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An International Migration Protection Regime: The Current Situation, Dilemmas and Initiatives

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AN INTERNATIONAL MIGRATION PROTECTION REGIME: THE CURRENT SITUATION, DILEMMAS AND INITIATIVES[1]

Stefanie Grant

In the years after the Universal Declaration of Human Rights (UDHR) had laid the foundation for a system of international human rights protection in 1947, priority was given first to the protection of refugees, and then to defining the rights of citizens. Concern for the human rights of migrants has been a more recent development. Although there is not yet a protection regime which can be compared with that for refugees, significant advances have been made in the last two decades, which bring migrants closer to the mainstream of human rights protection. They are the focus of this paper.

Writing in 1984, Lillich commented that «surprisingly little systematic work» had been done on the rights of aliens, and compared the topic to «a giant [though as yet unassembled] juridical jigsaw puzzle» whose pieces were to be found in different areas of law[2]. But a "major change" was taking place in the way in which aliens' rights were protected: «from the classic system of diplomatic protection by the alien's State of nationality … to the direct protection of the alien's rights through his use of national and international procedures to enforce a set of reformulated international norms». The significance of the change «cannot be overstated».

This paper reviews this changing situation, and asks whether it is yet possible to speak of an international migration protection in regime. It examines the international human rights treaty system, and the application of these treaties to migrants; it then reviews recent developments including the criminalisation of

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[1] This paper uses the term "international migrant" to refer to «persons moving from one country to another with the intention or possibility of staying for some time, often a year or more»: see SG's report *International Migration and Development*, 2006, A/60/857, para. 112. It accepts that the terms "migrant", "alien" or "non citizen" are often used inter changeably. It uses the terminology of "irregular" and "regular" migrants, following (a) the practice of the ILO, and (b) the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families [Art. 5(1)].

[2] See R. LILLICH, *The Human Rights of Aliens in Contemporary International Law*, Manchester, 1984, p. 3 and footnote 7. The passage reads in full: «It is like a giant (though as yet unassembled) juridical jigsaw puzzle, whose pieces have been found in such disparate areas of law as the medieval law merchant, the practice of Western European states in the headiest days of imperialism, the commercial treaty practice of the 19 and 20 centuries, the arbitration experiences of the post-World War I era, the general international law of human rights which has evolved since World War II, the regional human rights initiatives … and various other international, regional and even State efforts».

abusive migration – smuggling and trafficking – as offences under international law, and changes to international maritime law; it considers implementation through international monitoring and reporting procedures, and issues of national integration and protection. It also considers the law and practice of consular protection from a human rights perspective. In a final section, it looks to the future, and identifies recent initiatives, as well as the dilemmas inherent in building an international protection regime.

It may be helpful at the outset to identify five criteria against which progress towards a migrant protection regime can be assessed. There must be clarity as to the rights to be enjoyed by all migrants; these rights must be both formally accepted by states, and there must be a political will on the part of states to respect them in practice; there must be effective implementation mechanisms, and the rights should be articulated in clear and simple terms.

There is no simple definition of what "protection" means for international migrants. Perhaps parallels may usefully be drawn with other forms of international protection: of refugees, of IDPs, of civilian populations in time of conflict, or of children. In all of these cases, international agencies – UNHCR, ICRC, and UNICEF – work operationally with governments to ensure that individual rights are protected. Their object is to obtain full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. human rights, humanitarian and refugee law), to prevent or stop abuse and/or alleviate its immediate effects, to restore people's dignity and to ensure adequate living conditions[3].

Protection is thus a practical activity, but one which takes place within a legal framework. Accordingly, this paper will focus first on the rules of international law which protect migrants' rights throughout the migration cycle: in transit, on arrival, during their stay in another country, and in situations where they are required to leave it. A starting point is to review the current situation.

1. The Current Situation

1.1 The Dimensions of International Migration

The context for any review of migrant protection is one of rising international migration – from an estimated 75 million in 1960 to over 190 million in 2005. During 2000-2005, more developed regions gained some 2.6 million migrants annually from the less developed world, of which over one million came to Europe[4]. Between 1960 and 2000 the number of women migrants more than

[3] See, e.g., ICVA, *What is Protection? A definition by Consensus*, A Background Note for the Workshop on the Development of Human Rights Training for Humanitarian Actors, 2001.
[4] UN POPULATION DIVISION, *International Migration 2006*, New York, 2006.

doubled, from around 35 million to some 85 million[5], and now almost half all international migrants are women. Many migrants move illegally through transit states and enter their new countries irregularly. At any point in time, around 2.5 million women, men and children are victims of trafficking[6]. These changes in the scale and character of international migration have stimulated – and required – stronger protection for migrants' rights.

In comparison, refugee numbers have dropped; the number of recognised refugees declined to around 8.4 million at the end of 2005, the lowest level since 1980. Between 1999 and 2005 UNHCR recorded a drop of one third in the global refugee population, which it attributes to fewer armed conflicts, and more large scale repatriations[7]. More restrictive approaches by countries of asylum in recognizing refugees clearly also play a part in these shrinking numbers.

A major cause of migration is the extreme asymmetry between the developed and much of the developing world in economic prosperity, social conditions, security and human rights. The rise in the number of international migrants has been encouraged by economic globalisation, in which goods, services and capital move freely, but barriers to the cross-border movement, particularly of unskilled workers, remain. Globalisation of markets has not been accompanied by globalisation of the work force. This has resulted in a discordance between the number of individuals who wish to migrate and the legal opportunities for them to do so, with the result that the number of irregular migrants is high in many countries, that many have been trafficked or smuggled, and that there has been a "steady deterioration" in their human rights situation[8]. The most acute problems of protection concern irregular migrants.

Migrants as a group are specially vulnerable in human rights terms because they are not citizens of the country in which they live, they have crossed an international border and – unlike citizens – they may generally enter and live in another country only with the express consent of its authorities[9]. This dissociation between nationality and physical presence has many consequences. As strangers to a society, migrants may be unfamiliar with the national language, laws and practice, and so less able than others to know and assert their rights. They may face discrimination, and be subjected to unequal treatment and unequal opportunities at work, and in their daily lives. In some countries, national non discrimination laws do not protect migrant workers. In any case migrants are more

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[5] UNITED NATIONS, *Women and International Migration. Report of Secretary General*, A/59/287/Add.1, para. 29.
[6] ILO, *Global Alliance against Forced Labour: Global Report*, 2005, p. 46.
[7] UNHCR, *Global Refugee Trends*, June 2006, p. 3. In addition there are some 4.3 million Palestinian refugees under the responsibility of UNRWA.
[8] UN COMMISSION ON HUMAN RIGHTS, *Interim Report on the Human Rights of Migrants*, A/59/377, 2000, para. 30.
[9] Exceptions include those with diplomatic status.

likely to work in sectors where labour standards are not applied, or even not applicable.

They may also face racism and xenophobia. At times of political tension, they may be the first to be suspected – or scapegoated – as security risks. By linking anti-terrorism and immigration control in the context of the "war on terror", many governments have encouraged – however unintentionally – xenophobia against migrants and refugees. This xenophobia may in turn translate into more restrictive immigration laws, which separate families where husbands, wives and children have different nationalities.

While regular migrants, including most skilled professionals, may experience some of these vulnerabilities, serious rights violations are very significantly higher in the case of irregular migrants. Where a migrant enters another country illegally, or enters legally and subsequently loses any legal immigration status, his or her vulnerability to abuse and exploitation sharply increases. Irregular migrant workers, many of whom are unskilled, "easily fall prey" – in the words of the ILO – to extortion and are highly vulnerable to abuse and exploitation by employers, migration agents, corrupt bureaucrats and criminal gangs. Women in an irregular status are doubly vulnerable owing to the high risk of sexual exploitation. Victims of smuggling and trafficking may find themselves both irregular in legal terms, and in situations of exploitation at the hands of the traffickers or smugglers. The more illegal the status of a migrant, the greater are the dangers s/he may face on the journey, the higher the risk that s/he will be exploited, or even enslaved by traffickers and unscrupulous employers on arrival, and the greater is the impunity of those who violate his or her rights.

