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MIGRATION **DIALOGUE** BENEFITS  
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SOCIETY IOM ASSISTS IN MEETING  
THE GROWING OPERATIONAL  
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UNDERSTANDING **AND MIGRATION: OF**  
MIGRATION ISSUES **AN ANALYSIS**  
ENCOURAGES SOCIAL AND ECONOMIC  
DEVELOPMENT THROUGH MIGRATION  
UPHOLDS THE HUMAN DIGNITY AND  
WELL-BEING **OF MIGRANTS**





**INTERNATIONAL  
DIALOGUE  
ON MIGRATION**

**INTERNATIONAL  
LEGAL NORMS  
AND MIGRATION:  
AN ANALYSIS**

Offprint and the introductory chapter of

***International Legal Norms and Migration***

A comprehensive expert study, conducted by the Migration Policy Institute (MPI), Washington, D.C. and the Institut Universitaire de Hautes Etudes Internationales (IUHEI), Geneva, commissioned by and in cooperation with the International Organization for Migration (IOM). The study, sponsored by the Government of Switzerland, was edited by T. Alexander Aleinikoff (MPI) and Vincent Chetail (IUHEI), and will be published by T.M.C. Asser Press\* in early 2003.

\* See website [www.asserpress.nl](http://www.asserpress.nl)



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This book is published by the Migration Policy and Research Programme (MPRP) of the International Organization for Migration. The purpose of MPRP is to contribute to an enhanced understanding of migration and to strengthen the capacity of governments to manage migration more effectively and cooperatively.

Opinions expressed in the chapters of this book by named contributors are those expressed by the contributors and do not necessarily reflect the views of IOM.

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**INTERNATIONAL  
DIALOGUE  
ON MIGRATION**



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## Foreword

There are many bilateral, regional and multilateral agreements and conventions aimed at managing migration, particularly in the humanitarian field. Some of these rules work satisfactorily whereas others are not fully implemented. In certain areas, however, no rules or guidelines to regulate interstate cooperation exist. There is, moreover, no global structure through which to manage orderly movements in a cooperative way and which combines efficiency, equity and respect for the interests of the countries of origin, of transit and destination. Although policy makers are becoming gradually more aware that domestic measures alone are not sufficient to effectively manage migration and although migration is now increasingly discussed at the international level, there has been, until now, no broad-based initiative to open up a dialogue between countries of origin, countries of transit and countries of destination on the full range of migration issues.

It is in recognition of this that, the Federal Office for Refugees of Switzerland launched the Berne Initiative with the objective of enhancing migration management at the regional and possibly at the global level through cooperation between States. The process would ideally lead to a dialogue between countries of origin and destination first at the regional and then at a global level. Through this dialogue an establishment of a suitable intergovernmental framework could be developed with guidelines and best practices to assist Government when confronted with challenges in the field of migration.

However, to achieve at such a result, a series of intermediary steps is necessary. One of these is a stocktaking of existing international legal norms on migration. The entire study will be published in early 2003. The conclusions of the study are presented to you in this volume. They have been drafted by Mr. T. Alexander Aleinikoff, Professor of law and Senior Associate of the Migration Policy Institute in Washington D.C. The aim of the expert study is to highlight existing standards and norms on migration as well as to identify clear legal gaps. The study will be a valuable tool for Government migration policy-makers and practitioners, and will facilitate the dialogue on interstate cooperation in migration management.

Jean-Daniel Gerber  
Director  
Swiss Federal Office for Refugees

# Preface

International migration is an established feature of contemporary social and economic life. As governments the world over come to terms with this reality, they are faced with the challenge of developing effective modes of cooperation in this field.

At its Eighty-second Session of the Council held in November 2001, IOM launched, as an integral component of the Council session, its International Dialogue on Migration. The first session of the dialogue emphasized the requirement for a comprehensive approach to managing migration, as well as the need to better understand migratory phenomena. Of most relevance to the current publication, governments emphasized the need to understand the existing international legal framework relevant to migration management.

The Berne Initiative, launched by the Swiss government in June 2001, has been following a similar orientation. One of its main purposes is to open up avenues of study, reflection and consultation among governments and other migration stakeholders with a view to enhancing cooperation.

*International Legal Norms and Migration: An Analysis* is an important contribution to this process and a response to numerous requests from policy makers for a concise guide to international legal norms and standards in the field of migration. This Analysis provides a ready tool for policy makers and migration practitioners by gathering and analysing in one place relevant international legal norms for the management of

migration. For this reason, this Analysis is published by IOM, as part of the International Dialogue on Migration series.

The Analysis is drawn from an expert study, *International Legal Norms and Migration*, commissioned as part of the Berne Initiative, that provides 17 distinct papers on different migration issues prepared by international law experts in each of the identified fields relevant to migration management. It includes chapters on the authority and responsibility of States, freedom of movement, return to States of origin, labour migration, forced migration, smuggling and trafficking, rescue at sea, human rights of migrants, nationality, family unification, children and international migration, integration, migration and security, migration and development, migration elements of international trade law, migration and health, as well as a chapter on interstate cooperation on migration, including significant bilateral and multilateral agreements. This expert study will be published in early 2003 by Asser Press. The Analysis presented here is the introductory chapter of that volume and provides an overview of the chapters from the expert study in an integrated piece.

IOM would like to thank the author, Mr. T. Alexander Aleinikoff, Senior Associate of the Migration Policy Institute, Washington, D.C., and professor of constitutional and immigration law at Georgetown University Law Center, under Swiss Government sponsorship, for his excellent work and tremendous patience and flexibility in the preparation of this work. IOM would also like to thank the many experts who contributed their time and expertise to the underlying study.

Brunson McKinley  
Director-General  
International Organization for Migration

# Introduction

We are a world of states and a world of people on the move. Thus, we are also a world of borders. People cross borders for a wide range of reasons: to work, to visit family, to escape violence and natural disaster, to seek an education or medical care, or to return home. Virtually all states attempt to manage their borders, controlling the flow of persons in and out of the state.

It is sometimes said that states have complete authority to regulate the movement of persons across their borders – that anything less than complete authority would undermine their sovereignty and threaten their ability to define themselves as a nation. Against this claim, it is regularly asserted that migrants have fundamental human rights that state regulations of migration cannot abridge.

This debate misses crucial aspects of the current international legal regime, and it insufficiently values the possibility for cooperative efforts at managing migration in the interest of both states and migrants. There is, in fact, a fairly detailed – even if not comprehensive – set of legal rules, multilateral conventions and bilateral agreements that constrain and channel state authority over migration. The claim of unbridled state authority cannot be sustained. But importantly, the extant norms are not imposed from above, the product of some worldwide legislature that has established a master plan for the movement of persons with which states must comply. Rather, the norms have been created from the ground up, through state-to-state relations, negotiations and practices. States, that is, have sought to manage migration in the interests of both their populations and of friendly

relations with other states; and they have affirmed human rights norms both on principle and because they expect such norms to be followed by the states to which their citizens travel and in which they take up residence. In short, because human migration has always occurred, because it is a natural human process – indeed, more natural than the state borders that people cross – it is not surprising that states have sought to work with other states in managing such movement.

Accordingly, this report examines international legal norms from a different perspective than the win/lose debate of state control versus migrants' rights. It seeks to identify the legal norms that constitute the framework of and for cooperative management in the interests of states, their citizens, and interstate relations. It is therefore consistent with the purpose of the UN expressed in the Charter, to which Member states commit themselves, “[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

We will see that there is both more and less international law than might be supposed. On a number of issues there are easily identified norms relating to migration. Many are enshrined in interstate conventions (such as the principle of non-refoulement, which prohibits the return of persons to states where they face a risk of persecution). Others have evolved over time, and form part of customary international law (for instance, the duty of states to readmit nationals who seek to return). Furthermore, there are literally scores of international, regional, and bilateral agreements pertaining to migration that establish reciprocal obligations for ratifying states. These cover such diverse areas as trafficking, trade, the free flow of migrants within regions, and the rights of migrant workers.<sup>1</sup>

On other issues, international norms are less clear or have not yet fully crystallized. Examples include: (1) although a right to

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<sup>1</sup> See IOM, “Inter-state Cooperation on Migration – Significant Bilateral and Multilateral Agreements”, in the Expert Study.

family unity is recognized in widely ratified human rights conventions, it is more difficult (outside the refugee context) to speak of an established right to migrate in order to unify a family; (2) while the duty to rescue persons at sea is clear, there is no firm rule on where such persons may disembark; (3) states are permitted to draw lines based on citizenship status, but the standard for assessing the permissibility of discriminatory treatment is not firmly established. And in other areas, no clear legal norm has been established or is on the horizon. For example, there are no general international norms that manage dual nationality or regulate the integration of immigrants.

