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International migration and human rights

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**The analysis provided in this paper is that of the author, and does not
represent the views of the Global Commission on International Migration.**

This paper reviews the actual and legal situation of international migrants in relation to their enjoyment of human rights. It starts from the position that respect for human rights, the rule of law and core labour standards are essential to political stability and to social and economic development. Globalisation has encouraged the free movement of goods, services and capital, but barriers to the cross-border movement, particularly of unskilled workers, remain and globalisation of markets has not been accompanied by globalisation of the work force. This has produced a discordance between the number of individuals who migrate and the legal opportunities for them to do so.

In many situations there is a gap between the rights which migrants, both regular and irregular¹, enjoy under international law, and the difficulties they experience in the countries where they live, work, and across which they travel. This gap between the principles agreed by governments, and the reality of individual lives, underscores the vulnerability of migrants in terms of dignity and human rights.

The paper examines the different ways in which international migration and human rights intersect, both in countries of origin, transit and destination, and in relation to particular socio-economic groups. It then reviews the protection given to migrants' rights under international law - human rights law, labour standards, criminal law and through diplomatic protection - and their duties to host societies. It considers the role of human rights as a policy tool in current migration discussions, suggests some elements of a rights based approach to migration, and identifies 'good practices' at the national, regional and international levels.

The paper identifies as an over-riding priority the need to create a situation in which migration can take place in conditions of dignity, and become an informed choice, rather than a strategy of survival - even desperation - in an economically asymmetric world, as it is today for many migrants.

I. Migrants as a vulnerable group

The special vulnerability of migrants stems from the fact that they are not citizens of the country in which they live, they have crossed an international border and – unlike citizens –

¹ *Terms.*

The terms 'regular' and 'irregular' migrant are used in this paper; this reflects (a) the practice of the ILO, and (b) the language of the Convention on Migrant Workers ['CMW'].

- i. The ILO explains its usage in this way: '(p)eople who enter or work in countries without legal authorisation have been labelled illegal, clandestine, undocumented or irregular. "Illegal migrants"... has a normative connotation and conveys the idea of criminality. Thus the 1994 International Conference on Population and Development recommended the term 'undocumented'; but this is incomplete, since it does not cover migrants who enter the host country legally with tourist documents but later violate their conditions of entry by taking a job. Furthermore, migrants moved by traffickers may have false documents; this prompted an International Symposium on Migration in Bangkok in April 1999 to recommend the term 'irregular'. Irregularities in migration can arise at various points – departure, transit, entry and return – they may be committed against or by the migrant.' [ILO *Towards a Fair Deal for Migrant Workers in the Global Economy*, 2004].
- ii. The CMW defines regular migrant workers as those who are authorised to enter, stay and to engage in a remunerated activity in the State of employment. CMW, Art 5(1).

Following the definition in the CMW, the term "migrant worker" is used to refer to 'a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national' [A.2(1)].

that they may generally enter and live in another country only with the express consent of its authorities¹. This vulnerability, which derives from an alien status, often contrasts sharply with the determination, ingenuity and resilience required for the migration process itself.

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. 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. In some countries, national discrimination law does not protect migrant workers, and in any case migrants are more likely to work in sectors where labour standards are not applied, or even not applicable

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 ‘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 a migrant, the greater is the danger of the journey, or of being exploited, or even enslaved by traffickers and unscrupulous employers.

II. The problem of data

A major obstacle to policy making is lack of information - on types of violation, the places where they occur, and their characteristics. Violations have been generally under recorded, and lack of reliable data and of policy-oriented research will be a recurring theme in this paper².

There are a number of reasons for the absence and under recording of data. Migrants are less likely than citizens to place their jobs at risk by reporting abuse by employers³. Under-recording is the greater to the extent that migrants are irregular or marginal, and so less able – or willing – to report their difficulties to national or international authorities and seek redress through formal procedures. Irregular migrants who are subjected to rights abuse by immigration authorities in the course of deportation seldom report his or take legal action once they have reached their home country. In many situations, migrants do not know what rights they are entitled to, and still less how to claim them; the case of migrant women is an extreme example this lack of knowledge, and of under recording. Another is forced labour, which takes place in the illicit underground economy and so tends to escape national statistics. National statistics are sometimes restricted by official fears that the information – eg on illegal entry and enforcement – could be ‘misused’⁴. Media and governmental reports on rights violations during the migratory process are increasing, but it is not clear whether this reflects increased levels or increased exposure⁵. NGO reporting on migrants’ rights is also increasing, but it remains modest in comparison with that on refugees.

Much reporting, as well as standard setting, has focussed on migrant workers. This work has a wider relevance for migrants since most – with the limited exception of, eg, some family members and students – are or have been in some form of remunerated activity.

A recent EU expert study noted that one of the biggest gaps in the understanding of trafficking is in data collection, and is due to many factors which are linked to the illegality of traffickers' activities, the use of different definitions, the lack of data sharing and political decisions. It proposed the establishment of independent 'National Rapporteurs' who would collect and analyse information from different source, and develop common guidelines so that the data collected could be compared⁶.

III. The situation of migrants

The situation of migrants and their human rights can be seen as a spectrum, which has integration and equality at one end, and marginalisation and exclusion at the other.

At one end of the spectrum are skilled migrants, many whom are in professional occupations, who usually enjoy full protection of their human rights in their new country, and throughout the migratory process.

At the other end of the spectrum are migrant populations who are poor, unskilled and excluded from the societies in which they live; increasingly they are women. For these groups, the intersection of human rights and international migration is a negative one, which occurs at a number of points during the migratory 'life cycle', in countries of origin, transit and destination. The intersection is most problematic for those in an irregular immigration status, where the interest of states in preventing and eliminating unlawful migration impacts negatively on the rights of individual migrants, or where states are unable or unwilling to curb exploitation by employers, smugglers or traffickers, or where national law or national officials violate human rights in their efforts to prevent and eliminate illegal movements and employment of irregular migrants.

All points on this spectrum are present within the European Union. On the one hand, the EU is creating a common 'legal space' within which the 450 million citizens of its 24 member states will enjoy full equality. Distinctions between citizens of one member state, and migrants from other EU member states, have been progressively replaced by legal equality across the full span of rights, including free movement and political participation, and is reflected in a common citizenship for nationals of member states. From the start, free movement of workers was recognised as an essential component of economic integration, and included in the founding document, the Treaty of Rome.

Free movement is an element of other economic integration areas, in Africa and Latin America, for example the Economic Community of West African States [ECOWAS].

But free movement in the EU does not automatically extend to third country nationals, while non nationals in an irregular immigration status are at the extreme edge of the spectrum – including rejected asylum seekers. Over time the EU has created a privileged status for regular migrants, but at the same time an emphasis on the prevention of clandestine migration has undercut, or even eclipsed, the concern to protect the rights of irregular migrants.

The migratory process

a. Country of origin or nationality

Where human rights violations rise to the level of persecution they become immediate causes of refugee flight. But in many situations, the line between refugee flight, and migration in response to human rights problems which do not amount to persecution, is hard to draw. Flight from generalized political violence is not usually a basis for refugee recognition, nor is migration to escape even extreme violations of economic and social rights or environmental degradation. It has become increasingly difficult, in practice, to separate out refugees from other involuntary migrants or from economic migrants, even though such separation is seen by governments as an essential condition of asylum and immigration policy⁷ Although it is only a part of the explanation of why people move, denial of human rights - including gender discrimination – is one of the driving forces of migration.

Increasing economic disparities between countries and a lack of gainful employment, decent work, human security and individual freedoms explain much contemporary international migration. The Cairo Conference identified as causative factors:

international economic imbalances, poverty and environmental degradation, combined with the absence of peace and security, human rights violations and the varying degrees of development of judicial and democratic institutions⁸.

In the decade since 1994, researchers have confirmed the links between migration and human rights violations, including those committed in situations of conflict, those which arise from weak institutions, and those which are inherent in poverty⁹.

Much migration research has focussed on trafficking. Migration and trafficking are interlinked, because traffickers often exploit the processes by which individuals seek to migrate for economic reasons, particularly in the case of female migrant domestic workers¹⁰. The UN Special Rapporteur on Violence against Women examined the conditions which facilitate trafficking in South Asia, and found that gender discrimination, in law and in practice, was a root cause. She underscored the need ‘to give dignity and equality to girls’, noting that many of those who are trafficked belong to lower caste groups or ethnic minorities, both groups which face discrimination. Lack of access to inheritance, land and employment, and the practice of polygamy also make women ‘easy prey to traffickers who exploit their desire to emigrate’¹¹.

Research into child trafficking in Africa confirms the strong link between gender discrimination and gender violence, and trafficking. It also relates birth registration to reduced vulnerability to trafficking, noting that a child who has no official recognition of his or her name or nationality, and no official registration of birth, is ‘much more likely’ to be targeted by trafficking operations. Birth registration is a human right under the CRC^{12 13}. Other research has identified as underlying causes of trafficking, situations where human rights are not protected because the rule of law is weak, where there is a lack of enforcement, where law enforcement institutions are corrupt, and so trafficking becomes a ‘low risk’ activity¹⁴.