Tightened border controls, to prevent irregular entry, appear to have had a negative impact on migrants' rights in situations where migrants are smuggled or trafficked along more dangerous travel routes in order to avoid border controls. There is evidence, to take one example, that tougher controls on the US/Mexican border have failed to reduce the number of persons who crossed the border irregularly, but have rather led migrants to run more risks, including using the "services" of smugglers and traffickers.

«The strict border controls near urban areas in California and Texas have meant that those who try to cross the border do so in uninhabited and relatively un-patrolled areas in Arizona, New Mexico and Texas. As a result, more and more people have died due to asphyxia, hypothermia, dehydration, accidents or drowning, when trying to cross the inaccessible and un-patrolled areas such as deserts, … rivers, canyons, streams and mountainous zones […]. From 1993-1997 the number of deaths … tripled»[10].

[10] IACHR, *Inter American Rapporteur on Migrant Workers. Annual Report 2003*, paras. 117-118.

A comparable development is reported on the EU/North African border, where tightened police controls in the Straits of Gibraltar, northern Morocco and the Canary Islands have forced traffickers into finding new, longer and more dangerous routes into Europe[11]. When Italian authorities rescued one small boat, which had run out of fuel, food and water on its journey from North Africa, they found that only 15 of an original boatload of 85 were still alive, and were thought to be Somalis, being smuggled from Libya. They described the vessel carrying the dead and survivors as resembling «a scene from Dante's Inferno»[12].

These new and complex dimensions of international migration have spurred a greater recognition of the need to protect migrants, and to strengthen institutions of protection. This gained momentum after 1990, when the UN General Assembly adopted the Convention on the Rights of All Migrant Workers (CMW), a treaty which gives protection to migrant workers, regardless of their legal status. The Human Rights Commission then identified migrants as a vulnerable group, and appointed a Special Rapporteur in 1999. An expert study by the Sub Commission mapped the protection of migrants – "non citizens" – rights under international law and found a disjuncture between theoretical rights and the reality of migrants' lives[13]. The UN human rights treaty bodies then began to apply the treaties more systematically to migrants; they went beyond the "classic" civil rights to confirm their entitlement to social and economic rights such as essential health care, education, and adequate housing. Two international criminal treaties, the Palermo Protocols, were adopted in 2000, and these require states – on the one hand – to prosecute trafficking and migrant smuggling as international crimes, and – on the other hand – to protect the rights of smuggled and trafficked migrants. In 2006, protection for shipwrecked migrants was strengthened.

Feminisation of labour migration from poorer countries has meant that

> [i]n astonishingly large numbers, women are migrating great distances against international boundaries to engage in poorly remunerated labour that isolates them in a subordinate position in a private realm, exposing them to acute risks of physical and psychological violence and to expropriation of their economic gain[14].

A significant number are forced migrants who have fled conflict, persecution, environmental degradation, natural disasters and other situations that affect their habitat, livelihood and security. Distinctions between trafficked and voluntary

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[11] *Migrants Saved after Canaries Bid*, in «BBC World News», 19th March 2006.
[12] «New York Times», 21st October 2003.
[13] UN COMMISSION ON HUMAN RIGHTS, *Final Report on the Rights of Non Citizens*, E/CN.4/Sub.2/2003/23, 2003.
[14] UNITED NATIONS COMMISSION ON HUMAN RIGHTS, *Report of the Special Rapporteur on Violence against Women*, E/CN.4/1997/47, para. 123.

migrants are difficult to make because – in the case of domestic work – both may end up in comparable situations of exploitation, violence and abuse[15].

It must be stressed that international protection norms, which are accepted by – and binding on – all states, are of particular importance in the case of international migration. This is because of the political controversy which often surrounds migration, and because of the different – often opposing – perspectives through which it is seen in countries of origin and countries of destination. In the former, discussion tends to centre on ways to restrict the entry of aliens, on the social, cultural and economic consequences of immigration and on which social services immigrants may legally be denied. In countries of origin, the focus is rather on the basic rights of migrants, as fellow nationals, who are at risk of being abused and exploited, and how they can be protected[16].

1.2 International Law and the Protection of Migrants

In the sixty years since the UDHR, international protection for migrants has developed along a number of legal tracks: international human rights, international labour and international criminal law, international maritime law and – by far the oldest – consular protection by the state of nationality.

While these protection norms are rooted in different treaty regimes, and operate separately, they are nonetheless mutually complementary. This can be seen in the various international protection measures taken to address the situation of women migrant domestic workers in one Middle Eastern state, which are referred to below: by treaty bodies, by special rapporteurs and through the practice of consular protection.

1.2.1 International Human Rights Law

The UN Charter and the Universal Declaration of Human Rights gave a vision of a world grounded in the rule of law, and respect for human rights. Respect for fundamental rights would be an imperative for all governments. The Universal Declaration was carried into international law in 1976 through two Covenants, one on Civil and Political Rights and the other on Economic, Social and Cultural Rights. They are the cornerstone of a body of international and regional agreements, which now regulate the treatment of individuals in international law.

This body of international treaty law has a number of characteristics. First, it is universal in scope, and recognizes that the «essential rights of man are not derived

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[15] UNITED NATIONS, *World Survey on the Role of Women in Development. Report by the Secretary General. Addendum: Women and International Migration*, A/59/287/Add.1.
[16] IACHR, *Second Progress Report of the Special Rapporteurship on Migrant Workers*, 2000, #33.

from the fact that he is a national of a certain state, but are based on his human personality»[17]. Second, it opened a new chapter in international affairs in that it did not concern the traditional function of international law, that of regulating relations between sovereign states. It rather sought to regulate the relationships between the state and individuals. Third, the standards and guarantees offered to the individual were agreed and accepted by the states themselves. Fourth, states – again by agreement – established systems of international accountability providing for systematic and regular assessment of how they implement their commitments on human rights.

The human rights treaty system is today based on seven core UN human rights treaties: ICCPR, ICESCR, CERD, CEDAW, CAT, CRC, and CMW[18]. The principal objective is to ensure human rights protection at the national level through the implementation of the human rights obligations contained in the treaties. The treaties set legal standards for the protection of human rights and create legal obligations for states to implement human rights at the national level. How states comply with these standards is monitored by seven treaty bodies, composed of independent experts elected by states. All consider reports, and five consider individual petitions.

In parallel, the Commission on Human Rights[19] has set standards, and applied legal norms to thematic and country situations through its special mechanisms and its Sub Commission.

1.2.2 Migrants' Rights: Protection under the International Human Rights Treaties

International law does not limit a state's sovereignty to define its migration policy, and control its borders; like Malaysia in 2004, it may decide to expel irregular migrants, or like Spain in 2005, it may decide to regularize their status. But policies for those who are within its territories must be informed by three principles: universality, general equality between migrants and citizens in their enjoyment of rights, and protection from forcible removal to countries where individuals would suffer "irreparable harm".

Through their interpretative comments and recommendations, the treaty bodies have emphasized the general rule that international human rights law applies equally to migrants and citizens. The principle of non discrimination does not

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[17] *American Declaration of the Rights and Duties of Man. Preamble*, 1948.

[18] International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of All forms of Discrimination against Women (CEDAW); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); and International Convention on the Protection of the Rights of All Migrant Workers and their Families (CMW).

[19] In 2006, the Commission on Human Rights was replaced by the Human Rights Council.

mean that migrants have exactly the same entitlements as nationals, but any distinctions must both serve a legitimate objective, and be proportional to achieving that objective. Through their examination of country reports, they identify deficits in migrant protection in different countries; through their conclusions the treaty bodies identify the steps which States Parties should take to comply with their treaty obligations; and through decisions in individual cases they are starting to develop a jurisprudence.

Although neither the Universal Declaration nor the human rights treaties make specific reference to aliens, they are universal in scope. The UDHR affirms that «all human beings» are born «free and equal in dignity and rights», and that «everyone» has the right – e.g. to life, liberty and security of person, and that «no-one» shall be – e.g. – subjected to arbitrary arrest or detention. The treaties protect the rights of «all» individuals within the state's territory and jurisdiction, and the treaty bodies are engaged in clarifying which rights may be restricted to citizens, when states may discriminate between citizens and non citizens, how far those who are not lawfully in the country – irregular migrants – enjoy equal protection, and what rights may be limited for non citizens in the context of immigration.