Each of these categories of issues implicates cooperative state efforts. Established norms evidence general international agreement; emerging and vague norms are areas where joint interpretive work may be productive; and “gap” areas provide obvious issues for further international consideration.

The migration process is frequently conceptualized as a triangular relationship among a person, a sending state, and a receiving state. But a more complete description considers the role, *inter alia*, of countries of transit, social networks of migrants in home and settlement states, employers in receiving states, carriers, smugglers and traffickers, and non-state agents of persecution whose acts cause persons to flee. This produces a complex web of connections among these various persons, groups, and states. International legal norms, accordingly, operate on several levels and have a range of addressees. They may describe state-to-state obligations (such as the duty to accept the return of one’s nationals); state-to-individual obligations (such as the principle of non-refoulement of refugees); or individual-to-individual obligations (such as a ship captain’s duty to rescue persons in distress at sea).

The expert papers that constitute the bulk of the Expert Study describe in full these cross-cutting legal norms.<sup>2</sup> The purpose of this introductory chapter is to extract from and organize that work

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<sup>2</sup> It does not purport to be a survey of domestic norms, nor is it a comparative study of different kinds of domestic regimes of regulation.

in a manner that can be useful for policy-makers. It thus groups themes from papers under broader categories, such as the authority and responsibility of states and the legal regime regarding forced migrants. Legal citations have been kept to a minimum; for detailed legal references and discussions, the reader is urged to consult the expert papers.



# **State Authority and Responsibility**

## **Authority**

International law affirms the authority of states to regulate the movement of persons across their borders. Such power is understood to flow from the concept of an international system of states, with states possessing primary authority over their territory and population. State power over immigration is generally stated in broad terms; that is, states are deemed to have wide discretion in crafting admission, residence, expulsion and naturalization policies for non-citizens.

### *Managing admissions and residence*

In the modern era, states have exercised authority to manage admissions to their territory by defining classes of admissible and inadmissible non-citizens, to remove non-citizens deemed undesirable, and to make certain benefits and opportunities available only to citizens. Grounds for refusing admission (or mandating expulsion) typically include disease, criminal activity, violations of immigration laws, national security or *ordre public* concerns, and lack of economic means. Virtually all states have also specified documentary requirements – such as possession of a valid passport, visa, or travel document – for the entry of non-citizens into state territory.

## *Securing integrity of borders*

State authority has also been exercised against persons and organizations that seek to transport migrants in violation of law.

The UN Convention Against Transnational Organized Crime (adopted by the General Assembly in 2000, not yet in force)<sup>3</sup> includes protocols dealing with smuggling and trafficking.<sup>4</sup> Under the protocols, “smuggling” is defined as the organized movement of persons into national territory for financial or other material benefit in violation of domestic laws;<sup>5</sup> “trafficking” is defined as the recruitment, transportation, or harboring of persons involving the threat or use of force, coercion, fraud, deception, or abuse of power or of a position of vulnerability for the purpose of exploitation.<sup>6</sup> The protocols call for criminalization of certain acts and for interstate cooperation in exchange of law enforcement information and return of smuggled and trafficked persons.<sup>7</sup>

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<sup>3</sup> United Nations Convention Against Transnational Organized Crime, 9 January 2001, GAOR 55<sup>th</sup> Session, UN Doc. A/Res/55/25, 40 *I.L.M.* 335 (2001) (not yet in force at time of publication). The Convention has been signed by 143 states and ratified by 24 states. It will enter into force after the 40<sup>th</sup> ratification. *Id.* at art. 38.

<sup>4</sup> See Protocol Against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention Against Transnational Crime (hereinafter, “Smuggling Protocol”), art. 18, 15 November 2000, ch. II, UN Doc. A/55/383 (2000), 40 *I.L.M.* 335 (2001) (not yet in force at time of publication); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (hereinafter, “Trafficking Protocol”), art. 8, 15 November 2000, UN Doc. A/55/383 p. 53, 40 *I.L.M.* 335 (2001) (not yet in force at time of publication). States Parties must also “take or strengthen measures . . . to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of opportunity”. Trafficking Protocol, art. 9(4).

<sup>5</sup> See Smuggling Protocol, art. 3(a).

<sup>6</sup> See Trafficking Protocol, art. 3(a).

<sup>7</sup> Importantly, each protocol includes a “saving clause” which notes that nothing in the provisions of the protocol “shall affect other rights, obligations, and responsibilities of State and individuals under international law, including international humanitarian law and international human rights law, and , in particular, where applicable, the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees and the principle of non-refoulement as contained therein”. Smuggling Protocol, art. 19(1); Trafficking Protocol, art. 14(1).

Regional efforts have also been undertaken, such as the Bangkok Declaration of 1999 (under which states pledge to coordinate efforts on irregular migration, smuggling and trafficking). And bilateral arrangements between receiving states and states of origin have provided training and assistance to law enforcement officers and carrier personnel in states of origin in preventing illegal transit.

International conventions also deal with specific crimes sometimes associated with cross-border movements, such as terrorism, narcotics trafficking, and transnational organized crime.<sup>8</sup> These instruments generally call upon states to criminalize the activity, take steps to prevent its preparation within state borders, and cooperate with other states in prosecuting offenses (through, for example, extradition and legal assistance).

A number of consultative processes have been initiated in various regions of the world that seek to foster cooperation in stemming irregular migration.<sup>9</sup> More than 40 European governments and ten international organizations participate in the Budapest Process, begun in 1991, which deals with such issues as smuggling, visa policy harmonization, readmission agreements, and sharing of information on unauthorized migration. The Regional Conference on Migration (commonly known as the Puebla Process) was initiated in 1996 to bring together North and Central American sending and receiving states on issues of common concern. Sixteen governments, IOM and UNHCR participate in the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC), which provides a forum for the exchange of information exchange and comparative policy analysis.

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<sup>8</sup> See Fisher, Martin, and Schoenholtz, "Migration and Security in International Law", in the Expert Study. (Hereinafter referred to as "Fisher et al").

<sup>9</sup> See generally A.K. von Koppenfels, *The Role of Regional Consultative Processes in Managing International Migration*, IOM Migration Research Series, No. 3 (2001).

## *Nationality*<sup>10</sup>

Every state possesses authority to determine who are its nationals, subject to conventional and customary law norms. So states may choose whether to adopt *jus soli* or *jus sanguinis* rules (or both) for birthright citizenship; and there is no international law requirement that a state extend citizenship to the children of immigrants (international instruments do, however, urge steps to avoid statelessness).<sup>11</sup> The state's power to make membership rules as well as its power to regulate immigration support state authority to make rules for the granting of citizenship to immigrants (naturalization) (Nationality is discussed in greater detail below.)

## *National security*

The power of a state to protect its security is a core attribute of sovereignty. Although there is no comprehensive instrument relating to migration and security, it is clear that states possess authority, under international law, to limit and control migration on national security grounds; and the exclusion and expulsion of persons thought to pose a threat to the national security of a state is firmly embedded in state practice.

In the wake of the September 11 attacks on the United States, the UN Security Council adopted Resolution 1373, calling on states to “[p]revent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for

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<sup>10</sup> In this paper, the terms “citizenship” and “nationality” are used interchangeably, although their meanings may have different connotations under the domestic laws of states.

<sup>11</sup> E.g., Convention on the Rights of the Child (hereinafter, “CRC”), art. 8, 20 November 1989, UN Doc. A/RES/44/25 (1989), 28 *I.L.M.* 1457 (1989).

preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents".<sup>12</sup>

National security grounds sometimes arise in international law as exceptions to rights secured under human rights and other conventions. These exceptions take the form of limitations on rights ("clawbacks") or as grounds for derogating from rights protected in the convention. The International Covenant on Civil and Political Rights (ICCPR) includes both kinds of provisions. Under Article 12(3), for example, it is provided that freedom of movement within state territory and the right to leave a state "shall not be subject to any restrictions except those which are provided by law, *are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant*".<sup>13</sup> Similarly, Article 13, provides:

An alien lawfully in the territory of a State Party to the present Covenant 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. (Emphasis supplied)

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<sup>12</sup> Efforts at drafting a comprehensive convention of terrorism have foundered on reaching agreement on the definition of terrorism. However, two conventions dealing with specific aspects of terrorism have recently entered into force: (1) the International Convention for the Suppression of Terrorist Bombing, GA Res. 52/164, annex (15 December 1997), 37 *I.L.M.* 249 (1998) (entry into force 23 May 2002)(obligating states parties, *inter alia*, to criminalize terrorist bombing and to extradite persons wanted by other states parties); and (2) the International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109 (9 December 1999), 39 *I.L.M.* 270 (2000) (entry into force 10 April 2002) (requiring states parties to take appropriate steps for detecting, freezing and seizing funds used in terrorist activities and cooperate with other states parties in preventive and enforcement efforts).