If, then, absence of human rights is one of the drivers of migration, strengthening human rights becomes an element in any strategy to reduce migration through addressing its

underlying causes, and recognising the role of human rights in successful poverty reduction programmes¹⁵, and in empowering women. International law now requires states to take measures to prevent trafficking by alleviating poverty, under development, and lack of equal opportunity, which are identified as its causes, and to ‘combat the root socio-economic causes’ of migrant smuggling¹⁶.

b. Transit and irregular movement

As migration flows have increased, many governments have tightened legal controls and strengthened – even fortified – their geographical borders; at the same time, the activities of traffickers and smugglers have expanded, and the dangers facing migrants during illegal travel and transport have grown exponentially. Restrictions on legal entry stay in most countries of destination, enforced through strict visa regimes and carrier sanctions, mean that a large proportion of migrants travel with illegal documentation, often using long, tortuous and dangerous routes. The most striking feature of these new patterns is the increase in the use of smuggling and trafficking agents¹⁷.

Figures and accurate data for illegal travel are, by their nature, hard to find. The UN Special Rapporteur on Migration [‘UN Special Rapporteur’] has noted that some migrants ‘appear to vanish’ in transit countries. They travel under assumed names, and are detained, tried and sentenced under names and nationalities other than their own. This makes it difficult for families to find them, or to trace others reported to have disappeared and died as they tried to cross dangerous borders, or while being transported by smugglers¹⁸.

Experience has shown that restrictive approaches, based on efforts to obstruct or deter people from moving from one country and region to another, have not succeeded; moreover, they have had negative consequences. Their enforcement is likely to violate human rights principles, and to force prospective migrants and asylum seekers into the hands of unscrupulous human traffickers.

States’ policies in promoting immigration restrictions and reducing opportunities for regular migration have not been effective in preventing migration. Rather they have created a market for irregular migration, often as organised serious crime, through trafficking and smuggling of people¹⁹.

This assessment by European trafficking experts is born out in the cases of countries on two migration ‘fault lines’, where migratory flows are triggered by economic disparities between neighbouring states: the US-Mexican and the Spanish-Moroccan borders²⁰.

Migrants from Mexico, and from the countries of Central and South America, seek to enter the US, either from Mexico or using Mexico as a transit country on the way to the US. Reports from the Inter American Commission on Human Rights, and its Rapporteur on Migrant Workers [‘IACHR Rapporteur’], show that irregular migration continues and has not been halted by tightened border control, but that tighter controls have been followed by increased loss of life among migrants. In order to evade the controls, more migrants have placed themselves in the hands of traffickers or smugglers, the routes have changed, entailing longer, more expensive and more dangerous journeys, in which riskier means of transport are used. In her report on Morocco, the UN Special Rapporteur has described how bribery of the law enforcement authorities by smugglers has grown²¹.

The IACHR Rapporteur reports that new and expensive US border controls have had the effect of curbing ‘circulatory migration’ but have not diminished the number of persons who enter the US as irregular migrants.

Paradoxically the number of apprehensions by the Border Control has declined steadily since 1986...The most serious effect [of the controls] has been the increasing number of deaths of people trying to cross. 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.²²

The UN Special Rapporteur reports that in the last five years more than 4,000 irregular migrants have been drowned in the Strait of Gibraltar attempting to cross from Morocco to Spain²³. But many succeed: an estimated 1 million, out of Spain’s migrant population of 2.5 million, are believed to be irregular. In one incident, which illustrates a much deeper tragedy, Italian authorities reported the rescue of a small boat, which had run out of fuel, food and water on its journey from North Africa, leading to the deaths of most passengers; 15 out of an original boatload of 85 who were still alive were thought to be Somalis who had travelled from Libya. One rescuer described the vessel carrying the dead and survivors as resembling ‘a scene from Dante’s Inferno’²⁴. These reports are consistent with reports from other regions where irregular migrants, using the services of criminal agents, have lost their lives in the course of dangerous journeys – not only by ships, but also by land, including in refrigerated trucks, and by air in the undercarriage of aircraft.

These deaths are increasingly foreseeable consequences of migration policies which rely on border control rather than addressing the underlying reasons – and despair – which motivate such high risk travel. To the degree that loss of life, and violation of the right to life, can be attributed to the criminal activities of smugglers or traffickers, criminal prosecution should take place. In the past, evidentiary and jurisdictional problems obstructed successful prosecution. The new Smuggling and Trafficking Protocols – see below - should make prosecution easier from a legal and technical perspective; but the challenge to resolve questions of evidence and increase resources will remain. There has been little effort to place law enforcement policies to combat smuggling and trafficking in the wider context development, and to address the human rights ‘deficits’ which create the conditions in which emigration – through whatever means - becomes a survival strategy.

Measures to strengthen and fortify borders have been accompanied by reports of the use of excessive force on the part of border guards, resulting in loss of life for undocumented, but unarmed, migrants attempting to make illegal frontier crossings²⁵.

c. Countries of destination

The status of migrants in their new country will vary widely: they may be legal migrants, admitted on the basis of employment or family, with the right to settle and become naturalised, students or temporary guest workers required to leave when their studies or their

contract expire, or irregular migrants, including refused asylum seekers, who are liable to arrest and removal at any time. While all enjoy certain basic rights, including non discrimination, other entitlements will usually be determined by their immigration status.

(i) *Discrimination, racism & xenophobia*

Many human rights problems affecting migrants arise from discrimination and racism, and concern integration and cultural identity. Migrant workers are frequently subjected to unequal treatment and unequal opportunities, as well as discriminatory behaviour, and they are key reasons why migrant and ethnic minority workers face greater obstacles than the majority population. These obstacles are encouraged – even legitimated - where the law allows, or does not proscribe, discrimination. Responses to the ILO's International Labour Migration Survey²⁶ showed that national legislation in fewer than half the countries surveyed provided for any protection against discrimination at work. Two countries in the Middle East – the region with the highest number of migrant workers – Kuwait and Saudi Arabia – go so far as to exclude all migrant workers from national social and labour laws²⁷.

Discrimination and racism particularly affect migrants; they may take the form of racial violence, limit access to citizenship, or access to the administration of justice. Unequal access to economic, social and cultural rights may mean that migrants, including the children of undocumented migrants, are excluded from education, and limited or denied access to health services, including emergency care, as part of policies to restrict and deter immigration²⁸.

(ii) *Integration*

It is increasingly recognised that early integration based on equal treatment and the prohibition of discrimination is in the best interests of both migrants and of the community in which they live. The degree of integration depends on a number of factors. They include language, the availability of work generating sufficient income, legal status, participation in civil and political life, access to social services, family reunion, and access to citizenship through naturalisation. Human rights play an important role in this integration process and, conversely, where migrants, whether regular or irregular, are excluded from rights – for example from social services which protect social and economic rights – this contributes to their marginalisation, and also fuels negative attitudes towards them from the local people²⁹. Respect for the basic human rights of all persons in each society is also an essential basis for addressing and resolving the tensions and potential conflicts between people who have different interests and socio-cultural backgrounds³⁰.

Integration raises a number of difficult policy questions. Should migrants be required to assimilate and how far should diversity of cultures and values be recognised in host countries? Does formal integration lead to assimilation of values, in the case - for example - of Islamic communities in Western European countries? How should a migrant's duty to respect the cultural identity of the host state be interpreted where there is a clash of values?

Integration is a two way process involving adaptation by migrants to the host community, and the host community welcoming and adapting to the migrants. Well planned integration policies are essential to social stability and to protecting the rights and dignity of migrants. UNDP's *Human Development Report* recommends three policy principles: respect diversity, recognise multiple identities, and build common bonds of belonging to the local community³¹.

(iii) *Rights and duties*

A part of the integration process is to enable migrants to understand the laws and values of their new society, the duties imposed on migrants, as well as on citizens, by national and international law, and that these duties are to the community in which they live.

General international human rights law sets out a migrant's duties to the community 'in which alone the free and full development of ...personality is possible'. It establishes the principle that the exercise of rights carries with it special duties and responsibilities. The CMW is more specific, requiring migrant workers to comply with the laws and regulations of any state of transit and of the state where they work, and to respect the cultural identity of those who live in these states³².

This encompasses criminal as well as civil law, and includes guarantees of tolerance and religious freedom, requiring migrants, like citizens, to respect the laws of the society in which they live, including those which protect the human rights of other citizens.

(iv) *Discrimination and security*

Efforts to combat terrorism have placed state security at the forefront in discussions of international migration, often to the detriment of migrants' and refugees' rights. Where governments have introduced emergency measures and tighter immigration controls, they have not always succeeded in addressing legitimate national security concerns without undermining refugee protection and human rights standards³³. In some cases discrimination takes the form of action against groups of migrants. In others, the problem is compounded because the measures were introduced in an existing climate of growing hostility and restrictions on the rights of refugees, asylum seekers and migrants, and fuelled racism and xenophobia, by presenting irregular migration as a national security threat³⁴.