In order to clarify the legal position, the UN Sub Commission commissioned a study on the rights of non citizens[20]. After reviewing international and regional human rights law, and jurisprudence, and the views of Treaty Bodies[21], David Weissbrodt, the study's author, concluded that: «[t]he architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights unless exceptional distinctions … serve a legitimate State objective and are proportional to the achievement of that objective»[22].

Thus the general rule is that each of the rights under, for example, the ICCPR must – with narrow exceptions – be guaranteed without discrimination between aliens and citizens. The exceptions include the right of states "narrowly" to draw distinctions between citizens and non citizens with respect to political rights, and to restrict freedom of movement. Aliens have no right to enter or reside in a

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[20] See note 13. Thus Weissbrodt's findings led CERD to revise its 1993 General Recommendation on the rights of non citizens which had interpreted art. 1.2 of the Convention as allowing discrimination between citizens and non citizens. Art. 1.2 reads: «[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a SP … between citizens and non-citizens». The 1993 GR had advised SPs that the Convention (art. 1.2) allowed them to "except" from the definition of racial discrimination «actions … which differentiate between citizens and non citizens». The 2004 GR takes a radically different position, and states that art. 1.2 «must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms … enunciated … in the UDHR, the ICESC, and the ICCPR».

[21] See, e.g., CERD, *Response to the Questionnaire Sent by the Special Rapporteur on the Rights of Non-Citizens*, CERD/C/62/Misc.17.Rev.3, 2003.

[22] *Ibidem*, Executive Summary; para. 6.

State's territory and may be admitted subject to conditions relating, for example, to movement, residence and employment. However, once within the territory of a state, non citizens are entitled to the rights set out in the Covenant.

> Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of the person[23].

These rights are not limited to citizens, «but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party»[24].

Guarantees against racial discrimination «apply to non citizens regardless of their immigration status»[25], states must ensure the realization of all rights in the CRC «for all children in their jurisdiction»[26].

> This enjoyment of rights … is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also

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[23] UN HRI, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies. General Comment No. 15 – The Position of Aliens under the Covenant*, HRI/GEN/1/Rev.5, 2001, p.128, paras. 2, 5-7. Para. 7 continues: «Aliens may not be imprisoned for failure to fulfill a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant».

[24] HRC, *The Nature of the General Legal Obligation Imposed on States Parties. General Comment No. 31*, 2004, para. 10.

[25] CERD, *Discrimination against Non Citizens*, General Recommendation XXX, 2004, para. 7.

[26] UN HRI, *Compilation of General Comments and General Recommendations*, cit., *General Comment No. 3 – The Nature of States Parties Obligations*, para. 1.

be available to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness[27].

Thus, although international human rights law does not prohibit all distinctions between citizens and migrants, differential treatment is only allowed if it does not amount to discrimination, and can be justified on reasonable and objective grounds.

Migrants are also protected against «removal – through extradition, expulsion or deportation – to a country where there are "substantial grounds" for believing s/he would be tortured, or would suffer "irreparable harm"»[28]. Refoulement of refugees is prohibited[29].

The GCIM summarised the principle of migrant protection in these terms: «entering a country in violation of its immigration laws does not deprive migrants of … fundamental human rights, nor does it affect the obligation of states to protect [irregular] migrants»[30].

1.2.3 Convention on the Protection of the Rights of All Migrant Workers

The Convention came into force in 2003. It sets out the different rights to be enjoyed by migrant workers, regular and irregular. It addresses particular problems such as exploitation and discrimination in the workplace, and smuggling of persons, and it identifies the economic and social rights to which migrant workers are entitled. It is explicit that irregular migrants have no right to regularize their status.

Rights which are protected for all migrant workers include: the right to life; prohibition of torture; prohibition of inhuman or degrading treatment; prohibition of slavery and forced labour; freedom of opinion and expression; freedom of thought conscience and religion; right to join a trade union; prohibition of arbitrary or unlawful interference with privacy, home, correspondence and other communications; prohibition of arbitrary deprivation of property; the right to liberty and security of persons; safeguards against arbitrary arrest and detention; recognition as a person before the law; right to procedural guarantees; prohibition of imprisonment, deprivation of authorization of residence and/or work permit and expulsion merely on the ground of failure to fulfill a contractual obligation; protection from confiscation and/or destruction of *id* and other documents; protection against collective expulsion; right to recourse to consular or diplomatic

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[27] CRC COMMITTEE, *Treatment of unaccompanied and separated children outside their countries of origin. General Comment No. 6*, 2005, para. 12.
[28] CAT, art. 3.1; ICCPR, *GC 31*, para. 12.
[29] *Convention on the Status of Refugees*, art. 33.
[30] GCIM, *Migration in an Interconnected World: New directions for action*, 2005, pp. vii, 4 and 55.

protection; principle of equality of treatment in respect of: remuneration and other conditions of work and terms of employment; social security; and right to receive urgent medical care; right of a child of a migrant worker to a name, registration of birth and nationality; access to education on the basis of equality of treatment; respect for the cultural identity of migrant workers and members of their families; right to transfer in the state of origin their earnings, savings and personal belongings; right to be informed on the rights arising from the Convention and dissemination of information[31].

While the Convention does not depart substantively from the fundamental rights protected in the ICCPR, CESCR, and other human rights treaties, it does articulate these rights in ways which take into account the particular situation of migrant workers and their families. Thus, where a migrant worker is deprived of his liberty, the state must « pay attention to the problems that may be posed to his family». The Convention makes unauthorised confiscation of documents an offence, and gives migrant workers the right to information about their conditions of admission.

The Convention then gives additional rights to regular migrant workers: for example to be "temporarily absent" – i.e. to make return visits home; to equality of access to education, housing, social and health services, subject to the requirements of national law, and to transfer earnings and savings – remittances – to their home countries[32].

In its last substantive part, the Convention sets out a framework for promoting "sound, equitable, humane and lawful" conditions for the management of international migration. There should be consultation and co-operation between states, and the "orderly return" of migrants, at the end of their contracts or where they are irregular. States should collaborate to "prevent and eliminate" illegal or clandestine movements, and the employment of irregular workers[33].

The Convention seeks to establish basic principles for the treatment of migrant workers, and to establish norms which contribute to the harmonisation of states' attitudes towards migration through acceptance of these basic principles.

1.2.4 Have States Agreed to Respect These Rights?

States have agreed to respect migrants' rights through their accession to the six universal human rights treaties. But because the treaties do not generally refer expressly to "aliens", "migrants", or "non citizens", many states have perhaps not realized the extent to which they are legally committed to protect the rights not

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[31] *Convention on the Protection of the Rights of All Migrant Workers*, 2003, Articles 8-35.
[32] *Ibidem*, Part IV.
[33] *Ibidem*, Part VI.

only of their citizens, but also of "all" migrants. In Europe, for example, there are many instances in which the 46 Council of Europe member states have failed to appreciate their obligations under the ECHR when dealing with irregular migrants, and as a consequence their rights and freedoms have been violated[34].

A majority – sometimes an overwhelming majority – of states are legally bound in this way. The *average* number of states parties to six of the treaties is 166[35]: 192 states are parties to the CRC, and in the case of the ICCPR – perhaps the general standard setter – the number is 157. These states, which include all EU members, have thus voluntarily accepted the duty to protect migrants' rights, with the limited exceptions referred to above, as an obligation under international law. But this is not yet true of the CMW, which has been ratified by only 34 states[36].

Although most states have thus formally undertaken to protect migrants' rights, the reality is very different. In his study, Weissbrodt found a "disjuncture" between the rights that international human rights law guarantees to non citizens and the realities faced by migrants. In many countries there were institutional and endemic problems. He drew particular attention to violations of non citizens' rights in response to fears of terrorism, commenting that the "narrow exceptions" to the principle of non discrimination did not "justify such pervasive violations".

1.2.5 Implementation through the UN System

This "disjuncture" between legal principle and human reality is addressed within the UN system in three principle ways: through treaty body monitoring, in the work of the Human Rights Commission/Council's special rapporteurs, and by UN agencies such as UNICEF, the ILO, and UNHCR.

- *Treaty Body Review of States' Practice*

The process of reporting means that a state must review what steps it has taken to bring its national law and practice into line with the treaty, and the preparation of reports provides a platform for national dialogue on human rights. When states prepare their reports to the TBs, they are asked to provide information on the ways in which national laws and policies give effect to the treaty's provisions and protect migrants. When they then meet with TB expert members, they may be questioned about apparent violations.