<sup>13</sup> Emphasis supplied. For references to clawback provisions in other treaties, see Fisher et al, *supra*, at n. 69.

States parties may also derogate from certain of their obligations under the Covenant “[i]n time of public emergency which threatens the life of the nation . . . to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin”.<sup>14</sup> The appropriateness of a limitation or derogation is judged on a case-by-case basis; but it is certain that a significant threat to national security would rank high among the state interests that could trigger restriction of a right.

Security grounds also provide an exception to the right of non-refoulement under international refugee law.<sup>15</sup> However, the Convention against Torture does not provide such an exception, and the Committee Against Torture (the monitoring body for the treaty) has criticized national legislation that appears to permit the return to torture of persons deportable on national security grounds.<sup>16</sup>

### *Enforcement on the high seas and air carriers*

States increasingly seek to project enforcement of their immigration laws beyond their borders, deterring unlawful entries by sea and air. Under customary and conventional international law, state authorities may stop and board ships bearing their flags, stateless ships, and ships that have entered their territorial waters. States may enforce their immigration laws on ships in international waters flying foreign flag only with the consent of the flag state.<sup>17</sup>

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<sup>14</sup> Art. 4(1). See procedural requirements in art. 4(3).

<sup>15</sup> Convention Relating to the Status of Refugees, art. 33(2), 28 July 1951, 189 *U.N.T.S.* 150.

<sup>16</sup> E.g., CAT/C/SR.13 para. 27 (1989). And see ICCPR, art. 4(2), not permitting derogation from Article 7 of the Covenant, which prohibits torture and cruel, inhuman or degrading treatment or punishment.

<sup>17</sup> Convention on the High Seas, 29 April 1958, 450 *U.N.T.S.* 82 (entry into force 30 September 1962); United Nations Convention on the Law of the Sea of 1982 (hereinafter, “UNCLOS”), 10 December 1982, art. 98(1), 1833 *U.N.T.S.* 397; Fisher et al, *supra*.

Ships transporting migrants are sometimes overcrowded and present dangers to their passengers. Ship masters have a duty under international law to rescue persons on ships in distress on the high seas;<sup>18</sup> and states have a duty to adopt legislation that establishes penalties for ship masters who violate the duty to rescue.<sup>19</sup> Two difficult situations arise in regard to persons rescued at sea. First, international law does not provide clear guidance on where they should be taken – possibilities include the next scheduled port of call for the vessel or the nearest port. Second, persons rescued may frequently fear return to their home states and may have valid claims to non-refoulement under the Refugee Convention or other human rights instruments.<sup>20</sup>

Persons arriving in state territory by air are generally subject to inspection and admissibility procedures. Under Annex 9 to the (Chicago) Convention on International Civil Aviation, air carriers must “take precautions at the point of embarkation” to ensure that passengers possess valid travel documents as required by the state of disembarkation.<sup>21</sup> Passengers found to be inadmissible are transferred to the custody of the carrier, who is responsible for their “prompt removal” to the place where they began their journeys or to any other place where they are admissible. States Parties to the Convention commit themselves to receiving a passenger denied admission elsewhere if he or she had stayed in state territory before embarkation (other than in direct transit), unless the person had earlier been found inadmissible there. Many states impose fines and other penalties on air carriers landing passengers who do not possess proper

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<sup>18</sup> UNCLOS, art. 98(1); International Convention for the Safety of Life at Sea, 1 November 1974, Chapter V (Reg. 10), 32 *U.S.T.* 47 (entry into force 25 May 1980).

<sup>19</sup> UNCLOS, art. 98(1). See also International Convention on Maritime Search and Rescue, 1979 Annex, *T.I.A.S.* 11093 Chapter 2, para. 2.1.10 (entry into force 22 June 1985).

<sup>20</sup> See UNHCR paper, “Protection of Asylum Seekers and Refugees Rescued at Sea”, in the Expert Study. The United States Supreme Court has held that, under U.S. law, the Refugee Convention does not apply to actions of U.S. authorities beyond the territorial waters of the United States. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 166, 113 S.Ct. 2549 (1993).

<sup>21</sup> 3.52-3.71.

documents, although penalties are not permitted where the carrier can demonstrate that it has taken “adequate precautions” to ensure compliance with documentary requirements.

In sum, international law recognizes a significant – if not primary – role for unilateral state action in regulating migration. Nonetheless, in many areas states have entered into cooperative interstate arrangements in pursuit of state interests and of better management of international migration.

## **Responsibility**

Recognizing the existence of authority does not imply that such authority is unconstrained. As the regulation of migration implicates the interests of countries of origin and transit as well as the interests of migrants, states have entered into bilateral and multilateral agreements that limit and channel their authority over immigration. So too international law may establish substantive and procedural norms for the exercise of state power – including, most importantly, human rights norms and other customary law norms as well.

### *International commitments*

It is a bedrock norm in international law that treaties freely concluded and in force between states are to be respected and implemented. This principle – *pacta sunt servanda* – is recognized in Article 26 of the 1969 Vienna Convention on the Law of Treaties: “every treaty in force is binding upon the parties to it and must be performed in good faith”. It is further established that, under international law, treaty obligations between parties take precedence over conflicting provisions of municipal law.<sup>22</sup>

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<sup>22</sup> *Greco-Bulgarian Communities* case, PCIJ Reports, Series B, no. 17, p. 32. It remains, however, a question of domestic law whether international law will be given priority in domestic courts over inconsistent domestic law.

Although it is difficult to speak of a general duty of states to cooperate with one another on common issues, the UN Charter requires states to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered”. Art. 2(3).



### *Respect for and protection of international human rights norms*

States are bound by commitments in human rights conventions that they ratify and by customary international law norms. Most human rights are guaranteed irrespective of an individual's immigration status; they are a function of a person's status as a human being, not as a citizen of a particular state.<sup>23</sup>

As will be detailed below, of particular importance to regulation of immigration and immigrants are non-discrimination norms, general protections regarding due process, detention, and access to courts, specific protections pertaining to immigration proceedings, and norms relating to family unity.

### *Non-refoulement*

Several widely ratified conventions prohibit the return of persons to particular kinds of harm. Most important among these are the 1951 Convention Relating to the Status of Refugees, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, discussed below. These obligations also call into question some state practices directed at preventing illegal entry that have the effect of deterring or punishing asylum seekers and other persons in need of international protection.

### *Duty to accept return of nationals*

Numerous authorities report that states have a duty to accept the return of their nationals from other states.<sup>24</sup> Although this duty is not established by a multilateral convention, it is generally deemed to follow from the recognized authority of a state to expel non-nationals. That is, for the right of a state to remove non-nationals to be effective, another state must accept those removed;

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<sup>23</sup> General Comment number 15, para. 7 (1986) (stating that aliens are entitled to recognition before the law).

<sup>24</sup> See sources cited in Noll, "Return of Nationals to States of Origin and Third States", in the Expert Study.

and in a world that understands citizenship as state membership, that obligation is said to fall on home state of which the expellee is a citizen. Widespread state practice of accepting the return of one's citizens, including the conclusion of readmission agreements, is said to support the existence of such a norm of customary international law.

Despite the notice of such a norm in leading international law treatises, there are some difficulties with the position that one state must make perfect another's state exercise of the power to remove non-nationals. The home state may possibly object that its authority is being compromised by the demand of the expelling state; perhaps, then, only a more limited duty of non-interference exists – that is, not to hinder removal efforts of another state. Furthermore, it is arguable that the duty to accept the return of one's nationals applies only to those voluntarily returning. In this way, it would complement the individual's right to return rather than represent a duty imposed on one state because of the exercise of power of another state. Finally, the evidence of readmission agreements can be argued two ways: either they demonstrate the lack of a norm (and hence the necessity for an agreement), or they demonstrate the fleshing out of a recognized extant norm.<sup>25</sup>

In all events, it is clear that difficulties attending the return of non-nationals to their countries of origin have been a significant irritant in interstate relations. Readmission agreements are evidence of one kind of interstate cooperation that is possible;<sup>26</sup> broader international commitments may also be feasible and advisable.<sup>27</sup>

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<sup>25</sup> See *id.*

<sup>26</sup> See, for example, the European Council Recommendation of 30 November 1994 concerning a model bilateral readmission agreement between a Member state and a third country, *Official Journal C 274*, 19 September 1996, p. 20 (art. 2(1): “The Contracting Party via whose external frontier a person can be proved, or validly assumed, to have entered who does not meet, or who no longer meets, the conditions in force for entry or residence on the territory of the requesting Contracting Party shall readmit the person at the request of the Contracting Party and without any formality”).