After the September 2001 attacks in the US, the UN Security Council called on states to tighten border controls and controls on travel documents to prevent the movement of terrorists³⁵. Biometrics technology is now being introduced into travel and identity documents; its advocates argue that this will fill 'the gaps' in traditional methods of border control, and that migrants will enjoy equal benefit with citizens from faster immigration procedures. But the newness of the technology – facial recognition, finger prints and iris scans – and the way the technology is being introduced raise fears that it will increase and facilitate discrimination against migrants and minorities, and that the negative impact will be disproportionate to its legitimate objects³⁶. These fears have been reinforced by official explanations which link terrorism, 'illegal migration' and the need for biometric identity documents³⁷.

Efforts thus far have concentrated on introducing biometrics into passports and identity documents. The technology is now mandatory for visas and residence permits for third country nationals entering the EU, including – of course – migrants and asylum seekers. All migrants wishing to enter the EU or US, and an increasing number of other countries, will be required to present biometric identity documents at the border, and their details will be logged and cross checked against criminal data bases.

Particular concerns arise from the perceived threats to individual privacy, where migrants' personal data becomes part of national, regional or international security data bases, without proper safeguards and regulation. This risk is equally present for nationals, but whereas nationals are likely to have greater recourse to data protection rules and bodies, migrants are likely to find themselves in a legal no-man's land. There are also concerns that the costs – to be born by document holders – will discriminate against migrants from poor countries and will constitute a further barrier for those seeking legal entry. The new measures risk violating refugees' right to seek asylum in situations where their flight from persecution may require the use of false documents – a necessity which is recognised in international law³⁸. Generally the concern is that migrants may become guinea pigs in the use – or misuse - of unproven technologies, which greatly strengthen the state's powers of control without adequate safeguards.

(iv) *Irregular status*

Even the EU, with its strict immigration controls, accepts that it is impossible to have a clear picture of the scale of 'illegal migration', which is often an outcome of trafficking and smuggling³⁹; some estimates suggest that more than half irregular migrants have been assisted by smugglers or relocated by traffickers, although others are lower, and none rests on 'hard' data.

Migrants can acquire irregular status in a number of ways⁴⁰. They may enter a country illegally, either by avoiding border controls or by entering with false documents. Even if they enter legally, they may overstay their visas and thus become illegal. Or they may have entered on a non working visa and then started to work; in some countries, this may make the entry illegal retroactively, since the act of seeking or accepting work is construed as meaning that the migrant deceived the authorities on entry – by posing as a student or tourist while intending to work. This can also happen when people are allowed to enter under family reunification schemes, but are not authorised to work. In a number of countries, a migrant worker loses any legal immigration status when his or her employment contract ends without any interval for obtaining further work. In this notoriously complex area of law and regulation, it may be difficult for the individual to know the precise conditions attached to his or her stay⁴¹.

Migrant workers in an irregular status often face difficulties in accessing judicial procedures to protect their rights. These arise in particular in relation to deportation/expulsion, detention and employment.

Difficulties include the fact that irregular migrants do not have the same rights as regular migrants to challenge expulsion or deportation under human rights law⁴². Detention is increasingly used by governments, either as an administrative measure pending deportation or expulsion, or under criminal law for acts such as overstaying, breaching conditions of stay, or use of false documents. In her reports, the UN Special Rapporteur has criticised the high degree of discretion, and the broad powers to detain, which are given to immigration and law enforcement officials in many countries, and which can give rise to abuses. She has expressed concern about prolonged detention periods, the arbitrary nature of detention decisions, detention of trafficking victims, overcrowding and poor hygienic conditions, and the absence of legal assistance and judicial review procedures. She has drawn attention to the increasing criminalisation of irregular migration by governments in order to discourage it⁴³.

While human rights law does not prohibit detention of non citizens, it sets thresholds below which treatment and conditions should not fall. But in practice, there are wide variations in the legal and physical conditions of detained migrants in different countries. The UNHCR has developed Guidelines on the Detention of Asylum Seekers, and similar Guidelines are needed for migrants⁴⁴.

Irregular migrants may also find themselves excluded from the protections of national employment law. In some countries, irregular migrant workers are caught in a legal tension, even contradiction, between laws which have the object – on the one hand - of discouraging illegal contracts, and – on the other hand – laws which protect the rights of those in an employment relationship, to payment of wages, rest periods and reasonable hours of work. Irregular migrants who try to claim – e.g. unpaid wages – in employment tribunals may be told that their contracts are illegal because of their irregular status, and so unenforceable by the courts.

The actions taken by states in response to irregular migration range between legalising their stay to expulsion. In two recent and sharply contrasting cases, Malaysia expelled over 800,000 migrant workers, under penalty of imprisonment and whipping, while Spain amnestied the same number of irregular migrants, with a stated object of ending labour exploitation.

Enlargement of the EU to its present membership of 25 will diminish flows of irregular migration from east and central Europe as it redefines many thousands from irregular migrant to citizen. Citizens of the new accession states – notably Poland - who were illegally in EU member states before 30 April 2004, and the next day – 1 May - became EU nationals when their countries of nationality EU members⁴⁵.

(v) *Exploitative and forced labour*

Most highly skilled workers migrate through regular channels into formal sector jobs with good conditions of work. But the great majority of migrant workers, both men and women, are in low skilled occupations, in the informal sector, requiring long or irregular hours of work or subject to seasonal lay offs – jobs normally shunned by national workers.

Migrant workers are concentrated in the labour markets which are sometimes characterised as the ‘bargain basement’ of globalisation. Most are employed in low skill services, agriculture and labour intensive manufacturing in which employers are small enterprises that are basically ‘price takers’ – they have no influence on the prices of their products or services. With intensifying competition from suppliers in other parts of the world, employers in these sectors seek to maintain their small margins by squeezing workers’ wages, and lengthening their hours of work – this is particularly prevalent in garment manufacturing and in food and agriculture.

Exploitative labour conditions are found in many countries, in all regions, including those where workers’ employment rights have historically been well protected, but where regulation has given way to ‘flexible’ and unregulated working conditions in the informal sector.

Concentrations of clandestine workshops and enterprises are found in a number of European countries; they employ large numbers of illegal migrants and use labour practices that are contrary to the most rudimentary principles of respect for human rights at work. The migrants are often engaged through ‘a bewildering array of subcontracting chains and agents’, all of which can make it difficult to claim and safeguard basic human and labour rights. In extreme cases, their conditions and treatment can amount to forced labour. A recent study of the UK shows that these conditions are common to both regular and irregular migrants⁴⁶.

While all forced labour involves bad working conditions, not all situations of unsatisfactory working conditions constitute forced labour. International law proscribes, but does not define, forced labour. Drawing on its experience, the ILO has identified six component elements which – together or individually – lead to extreme individual vulnerability, and indicate that forced labour is taking place.

- i. Threats or actual physical harm to the worker.
- ii. Restriction of movement and confinement, to the workplace or to a limited area.
- iii. Debt bondage: where the worker works exclusively to pay off a debt to the employer or loan, and is not paid for his or her services. The employer may provide food and accommodation at such inflated prices that the worker cannot escape the debt.
- iv. Withholding of payment or excessive wage reductions.
- v. Retention of passports and identity documents, so that the worker cannot leave, or prove his/her identity and status.
- vi. Threat of denunciation to the authorities, where the worker is in an irregular immigration status.

Those migrating under irregular conditions, including those who are trafficked or smuggled tend to experience the most unfavourable conditions of work, run the highest risk of exploitation, and have the most limited means of seeking redress. They include women domestic workers, women and children trafficked for sexual exploitation, and men in situations of forced or exploitative labour⁴⁷.

One of the sectors in which migrant workers predominate and where the incidence of forced labour is high, among both regular and irregular migrants, is domestic work which is typically undertaken by women.

(vi) *Domestic workers*

Migrant women domestic workers are among the world’s most vulnerable workers. Most move from poorer to richer countries for economic reasons, and most leave their children behind. Their working conditions vary enormously. While some are treated as members of the employer’s family, others are subjected to conditions which may amount to virtual slavery and forced labour.

An estimated 800,000 Asian women workers migrate each year, with women accounting for around 75% of legal migration from the Philippines. Three quarters of Indonesian migrants are also women, and 94% migrate as domestic workers to the Middle East, and other Asian countries⁴⁸. The UN Special Rapporteur on Violence against Women has described the feminisation of labour in these terms:

In 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 gain⁴⁹.

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.⁵⁰ Because of their subordinate status both as migrants and as women – sometimes characterised as ‘double marginalisation’ – female migrant workers are particularly vulnerable to exploitation and ill treatment⁵¹. Distinctions between trafficked women and voluntary women migrants are difficult to make because both may end up in comparable situations of exploitation, violence and abuse.