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[34] J. MACBRIDE, *Irregular Workers and the ECHR*, Council of Europe Parliamentary Assembly, AS/Mig/Inf(2005) 21, 2005, para. 185.

[35] At 15th October 2006, CERD: 170 SPs; ICESCR: 154 SPs; CEDAW: 184 SPs; and CAT: 141 SPs.

[36] The reasons for this are examined in A. PECOUD, P. DE GUCHTENEIRE, *Migration, Human Rights and the UN: An Investigation into the Low Ratification Record of the UN Migrant Workers Convention*, in «Global Migration Perspectives», 2004, 3.

Before meeting with state representatives, Treaty Bodies often identify issues on which they would like further information, and these lists of issues are helpful in highlighting problems in the practical application of the particular treaty. Thus, after the Committee on Migrant Workers had reviewed Mali's report, it asked the government to provide further information on national laws and practice. Its questions included: whether migrant workers, including irregular migrants, could freely join trade unions; how detained migrants could access a court to challenge the lawfulness of their detention; what were the procedures for confiscation of identity documents, and for expulsion; what were the arrangements for the provision of urgent medical care to regular and irregular migrants; what were the measures to ensure the right of each child to a name, registration of birth and a nationality; whether the right to education is ensured to the children of irregular migrants; whether mechanisms exist for the transfer of migrants' earnings and savings; and what was the State's strategy for tackling illegal and clandestine movements, and the employment of irregular migrants[37].

Similarly, CERD has questioned a number of states – Qatar, Tonga, Egypt and Cyprus – about discrimination in relation to marriage between citizens and non citizens, and children's acquisition of citizenship. CERD and CESC have encouraged states such as Saudi Arabia and Israel to include migrants in national health care systems, and have welcomed measures taken by South Korea to give children of regular and irregular migrants equal access to local schools[38].

Monitoring by Treaty Bodies has also focused on the expulsion and deportation of migrants. Thus the Committee against Torture questioned Belgium about its compliance with the Convention's bar to refoulement (Article 3) in cases where there are "substantial grounds" for believing an individual would be subjected to torture; and Estonia about time limits on the detention of illegal immigrants under expulsion orders. The Human Rights Committee questioned Switzerland about the use of excessive force during deportation. The CRC questioned Spain about ill treatment of unaccompanied minors during expulsion.

Although the TBs have little follow up, and no implementation, capacity their findings may later be used by regional and national courts in enforcement proceedings. Thus the CRC's recommendation that the Dominican Republic register – as of right – the birth of children of Haitian migrant families was cited by the Inter American Court of Human Rights in its important judgment that the DR had discriminated against migrants in their right to a nationality (See below)[39].

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[37] CMW, *List of Issues for the Initial Report of Mali*, CMW/C/MLI/Q/1, 27th December 2005.
[38] References on file with the author.
[39] IACtHR, *Yean and Bosico*, Series C, No. 130, paras. 169 and 237.

- *UN Monitoring Mechanisms*

Fact finding is a key component of protection, and within the UN human rights system there is now a growing body of reporting on migrants' rights. This has developed through the "special procedures" created by the Human Rights Commission (now the Human Rights Council), and especially through the reports of the Special Rapporteur on the Human Rights of Migrants (SRHRM), and other mandates, such as those on trafficking, indigenous people, violence against women, the sale of children, and the right to health[40].

The SRHRM[41] is mandated to examine "ways and means" to overcome "obstacles" to the full and effective protection of the human rights of migrants, including difficulties for the return of migrants who are undocumented or in an irregular situation. The SR requests and receives information on individual violations; recommends measures of prevention and remedy; and promotes the effective application of international norms, paying special attention to the occurrence of "multiple discrimination" and violence against migrant women. To this end, the SR sends appeals to governments about violations, makes country visits, reports to the General Assembly and to the Commission (now the Council), and makes recommendations on the global state of protection of migrants' human rights.

During 2005 the SRHRM communicated allegations of abuse to 34 countries; these cases illustrate, and even offer a "typology" for, situations in which the rights of migrants are most frequently abused.

They included: assault, rape and death at the hands of employers; deportation of regular migrant workers; imposition of excessive working hours (up to 16 hours a day) and the refusal to pay wages; confiscation of passports and identity papers by the employer; many forms of trafficking; violent racist attacks; misleading or fraudulent information from recruitment agencies, and the failure by an agency to act on complaints of ill treatment prior to the death of the worker; access to health benefits being made dependant on a trafficked worker's willingness to testify against the trafficker; lengthy periods of detention; failure to pay court awarded compensation to a trafficked person because she had been deported and had no local bank account; assaults by an employer on workers to deter them from complaining to a workers' rights Ngo; refusal by an employer to allow sick leave after surgery following an accident at work; detention in the company compound

[40] UN GENERAL ASSEMBLY, *Resolution 60/251 Establishing the New Human Rights Council*, 15th March 2006, requires the Council to «maintain a system of special procedures, expert advice and a complaint procedure».

[41] The mandate was created in 1999 by the Commission on Human Rights (Resolution 1999/44), and extended in 2005 (Res. 2005/47). The two holders have been: Mr. J.A. Bustamante (Mexico), since August 2005 (Res. 2005/47); Ms. Gabriela Rodríguez Pizarro (Costa Rica), since 1999.

of workers, who had sought payment of unpaid wages, without food or water, after the telephone line had been cut[42].

On a visit to Lebanon the Special Rapporteur on Trafficking investigated the situation of migrant domestic workers. She reported – inter alia – that as soon as a domestic migrant worker disembarked from her plane, General Security Department officials took away her passport. Rather than give it back to her, they will give it to her employers who will usually confiscate it for the duration of her stay to control her. Without her passport, she is liable to arrest, criminal conviction as an undocumented migrant, followed by deportation[43].

1.2.6 International Criminal Law: Trafficking and Smuggling

If one side of the protection coin is strengthening human rights, the other is the criminal prosecution of those responsible for smuggling and trafficking. The two Palermo Protocols make trafficking in persons, and smuggling of migrants as international crimes. Adopted in 2000, they have now been ratified by over 100 states[44], including states such as Italy and Spain which are on the "frontline" in receiving migrants who have been trafficked and smuggled by sea from North Africa. The protocols are unusual in that they combine criminal, human rights and maritime law.

The key elements of trafficking are movement, the presence of exploitation and the fact of coercion. Consent to the exploitation is irrelevant where any of these means have been used, or where the victim is under 18[45]. Trafficking is sometimes described as a crime against people. The key elements of smuggling are illegal border crossing by the smuggled person, and receipt of a material benefit by the smuggler. It is sometimes seen as a crime against the state[46].

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[42] UN COMMISSION ON HUMAN RIGHTS, *Report of the Special Rapporteur on Human Rights of Migrants. Addendum 1*, E/CN.4/2006/73/Add.1, 2006.

[43] See generally *Idem, Annual Report of the Special Rapporteur on Trafficking in Persons, Especially in Women and Children. Addendum 3*, E/CN.4/2006/62/Add.3, 2006, paras. 28-37.

[44] Trafficking Protocol had 108 parties, and the Smuggling Protocol had 101 parties at 15 October 2006.

[45] The offence is defined as: «the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include … the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs» (*Smuggling Protocol*, art. 3).

[46] The offence is defined as: «the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident».

Both protocols require states to protect migrants, as well as prosecuting their traffickers and smugglers, and are clear that migrants should not be prosecuted because of their illegal entry. But they differ in the protections they afford migrants. The Trafficking Protocol sets out a broad range of protective measures including measures to provide for the physical, psychological and social recovery of victims and enabling trafficking victims to remain in the country. There is considerable political will to implement this Protocol, and planning and legislative change are relatively advanced in a number of countries[47].

The Smuggling Protocol also requires states to combine prosecution and protection. But much less attention has been given to the protection of smuggled migrants. The protection provisions are nonetheless of great importance, given the physical dangers and rights violations which are inherent in much smuggling. The Protocol specifies – inter alia – that states must to take «all appropriate measures … to preserve and protect the rights of smuggled persons … under international law, in particular the right to life, and the right not to be subjected to degrading treatment or punishment»[48].