<sup>27</sup> See also Trafficking Protocol, art. 8 (requiring State Parties to facilitate and accept return of trafficking victim who had right of permanent residence in the state at the time of the victim's entry into the receiving state); Smuggling Protocol, art. 18.

### *Consular access*

Under the 1963 Convention on Consular Relations, a state that arrests or detains a non-citizen must inform him of his right to contact consular officials of his home state and must communicate such a request to consular officials “without delay”. Consular officials are given the right “to visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation”.<sup>28</sup>

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<sup>28</sup> Article 36.

## Freedom of Persons to Leave and Return

Numerous international and regional conventions affirm the right of persons to leave any country and to return to his or her country.<sup>29</sup> Importantly, this norm is narrower than a general right to cross international borders or to be admitted to whatever country one chooses. Rather, it establishes a right to be free from arbitrary departure restrictions and an affirmative duty on states to provide travel documents. The right is not absolute. States may prevent departure, for example, to enforce criminal sanctions, the payment of taxes, military service requirements, and attendance at legal proceedings.

The right to leave is an “incomplete” right.<sup>30</sup> In a world of nation-states and controlled borders, exercise of the right depends upon a person’s ability to locate a state willing to take him or her in. Because there is no right to enter a state other than one’s own, persons who find that door closed or who seek to depart their home state but can find no other state to admit them will be unable to exercise their right to depart – except, perhaps, through unauthorized means.<sup>31</sup>

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<sup>29</sup> E.g., Universal Declaration of Human Rights (1948) (“UDHR”): “Everyone has the right to leave any country, including his own, and to return to his country”. See Chetail, “Freedom of Movement and Transnational Migrations: A Human Rights Perspective”, in the Expert Study.

<sup>30</sup> See *id.*

<sup>31</sup> The failure to provide lawful routes for departure and entry fall particularly hard on refugees and asylum seekers who seek safety outside their countries of origin.

The right to leave applies to both nationals and non-nationals of the state of residence. Categories of persons able to assert a right to return, however, are more limited; it pertains to citizens and nationals of a state, and – it is generally agreed – to persons stripped of their nationality in violation of international law and perhaps to settled immigrants as well.<sup>32</sup> At the same time, the right to return is recognized as subject to fewer restrictions than the right to depart. According to the Human Rights Committee, charged with monitoring implementation of the widely ratified International Covenant on Civil and Political Rights, “there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable”.<sup>33</sup>

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<sup>32</sup> Human Rights Committee, General Comment No. 27, CCPR/C/21/Rev.1/Add.9, para. 20 (1999) (noting that Article 12(4) of the ICCPR uses the phrase “his own country”, rather than the phrase “country of his nationality”).

<sup>33</sup> *Id.* at para. 21.

## Forced Migration

Because it is commonplace to note that increasing numbers of persons seek to travel across international borders, it is sometimes forgotten that the vast majority of the world's people seek to remain in their country of origin. Staying, that is, is the rule; moving is the exception. Indeed, it has been suggested that people have a "right to remain" in their home countries<sup>34</sup> – a right that is put under pressure by human causes and forces of nature.

International law does not recognize a general category of "forced" or "involuntary" migrant, but important and well-engrained norms pertain to certain classes of such persons. Indeed, a fairly elaborate regime has been established for the international protection of refugees and for victims of torture.<sup>35</sup> At the regional level, interstate agreements and arrangements have extended protection to persons who cross state borders in flight from other forms of inhumane treatment, civil war or disorder, and natural disasters. Furthermore, human rights principles condemn many of the practices that force persons to flee.

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<sup>34</sup> Newland and Goodwin Gill paper, "Forced Migration and International Law", in the Expert Study.

<sup>35</sup> See also Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 *U.N.T.S.* 287 (1949), art. 45 (Stating that "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs").

## Refugees

More than 140 states have ratified either the 1951 Convention relating to the Status of Refugees or its 1967 Protocol. Under these instruments, a refugee is defined as a person who “owing to well-founded fear of being persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”. States are obligated to grant recognized refugees a range of benefits and opportunities afforded to immigrants and nationals. Most important, Article 33 prohibits the return of a refugee to a country “where his life or freedom would be threatened” on one of the Convention grounds (the principle of non-refoulement).<sup>36</sup>

The Convention establishes a regime of “surrogate protection”.<sup>37</sup> That is, the States parties have committed themselves to protecting persons forced to flee their home state who cannot rely upon that state to safeguard their fundamental rights and interests.

Prior to adoption of the 1951 Convention, the General Assembly established the Office of the United Nations High Commissioner for Refugees to provide international protection to, and seek permanent solutions for, refugees. The Convention also charges UNHCR the supervision of the application of its provisions.<sup>38</sup>

Although these refugee protection norms and practices constitute the most well-established and widely adopted

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<sup>36</sup> The principle of non-refoulement is also, arguably, a norm of customary international law. See G. Goodwin-Gill, *The Refugee in International Law* (2d. ed 1996), at 225; Chetail, “Le principe de non-refoulement et le statut de réfugié en droit international,” in V. Chetail, ed., *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés – 50 ans après: bilan et perspective* (2001), at 65.

<sup>37</sup> James Hathaway, *The Law of Refugee Status* (1991), at 135.

<sup>38</sup> Art. 35.

international regime pertaining to migration, there are nonetheless numerous gaps in the system:

- 1) Although there is a recognized right to “seek asylum”,<sup>39</sup> states are under no duty to grant asylum or even to admit persons so that asylum claims may be pursued.<sup>40</sup> The crucial state obligation is non-refoulement, not admission or a grant of residence.
- 2) States have adopted varying interpretations of the term “refugee” which has led to inconsistent application of the Convention. UNHCR has authority to issue guidance on interpreting the Convention’s provisions, but such guidance is not binding on States Parties.
- 3) The Convention and Protocol do not apply to all persons forced to cross international borders – such as some victims of civil war or disorder, and persons who flee extreme poverty, famine or other natural disasters. (Regional instruments and declarations include some of these categories).
- 4) States, in efforts to deter unlawful migration, have adopted numerous measures – such as visa requirements, carrier sanctions, and detention policies – that hinder the ability of persons seeking asylum to leave their countries of origin or gain access to refugee status determination procedures.
- 5) Asylum seekers frequently travel through other countries before reaching the state in which they assert a claim to refugee status. Norms are not well established, however, regarding the duties of transit countries or return of asylum seekers to such countries.

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<sup>39</sup> UDHR, art. 14(1).

<sup>40</sup> But see Ex. Comm. [of the UNHCR Programme] Conclusion No. 22 (XXXII), Protection of Asylum Seekers in Situations of Large-Scale Influx (states should admit asylum seekers in cases of large-scale influx pending arrangements for a durable solution).



- 6) The Convention does not supply standardized status determination procedures. Accordingly, procedures vary considerably among states.

In each of these areas, frictions among states have developed. For instance, some states seek to return asylum seekers to states through which they transited with the idea that they request asylum there; and differing treatment of classes of persons who do not meet the formal definition of refugee may deflect flows from one state to another. Nor does there appear to be emerging a norm that a state that creates a refugee flow has breached a duty owed to the state burdened by that flow.<sup>41</sup> Some of these matters have been dealt with on a bilateral or regional basis,<sup>42</sup> and the opportunity for mutually advantageous state cooperation – consistent with the overriding norm of protection for bona fide refugees – is apparent. For example, in 2001, the EU Council issued a directive establishing minimum standards for temporary protection programmes in situations of mass influx.<sup>43</sup>

Beyond the protection of the non-refoulement principle, the 1951 Convention establishes fairly robust non-discrimination norms (e.g., to work, social welfare programmes, religious freedom) for refugees lawfully in their countries of settlement. Refugees are guaranteed the right of access to courts and freedom of movement and are protected, with certain qualifications,

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<sup>41</sup> See Lee, "The Right to Compensation: Refugees and Countries of Asylum", 80 *Am. J. Int'l. L.* 532 (1986).

<sup>42</sup> See IOM and Newland and Goodwin-Gill, *supra*. See also U.S. - Canada Smart Border Declaration (12 December 2001), available at [www.canadianembassy.org/border/declaration2-e.asp.e](http://www.canadianembassy.org/border/declaration2-e.asp.e).

<sup>43</sup> Council Directive 2001/55/ED (20 July 2001). The EU is also in the process of developing a common policy on asylum, as mandated by art. 63 of the Treaty of Amsterdam.

