for Migration Management, 43 a comprehensive non-binding framework that gathers states’ common perspectives and understandings on such topics as migration and development, human rights, labour migration, integration of immigrants, irregular migration, trade, health, trafficking and return. Other processes are more focused, such as the Budapest Group, which concentrates on management of unauthorized migration, and the International Conference on Central American Refugees (CIREFCA).

3.2 Towards global governance of migration?

It would overstate the level of legal development to describe the foregoing strategies and norms as a regime. Not surprisingly, then, a number of scholars and practitioners have suggested the need for the establishment of a formal international legal regime relating to migration. Arthur Helton argued for the creation of a ‘World Migration Organization’ that would ‘make and arbitrate global migration policy’. 44 Bimal Ghosh has suggested that it is time for a new international regime to facilitate the orderly movement of persons. This would include a shared set of objectives, an international normative framework, and the establishment of ‘a coordinated institutional arrangement, including a monitoring mechanism’. 45 Philip Martin, Susan Martin and Patrick Weil have explored migration management on several continents and call for a ‘strategy of cooperation’ among sending and receiving states ‘through a series of tradeoffs that facilitate the improved management of legal migration flows and better deal with illegal flows’. 46 These scholarly efforts, however, have not gathered steam on the international level or among states. Numerous international and regional ‘processes’ suggest ‘best practices’ and information sharing, prepare agendas for action, and the like. 47 But they neither seek, nor have they produced, binding legal norms or building blocks of a general regime architecture.

To report these developments is not to slight them. I fully expect that the rather soft law in many migration-related areas will slowly harden. And law, of course, hardens in some significant areas. Refugee law is the most noteworthy example; others include norms relating to consular protection (both in terms of treaty- and custom-based laws) and the free movement of EU citizens within the territory of the Union.

These examples are, however, far outnumbered by areas in which no significant supranational norms exist (such as citizenship), where existing norms are poorly implemented (such as human rights conventions), or where they have yet to be widely ratified. Emblematic of the latter is the ICRMW. The Convention provides a comprehensive set of rights for migrant workers – irrespective of their legal status in the host state – yet it has entered into force due to ratifications by primarily sending states and remains unratiﬁed by the major destination countries.

It was in the realm of possibility that the Report of the GCIM would call for the establishment of a new international organization or recommend first steps

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41 See Bagshaw’s contribution, at p. 200.
42 See, e.g., the decision of the Inter-American Court of Human Rights on the Legal Status and Rights of Undocumented Migrants, Advisory Opinion OC-18/02 of 17 Sept. 2003, requested by the United Mexican States, Inter-American Court of Human Rights (Series A) No. 18 (2003); see also the decision by the UK House of Lords in A (FC) and others (FC) v. Secretary of State for the Home Department [2004] UKHL 56, on the detention of foreigners suspected of terrorism without criminal charge.

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46 See P.L. Martin, S.F. Martin, and P. Weil, Managing Migration: The Promise of Cooperation (Lanham, Lexington Books 2006) p. 231; although they do note that [m]oving from the current arrangements to a more robust international regime may be premature’ (ibid., at p. 244). It is also worth considering in this regard Jagdish Bhagwati’s early call for a ‘brain drain tax’, in terms of which developing countries would be entitled to receive revenue from the taxes paid by their skilled emigrants in the destination states. See, e.g., J.N. Bhagwati and M. Partington (eds.), Taxing the Brain Drain: A Proposal (Amsterdam, North-Holland 1976); J.N. Bhagwati (ed.), The Brain Drain and Taxation: Theory and Analysis (Amsterdam, North-Holland 1976).
47 Nielsen provides an excellent overview of these processes in her contribution to the present volume.
towards an international legal regime on migration. Ultimately, however, it did neither. The Commission acknowledged both 'the paramount importance of inter-state consultation and cooperation as a basis for the formulation and implementation of migration policies' and 'that if the benefits of international migration are to be maximized and its adverse consequences minimized, then migration policies should be based on shared objectives and have a common vision'. But it also recognized 'that there cannot be a single model for action by states and other stakeholders' and that 'there is currently no consensus concerning the introduction of a formal global governance system for international migration, involving the establishment of new international legal instruments or agencies'. It was thus led to conclude that international, regional and domestic migration policies should be guided by a set of principles that might 'be employed by states and the international community as a guide to the formulation of comprehensive, coherent and effective migration policies'; these principles could be used to 'monitor and evaluate' the impact of immigration policies and to 'provide a framework for action that states and other stakeholders can use in their efforts to capitalize on the opportunities presented by international migration'. In short, the Commission called for more coherent policies at the domestic level and greater consultation and cooperation at the regional and global level. Less dramatic conclusions are hard to imagine.

The chapters in this volume, taken as a whole, suggest that there can be no monolithic approach to migration management. Some areas might well benefit from norms adopted by way of an international convention; guiding principles might work best for areas in which a consensus is further away – perhaps in dealing with the problem of stranded migrants, for example.

While it seems plain that the establishment of an international organization to regulate migration – charged, for example, with the tasks of issuing universal rules regarding citizenship or dual nationality, controlling levels of migration, or establishing social benefit entitlement rules for migrants – is not on the cards, there may well be room for collective action across a fairly wide range of issues if agreement is reached from the bottom-up. That is, one can imagine a Conference, Platform or other multilateral process that would bring states together for discussion and negotiation on the relevant issues. The idea here would not be that states should agree on a universal set of rules for international migration, but rather that they would put on the table their specific interests and then see if mutually advantageous bargains are possible. For example, a sending state might bargain for enforcement of labour standards for its citizens working in another state; and that host state might agree to such enforcement if the sending state assists in combating visa fraud or undocumented migration.