1.2.7 International Maritime Law

The irregular cross border movement of migrants, particularly when they are trafficked and smuggled, involves dangerous journeys at sea, and there has been a high death toll of migrants and asylum seekers using unseaworthy and overcrowded vessels. In response, international maritime law has been strengthened to increase the protection duties of governments, ship owners and ship masters.

The basic protection duty of states under the Convention on the Law of the Sea is to require the masters of ships flying their flag to assist and rescue persons found at sea, and in distress; and coastal states must maintain search and rescue services[49]. Rescue includes delivering those in distress to a place of safety[50]. States must make necessary arrangements for the rescue of persons in distress around its coasts[51].

Changes came into effect in 2006, which strengthen the obligation to assist, «regardless of the nationality or status», or «the circumstances in which they are

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[47] See, e.g., EUROPEAN COMMISSION, *Report of the Experts Group on Trafficking in Human Beings*, ,2004.
[48] *Smuggling Protocol*, art. 16.1, and see arts. 9, 14 and 15.
[49] «Every state shall require the master of a ship flying its flag, insofar as he can do so without serious danger to the ship, the crew or the passengers … to render assistance to any person at sea in danger of being lost; […] to proceed with all possible speed to the rescue of persons in distress» (*UN Convention on the Law of the Sea*, art. 98).
[50] Search and Rescue Convention.
[51] Safety of Life at Sea Convention.

found», and prevent interference with the professional judgment of a ship's master. States are to work together to assist ship's masters in delivering rescued persons to a place of safety; owners, charterers «or any other person» «shall not prevent or restrict» masters from taking decisions which, «in the master's professional judgment, is necessary for safety of life at sea»[52]. Explaining the changes, the Imo comments that «[i]n an age when ships' captains are constantly asked to improve efficiency and cut costs, it remains vital that they continue to rescue those found in grave peril on the sea – whoever they are and whatever their reason for being there».

1.2.8 International Labour Standards[53]

ILO labour standards focus on labour rights, including forced labour and exploitation. They also provide specific protection for migrant workers. Convention 97 sets forth the rights of migrants in relation to – e.g. – remuneration, social security, taxation, access to trade unions, and transfer of personal belongings. Convention 143 sets out the rights of irregular migrants, and rights to equal treatment with nationals[54]. However, neither treaty is widely ratified by states. More recently, the ILO's 1998 Declaration on Fundamental Principles and Rights at Work (ILO Declaration), binds *all* ILO members, protects all migrant workers regardless of status, and commits all ILO members to eliminate forced labour. The Declaration had led to excellent research by the ILO on irregular labour migration[55].

1.2.9 Regional Protection Systems

Migrants' rights are also protected under regional treaties, which are interpreted and applied through the case judgments and advisory opinions from the European and the Inter American Courts of Human Rights (ECtHR and IACtHR), and the African Commission.

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[52] Amendments to SOLAS Chapter V, in effect 1 July 2006.

[53] See generally V. LEARY, *Labor Migration*, in T.A. ALEINIKOFF – V. CHETAIL (eds.), *Migration and International Legal Norms*, Cambridge, 2003, pp. 227-239.

[54] Convention 97 on Migration for Employment (42 ratifications); Convention 143 on Migrants in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (18 ratifications).

[55] Labour standards developed within the ILO had a profound influence on the content of the international human rights treaties, including the ICCPR, the CESCR and the CMW. Rights in employment, such as fair wages, safe and healthy working conditions, reasonable working hours and trade union rights, are now protected by international human rights law as well as by international labour standards. The two systems – which protect workers' rights under ILO labour standards, and which protect human rights under UN and regional treaties – are complementary and mutually reinforcing See – e.g. – See CESCR, A.7 and A.8.

- *The European Human Rights System*

The most significant body of case law on the civil and political rights of migrants is from the ECtHR, under the ECHR. It binds the 46 states of the Council of Europe, including receiving states (notably EU members), and "sending" states (in south eastern Europe, Russia and the Ukraine).

Since – inevitably – this case-law addresses only those issues which have been taken to the Court through individual complaints, it does not yet provide a general interpretation of the Convention's application in the field of migration. Nor has the ECHR affected member states' formal control over their borders. Nonetheless, the Court's decisions have established principles in many of the areas in which the actions of the state typically affect the rights of migrants.

These include discrimination on grounds of race or ethnicity in admission, and in the enjoyment of rights after entry; infringements of the right to family and private life; and removal, both in the methods used, and in situations where the individual would face – e.g. – torture, or inhuman or degrading treatment proscribed under the Convention. Thus while the Convention does not create a right of entry, it may prevent the removal, or deportation, of a migrant from a member state – for example where it is the home of his immediate family, and removal would be an infringement of the right to respect for family life[56].

As the European Court has grappled with the competing interests of the state in deporting convicted criminals, and of the rights of migrants who have established their lives in another country, so it has had to take into account the effect of deportation on private and family life [under A.8]. The competing interests are evident in this extract from a 1995 judgment of the Court.

> A state which for reasons of convenience accepts migrants workers and authorises their residence, becomes responsible for the education and social integration of the children of such immigrants as it is for the children of its "citizens". Where such social integration fails, and the result is anti social or criminal behaviour, the state is also under a duty to make provision for their social rehabilitation without sending them back to their country of origin, which has no responsibility for the behaviour in question and where the possibilities of rehabilitation in a foreign social environment are virtually non existent. The treatment of offenders whether on the administrative or criminal level should not therefore differ according to the national origin or the parents in a way which – through deportation – makes the sanction severe in a clearly discriminatory manner[57].

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[56] See generally J. MACBRIDE, *Irregular Migrants and the European Convention*, cit.. ECHR cases under Article 8 are summarised in d. WEISSBRODT, *Progress Report on the Rights of Non Citizens. Addendum 2*, E/CN.4/Sub.2/2002/25/Add.2, 2006, paras. 36-52.

[57] ECHR, *Nasri v. France. Judgment of Judge Morenilla*, 19465/92 (1995) ECHR 24, 1995. Judge Morenilla is expressing a general view, although the facts of the case were unusual, and concerned an Algerian, born deaf and dumb, who came with his family to France at the age of 5.

Although there is no European reporting and fact finding mechanism comparable to that established in the Inter American region, the European Committee for the Prevention of Torture plays an important role through its fact finding and standard setting in relation to detention. The Committee's mandate is to examine «the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment»[58]. The Committee's country visits include inspection of detention centres for migrants in countries of destination such as France and the UK, and countries of transit such as Malta.

Recently, Council of Europe parliamentarians have taken steps to clarify the rights of irregular migrants, by setting out the "minimum" civil, political, social and economic rights to which irregular migrants are entitled in the Council's 46 member states, by virtue of the Echr and other regional and international treaties. Clarification was needed because the «large number of disparate instruments» and the varying number of signatures and ratifications left "a web of uncertainty" as to the minimum rights of irregular migrants[59].

- *The Inter American Human Rights System*

Over the last decade, the Inter American human rights system has made setting standards on the rights of migrant workers a priority. In contrast to the European system, its focus has been on social and economic, as well as on civil and political, rights. [60] The Inter American Court of Human Rights is the source of a number of important decisions and advisory opinions, including on the employment rights of irregular migrants, equality in access to nationality, and on consular protection [see below at xxx].

- *Employment Rights*

The case was taken to the Court after a ruling by US national court that a Mexican irregular worker, who had been unfairly dismissed from his job [for trying to establish a union], was not entitled to back pay for the work he had performed. Mexico asked the Court to review the refusal of back pay. While Mexico did not dispute that states may control entry and residence, and that migrants may be treated differently from nationals for purposes such as voting, it argued that all workers must have their labour rights respected and protected. This followed from the basic obligation of states to ensure the human rights of everyone within their jurisdiction, and from the principle of non discrimination. The Court upheld the claim to back pay, saying that a migrant «acquires rights

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[58] *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, art. 1.

[59] COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, *Human Rights of Irregular Migrants*, Resolution 1509 , 2006.

[60] See generally B. LYON – S. PAOLETTI, *Inter American Developments on Globalization's Refugees: New Rights for Migrant Workers and Their Families*, in «European Yearbook of Minority Issues», 3, 2003/2004, pp. 63-87.

that must be recognised and ensured because he is an employee irrespective of his regular or irregular status … These rights are a result of the employment relationship»[61].