Serious problems commonly faced by migrant domestic workers include debt bondage, passport retention, illegal confinement, rape and physical assault⁵². Reports by governmental and non governmental organisations emphasise the fact that human rights abuse is facilitated because work takes place in private households where the women are isolated from other workers. Many work without contracts, or – if contracts exist – they are on unfavourable terms: low salaries, no insurance, no control over working hours. Employers may forbid domestic workers to leave the house, in effect confining them for the period of the employment to the house or apartment building in which they work.

The very nature of domestic work gives rise to complex rights protection issues, since the unregulated nature of informal labour translates into minimal or no legal protection for migrant workers. 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. Even if they are protected by legislation, it can be very difficult for domestic workers to learn about or benefit from available protections, the result being widespread violations of labour laws. Domestic work is often excluded from the scope of national labour and/or other laws⁵³.

Some women leave abusive employment⁵⁴, but many do not. The factors put forward to explain this illustrate the helpless situation of many domestic migrant workers: a lack of alternative employment; ignorance of rights; financial obligations to family and the fact of their dependence on the worker’s income; lack of financial resources; fear of deportation; restrictions on movement; lack of identity papers; fear of arrest; fear of violence by agents/traffickers/employers; debt bondage; a fear of retaliation against the family if the debts are not paid; and a general fear of reprisals⁵⁵.

Under such circumstances, domestic work becomes a form of forced labour⁵⁶, and as such a serious violation of human rights and of labour standards

(vii) *Trafficking and smuggling*

Each year, an unknown number of people are smuggled or trafficked across international borders⁵⁷.

Trafficking occurs in a very wide range of country situations and takes many forms. The Special Rapporteur on Violence against Women described trafficking of women in Asia in these terms:

There are well documented trafficking routes within South Asia, from Bangladesh, Nepal and Pakistan to India, and widely within India, particularly to the cities of Calcutta and Bombay. The political situation in Myanmar has contributed to a trafficking outflow, particularly of Karen women. There is also widespread trafficking from South Asia to the Middle East, particularly for domestic labour. Likewise, trafficking within and from South-East Asia has been widely recorded. Trafficking occurs within and to China from bordering countries largely for forced marriages. women and girls from the People's Democratic Republic of Korea are being trafficked to China for forced marriages to Chinese farmers and labourers throughout the country. Reportedly, others are being sold to karaoke halls and brothels. Increasing levels of poverty and decreasing levels of employment are said to be contributing to an increase in trafficking of women from the People's Democratic Republic of Korea to China.⁵⁸

While the difference between smuggling and trafficking is now defined under international law [see below], it is often less easy to make in practice, and much less is known about smuggling as a phenomenon.

The movement of trafficked persons is based on deception or coercion and is for the purpose of exploitation. Profit comes not from the movement but from the sale of a trafficked person's sexual services or labour in the country of destination. Most smuggled migrants are men. Most trafficked persons are often assumed to be women and children, but many men also are trafficked.

Those who are smuggled are moved illegally for the smuggler's profit or benefit; 'smuggling' can cover situations ranging from large scale criminal enterprises to 'moral smuggling' where individuals arrange travel for modest payment in order to re-unite family members or assist a refugee fleeing persecution. In principle, the relationship with the smuggler ends at the destination country.

The porous line between trafficking and smuggling and the links of both with forced labour makes this a particularly difficult area in which to draw distinctions, as this case summary shows.

In 2003 a group of Eastern Europeans were brought to the UK by a gang to work illegally in a factory. They were originally informed that they would be working with permits, but en route were given false British passports. When they realized that they would be in the UK illegally they attempted to leave the gang's control, but were threatened so seriously that they were forced to continue. On arrival they were informed of their conditions: that they must work seven days a week for one year with no pay because they needed to repay their 'debt' incurred for various expenses, including those related to migrating to the UK. Their salaries were transferred into the bank account of a gang member. They were watched very carefully, moved from house to house, and kept isolated. If they broke any conditions - if they spoke to anyone for

example - they were fined and this was all noted down in a book and added to their 'debt'. Control was maintained by beatings and physical assault.⁵⁹

Forced and exploitative labour are often part of the trafficking cycle, and may also be an indirect outcome of the smuggling process, because the worker's illegality makes him/her vulnerable to exploitative employers. In this situation, the practical distinction between workers who have entered forced labour because they were trafficked, and those who were smuggled, will often be difficult to make⁶⁰. The distinction is an important one because national law – following the Trafficking Protocol [see below at p. 19] – increasingly sees those who are trafficked as victims who should be given assistance. But the distinction may be elusive where a person who was illegally smuggled is later trafficked within the same country (national law on trafficking does not always require a cross border element) to undertake exploitative work.

(viii) Trafficking of children

Trafficking of children is an area where the gap – in this case a chasm – between human rights norms and their effective application is at its most extreme. Child trafficking is an offence under international criminal law, and a violation of the child's human right not to be exploited economically or sexually or in pornography, or abducted, sold or trafficked has been made absolute by governments through the Convention on the Rights of the Child⁶¹ and the Trafficking Protocol. Nonetheless, trafficking of children takes place in many countries and regions of the world, involving an estimated at 1.2 million each year.⁶²

This protection gap – and also the protection role which can be played by states of destination – is well illustrated by the circumstances in which the first US 'T' visa for victims of trafficking was issued in May 2002. This visa allows persons to stay in the US where they would have to face a particularly difficult situation if returned to their country of origin. The visa was issued to a 4 year old Thai child who had entered the country with false documents and accompanied by two adults who were not relatives; the minor was HIV positive⁶³.

A recent UNICEF report found trafficking of women and children to be a recognised problem in at least 49% of Africa countries, with twice as many countries reporting child trafficking as the number who reported trafficking in women. Africa is a region of origin for women and children trafficked to Europe as well as to the Middle East, Gulf countries and to Southeast Asia. Africa is also a region of destination, at the international level, for women and children trafficked from other continents. In some cases, African countries also act as transit points.

There is generally more information on trafficking in countries of origin than destination, perhaps because it is politically less sensitive to admit to being a victim than to admitting association with the victim's exploitation. Here, again, policy making is hampered by lack of relevant research data, which is due – at least in part – to the fact that research is made difficult by the clandestine nature of child trafficking, and because the risks to the child of trafficking are not well understood by many families and communities.

Enforcement of criminal law and protection of human rights can play a strongly complementary role, but law enforcement is often ineffective at a national level. There are many reasons for this, and they include weak anti trafficking laws; scarce resources available to law enforcers with few or no resources available for trans-national investigations; victims'

fear to give evidence against traffickers; and in some cases official complicity in trafficking because traffickers bribe police officers to induce them not to investigate or to tamper with evidence⁶⁴.

(ix) *Expulsion and deportation*

Human rights violations also take place in the course of the expulsion and deportation. In 2002 the severity of the problem led the Parliamentary Assembly of the Council of Europe, which represents 46 governments, to express its concern at the number of deaths resulting from methods used to enforce expulsion orders in member states.

All too often, persons awaiting expulsion are subjected, in breach of the European Convention on Human Rights, to discrimination, racist verbal abuse, dangerous methods of restraint and even violence and inhuman or degrading treatment. All too often, the officials...resort to an unjustified, improper or even dangerous use of force.

The Assembly urged governments – inter alia – to forbid specific practices, which included ‘the use of poison gas or stun gas’, the wearing of masks or hoods by security escorts, and ‘partial or total obstruction of the respiratory tract’. It also noted the difficulty of gathering reliable information; ‘it is often only by chance that ill treatment suffered during deportation comes to light...(V)ery few people on returning to their countries of origin, bring proceedings against those responsible for expelling them’⁶⁵

IV. The human rights framework

It is appropriate that migrants caught in any of these situations should look for protection to human rights laws and policies. Do these laws and policies provide them with effective protection and remedies?

In the last half century, human rights have been transformed from the abstract principles embodied in the Universal Declaration of Human Rights [‘UDHR’], to become legal entitlements for individuals, and legal duties for states. This has been achieved through a process of treaty making, in which governments have together defined the rights which should be protected, and created mechanisms to ensure that these rights are given effect through national law and policy. The outcome of this process of negotiation and agreement are six core human rights treaties; two general covenants protect civil, political, economic, social and cultural rights, and four conventions provide more specific protection – for children and for women, against racial discrimination, and against torture. These treaties have been accepted – in part or in whole - by all UN member states as legal obligations to which their national law and policy must conform, and which protect everyone, both citizens and non citizens. The Convention on the Rights of the Child has been ratified by all but two UN member states, and has thus become – in effect – a near universal law binding all states and protecting all children².