See also 1969 Organization for African Unity Convention on the Specific Aspects of Refugee Problems in Africa (extending refugee definition to persons who flee "external aggression, occupation, foreign domination or events seriously disturbing public order" as well as persons protected as refugees under the 1951 Convention, Art. I(2)); 1984 Cartagena Declaration, pertaining to forced migrants in Central and South America.

against penalties for unlawful entry. The Convention also establishes limits on the detention of refugees.

International law recognizes the special case of children refugees and asylum seekers.<sup>44</sup> Children may be entitled to refugee status on grounds similar to those of adult asylum seekers or as members of a “particular social group”, such as victims of abuse or trafficking. Furthermore, it cannot be assumed that a child’s asylum claim necessarily merges with a parent’s claim – most obviously in cases where the child is asserting abuse within the family. Guidelines have been developed at the international, regional and national level to address substantive and procedural issues specific to child asylum seekers.<sup>45</sup>

## **Torture victims**

International and regional conventions and customary international law protect other victims of human rights abuses from refoulement. Most states have ratified the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), under which they commit themselves not to return a person “where there are substantial grounds for believing that he would be in danger of being subject to torture”.<sup>46</sup> The protection in the European Convention on Human Rights and Fundamental Freedoms against torture and

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<sup>44</sup> Article 22(1) of the Convention on the Rights of the Child, *supra*, provides: *States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.*

<sup>45</sup> See Bhabha, “Children, Migration and International Norms”, in the Expert Study.

<sup>46</sup> Art. 3. While the non-refoulement provision of the Refugee Convention, art. 33(2), does not extend to refugees who pose a danger to the security of the country of refuge or who have committed a “particularly serious crime” there, the Torture Convention’s prohibition against refoulement is absolute.

inhuman or degrading treatment and punishment has been interpreted to prohibit the return of person to a state when there is a “real risk” he or she would suffer such treatment.<sup>47</sup>

## **Trafficked persons**

The recently adopted Trafficking Protocol goes beyond traditional law enforcement approaches that viewed trafficked aliens as irregular migrants. In addition to promoting the suppression of trafficking, the Protocol states a purpose of protecting and assisting victims of trafficking, “with full respect for their human rights”.<sup>48</sup> It thus mandates that States Parties take steps to protect the physical safety, privacy and identity of victims, to assist victims in legal proceedings, and to consider implementing measures to provide for the physical, psychological and social recovery of victims. States are also urged to consider adopting laws or regulations that permit victims to remain in the territory on a temporary or permanent basis.<sup>49</sup>

Children are particularly vulnerable in trafficking situations, and they are frequently the victims of sexual exploitation, abusive adoptions or coerced labour. International norms prohibiting child exploitation<sup>50</sup> thus complement anti-trafficking norms.

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<sup>47</sup> *Soering v. UK*, 7 July 1989, Series A no. 161, pp. 35-36, §§ 90-91; *Chahal v. UK*, 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1853, §§ 73-74. See also ICCPR, art. 7 (implicit non-refoulement obligation for persons facing torture or cruel, inhuman or degrading treatment or punishment).

<sup>48</sup> Art. 2.

<sup>49</sup> Arts. 6, 7. See also Muntaborn, “Combatting Migrant Smuggling and Trafficking in Persons, Especially Women”, in the Expert Study.

<sup>50</sup> E.g., CRC, art. 36; ICESCR, art. 10(3).

# The Human Rights of Migrants

The human rights of individuals – including immigrants – are frequently conceptualized as rights that challenge the sovereignty of states. This approach, however, fails to recognize that such rights are often memorialized or protected in exercises of state sovereignty. States may be bound by human rights norms because they have ratified conventions protecting such rights; in such cases, any resulting limit on state sovereignty has been expressly consented to by the state. States may also be bound by norms of customary international law. These norms are established only after they have received widespread support in state practice and they are generally recognized by states as binding legal obligations. Furthermore, under prevailing international law, states are not bound by norms to which they objected during the crystallization of the norm. In short, human rights norms do not appear *deus ex machina*; they reflect state deliberation, practice and commitment.

## **Non-discrimination**

The principle of non-discrimination – fundamental to international law – protects immigrants as well as citizens.<sup>51</sup> It does so in two ways. First, non-citizens, like citizens, are protected against discrimination based on race, religion, sex and other

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<sup>51</sup> See also *id.* at art. 26 (guaranteeing to “all persons” equality before the law and equal protection of the law without discrimination).

protected grounds. Second, differential treatment based on a person's alienage is subject to scrutiny under prevailing human rights norms. Both these concepts are found in the ICCPR. Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

A law, for example, that denies job opportunities to members of a particular religion would be evaluated in the same manner under the Covenant's protections whether a member of that religion is a citizen or a non-citizen. Furthermore, a law that denied non-citizens, but not citizens, a right to go to school or to own land could also give rise to claim because alienage could constitute a protected "status" under the provision.<sup>52</sup>

It is clear, however, that neither the ICCPR nor other human rights instruments purport to prohibit all distinctions between citizens and non-citizens. While different formulations have been proposed to describe the alienage non-discrimination norm,<sup>53</sup> it

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<sup>52</sup> Regional conventions are to the same effect. Kaelin, "Human Rights and Integration of Migrants", in the Expert Study. The International Convention on the Elimination of All Forms of Racial Discrimination specifically provides that its prohibition of racial discrimination does "not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens". Article 1(2). But the precise meaning of this - rather odd - exception is unclear, and does not appear to prevent immigrants from asserting a right to be free from racial discrimination. Fitzpatrick, "The Human Rights of Migrants", in the Expert Study.

<sup>53</sup> Compare Fitzpatrick, *ibid* ("differential treatment is permitted 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") with Martin, "The Authority and Responsibility of States", in the Expert Study (suggesting that a lower standard - that there be "some rational basis for the differentiation relevant to the purpose that is sought to be achieved" - better reflects real-world application).

is clear that (1) the state must be pursuing a legitimate end and (2) there must be a demonstrable connection between that end and the means used to advance it. As noted in a General Comment of the Human Rights Committee (established under the ICCPR to monitor States Parties' compliance with the Covenant), "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".<sup>54</sup> In the context of discrimination based on alienage, the status of the alien (settled immigrant, temporary visitor, unauthorized migrant) is likely to influence the evaluation of the differential treatment.

States would have a difficult time justifying policies that deny to non-citizens core civil rights and political freedoms that are granted to citizens – such as access to courts and freedom of speech. It is generally recognized, however, that restricting the franchise and political office holding to citizens does not constitute unjustifiable discrimination against immigrants.<sup>55</sup>

Rights protected under the International Covenant on Economic, Social and Cultural Rights (ICESCR) – such as the right to work, to an adequate standard of living, to health, and to education – are generally guaranteed to "everyone" within a state. Furthermore, the Covenant provides that such rights "will be exercised without discrimination of any kind".<sup>56</sup> Thus non-citizens are protected against discrimination based on their

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<sup>54</sup> General Comment 18, Non-discrimination (1989), para. 13.

<sup>55</sup> See ICCPR, art 25 (limiting to citizens the rights to take part in public affairs, vote and to have access to public service).

<sup>56</sup> ICESCR, art. 2(2). Such discrimination would also be subject to the non-discrimination norm of art. 26 of the ICCPR.

The ICESCR recognizes that the provision of social, economic, and cultural rights frequently requires affirmative conduct by states (including expenditure of state resources). It thus commits States Parties to "achieving progressively the full realization of the rights recognized in the present Covenant", subject to "the maximum of its available resources". Art. 2(1). This provision, however, does not authorize discrimination against non-citizens as a way for states to progressively realize Covenant rights.

alienage as regards rights secured by the Covenant.<sup>57</sup> The ICESCR includes a provision authorizing a particular kind of discrimination against non-citizens: developing states are permitted to determine “to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”.<sup>58</sup> But express recognition of this limited form of discrimination supports the proposition that the Covenant generally prohibits discrimination based on alienage for Covenant rights. Nonetheless, state practice demonstrates widespread limitations on economic and social rights, restricting, for example, the right to work and participation in social welfare programmes for various classes of immigrants.

## **Substantive rights**

Instruments protecting human rights generally apply to all persons within a state’s jurisdiction.<sup>59</sup> In other words, a person’s status as an alien does not take him or her outside the protections of human rights law.

Non-citizens, like citizens, are entitled to rights that are absolute or not subject to derogation or limitation. They are also entitled on equal terms with citizens to those rights whose denial on the basis of alienage would never be justifiable. These include, for example, the right to life, prohibitions against torture and cruel, inhuman, and degrading treatment or punishment, rights guaranteed in the criminal process, freedom of thought, conscience and religion, the right to leave a country, the

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<sup>57</sup> State laws excluding settled immigrant children from primary education would be particularly difficult to justify, given the importance of education to a child’s development and his or her ability to enjoy other rights. See CRC, art 28(1); ICESCR, art. 13.