- *Access to Nationality*

The case concerned two girls of Haitian descent, who had been born and their lives in the DR, but were denied birth registration, could not enrol in school, were refused Dominican nationality and so rendered stateless. The Court ruled that governments may not discriminate on the basis of race in granting citizenship, and ordered the Dominican Republic to reform its birth registration system, to open school doors to all children, including those of Haitian descent, and to pay monetary damages. The fact that a person had been born in the state was «the only fact that needs to be proved for the acquisition of nationality» if the individual would otherwise be stateless[62].

The states of Latin and Central America are "sending" as well as "receiving" states, and are aware of the vulnerability of their nationals when they work abroad. This may have informed their decision to establish a Rapporteur on Migrant Workers, who – like the UN SRHRM - makes country visits within the region, responds to individual cases, and recommends measures to be taken by states. Reports have drawn attention to general problems affecting migrants, including xenophobia, lack of due process, lengthy administrative detention in bad conditions, in addition to smuggling and trafficking. As well as calling on states to ratify the CMW, he has recommended that the states of origin, transit and destination in the Inter American region consider drafting their own regional treaty to protect migrant workers[63].

1.2.10 National Protection

Under international law, states have both positive and negative duties. They must refrain from violating the rights protected in the treaties, and must protect individuals not just against violations by its officials, but also against violations by private persons, including, for example, employers. They must also take «legislative, administrative, educative and other appropriate measures' which will result in all branches of government respecting individual rights»[64]. While integration is not a legal concept in itself, it is both a goal and an outcome of human rights principles such as equality and non discrimination. Human rights principles can contribute in different ways to integration; economic, social and

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[61] INTER-AMERICAN COURT OF HUMAN RIGHTS, *Legal Status and Rights of Undocumented Migrants. Advisory Opinion*, OC-18/13, 17th September 2003, paras. 173.8 and 173.9.
[62] IACtHR, *Yean and Bosico v. Dominican Republic*, 2005, para. 156.a.
[63] IACHR, *Rapporteur Annual Report*, 2000, para. 129.5.
[64] HUMAN RIGHTS COMMITTEE, *General Comment No. 31*, paras. 4, 6 and 8.

cultural rights are particularly important as they address issues such as education, labour, housing and health which, together with the protection of family life.

One area in which there are particular tensions between international human rights law and state practice is the administrative detention of migrants. In some countries, violations of immigration regulations are criminalized, and irregular migrants are subject to criminal detention which is punitive in nature for such infractions as irregular border crossing, or overstaying their immigration leave. Other countries resort to administrative detention until deportation or removal can take place.

Although the state has general authority to decide who enters and who should be removed from its territory, at the same time it must comply with fundamental human rights principles in relation to, for example, the length of detention or irregular migrants awaiting removal, the procedural safeguards which must be in place, the conditions of detention, and ensuring judicial oversight of detention.

Tensions have been heightened by security measures taken by states in the context of anti-terrorism policies, particularly since 2001, which allow for long periods of detention of non nationals. The SRHRM has drawn attention to cases where national legislation does not specify a time limit beyond which detention should not continue if deportation cannot take place, and to situations in which laws do not provide for an automatic review of detention[65].

One UK case illustrates the role of national courts in using international human rights law to protect migrants' rights. The case concerned foreign nationals who had been detained on grounds of national security. They challenged their indefinite detention without trial, on the ground that the law applied to foreign but not to British nationals, and that it was not permissible for the state to discriminate between aliens and citizens as regards the right to liberty. The House of Lords, the highest UK court, agreed, ruling that a distinction between citizens and migrants in their enjoyment of the right to liberty amounted to discrimination. While the rights of citizens and aliens might differ in an immigration context, international human rights law – the Echr and the ICCPR – did not permit discrimination between citizens and aliens in their right to liberty. A state was «not permitted to discriminate against an unpopular minority for the good of the majority»[66].

Some states have had technical difficulties in prosecuting exploitative employers because their criminal justice systems do not yet define forced labour. The ILO has pointed out that employers may nonetheless be prosecuted by addressing such component elements as: threats or actual physical harm to the worker; restriction of movement, and confinement to the workplace or to a limited area; debt bondage, where the worker works exclusively to pay off a debt to the employer or

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[65] See generally OHCHR, *Administrative Detention of Migrants*.
[66] UNITED KINGDOM HOUSE OF LORDS, *A(FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondents)*, UKHL 56, 2004, PARA. 136.

loan, and is not paid for his or her services; withholding of payment or excessive wage reductions; retention of passports and identity documents, so that the worker cannot leave, or prove his/her identity and status; or threat of denunciation to the authorities, where the worker is in an irregular immigration status.

Each of these acts, if committed intentionally or knowingly, is likely to be a criminal offence under national law: for example, threats or actual physical harm may be prosecuted as assault; the act of withholding wages may be the criminal offence of theft, subject to proof that the worker was entitled to the wages, and that the employer intended to withhold them permanently. Similarly, withholding of passports may also be theft. In many countries the threat of denunciation to the authorities can come within the criminal law definition of blackmail[67].

1.3 Consular Protection[68]

When the Lebanon/Israeli conflict broke out in 2006, the Sri Lankan Ambassador in Beirut was reported to be going "from bakery to bakery" to buy bread for 400 domestic workers who had take refuge in the embassy. He described his shopping trip as "an unusual assignment". While it may be unusual for ambassadors to go shopping for bread, the act of assisting nationals who are aliens in a foreign country is part of a long established practice of consular protection and assistance, and as a right in international law. It is through consuls «that the state extends its protecting arm»[69].

In the Sri Lankan case, the protection needs of at least some of the domestic workers in Lebanon arose not only from the conflict, but also from the same patterns of labour and human rights violations which had been recorded by the UN SR Trafficking, which had concerned the ILO, and which the Committee on the Elimination of Racial Discrimination had asked the Lebanese authorities to prevent[70].

Before the conflict, large numbers of migrants, including around 80,000 Sri Lankan women, worked as maids and cleaners in Lebanese homes and in hotels. Some were sacked at the outbreak of hostilities when their employers fled the country. Others were in Lebanon illegally, because their contracts expired or because they had escaped from abusive employers who – in the Ambassador's words – « refuse to give their passports or pay their salaries»; they risked jail if

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[67] See ILO, *Trafficking in Human Beings for Forced Labour and Services: A Guide to ILO Conventions and Practical Action*, pp. 20-22.
[68] See generally R. PERRUCHOUD, *Consular Protection and Assistance*, in «IOM Book», forthcoming.
[69] P.L.E. PRADIER-FODERE, *Trait de Droit International Public*, 1888, Vol. IV, p. 555, quoted in L.T. LEE, *The Law of Consular Protection*, Oxford, 1991, p. 124.
[70] CERD, *64th Session. Concluding Observations: Lebanon*, CERD/C/64/CO/3, 2004, para. 11.

they tried to obtain an exit visa at security headquarters[71]. For them, consular assistance and protection was of more immediate value than any initiatives which international bodies could take.

Although the Vienna Convention on Consular Relations (VCCR) is not a human rights treaty in the strict sense, it establishes a framework both for humanitarian assistance, and for the protection of migrants' rights. Consular functions are defined to include helping and assisting nationals. When a state arrests a non citizen, international law requires that he is informed of his right to contact his consul, and national authorities are obliged to communicate such a request "without delay", to consular officials who are then entitled to visit a national in custody, to arrange legal representation, and to perform any other functions which are referred to in international agreements between the two states[72].

The practice of consular protection is, of course, rooted in the reciprocal interest of states to safeguard their nationals abroad. Although protection activities varies from state to state, its importance has grown as migration – both regular and irregular – has increased; embassies of a number of South Asian countries provide a range of services to their migrant workers including shelter and medical services to runaway workers, repatriation, issuing of passports to those whose passports have been retained by employers or agents; and legal action to obtain payment of wages and compensation[73]. China advises its citizens that it will negotiate with local authorities when their rights or freedom under the law are restricted or infringed upon in the receiving state[74]. Mexican consuls visit their nationals in detention, in prison, in hospital and in other difficult situations[75].

Grave breaches of the right to consular notification and protection have occurred, as in the case of Indians in Saudi Arabia or Mexicans in the US Indian authorities have reported that they receive no advance information from the Saudi authorities about the execution (by beheading) of Indian migrant workers; «we generally get the information after the execution from our local newspapers»[76].