4. TOWARDS AN INTERNATIONAL BILL OF RIGHTS FOR MIGRANTS

The human rights approach to international migration is well-recognized in hard and soft law and in the scholarly and policy literature. Seven conventions establish wide-ranging rights that extend to non-citizens as well as citizens. The problem, as the Weisbrodt chapter makes clear, is with implementation – at all levels. The committees that monitor compliance with several of the conventions have no independent enforcement power; and those conventions left to national implementation are often not adequately enforced by domestic authorities. The GCIM thus noted that there is an urgent need to fill the gap that currently exists between the principles found in the legal and normative framework affecting international migrants and the way in which legislation, policies and practices are interpreted and implemented at the national level.

However, in a world of nation states where citizenship defines membership, immigrants will to some degree inevitably be treated differently. The task is to ensure that any differential treatment is fair, humane and justifiable.

Perhaps one way to move the human rights agenda forward would be to draft and promulgate an International Bill of Rights for Migrants. This would set out, in a clear and direct manner, a core set of guarantees for immigrants. It ought to include traditional negative rights – against cruel and inhumane treatment, detention without due process, and undue limits on speech and on the practice of religion – as well as some positive rights, such as guarantees of 'safety net' social benefits (e.g., emergency medical care, education and unemployment insurance). These might be formulated either as direct guarantees or as protections against

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49 GCIM Report, op. cit. n. 16, at p. 3, para. 11.
50 Ibid., at p. 3, para. 12.
51 Ibid., at p. 3, para. 13.
52 Ibid., at p. 3, para. 15.
53 Cf., Martin, Martin and Weil, op. cit. n. 46. The International Agenda for Migration Management (IAMM), discussed in the chapters by Cholewinski and Nielsen in this volume, is a potential source and/or basis for inter-state cooperative approaches as well as for the formulation of mutually acceptable principles. See International Agenda for Migration Management, Berne, 16-17 Dec. 2004 (IOM, Swiss Federal Office for Migration, 2005).
54 GCIM report, op. cit. n. 16, at p. 58, para. 24.
discrimination. Attention might be drawn to the special vulnerability of women, children and trafficked migrants.

Such a Bill of Rights could be proposed as hard law, seeking state ratification; it could be proposed as honorary - like the Universal Declaration of Human Rights - in the hope that it might 'harmonize' over time; or it could be proposed as appropriate for direct incorporation into domestic law (as was the case, for example, with the suggested definition of the term, 'refugee' in the Cartagena Declaration on Refugees). The instrument could be the product of a state-based process (e.g., the Refugee Convention), a UN process (for example the ICRMW), or of efforts of civil society (such as the Landmines Convention).

The proposal for an International Bill of Rights for Migrants might seem ill-advised for several reasons. First, it might be argued that the web of existing legal norms would adequately protect migrants if they were properly enforced; therefore, rather than proposing another instrument, it might be more advisable to devote energy to compliance. Second, it may be suggested that the ICRMW accomplishes much of the task I am proposing here. As Cholewinski points out in his contribution to the present volume, the Convention did not create many new rights; rather, it collected rights recognized in other instruments and under customary international law and applied them to the context of migrant workers and their families. Since most persons migrate either to work or to join family members who work, the Convention may fairly be said to cover a great majority of immigrants. A final objection may be that the prospect that such a Bill of Rights would actually be ratified by states is quite small in the current international and national climates.

These are not frivolous objections; however, I think there are persuasive answers to them. An International Bill of Rights for Migrants would not be a complex legal document designed only for lawyers and international tribunals. It would be a clear and concise statement of rights. Fitting perhaps on a single page (or computer screen), it could be easily circulated, read, and discussed - distributed to migrants, NGOs and state authorities, included in books, placed on posters, printed on T-shirts. It would demystify existing legal language and complex processes (how many migrants understand, for example, the current process for raising claims before the Human Rights Committee)? It would serve, then, as a rallying point. Even though a non-binding instrument, it could contribute to the creation of a culture of rights which might engender and encourage better implementation of existing norms. The Universal Declaration of Human Rights provides an obvious analogy. Furthermore, even if not officially accepted at the international level - where the consensus necessary to formulate hard law may be difficult to attain - states could be encouraged to adopt an International Bill of Rights for Migrants into their domestic legal systems.

5. CONCLUSION

Legal norms and principles relating to international migration are both broad in scope and many in number, but they form no coherent regime. Moreover, it is not obvious that they either can or should. The sites and topics of governance may simply be too diffuse to permit a single edifice to be established, particularly at the international level. Nonetheless, there would seem to be enough overlapping concerns of states that some form of bottom-up negotiating process might produce a set of norms that could become widely shared, even if not fully comprehensive. Furthermore, the opportunity also exists, I would suggest, for civil society actors to draft, publicize and press for an International Bill of Rights for Migrants drawn from norms and principles in existing human rights instruments. Both would be of considerable help in providing some much needed architecture to the substance of international migration law.

54 Compare the Refugee Convention, loc. cit. n 26, in particular Arts. 16(1) (on the right of access to courts) and 15 (on the right of association on the most favourable terms granted to foreign nationals).