² These six core human rights treaties are: Convention on the Rights of Child [192 ratifications: ‘CRC’], Convention to Eliminate all forms of Discrimination against Women [179 ratifications: ‘CEDAW’]; Convention to Eliminate Racial Discrimination [170 ratifications: ‘CERD’]; International Covenant on Civil and Political Rights [154 ratifications: ‘ICCPR’]; International Covenant on Economic, Social and Cultural Rights [151

This body of international human rights law has opened a new chapter in international affairs in that it does not concern the traditional function of international law, that of regulating relations between sovereign states, but rather seeks to regulate the relationship between the state and individuals within its territory and jurisdiction. By agreement between themselves states have established systems of international accountability which provide for regular assessment of how they implement their commitments on human rights. The principle which unifies and underlies the treaty 'regime' is universality. 'Everyone' is protected, and human rights are linked not to citizenship but to a common humanity.

The central principle is non discrimination, and equal treatment. Distinctions between citizens and non citizens may be made, but since they are exceptions to this principle, they must serve a legitimate state objective and be proportionate: in other words, the means used must not exceed the goals pursued. Thus states may limit free movement and political participation, but they must not draw distinctions between citizens and non citizens in relation to fundamental rights, such as those contained in the International Covenant on Civil and Political Rights.

This principle of equality was recently underscored in a case brought against the British Government by foreign nationals who had been detained on grounds of national security, and who challenged legislation allowing their indefinite detention without trial, on the ground that it applied to foreign, but not to British, nationals. The House of Lords held that, while the rights of these two groups might differ in an immigration context, international human rights law – in this case the European Convention on Human Rights - does not permit discrimination between citizens and aliens in their rights to liberty. It was not therefore permissible for the state to discriminate between aliens and its own nationals as regards their right to liberty⁶⁶.

Governments have recognised that some individuals and groups are particularly vulnerable; although they enjoy the same universal protection as 'everyone', they also have special protection needs. To this end, treaties have been drafted which give specific protection to children, women, and which prohibit torture and racial discrimination. A new treaty is now being drafted to protect the rights of another vulnerable group - the disabled. They, like women and children, are covered by the universal language of the human rights treaties, but because – like migrants - they are not mentioned by name, their rights have been little recognised, and they are often invisible. Each treaty restates the core human rights which are contained in the UDHR, and defined in the two Covenants, and then elaborates them to protect the particular group.

Refugees and migrants have also been recognised as groups with special protection needs. In each case, governments may exercise their national sovereignty to decide who to admit to their territory, but once the individual has entered the country, the national government is responsible for the protection of his or her rights – for example the police and criminal justice system should protect him from assault or robbery in the same way as they protect any citizen.

Refugees are distinguished from migrants by their lack of protection by their own governments, and it is for this reason that a special protection 'regime' was created, which defines them by reference to their 'well founded' fear of persecution at home, protects them from *refoulement*, recognises their civil, social, economic and cultural rights, and places them

ratifications: 'ICESCR']; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [139 ratifications: 'CAT'].

under the protection of individual states and of the UNHCR⁶⁷. This regime was established in 1951, and predates the human rights treaty system. Once a refugee has fled his or her home country to escape persecution, he or she can no longer look to that country for protection, and the international community steps in to provide that protection, through the UNHCR and in the country of asylum.

Human rights protection for migrants remains much less developed than the international refugee protection system, and no international institution yet has a protection mandate comparable to that of the UNHCR for refugees. Migrants nonetheless have rights under two sets of international instruments: first, the core human rights treaties such as the ICCPR, whose provisions apply universally, and thus protect migrants; and second the new Convention on Migrant Workers [‘CMW’] and the ILO conventions which specifically apply to migrants, and in particular to migrant workers.

But it remains difficult to speak of a single migrant rights protection ‘regime’, and to a large degree migrants continue to be protected under an amalgam of general international law, human rights law, labour law, and international criminal law. This area of law has been described as resembling ‘a giant unassembled juridical jigsaw’⁶⁸. Unlike refugees or children, whose rights are set out in one treaty, there is not yet a legal text for migrants which brings together all the different elements, and which is accepted as legally binding and authoritative by a majority of states.

This situation began to change when governments agreed the Convention on Migrant Workers [‘CMW’]³. Adopting the Convention in 1990, the General Assembly noted that although there was ‘an already established body of principles and standards’ for migrant workers, their ‘human rights and dignity’ were not yet fully ensured.

Migrants’ rights in the most extreme situations of – eg – war, genocide or crimes against humanity - are protected under international criminal law, and international humanitarian law. Most recently, and most notably, two protocols to the UN Convention against Transnational Organised Crime protect migrants’ rights in situations of trafficking, and – to a lesser degree – where they are smuggled.

V. International labour standards

The ILO has led the way in defining and enforcing workers’ rights, historically through specific Conventions and recommendations, and recently through the 1998 Declaration on Fundamental Principles and Rights at Work [‘ILO Declaration’], which binds *all* ILO members, and protects all migrant workers regardless of status. 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 nationals⁴. A Recommendation [86 of 1949] addresses a related issue – e.g. -

³ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

⁴ Convention 97 on Migration for Employment [42 ratifications]; Convention 143 on Migrants in Abusive Conditions and the Promotiion of Equality of Opportunity and Treatment of Migrant Workers [18 ratifications].

family reunification, and provides for continued residence in the host country in case of loss of employment; it includes a model bilateral agreement.

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. Labour standards developed within the ILO had a profound influence on the content of the international human rights treaties, including the ICCPR, the CESCRC and the CMW. Rights in employment, such as fair wages, safe and healthy working conditions, reasonable working hours and trade union rights, are protected by international human rights law as well as by international labour standards⁶⁹.

In many instances, migrant workers now enjoy greater protection under international human rights law because the human rights treaties have been much more widely ratified than have the ILO standards.

The Inter American Court of Human Rights has clarified a migrant workers’ rights in employment, advising that ‘(o)n assuming an employment relationship, the migrant acquires rights as a worker, which must be recognised and guaranteed, irrespective of his regular or irregular status in the state of employment’⁷⁰.

VI. The human rights of migrants

a. The core human rights treaties

Until relatively recently human rights law did not explicitly refer to migrants or recognise them as a vulnerable group. They were protected because this body of law applies to ‘everyone’ and is universal in its application. It still remains the case that human rights norms are dispersed throughout a wide range of texts. This means that migrants have been ‘invisible’ in much human rights discussion, and that fact has contributed to popular belief that they were a group apart, without the same fundamental rights as others.

A basic principle of human rights is that entering a country in violation of immigration laws does not deprive an irregular migrant of his or her most fundamental human rights, nor does it erase the obligation of the host state to protect these individuals. The analogy is sometimes made with the operation of criminal law where; although an individual may have broken the law, and be liable to prosecution for a specific criminal offence, he or she retains their basic human rights – to due process or humane treatment - throughout the legal process, and after conviction⁷¹.

The ICCPR gives ‘everyone’ freedom from abuses such as arbitrary killing, torture and inhuman treatment, slavery, forced labour, child labour, arbitrary arrest, unfair trial, and invasions of privacy; all persons also have the right to marry; to be protected as minors; to peaceful association and assembly; to equality; to freedom of religion and belief. These rights apply to

everyone ... irrespective of his or her nationality...(and) must be guaranteed without discrimination between citizens and aliens.⁷²

The CESCR gives ‘everyone’ the right to the progressive realisation of social, economic and cultural rights, including health, housing and education; and to labour rights such as collective bargaining, workers compensation, social security, just and favourable working conditions and environment. The right to health, for example, requires states to provide emergency health care to everyone, at a minimum; nor may states discriminate in ‘denying or limiting equal access for all persons, including ...minorities, asylum seekers and illegal immigrants, to preservative, curative and palliative health services’⁷³.

The CAT reinforces the prohibition on torture and gives general protection against refoulement to a country where an individual would be at risk of torture. The CERD requires that laws against racial discrimination must apply to non citizens ‘regardless of their immigration status’⁷⁴. The Geneva Conventions draw no distinctions between citizen and non citizen, or between regular and irregular migrant, in their protection against violations of humanitarian law in time of conflict.

These treaties require governments to ensure that human rights are respected by regulating the actions of national authorities – the police force, public education authorities, hospitals. Increasingly governments are also required to ensure that rights are respected in the private sphere, and that private persons – including employers – do not violate rights. When states ratify the CERD they accept a three tier set of obligations; they undertake to ‘engage in no act or practice of racial discrimination’, to ‘ensure’ conformity by public authorities, and to ‘prohibit’ discrimination by private groups⁷⁵.

Through their ratification of the Vienna Convention on Consular Access, states undertake to respect the right of all migrants to consular access and protection.

*b. The Convention on Migrant Workers*⁷⁶

The CMW brings together in a single text the rights which already protect migrants – including irregular workers – and which have already been accepted by most states through the ‘core’ human rights treaties. It gives some additional rights to regular migrant workers – including the right to family reunification. Most of the rights set out in Part III, which applies to ‘all’ migrant workers, and thus includes irregular migrants, are fundamental civil and political rights, mirroring the ICCPR. There is to be equal treatment between all migrant workers and nationals in respect of basic economic and social rights, including remuneration, work and employment conditions, social security, emergency medical care, and access to education for the children of migrant workers. Cultural rights are also protected. They may join any trade union. The Convention emphasises that these rights apply to ‘all’ migrant workers, irregular as well as regular, by obliging states parties to ensure that ‘migrant workers are not deprived of any rights ...by reason of any irregularity in their stay or employment’ [A. 25(3)].