When US authorities persistently failed to notify Mexico of the arrest of its nationals in the US, Mexico took its case to the International Court of Justice in

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[71] «Guardian Weekly», 28th July 2006.

[72] *Vienna Convention on Consular Relations*, art. 5 and art. 36. The full text of art. 5.m reads: «Consular functions consist in … performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or *which are referred to in the international agreements in force between the sending State and the receiving State*» (emphasis added).

[73] PONG-SUL AHN (ed.), *Migrant Workers and Human Rights: Outmigration from South Asia*, ILO, 2004.

[74] *Guide to Consular Protection and Services*, 24 November 2003; on file with author.

[75] L.T. LEE, *The Law of Consular Protection*, cit., p. 127.

[76] B*ad Dreams: Exploitation of Migrant Workers in Saudi Arabia*, in «Human Rights Watch», 17th July 2004, p. 110.

order to enforce its right of consular protection under the VCCR. Mexico's claim succeeded. The ICJ ruled that the US was in breach of its obligations to Mexico «in arresting, detaining, trying and convicting» Mexican nationals without informing them of their right to notify and communicate with their consul. The 52 men, all migrant workers, had been convicted of capital offences, sentenced to death, and were on death row awaiting execution. Mexico argued that consular notification was a fundamental due process right, and a human right, and that it «[c]onstitutes a basic component of due process by ensuring both the procedural equality of a foreign national in the criminal process and the enforcement of other due process guarantees to which that national is entitled»[77].

Although the ICJ did not characterise consular notification as a human right, the Inter-American Court of Human Rights has recognized that international law confers rights upon foreign nationals subject to prosecution and that non-compliance may annul the outcome of the criminal proceedings precisely because due process has not been respected[78]. Expressed in these terms, consular access contributes to an essential element of due process: that a person should understand the charges against him and the procedural rights available to him, and should not prejudice his case through ignorance.

2. *Creating an International Migration Protection Regime: Dilemmas and Initiatives*

As this paper has shown, important initiatives have been taken in the last decade, and especially since 2000, to strengthen the framework for protection. The CMW has come into effect; the application of UN human rights treaties to migrants has become more robust; international and regional "rapporteurs" have been appointed to provide an impartial record of violations; trafficking and smuggling have been criminalized; and the protection of shipwrecked migrants has been strengthened. The Berne Initiative and the GCIM have encouraged multilateralism in migration policy making, and have defined rights protection as fundamental to migration management. In its 2006 High Level Dialogue, members of the UN General Assembly emphasized that all states, whether of origin, transit or destination, had the obligation to respect the rights of all migrants, and that rights protection in countries of origin was a key factor in making migration a choice not a necessity[79].

Nonetheless, violation of the rights of migrants is widespread, and the "disjuncture" between theoretical protection and actual practice remains endemic.

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[77] ICJ, *Avena & Other Mexican Nationals (Mexico v United States of America)*, 2004, No. 128, paras 30 and 124.
[78] IACtHR, *Advisory Opinion OC-16/99*.
[79] UN GENERAL ASSEMBLY, *High Level Dialogue on International Migration and Development. Closing Statement by President*, 15th September 2006.

Within the migration cycle – in countries of transit and destination – difficult dilemmas need to be resolved. How should the balance be struck between the interests of national security and the legal duty to protect human rights? How can the state effectively protect migrants, in situations where their rights are violated not by state agents but by private employers? How can this be done where those who abuse rights are transnational criminal trafficking and smuggling organisations? Where irregular migration is criminalized, how can migrants be encouraged to seek protection when contact with state authorities may result in their detection and possible deportation? How should the state protect migrants who are willing to risk their lives to evade border control and effect illegal entry?

Underlying all of these questions is the fundamental challenge – set in Cairo and no closer to resolution today than it was in 1994 – of making migration a matter of choice not necessity. Any lessening of migrant numbers is likely to be contingent on a reduction in the global asymmetries between richer and poorer states which compel migration - of wealth, human security and human rights. This means that protection must start in countries of origin, by addressing the human rights deficits which force migration.

In all these circumstances, is it possible to speak of the existence of an *international migration protection regime*? This paper has argued that although most states have already and formally agreed to protect migrants' rights through their accession to the human rights and other treaties, many have yet to acknowledge this in practice – as is evident in their unwillingness to ratify the CMW. Many of the legal elements of such a regime now exist, but they operate separately, running on parallel tracks, and do not yet work together to form a coherent whole.

To create a protection regime which can be compared to that – for example – for refugees, will require a willingness on the part of states to restrict their traditional autonomy in dealing with migrants, as well as a major allocation of resources to support implementation and enforcement, nationally and internationally.

States' reluctance to accept the limits on national policies set by international human rights law has been particularly acute in the case of irregular migrants, who are in breach of national law, and whose presence is seen to undermine a state's sovereignty over its territorial borders. Throughout the 1990s, as the globalised economies of richer countries acted as magnets for migration from poorer countries, global governance of international migration nonetheless continued to be seen as «an intrusion on national sovereignty»[80]. The protection of migrants' rights continued to be «one of the most heatedly controversial» in contemporary international law[81].

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[80] K. NEWLAND, *The Governance of International Migration: Mechanisms, Processes and Institutions*, GCIM, September 2005.
[81] R. LILLICH, *The Human Rights of Aliens in Contemporary International Law*, cit.

In the last decade, this reluctance has been evident in states' refusal to take forward the migration agendas which they themselves had set at the Cairo International Conference on Population and Development. The Cairo Declaration introduced the concept of migration management; it took the position that until a "better economic balance" between north and south could be achieved through sustainable economic and social development, migration flows would continue and governments should adopt policies to "manage" these international flows. The rights and dignity of migrants should be protected and an over-riding objective should be «to make the option of remaining in one's country viable for all people». But repeated calls for a UN conference dedicated to migration were rejected by the major migrant receiving countries, who «feared a bruising North-South confrontation over issues of access to their territories and labour markets».

A gradual change in the international debate became apparent after 2000, influenced by a new understanding of the role of migration in relation to demographic deficits, and to development. Research by the UN Population Division showed that some states, notably in Europe, would soon face a demographic deficit to which new migration could offer a solution. Research, by the World Bank and others, showed the enormous volume and value of migrant remittances, which were already significantly greater than ODA as a form of development assistance[82].

After ten years of effective political paralysis and deadlock within the UN, a Global Commission on International Migration was set up in 2004, outside the UN but reporting to the Secretary General; its mandate was to provide the framework for a "coherent, comprehensive and global" response to the issue of international migration. Its challenge was to give policy makers – in Kofi Annan's phrase – a «strong ethical compass» for the future, and help to «win broad acceptance for a normative framework that has human rights at its heart». The Commission's influential report started from the understanding that «the economic, social and cultural benefits of migration must be more effectively realised, and that the negative consequences of cross border movement» should be better addressed.

Its first Principle for Action, the GCIM called for «women, men and children» to be able to realise their potential, meet their needs and exercise their human rights and fulfil their aspirations in their country of origin, and «hence migrate out of choice, rather than necessity».

[82] WORLD BANK, *Global Economic Prospects 2006: Economic Implications of Remittances and Migration*, 2006.

2.1 An International Migration Organisation?

One key policy issue confronting states is whether the management of migration requires global governance through an international organisation, which might have broadly equivalent responsibilities in relation to migrants to those of UNICEF for children, UNHCR for refugees, ILO for workers, or UNFPA for women. Each of these institutions includes human rights protection in its formal or informal mandates: UNICEF through its support for the CRC and its rights based approaches, UNHCR though its functions under the 1951 Convention and through its direct protection activities; ILO through its body of labour standards, and UNFPA through activities which take human rights as a foundation for its work. At present, each includes some groups of migrants in its protection activities, but none has a general mandate. The IOM which has a migration mandate, although not yet a formal protection mandate, remains outside the UN system.

The proponents of a world migration organisation argue that «the fragmented and uncoordinated policy environment relating to the international movement of people feed friction and fears». But while most would agree with this statement of the problem, there is no agreement as to the solution. Newland describes the dilemma thus:

> In terms of architecture, international migration is truly a case where form must follow function – and states have not yet agreed what the function … should be. What kind of institution is needed to govern international migration? A negotiating body like the WTO. A standard setting body like the ILO? […] An operational body like WHO? [...] A supervisory body like UNHCR. A service provider? A treaty oversight body[83]?