<sup>58</sup> *Id.* at art 2(3).

<sup>59</sup> See ICCPR Article 2(1), requiring states to ensure Covenant rights to “all individuals within its territory and subject to its jurisdiction”. This mandate mentions neither nationality nor reciprocity (i.e., there is no requirement that in order for a citizen of State X to be protected in State Y, State X must grant similar rights to citizens of State Y residing in State X).

prohibition on retroactive criminal penalties, and the right to marry.

For other categories of rights, immigration status may be a relevant consideration:

- 1) Some state practices that pertain only to non-citizens might not be deemed “arbitrary” under various provisions of human rights instruments. For example, the prohibition in Article 9(1) of the ICCPR of “arbitrary arrest and detention” cannot be read as prohibiting all detentions of immigrants in immigration proceedings. Nor would the Covenant’s protection against “arbitrary” interferences with family (Art. 17) erect a total bar to deportation of an immigrant who has family members in the state of settlement.
- 2) Some rights established in conventions are subject to limitation based on grounds of national security or *ordre public*.<sup>60</sup> To the extent that such rights may be limited for citizens, they may be limited for non-citizens within the jurisdiction of a state as well. Furthermore, alienage itself may be a factor in considering whether a particular limit serves a legitimate state purpose and is proportional to the end sought by the state.
- 3) Certain rights are expressly limited to citizens. For example, although most of the rights in the ICCPR are guaranteed to all persons, Article 25 states that “[e]very citizen” shall have the right to take part in the conduct of public affairs, vote and be elected, and to have access to public service. Other rights are guaranteed only to citizens and lawfully present migrants, such as the right to freedom of movement within a state secured by Article 12(1) of the ICCPR.
- 4) Some rights apply only to non-citizens, or a subset thereof (such as those concerning immigration proceedings).<sup>61</sup>

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<sup>60</sup> See ICCPR, arts. 18 (manifestation of religion), 19 (freedom of expression), 22 (freedom of association).

<sup>61</sup> E.g., ICCPR, art. 13.



- 5) Some human rights treaties state that their protections do not apply to certain differential treatment based on citizenship status.<sup>62</sup>

## **Family unity**

The right to family unity is widely recognized in international and regional human rights instruments. As the “fundamental group unit” in society, the family is entitled to protection and support.<sup>63</sup> Furthermore, under the Convention on the Rights of the Child, a child may be separated from his or her family only when competent authorities subject to judicial review determine that such separation is necessary for the best interests of the child.<sup>64</sup> Family unity rights pertain to non-nationals as well as nationals. Thus immigrants are protected in their rights to marry and form and raise a family.

Immigration regulation interacts with family unity in a number of ways. Most states permit the entry of immediate family members (spouses and minor children) to join a lawful resident immigrant. At the same time, however, it is increasingly apparent that some immigration policies pose significant challenges to family unity. For example, admissions policies frequently engender long delays in the entry of close family members or deny entry altogether. So too expulsion measures may threaten to separate families.<sup>65</sup> And the definition of family applied by

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<sup>62</sup> See International Convention on the Elimination of all Forms of Racial Discrimination (hereinafter, “CERD”), 21 December 1965, art. 1(2), 660 *U.N.T.S.* (entry into force 4 January 1969) (Convention “shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”); ICESCR, art. 2(3)(“Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”).

<sup>63</sup> Jastram, “Family Unification”, nn. 2-3, in the Expert Study.

<sup>64</sup> Art 9(1). Plainly, this rule would not prohibit all separations. For example, imprisonment of a parent after conviction for a criminal offense would not be barred. See art. 9(4).

<sup>65</sup> Less significant today is the denial of exit permission for a person seeking to join family members outside his or her state of origin.

the receiving state may be different than that used by the immigrant family.

It has been suggested that family unification across borders is a necessary corollary to the right of family unity. But this norm of international law has yet to crystallize, and state practice is frequently to the contrary. Human rights instruments exhort states to take best efforts to foster family unity, as does international refugee and humanitarian law. For example, the Convention on the Rights of the Child provides that “family unification shall be dealt with by States Parties in a positive, humane, and expeditious manner”.<sup>66</sup> Furthermore, it is not obvious that such a norm would require a state to admit family members of settled immigrants; it might be possible for the family to unify in another state (most particularly the state origin). An emerging right to family unification across borders is strongest for refugees and settled lawful immigrants; it would be more difficult to sustain such a right for unauthorized entrants or asylum seekers. It is clear, in any event, that the problem of separated families is significant both for the families and the states of residence, and that this remains an area for which interstate cooperative efforts would be important.

The right of a family to stay together has been more fully developed in expulsion cases. Thus, the Human Rights Committee, in a case raising a claim that the deportation of an immigrant was inconsistent with Article 17 of the ICCPR (prohibiting arbitrary interference with privacy, family or home), considered whether the threatened impact on the family would be disproportionate to the state’s effectuation of immigration policies. Factors to be examined included the length of residence, the age of the children and the impact of expulsion of a parent, the conduct of the parent, and the state’s interests in protecting public safety and promoting compliance with immigration laws.

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<sup>66</sup> Article 10(1). See also EU directive on family unity/TP; Convention on Migrant Workers (states shall take measures they deem appropriate to facilitate reunification); Final Act of the Conference of Plenipotentiaries, 1951 Convention Relating to the Status of Refugees; Additional Protocol I, 1977, art. 74; see also Protocol II, 1977, art. 4(3)(b).

As in the admissions context, however, it has also been recognized that expulsion does not necessarily destroy family unity; it may simply cause relocation of the entire family to another state.

The Convention on the Rights of the Child appears to apply a stricter standard, permitting family separation only when it is in the best interests of the child.<sup>67</sup> Thus, where expulsion would in fact result in family separation – because of practical relocation and adaptation difficulties – states would have an obligation under the CRC to hear from the child (or his or her representative) and determine whether the expulsion of the parent is in the child’s best interest.

It is apparent that the problem of separated families is one where cooperative state efforts would work to the benefit of both families and states.

## **Rights relating to immigration proceedings**

Human rights norms limit both the substantive and procedural scope of a state’s power to regulate immigration. In managing the movement of persons over its borders, a state necessarily has authority to adopt policies that pertain solely to non-citizens. Non-discrimination norms, however, may check state power to draw lines among non-citizens. For example, immigration policies based on race – once a fixture of some states’ legal regimes – are not sustainable under current human rights principles.<sup>68</sup> So too gender-based distinctions would require special justification.<sup>69</sup>

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<sup>67</sup> Article 9: states “shall ensure that a child shall not be separated from his or her parents against their will, except when . . . such separation is necessary for the best interests of the child”.

<sup>68</sup> See ERD, art. 1(2). Policies based on a person’s national origin (meant in the sense of citizenship, not ethnicity) do not generally constitute discrimination based on race.

<sup>69</sup> Fitzpatrick, *supra*.

Immigration proceedings must comply with general principles of due process. The ICCPR devotes a specific article, Article 13, to expulsion proceedings:

An alien lawfully in the territory of a State Party to the present Covenant 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.<sup>70</sup>

The somewhat limited scope of this norm is worth noting. First, it applies only to non-citizens “lawfully in territory” – thus, presumably not to undocumented entrants. The term, however, poses a conundrum because expulsion proceedings normally are held to determine whether or not a person is lawfully in the country. Accordingly, the Human Rights Committee has stated that “if the legality of an alien’s entry or stay is in dispute, any decision of this point leading to his expulsion or deportation ought to be taken in accordance with Article 13”.<sup>71</sup> Second, the exception for “compelling reasons” of national security might justify *ex parte* or *in camera* proceedings in terrorist cases. Third, the procedural rights guaranteed under the Covenant are less stringent than those guaranteed in criminal proceedings. It should be noted, however, that many states go significantly beyond the protections identified in Article 13, such as entitling aliens in expulsion proceedings access to a court independent of the initial decision-maker, the right to be represented by counsel, and the right to present evidence and examine evidence used against him.

A number of human rights instruments condemn mass deportations (that is, the summary removal of a large group of

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<sup>70</sup> Art. 13.

<sup>71</sup> General Comment 15, para. 9 (1986).

persons from a state).<sup>72</sup> Relatedly, the Human Rights Committee has as well interpreted the ICCPR as entitling “each alien a decision in his own case”.<sup>73</sup>

The detention of immigrants in the course of immigration proceedings is also subject to human rights norms that prohibit “arbitrary arrest or detention”. Thus, the ICCPR provides that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if detention is not lawful”.<sup>74</sup> Detention and migrant interdiction policies may impose particular burdens on asylum seekers, undercutting their rights to seek asylum and to be protected against non-refoulement.