The Convention grants certain rights solely to regular migrant workers, and to their families, giving them equal treatment with nationals in respect of – inter alia – access to educational institutions and service, vocational guidance and training, housing, social and health services, and participation in cultural life [Part IV]. They are given the right to form trade unions and rights to political participation. They also have a right to family reunification.

The Convention establishes a Committee to oversee implementation by states. The Committee examines reports from states, and consider communications from individual and other states alleging violations. An ILO representative is to participate in a consultative capacity at the Committee's meetings.

The Convention is important both as a synthesis of the rights and duties which have been already been agreed by governments through the core human rights treaties. It extends some rights – for example by extending rights to migrant workers directly against employers as well as against the state. It also grants some new rights – for example to transfer earnings and savings, and to be informed of the rights contained in the Convention.

CMW is a new treaty, which came into effect only in 2003. It has been accepted as legally binding by relatively few governments, and by no major employment country, and thus far lacks the legal authority of other human rights treaties, which have been ratified by a majority of states. But it is not unrealistic to expect that time will remedy this, as more states ratify the Convention; there are calls within the European Union, for example by the Economic and Social Council, for ratification by member states and – eventually – by the EU⁷⁷.

c. Trafficking and smuggling

If one side of the protection coin is strengthening human rights, the other is the criminal prosecution of those responsible for forced labour, smuggling and trafficking. The two Palermo Protocols define trafficking in persons, and smuggling of migrants as international crimes; the one is sometimes described as a crime against people, and the other as a crime against the state.

The key elements of trafficking are movement, the presence of exploitation and the fact of coercion. 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.⁷⁸

Consent to the exploitation is irrelevant where any of these means have been used, or where the victim is under 18.

The key elements of smuggling are illegal border crossing by the smuggled person, and receipt of a material benefit by the smuggler. The offence of smuggling 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.⁷⁹

Both protocols require states to criminalize trafficking and smuggling, put in place domestic law enforcement mechanisms, and to co-operate with other states. Both also provide that the migrants themselves should not be subject to criminal prosecution because of their illegal entry. Both recognise a link between abusive migration and poverty, and call for states to tackle their social and economic root causes.

But they differ in the protections they afford migrants. The Trafficking Protocol provides for a broad range of protective measures, requiring states to consider “implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons”; and to consider adopting legislation to enable trafficking victims to remain in their country “temporarily, or permanently, in appropriate cases.

The Smuggling Protocol, but only in its preamble, notes “the need to provide migrants with humane treatment and full protection of their rights”.

VII. States and irregular migration

ILO labour standards and the CMW recognise not only the right of states to determine who enters their territory, but also their interest in controlling large scale irregular migration, and the need to suppress clandestine migration.

The CMW was drafted before the growth of irregular migration in the last two decades, and before migration had become a profitable activity for international criminal organisations, at a time when state control emigration and immigration was stronger. The Convention, together with other human rights treaties, therefore assumes state control of migration, and contains important provisions on inter-state collaboration, requiring states to collaborate ‘with a view to preventing and eliminating illegal or clandestine movements, and employment of migrant workers in an irregular situation’. But this must not undermine states’ duty to ensure and respect the rights protected in the Convention. While the Convention requires states to take ‘all adequate and effective measures’ to eliminate employment of irregular workers, it also underscores that ‘the rights of migrant workers vis a vis their employer arising from employment shall not be impaired’⁸⁰.

VIII. Mechanisms for protection

International human rights protection for migrants takes two forms. Historically, aliens looked to their countries of nationality to assist them – through diplomatic protection - when their rights were violated, and so did not need – at least in principle - the protection of the international community. Migrants are distinguished from refugees by the fact that they, unlike refugees, can look to their country of nationality for protection and so do not require protection from the international community. Diplomatic protection is the first and older protection mechanism, and its important is growing.

International human rights law creates a second, and newer, system under which individuals are entitled to enjoy rights whether they are in their own countries or abroad. These rights derive not from their nationality, but from the human rights treaties which the state – their own or the country in which they live - has voluntarily undertaken to respect. This situation represents a major departure from, and also a restriction on, the broad autonomy which States

have traditionally enjoyed in their dealings with aliens, and migrants⁸¹. But it should be emphasised that it is a departure which states have agreed, and upon which governments have voluntarily embarked.

The practical implications of this system for migrants are profound, but they are not yet fully developed or understood. Nor do migrants, their legal representatives or even trade unions make full use of the complaints procedures which exist under the UN and regional treaties - to obtain redress in individual cases, or as a means of developing a comprehensive case law on migrants' rights, or to challenge national laws and policies which impact negatively on migrants.

A powerful obstacle to all rights protection is ignorance, and many migrants know little about what their rights are, or how to claim them. Many, perhaps most, migrant workers know little about their rights and the actions they can take when inequities or mistreatment occur. While this is a problem which their own countries can address, by providing information before they leave, the countries in which they live and work have the primary responsibility for protection.

Reporting on Saudi Arabia – where migrants make up almost half of the total population, and where rights protection is particularly weak – Human Rights Watch has urged the government to ‘provide a clear enunciation of the specific rights that migrant workers are entitled to enjoy’; the information should be practical not theoretical’. It should ‘draw on the specific abuses that migrants are most likely to face’. The information should be translated into the languages of the countries of origin, and provided to every worker on arrival as a routine matter of immigration practice⁸².

a. Diplomatic protection

When a state arrests a non citizen, international law requires the arresting state to inform him of his right to contact consular officials of his home state, and to communicate such a request to consular officials ‘without delay’. Consular officials are entitled to visit a national who is in custody, and may provide assistance, including arranging legal representation⁸³. The practice is rooted in the reciprocal interest of all states to safeguard their nationals abroad.

The importance of this practice has grown in the contemporary world as labour migration – both regular and irregular – has increased; for example, embassies of South Asian countries provide a range of services to 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; legal action to obtain payment of wages and compensation⁸⁴. When it was unable to ensure that its consuls could have access to Mexicans in custody in the US, many of whom were irregular migrant who had been charged and convicted of capital offences, Mexico took its case to the International Court of Justice, and succeeded in its claim that the US was in breach of international law. This important case demonstrated the essential role of consular access in human rights protection⁸⁵. It also shows the need for ‘lateral’ legal approaches in using general provisions of international law to provide specific rights protection for migrants.

Even graver breaches of the right to consular protection occur, as for example in the case of Saudi Arabia where Indian authorities have reported that they do not receive any advance

information from the Saudi authorities about the execution [by beheading] of Indian nationals - migrant workers; 'we generally get the information after the execution from our local newspapers'⁸⁶.

b. The human rights treaty system

When states ratify any one of the human rights treaties, they undertake to implement the treaty's provisions through national law and policy. In each case this implementation is overseen – and monitored – by a committee of independent experts, who are elected by governments, and who are referred to as Treaty Bodies. They review the steps taken by governments to protect human rights. The Human Rights Committee reviews reports from the 154 countries which are parties to the ICCPR, and can also determine complaints from those countries which have given it jurisdiction over individual cases in circumstances where individuals [citizens or migrants] claim their rights have been violated. One of the Committee's first decisions concerned discrimination between men and women in national immigration laws, and the family's right to live together. At the time, Mauritian law gave male citizen an automatic right to bring their wives to live in Mauritius, whereas a woman had no equivalent right for her husband. The Committee found that this was sexual discrimination and was a breach of the ICCPR. Mauritius then changed the law⁸⁷. The Committee also requests states to remedy particular situations; example include alleged forced labour, and cruel, inhuman and degrading treatment of Haitian nationals in the Dominican Republic; alleged violations of the rights of aliens in Azerbaijan; and it has asked Switzerland to ensure that restraints in cases of forcible deportation 'do not affect the life and dignity of the persons concerned'. Similarly, the Committee on the Rights of the Child monitors the steps taken by 192 states to implement that Convention, and a similar process is now beginning under the CMW⁸⁸.

Problems relating to the treatment of migrants arise under each of these treaties, and are considered by each treaty body. There is not yet a common jurisprudence and it can be difficult to know exactly how a particular right – for example, non discrimination – is to be interpreted across the board. There is a strong case for joint comments and recommendations by the treaty bodies which would establish a clear and consistent approach, which policy makers would then follow⁸⁹.

c. Regional systems

Migrants' rights are also protected under regional treaties. Case law and advisory opinions from the European and the Inter American Courts of Human Rights ['ECtHR' and ['IACtHR'], and the African Commission should be followed by countries in the three regions.