The HLD has broadly endorsed the Secretary General's proposal for a new, and loosely structured, Global Forum on Migration and Development[84]. The question is whether such a forum can lead over time to agreement on a global institution.

From the standpoint of migrant protection, clearly the best model is one in which a UN agency has an explicit mandate to monitor, assist and work with governments to protect migrants' rights. It could become – in effect – an implementing arm for the rights protected in the ICCPR, the CMW, the Smuggling and Trafficking Protocols, and other international treaties. UNICEF already does this to an increasing extent for the CRC.

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[83] K. NEWLAND, *The Governance of International Migration: Mechanisms, Processes and Institutions*, cit., p. 6.

[84] UN GENERAL ASSEMBLY, *High Level Dialogue on International Migration and Development. Closing Statement by President*, cit.. It was a measure of the political sensitivity of migration within the UN that the Dialogue, which was the first high level discussion of migration within the UN, reached no formal conclusion, no votes were caste, and the outcome took the form only of a President's summary.

One dilemma which such an agency could perhaps help to resolve is the protection deficit which arises where poorer sending countries have no, or inadequate, consular representation in the countries to which their nationals migrate. Perhaps a global migration organisation could be authorised to act as a "default" consul, where the migrant's state of nationality had no diplomatic representation. This is particularly needed by irregular migrants, including those who have been trafficked or smuggled, who cannot prove their nationality, or whose state of nationality will not assist in their return, as well as in situations where the country of nationality has no consul to whom they can turn[85].

Regardless of whether the international community is willing formally to endow an international agency with the right and duty of consular protection, initiatives are needed to reconfigure and re-invigorate traditional forms of consular protection to meet the needs of present-day large scale migration, much of which is irregular, and to integrate international human rights law as an integral element. References in the VCCR to international agreements[86] could helpfully be interpreted to include the human rights treaties to which both the detaining state and the state of the detainee's nationality are parties.

Thus, in the case of migrants who are legally minors, the CRC sets a minimum standard, which should guide consular representations and assistance in the case of all migrants under the age of 18. Since the CRC is now near universal in its acceptance by states, its provisions constitute what is – in effect – a common standard between countries, and arguably should be a central element of consular assistance and protection in all situations involving those under the age of 18.

2.2 Some Dilemmas

But such an agency would not necessarily be able to resolve some of the toughest dilemmas facing migrant protection.

- The first increasingly arises from conflicts between the interests of national security and the protection of migrants' rights. Indefinite detention is one aspect. Another is the steps taken by a number of states to sidestep or amend their non refoulement obligations under international law. In practice, refoulement – which has in some cases taken the form of "extraordinary rendition" – occurs where states remove migrants to countries where they risk being tortured, in violation of their own treaty obligations, on the basis of "diplomatic assurances" that ill treatment will not take place. The UN High Commissioner for Human Rights warns that this practice threatens to «retard the progress that has been achieved over more than half a century to extend… protection to all»[87]. But states argue

[85] See R. PERRUCHOUD, *Consular Protection and Assistance,* cit.
[86] *Ibidem*, A.XXX.
[87] L. HARBOUR, *Address at Chatham House*, 15th February 2006.

that an absolute bar to refoulement «affords no weight… to the rights of those whose lives… might be significantly protected by the removal of a person believed to be a terrorist threat»[88].

- There is also the fact that some situations in which the gravest rights violations occur involve the private sector – smugglers, traffickers or exploitative employers – rather than any direct engagement in abuses by state officials. Such violations include – for example – unlawful killing and violations of the right to life in the course of movement at the hands of traffickers and smugglers, and the infliction of cruel, inhuman or degrading treatment through forced labour. While the state has a duty to protect against violations committed by private individuals, the obstacles to doing so are clearly substantial where the victims are irregular, moving illegally, or working in a "black" economy.

- Another problem is the negative, even nullifying effect, of the criminalisation of illegal entry or stay, upon the enjoyment of rights. As anyone who has worked with migrant communities will know, the fear of detection and deportation frequently deters irregular migrants from seeking the assistance of the police, or public authorities, where their rights are violated. Irregular migrants who are denied wages, or otherwise exploited by their employers, seldom report this to labour or police authorities.

- A broader dilemma which underlies all these situations is the asymmetry between the protection afforded to refugees who flee violations of their civil and political rights, and migrants who flee violations of economic, social and cultural rights. How can protection be given to those «are unable to return to situations in which the lack of fundamental economic, social and cultural rights makes it extremely difficult or impossible to survive»[89].

- Yet another dilemma is how to protect the rights of migrant domestic workers employed in private households, who are especially vulnerable to exploitation because of the unprotected nature of their work and the highly personalised relationship between worker and employer[90]. Domestic work takes place in the private household which is typically excluded from labour regulations[91]. The

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[88] See ECHR, *Observations of the Governments of Lithuania, Portugal, Slovakia and the UK, intervening in Ramzy v. Netherlands*, Application No. 25424/05, para. 24.1. This argues a conflict between the art. 3 right to be protected from torture, and the art. 2 right to life.

[89] UN COMMISSION ON HUMAN RIGHTS, *Report of the Special Rapporteur on Human Rights of Migrants*, E/CN.4/2000/82, 2000, para. 31.

[90] As the ILO has noted, the very nature of domestic work gives rise to complex protection issues, and that in many countries, labour, safety and other laws do not cover domestic workers, so there are no legal norms for their treatment, or offices or inspectors to enforce them. ILO, *Towards a Fair Deal for Migrant Workers in the Global Economy*, 2004, para. 194.

[91] Although labour inspection is required – for example under ILO standards – in practice the home is out of bounds for inspectors. An ILO study of national laws in 65 countries found that only 19 of them had enacted laws or regulations dealing with domestic work. ILO, *A Global Alliance against Forced Labout: Global Report*, 2005, p. 50.

position of many migrant domestic workers is precarious also because of their insecure legal status, and their reluctance of seek protection from the authorities[92].

Other challenges, perhaps more easily overcome, include the need to articulate the content of migrant rights, and to make them more widely understood by both migrants and governments.

Many migrants do not know the rights to which they are entitled, and policy makers do not know their protection obligations[93]. This has facilitated a belief that irregular migrants in particular are entitled to little in the way of rights protection. Although both regular and irregular migrants enjoy most of the human rights contained in international law, there are many instances where states fail – or refuse – to appreciate this, and as a result their rights are violated. Ignorance as to the scope of migrants' rights also underlies the reluctance of some states to ratify the CMW, out of a mistaken fear that it creates new rights and duties. This misunderstands the Convention, and fails to recognise that it re-states rights which are already contained in treaties such as the ICCPR, but without specifying their application to non nationals[94], rather than creating new rights. Their reluctance also ignores the use which states can make of reservations in limited situations where they cannot comply immediately with a particular provision

As the Council of Europe has noted, the fact that migrants' rights are dispersed in so many different treaties and legal sources means that the rules are not articulated in a clear and accessible manner. The GCIM emphasised that this had added to the difficulties of implementation and of respect for migrants' rights. It suggested that the various principles should be articulated in a «single compilation of all treaty provisions and other relevant norms». Such an initiative – perhaps in a form broadly similar to the IDP Guiding Principles[95] – would be of real value, and is now on the Council of Europe's agenda.

In light of these various initiatives and dilemmas, how does Lillich's hypothetical jigsaw now look? Is it still in pieces or are the pieces now being assembled into a protection regime?

The major deficit in the calculus of protection remains: vulnerable migrants still have no legal equivalent to the 1951 Refugee Convention which protects their rights and binds a majority of states. Nor is there an international migrant protection agency, let alone one comparable to UNHCR. To many migrants, this – understandably – must make a mockery of the idea that they benefit from an international protection regime. But the legal elements of such a regime do now

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[92] *Ibidem*.
[93] J. MACBRIDE, *Irregular Migrants and the ECHR*, cit., para. 185.
[94] See generally A. PECOUD – P. DE GUCHTENEIRE, *Migration, Human Rights and the United Nations*, cit..
[95] OCHA, *Guiding Principles on Internal Displacement*, 2000.

exist, and the international priority should be to put them together and to use, to enable states to give effect to their duties, and assist migrants to know and claim their rights.