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<sup>72</sup> 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 1963, art. 4; American Convention on Human Rights, art. 22(9), November 1969.

<sup>73</sup> General Comment 15, para. 19 (1986).

<sup>74</sup> Art. 9(4). See also Fitzpatrick, *supra*.

## **Integration of Migrants**

Millions of persons seek not only to cross international borders, but also to take up residence in the foreign state to which they travel. It might be argued that if there is no general duty to admit a non-national, then there can be no duty to foster an admitted non-national's integration into the receiving state; furthermore, rules establishing the terms and conditions under which migrants could become settled residents would fall primarily within the domestic authority of the receiving state. This has been the traditional position of international law. Part and parcel of the accepted authority to determine admission policies is the authority of a state to establish opportunities (or not) for the integration and membership of immigrants as it sees fit. One cannot speak, then, of an internationally recognized right of immigrants to integrate or to be provided with the means to do so. Concomitantly, there is no duty on immigrants to naturalize.

These rather broad conclusions, however, must be supplemented by discussion of other topics that relate to integration and assimilation. Non-discrimination norms prohibit discrimination against non-citizens that both hinders material integration and sends a stigmatizing message to immigrants that they do not belong. So too guarantees of political rights – such as freedom of speech and assembly – may facilitate integration by providing immigrants a means to participate in the country and to provide information about policies that affect them, by training them in the political institutions and norms of their country of residence, and by giving them a sense of stake in the society.

Furthermore, as noted above, there is a trend toward recognizing that in some circumstances a non-national's ties (including family ties) to a state of residence may restrict state authority to expel him or her.<sup>75</sup> Here, integration serves not as a goal of state policy but rather as a limitation on state power; it represents a set of attachments that should be taken into account in determining whether enforcement of a state's immigration law is arbitrary and is proportional to the harm imposed on the immigrant and his or her family.<sup>76</sup>

Integration concerns are also implicated by citizenship rules and state tolerance of difference or promotion of assimilation.

### **Citizenship (nationality) and naturalization**

Citizenship (or nationality) is commonly understood as membership in a state. In today's world, citizenship plays a vital role – both for states and individuals. Thus, the Universal Declaration of Human Rights (UDHR) provides that “[e]veryone has the right to a nationality”, and that no one shall be arbitrarily deprived of his nationality or denied the right to change his nationality. (The UDHR does not by itself establish legally binding norms, although many of its guarantees may have attained the status of customary international law). The international legal community has also recognized that statelessness leaves persons particularly vulnerable.<sup>77</sup> Accordingly, the 1961 Convention on the Reduction of Statelessness mandates, *inter alia*, that States Parties grant nationality to persons born in

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<sup>75</sup> The right to family life is expressly protected in international and regional conventions. ICCPR arts 17, 23; CRC arts. 3, 9, 10, 16; ECHR art. 8; ACHR arts. 17, 19; African Charter, art. 18. See *Winata v. Australia*, UN Doc. CCPR/C/72/D/930/2000 (16 August 2001). See Martin, *supra*; Jastram, *supra*.

<sup>76</sup> Other aspects of the right to family unity also have a pertinent impact on integration.

<sup>77</sup> Convention relating to the Status of Stateless Persons, 28 September 1954 (entry into force 6 June 1960).

their territories who would otherwise be stateless and not deprive a person of his or her nationality if it would render him stateless.<sup>78</sup> The importance of possessing a citizenship in a state is expressly recognized in the Convention Relating to the Status of Refugees, which provides that states “shall as far as possible facilitate the assimilation and naturalization of refugees”.<sup>79</sup>

For an immigrant, or an immigrant’s children, acquisition of citizenship is likely to be an important measure of integration. This is not to say that integration cannot occur without acquisition of citizenship, nor that citizenship always and everywhere demonstrates integration. Nonetheless, citizenship generally connotes full membership, typically endowing its holder with the full range of domestic rights recognized by the state.

Citizenship is acquired either at birth or by naturalization. In the past, states could be fruitfully categorized as embracing notions of *jus soli* (citizenship based on birth within national territories) or *jus sanguinis* (citizenship based on descent). But more recently this distinction has broken down. Formerly *jus sanguinis* states that have experienced significant immigration have tended to adopt *jus soli* rules in order to avoid multiple non-citizen generations born in the state. And some *jus soli* states have adopted requirements permitting birthright citizenship only if one or both of the immigrant parents was in a lawful immigrant status at time of the child’s birth.<sup>80</sup>

While there is thus a growing convergence on birthright citizenship rules among major immigrant countries, it has not been the product of conventional or customary international law norms. There are no international conventions significantly regulating acquisition of citizenship; and under customary

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<sup>78</sup> Note, however, that only 26 states are parties to the Convention.

<sup>79</sup> Article 34.

<sup>80</sup> Aleinikoff and Klusmeyer, *Citizenship Policies for an Age of Migration* (2002).



international law, states are generally free to decide upon whom to confer citizenship.<sup>81</sup>

Immigration is linked to citizenship in another way. Virtually all states provide routes to formal state membership via naturalization laws. Although the policies vary state to state, states generally condition naturalization upon lawful residence for a certain number of years on state territory and non-criminal behavior; and most also require demonstration of ability in an official state language. Some states require evidence of knowledge of the history or culture the country. A number of states also require that persons attaining citizenship through naturalization renounce prior citizenships; this practice is far from universal, and it is neither required nor prohibited by principles of international law.

The exercise of a state's power to grant citizenship is, perforce, limited by overriding human rights norms – such as non-discrimination norms and requirements of procedural fairness. Thus laws denying citizenship based on race or gender, or permitting termination of citizenship without regular procedures would be difficult to justify under general human rights norms.

Multiple nationality is an increasingly common occurrence. In the past, plural nationality was seen as an irritant in international relations – a status to be discouraged or prohibited in order to avoid attendant issues of loyalty and diplomatic protection. More recently, however, states have shown greater tolerance for multiple nationality, recognizing that persons can maintain links to more than one state without major interstate conflicts ensuing. The relationship of plural nationality and

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<sup>81</sup> See Hailbronner, "Nationality", in the Expert Study. The 1997 European Convention on Nationality states that "each State shall determine under its own law who are its nationals (art. 3(1)); however, the Convention requires states to provide nationality to children born or found in their territory who would otherwise be stateless, and to children born on state territory one whose parents possesses state nationality. (Art. 6(1), (2)). The Convention also mandates that states facilitate the acquisition of nationality for spouses and children of nationals, and persons (including stateless persons and refugees) who lawfully and habitually reside on state territory. (Art. 6(4).)

integration is not clear; in some cases it may advance integration, in others it may undermine it. Accordingly the sorting out rights and duties for dual nationals would be an appropriate area for interstate deliberation and cooperation.

## **Difference and assimilation**

The term “integration” connotes a level of economic and social functioning within a society. Immigrants are fully integrated when they can find jobs, take care of their families, join in community life, and negotiate every day living in a society. “Assimilation” has a cultural sense. An immigrant is assimilated when he or she shares the common values of the society, speaks the language, and adopts dominant cultural practices.

As Professor Kaelin notes, the issue of cultural assimilation of migrants

is complex because of a deep tension between two basic principles: Human Rights such as the freedoms of religion, association, expression of opinion and marriage or the right to privacy and to protection of one’s own family life guarantee cultural autonomy and, thus, cultural diversity to everyone, including migrants. The respect for human beings requires a recognition of their cultural identity as, otherwise, individuals are degraded and discriminated against. . . At the same time, a certain basis of commonly accepted values is necessary, in every State and every society, for a minimal degree of cohesion.<sup>82</sup>

International law does not speak directly to these issues, but its protection of individual rights necessarily implies some degree of tolerance of difference (of religion, language, opinion). Furthermore, groups may enjoy rights that give them space from dominant social practices. Thus, Article 27 of ICCPR protects

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<sup>82</sup> Kaelin, *supra*.

persons belonging to an ethnic, religious, or linguistic minority against denials of their right “in a community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.<sup>83</sup>

States are free to promote assimilation, through educational, social and immigration policies. But compelled assimilation – such as a requirement that a person practice a particular religion or espouse a particular political opinion – would violate internationally recognized freedoms. Non-discrimination norms also cast doubt on policies that restrict state benefits, institutions and programmes to members of particular groups or that penalize certain group identities or practices. Indeed, it is likely that some degree of tolerance of difference will advance, rather than retard, the integration of immigrants – as immigrants come to see themselves as equal and valued members of society. Requirements for tolerance would be strongest in the private sphere, as state interests recede and privacy and associational interests grow.<sup>84</sup>

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<sup>83</sup> See also CRC, art. 29(1)(c) (stating that the education of children should be directed both at the national values of the country in which he or she is living and his or her own cultural identity, language and values and the country from which he or she may originate).