In Europe, although decisions of the ECtHR have not affected member states' formal control over external borders and free movement rights, they have circumscribed decision making in some individual cases. This means that while the European Convention does not create any right of entry, it may prevent the removal, or deportation, of a third country national 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 life⁹⁰. In an important advisory

opinion, the IACtHR stated that the enjoyment and exercise of an irregular migrant's contractual employment rights are not affected by any irregularity of migration status⁹¹.

d. National protection

The human rights system works on the principle that individuals take their cases to the international procedures only as a last resort, after all domestic remedies have been exhausted, and that international human rights law is to be applied in the first instance by national courts. Increasingly national courts are applying international human rights law to cases which come before them.

A recent UK case concerned a refusal of state support to three African asylum seekers, who were not allowed to support themselves by working while their application for asylum was under review. The court determined that this decision had resulted in a 'level of abject destitution' which breached the prohibition of inhuman and degrading treatment in the ECHR⁹².

e. UN special mechanisms

Both the UN and the Inter American system have appointed Special Rapporteurs to report on the human rights of migrants; the Inter American Commission also conducts site visits and holds special hearings. Other UN thematic rapporteurs report to the Human Rights Commission on migrant-related issues in the course of mandates on – eg - health, violence against women and trafficking. All are important tools for improving factual knowledge of the circumstances in migrants are most vulnerable, and for establishing a dialogue with governments. The reports of the thematic special rapporteurs give practical effect to human rights principles and apply them to the situation of migrants, notably the reports of the Special Rapporteurs on the Right to Health, and on Violence against Women.

IX. Resources

Effective protection requires significant resources - within the international human rights system, nationally to enable governments to transform legal entitlements into actual rights, and to equip civil society to assist migrants and represent their interests. In the present situation, limited financial, material, and human resources negatively affect migrants' rights in a number of ways.

The international mechanisms which implement UN human rights treaties have long been chronically under-funded by governments, with the result that review of country reports, and decisions on individual cases by treaty bodies are delayed, and there is little follow up⁹³.

As the numbers of migrant workers have increased, and as more have migrated through informal arrangements, more migrants need consular protection. In many cases, consulates lack⁹⁴ adequate staff, and particularly trained staff, and do not have the financial resources to deal with large number of cases. Funding constraints may mean that countries of origin have no consular representation in transit countries, or in countries of destination.

The enforcement of international criminal law does not come cheap, and substantial expenditure on law enforcement is needed in some of the poorest countries. Where prosecution requires trans-national criminal investigation, as will often be the case in order to prove smuggling and trafficking offences, the costs will be even higher⁹⁵.

In her reports, the UN Special Rapporteur has drawn attention to lack of resources as an obstacle to respecting procedural safeguards, including access to courts and judicial systems. She refers in particular to difficulties in providing free legal assistance, and of interpretation services. Where detention centres are located far from population centres, it may be too expensive for representatives [for example from a national human rights commission] to reach those detained there. She has called for imaginative and cost effective solutions to be found, which could include the creation of toll free services run by volunteers to provide information and assistance to migrants⁹⁶.

X. Policies to strengthen human rights

a. Current policy initiatives

Most current policy initiatives recognise that human rights should form a central component of managed migration.

The Berne Initiative, supported by the IOM, has taken as one of its starting points the assumption that respect for migrants' rights is a legitimate concern of all governments. In the course of a wide consultative process, rights protection has been identified as 'fundamental' to migration management, including access to judicial institutions, and remedies for violations, and non-discriminatory access to citizenship as a measure to enhance human security⁹⁷.

The ILO's Plan of Action for Migrant Workers advocates a rights based approach to migration of workers, in accordance with international labour standards and principles. It urges governments to adopt national policies giving migrants equal treatment with nationals, as a means of combating the exploitation associated with irregular status, and to promote basis human rights for all migrant workers⁹⁸. At the same time, national trade unions – including the AFL-CIO in the US, and the TUC in the UK – are beginning to welcome and organise migrant workers, rather than to exclude them⁹⁹.

The European Union's new Neighbourhood Policy is potentially far reaching in its impact on lawful migration to the EU. It would promote the free movement of persons, as well as goods, services and capital, between the EU and the border areas of the 25 member states, inter alia through new visa and visa free entry regimes. The countries in this new EU 'neighbourhood' are Russia, Ukraine, Moldova, Belarus, and the countries of the Southern Mediterranean¹⁰⁰, with a combined population of 385 million, most with a nominal GDP of less than 2000 Euros. Increasing lawful immigration is intended to have the effect of reducing irregular migration¹⁰¹.

The UK Parliament's Select Committee on International Development is one of a number of development policy makers which are urging greater coherence between migration and development policy making in addressing the links between the causes of migration, human

rights and inequality, and development. Its 2004 report argues that there may be aspects of development – democracy, good governance, gender equality – which developed countries might promote, and which might have the effect of reducing the ‘push’ factors that encourage migration, ‘leading to a situation in which migration is an informed choice rather than a desperate option’¹⁰².

b. A rights based approach to migration

The ILO, UNICEF and the UN Special Rapporteur are among those who have called for a ‘rights based approach’ to migration, through the integration of human rights principles and labour standards into policy making. Such an approach would use commitments voluntarily made by the state - whether of origin, destination or transit - to protect migrants’ rights and prevent serious human rights violations during the migration cycle. Human rights should become an integral part of any migration-related procedure, including the deportation/return of irregular migrants¹⁰³. She has also proposed that the provisions of the CMW should act as guiding principles in migration policy making.

Over the last decade, rights based approaches have been developed in a number of policy areas, including children, health, and poverty reduction; many argue that a similar approach should be used in developing migration policies¹⁰⁴. The essential elements of a human rights based approach in relation to migration are the observance of international human rights norms, including equality and non discrimination, standard setting and accountability, the recognition of migrants as subjects and holders of rights, the participation of migrant communities and the integration of a gender, child’s rights and ethnic perspective.

A rights based approach to migration might include these elements:

- Before a new law, policy or practice is introduced, it should be reviewed to ensure its consistency with the state’s national, regional and international human rights obligations, and international labour standards. There should be an assessment of the human rights impact to ensure that – e.g. – anti trafficking measures comply with respect for human rights.
- There should be systematic data collection, and its disaggregation by – e.g. - sex, geographic origin, age and ethnicity, to enable discrimination or potential discrimination to be identified, and eliminated – using the CERD as a guide¹⁰⁵.
- Existing national laws should be reviewed to see if they protect migrants and citizens equally.
- Employment contracts, made under bi-lateral agreements, should reflect labour and human rights; this should also be the case for workers moving for temporary employment under GATS Mode 4 agreements.

The value of a rights based approach lies in its ability to identify at an early stage laws, policies and practices which could lead to abuse of migrants’ rights; thus, states would reject certain methods as unlawful in the enforcement of expulsion orders.

A human rights approach to diplomatic protection could also be developed whereby consulates would base their representations on human rights principles, including non discrimination, which has been accepted as legally binding by both states – the state of nationality and the state of residence – through their treaty ratification. Thus, representations

on behalf of someone under the age of 18 – a domestic worker, or a girl caught in a trafficking network – would be based on the CRC, and on the ILO Declaration, both of which have near universal application, and on the rights protection provisions of the Trafficking Protocol.

c. *Good practices*

Countries of origin

- The Moroccan Government has created the Northern Region Development Agency in the northern region of Morocco, which is the home of most Moroccan migrants who attempt to enter Europe illegally. The Agency will revive the economy and combat trafficking in migrants by creating a centre for investment and job creation, and promoting training and education¹⁰⁶.
- A Brazilian government awareness campaign helps to prevent trafficking of women for sexual exploitation abroad by radio announcements and warning signs at airports in the four states from which most trafficked women originate. Police officers, judges and diplomats working at foreign consulates in Brazil are trained to identify situations of trafficking¹⁰⁷.
- Birth registration protects children against trafficking; lack of birth registration makes a child more likely to be targeted by trafficking operations¹⁰⁸.
- The Government of Singapore provides a telephone number that migrant domestic workers can call free of charge to obtain information on their rights and the procedure for changing employers¹⁰⁹.
- A Co-operation Agreement between Cote d'Ivoire and Mali establishes formal procedures for co-operation against child trafficking. The Agreement integrates the principle of 'the best interests of the child', and includes monitoring. The country of origin undertakes an obligation to prevent trafficking, and the country of destination is obliged to protect child-trafficking victims without discrimination¹¹⁰.
- Mexico has one of the most active consular networks in the world, described by the IACHR Rapporteurship as an example of how a state can protect its citizens abroad. Measures include obtaining an Advisory Opinion from the IACtHR to clarify generally the rights of migrant workers, enforcing the right to consular access through the International Court of Justice, and issuing identity cards to documented and undocumented nationals in the US [the main country of destination for perhaps as many as 10% of all Mexicans], to enable them to open bank accounts and obtain driving licences¹¹¹.

Countries of transit

- In 1990 Migrant Protection Groups [Beta Groups] were created to protect the physical integrity and property of migrants, both nationals and foreigners, who try to cross the northern border between Mexico and the US. The Groups provide first aid services, undertake rescue work, warn potential migrants of the risks, provide social assistance, lodging, and protection from criminal gangs. The Mexican authorities state that thanks to the work of this group, thousands of lives have been saved¹¹².