<sup>84</sup> There will be situations where the public/private distinction will prove problematic – for example, cases involving domestic arrangements or practices that are consistent with cultural norms but may violate human rights norms.

# Labour Migration

People have forever crossed borders in search of work. Today, millions of persons are employed outside their countries of origin, in highly skilled, skilled and unskilled jobs, as permanent settlers and temporary workers, lawfully admitted and unlawfully present. Both sending states and receiving states generally benefit from migration for employment purposes; and, not surprisingly, states – at least on a regional and bilateral basis – have sought to regularize the flow in their mutual self-interest and in the interests of the workers.

The migration of workers is sometimes secured by regional agreements that generally permit freedom of movement and settlement for citizens of Member states. Examples include the instruments establishing the European Union, the Treaty of the Economic Community of West African States, and the Agreement of the Council of Arab Economic Unity. Some states have special relations with former colonies that also permit largely unrestricted entry and residence and account for significant labour flows. Other states have established bilateral relationships with neighbouring states that specifically authorize the entry of temporary workers.<sup>85</sup>

Major international trade agreements include limited – but important – provisions supporting the temporary movement of persons between trading partners. The General Agreement on Trade in Services encourages governments to commit to opening

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<sup>85</sup> See examples in IOM, “Inter-state Cooperation on Migration – Significant Bilateral and Multilateral Agreements”, in the Expert Study.

markets, in the course of multilateral trade negotiations, to foreign service-providers. GATS Article I recognizes four modes of trade in services; the fourth mode is the movement of natural persons to provide services in a foreign country. Commitments made by governments under the GATS are enforceable in the WTO.<sup>86</sup> Regional trade agreements also have implications for the movement of persons. For example, under the North American Free Trade Agreement, persons engaged in “trade in goods, the provision of services or the conduct of investment activities” are entitled to enter Member states temporarily for business purposes.<sup>87</sup>

International law plays another role regarding non-citizens in the labour force, establishing rights and protections for migrants in three ways. First, the non-discrimination principles of major human rights conventions generally ensure that non-citizen workers benefit from protections afforded to citizen workers – such as minimum wage/maximum hour rules, prohibitions on child labour, rights to establish unions and collective bargaining.<sup>88</sup> Second, international instruments specifically guaranteeing workers’ rights generally apply to non-citizen as well as citizen workers.<sup>89</sup>

Third, several international instruments are directly concerned with the rights of non-citizen workers.<sup>90</sup> For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted by a UN General Assembly Resolution in 1990 and expected to come into force in 2002), secures for migrant workers many of the rights guaranteed by human rights treaties – such as protections against discrimination, torture and forced labour, and the rights to life, freedom of thought and religion. In provisions specifically related to employment, it provides that migrant workers shall “enjoy treatment not less favourable than that which applies to nationals of the State of employment” in respect of remuneration, conditions and hours of work; and further, that migrant workers have the right to join and take part in the activities of trade unions and other associations “with a view to protecting their economic, social, cultural and other interests”.<sup>91</sup>

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- <sup>86</sup> See Charnovitz, "Trade Norms and International Migration", in the Expert Study.
- <sup>87</sup> See NAFTA website at <http://www.nafta-sec-alena.org/english/index.htm>. See also J.Nielson, OECD, submission to the Joint WTO-World Bank Symposium on Movement of Natural persons (Mode 4) under the GATS, 11-12 April 2002 (available on the WTO website at <http://www.wto.org>).
- <sup>88</sup> Fitzpatrick, *supra*.
- <sup>89</sup> See Leary, "The Paradox of Worker's Rights as Human Rights", in L.A. Compa and S.F. Diamond, Eds, *Human Rights, Labor Rights and International Trade* (1996), pp. 22-47, detailing international conventions pertaining to workers' rights. See also Leary, "Labor Migration", in the Expert Study.
- <sup>90</sup> See ILO Conventions 97 (Migration for Employment Convention) (1949) (42 ratifications) and 143 (Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers) (1975) (18 ratifications) ("Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory").
- <sup>91</sup> Arts. 26, 27.

# Migration and Development

Migration and development are linked in a number of important ways. Underdevelopment is a major cause of migration – lawful and unlawful<sup>92</sup> – as persons seek work opportunities outside their countries of origin. But development may equally contribute to migration, as individuals gain the skills and resources that permit them to find employment in other states. Furthermore, the remittances of migrants frequently constitute a large source of foreign capital in developing states. Despite these obvious interstate relationships, there is little international law linking migration and development.

A number of international instruments declare a right to development.<sup>93</sup> Importantly, the ICESCR – which mandates that states “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”<sup>94</sup> – puts stress on “international assistance and cooperation” in achieving realization of the rights secured in the Covenant.<sup>95</sup>

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<sup>92</sup> See Programme of Action adopted at the International Conference on Population and Development, Cairo, 10.1 (1994); Bangkok Declaration on Irregular Migration, para. 5 (1999) (“the causes of irregular migration are closely related to the issue of development”).

<sup>93</sup> E.g., Declaration on the Right to Development, 41 UN GAOR Supp. 53, 186 (1986). Other resolutions and conclusions by scholars to the same affect are reported in Chimni, “Migration and Development”, in the Expert Study.

<sup>94</sup> Art. 11(1).

<sup>95</sup> Arts. 11(1) (“The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.”); 2(1). See Committee on Economic, Social and Cultural Rights, Comment 3 (1990).

Whether or not a duty of international assistance for developing states has fully crystallized, it is clear that development aid could have a material effect on immigration. It is therefore an important potential topic for interstate cooperation on migration. Thus, the 1994 Cairo Declaration on Population and Development invites states to “aid developing countries and countries with economies in transition in addressing the impact of international migration” and calls on states “to address the root causes of migration, especially those related to poverty”.<sup>96</sup>

Developed states may also assist developing states by making employment opportunities available to their nationals. Again, the Cairo declaration “invites” countries of destination “to consider the use of certain forms of temporary migration, such as short-term and project-related migration, as a means of improving the skills of nationals of countries of origin, especially developing countries and countries with economies in transition”.<sup>97</sup>

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<sup>96</sup> Report of the International Conference on Population and Development, paras. 10.2(a), 10.6 (September 1994), available at <http://www.cnie.org/pop/icpd/poa10.htm>.

<sup>97</sup> *Id.* at para. 10.5. See also Bangkok Declaration, para. 7; ILO Recommendation No. 86 Concerning Migration for Employment (rev'd 1949), art. 4(1) (“It should be the general policy of members to develop and utilize all possibilities for employment and for this purpose to facilitate the international distribution of manpower and in particular the movement of manpower from countries which have a surplus of manpower to those countries that have a deficiency”).



## Conclusion

The papers of the expert study make it clear that a fairly detailed set of international law norms is implicated in the regulation of international migration and migrants. In saying this, it is important to stress that international law does not establish a comprehensive international migration regime. It does not command that certain numbers of persons be permitted to travel between states each year; it does not supply a universal rule for the attribution of citizenship; it does not structure an international system for labour flows; it does not mandate particular enforcement regimes or the return of undocumented migrants. Moreover, in some areas in which international law applies, the norms are not precise or are just emerging.

Yet international law, in many respects, channels, influences, and supplies limits on state-to-state and state-to-individual relationships. It is perhaps best, then, to view the international norms as providing a framework – a background set of principles – for state cooperation on migration matters and for the protection of migrant human rights. That is, existing international legal norms both establish a space and a need for new initiatives in this age of migration.

The papers in the expert study disclose numerous areas where state-to-state cooperation is advisable. To mention but a few salient examples:

- 1) Development of arrangements on skilled and unskilled labour flows;
- 2) Further negotiation of readmission agreements;

- 3) Promotion of common definitions and procedures in refugee law;
- 4) Consideration of the impact of measures against unlawful migration on asylum seekers;
- 5) Coordination of anti-trafficking efforts;
- 6) Clarification of procedures to be followed regarding persons rescued at sea;
- 7) Provision of development assistance to sending states;
- 8) Further promotion of anti-discrimination norms as relate to non-citizens;
- 9) Cooperation in the re-uniting of separated families;
- 10) Consideration of migration issues in multilateral trade negotiations.

States have been most active in adopting domestic regulations for the admission of wanted immigration. Further steps are needed on how to manage both lawful and unlawful flows at the international level, in ways that redound to the benefit of states and migrants and that respect the human rights of migrants. These steps, if they are to be successful, must view international migration in a broader context of global inequality and insecurity – the main causes of migratory flows. Thus, the effective and humane management of international migration that international law can help to provide will require attention to the needs and interests of sending states, receiving states, and migrants as well as recognition of the root causes of migration.