Countries of destination

- US law allows trafficked persons to stay in the US when, upon their return to their country of origin, they would face a particularly difficult situation, through the issue of a 'T visa'¹¹³.
- The Gangmaster Act (2004) creates a compulsory licensing system in the UK for gangmasters and employment agencies who supply temporary workers for agricultural activities, gathering shellfish and related processing and packaging activities. Its purpose is to curb the exploitative activities of agricultural gangmasters. The UK Government has also announced new legislation which will make it a criminal offence for anyone, including employers, to hold on to passports without good reason¹¹⁴.
- Guatemala has created mobile consulates, which travel around the main cities of the USA and cater for needs of Guatemalan citizens¹¹⁵.

Regional organisations

- The IACHR has created a Special Rapporteurship on Migrant Workers with these objectives: (a) generating awareness of states' duty to respect the human rights of migrant workers and their families; (b) making specific recommendations to member states on areas related to protecting and promoting the rights of migrant workers and families, so as to adopt progressive measures benefiting them; (c) preparing specialized reports and studies; (d) acting promptly on petitions/communications which claim that the human rights of migrant workers and their families are violated¹¹⁶.
- Asia has the most advanced regional organizing and networking on migrants by civil society, comprising a regional migrant center, several regional networks addressing migrants' rights and a regional network of organizations of migrant workers¹¹⁷.

International organisations

- The High Commissioner for Human Rights has drawn up *Guidelines* to provide practical, rights based policy guidance on the prevention of trafficking and the protection of the rights of trafficking victims¹¹⁸.
- The ILO's works to prevent abuses by regulating the recruitment process, and promoting model contracts which incorporate basic rights in employment such as salary, hours of work and weekly rest¹¹⁹.

XI. Tentative findings

Although international human rights principles are universally applicable, and generally apply to all citizens and migrants without distinction, the rights actually enjoyed by migrants, and their treatment, differ widely from country to country. But some conclusions can nonetheless be drawn from the factual data – albeit too limited – which exists on the human rights situation of migrants.

It confirms the vulnerability of very many – though by no means all – migrants. It underscores the fact that some groups are more vulnerable than others to abuses. They

include women and children, particularly those in domestic employment and victims of smuggling, and migrant workers in exploitative employment. It is sometimes assumed that it is only irregular migrants who experience exploitation, but this is not confirmed by the data. They may be at the highest risk, but regular migrants are also caught in situations of labour exploitation from which they find it difficult to escape; this is particularly acute in the informal and unregulated economy.

One of the ‘drivers’ of migration is a human rights ‘deficit’ in countries of origin, together with a high incidence of gender and other discrimination; this pattern of causation is both wider, including social and economic rights, and less specific than the persecution which causes refugee flight. Many migration decisions which are typically seen as motivated by the wish for greater economic opportunity are driven by human rights factors.

The data underscores the links between irregular migration and trafficking and smuggling, between irregular migration and exploitative labour, and – generally – between an irregular immigration status and violation of human rights, by national authorities or by private individuals, employers, and criminal groups.

Attempts to end irregular migration by ever stricter controls have failed, and the clear correlation between illegality, lack of human rights protection, and abuses creates a serious policy dilemma for governments.

The data also shows that human rights are generally not well protected in informal sector employment, including domestic work, that regulation in this type of employment is very difficult, and that much more needs to be done by governments. In many countries the failure to separate rights protection from immigration control, especially in relation to employment, has prevented migrants from reporting abuses to the authorities, and resulted in a de facto immunity – and impunity – for those who exploit migrants. This is encouraged by widespread ignorance of their rights on the part of migrants.

A central challenge for governments is to prevent xenophobia and racism, which together create an enabling environment for other human rights abuse.

More resources would translate into greater rights protection at all levels.

The legal picture is more positive, at least in theory. It starts from the fact that human rights have been defined by governments, and voluntarily accepted by states as moral obligations and as legal duties. Human rights ‘do not appear “deus ex machina”; they reflect state deliberation, practice and commitment’¹²⁰.

Migrants, whether they are regular or irregular, enjoy rights which are protected under general human rights law; most of these rights are guaranteed irrespective of an individual’s immigration status. While relatively few states have yet accepted the CMW as a legal obligation, the general – ‘core’ - treaties already protect migrants’ rights and have a very high level of legal acceptance because they have been ratified by most states in both the industrialised and in the developing worlds. In some cases – notably the CRC – these treaties have created - in effect - a shared common law. They protect civil and political rights; social, economic and cultural rights; proscribe torture and discrimination, and they explicitly protect the rights of women and children. They ensure consular access. They criminalise exploitation in the form of forced labour and trafficking, and they protect the rights of its

victims. There is a high – but too often unrecognised - degree of concordance between the rights in the CMW and the rights protected by these widely ratified treaties.

Many international labour standards and employment rights are also human rights, most notably those contained in the ILO Declaration on Fundamental Principles and Rights at Work. The relationship between human rights and labour standards is a strongly complementary one.

Consular access and protection is an important mechanism for rights protection, and there are many examples of its value. This is an area in which more resources are urgently needed especially by the countries from which unskilled migrants originate.

But the fact that migrants' rights are to be found in different laws and treaties, and are 'dispersed' between a number of legal sources has made it hard for migrants to know their rights. Many migrants do not know the rights to which they are entitled, and policy makers do not know their protection obligations. This has facilitated a belief that they, and particularly irregular migrants, have little rights protection in comparison with citizens. Only when the CMW attains a much higher level of government acceptance is this major obstacle likely to be removed.

XII Some priorities for action

- There is a pressing need for more states to ratify all human rights treaties, including the CMW, and the ILO labour standards, so that migrants enjoy the same near universal level of protection as do children, through the CRC.
- These rights must then be enforced through national laws, policies, and practices, so that the present gap – often chasm - between theory and practice is bridged.
- One central difficulty is the fact that migrants' rights are dispersed between so many different treaties; and the one treaty which brings them together comprehensively is not yet widely accepted by states.

There is therefore a need for a simple and comprehensive statement of the human rights enjoyed by migrants, which brings together the principles contained in international law. This could draw on the example of the *Guiding Principles for Internally Displaced Persons*, and be written in clear and non legal terms. It should be easily understood by migrants, and could guide government officials in policy and law making. It would make migrants and their representatives aware of their rights, as well as trade unions and employers' organisations. Such a statement could be used by consular officials in their representations on behalf of their nationals, and it could inform the content of employment contracts in the informal, as well as the formal, sectors. It would not be a legal text, or 'compete' with international and regional treaties, but would protect by empowering migrants to know and claim their rights.

- At the same time, rights based approaches to migration policy should be developed, using the CMW and other human rights norms and labour standards as tools for policy making.

- It is evident that the data ‘gap’ has held back rights protection and research-based policy making. Conventional methods of data collection cannot easily be adapted to situations involving illegality, where people fear to report rights abuses. The two Special Rapporteurs – appointed by the UN and by the IACHR – make an important contribution to research, fact finding, and policy making. Similar appointments – like the proposed EU Rapporteur to collect data on trafficking - could usefully be made at a regional level to focus on those stages of the migratory process in which migrant’s rights are at risk.
- Laws and policies protecting the rights of migrants during the migration cycle should be set in the context of, and complemented by, development policies which address the underlying causes of migration. There is increasing recognition that discrimination, extreme gender inequality, and abuses of social and economic, as well as civil and political, rights are central factors in the decision to emigrate, and that this is especially true in the case of trafficking and smuggling.
- The over-riding priority is to create a situation in which migration can take place in conditions of dignity, and become an informed choice rather than a strategy of survival - even desperation - in an economically asymmetric world, as it is today for many migrants.

¹ Exceptions include those with diplomatic status.

² The International Organisation on Migration, itself a major source of migration research, notes : ‘The need for policy-oriented research to inform decision making...is...growing. Although a great deal of migration research is currently being conducted ...much of it does not respond to the specific needs of governments and appears to have little impact on policy making’. <http://www.iom.int/en/what/GMRA.shtml>.

³ On one estimate, less than 10% of migrants approach law enforcement officials where their rights are violated. Valery Tishkov, *Migration in the Countries of the former USSR*, GCIM paper, 2005.

⁴ See generally *Irregular Migration and Human Rights: theoretical, European and International Perspectives*, eds Bogusz, Cholewinski, Cygan and Szyszczak, Martinus Nijhoff, 2004; and specifically on this point R.Cholewinski, ‘European Union Policy on Irregular Migration’, p. 183.

⁵ See *Migration, Human Rights and the United Nations*, by Antoine Pécoud and Paul de Guchteneire, GCIM, September 2004

⁶ *Report of the Experts Group on Trafficking in Human Beings*, Brussels, 2004, p.77.

⁷ ‘The Afghan refugee crisis of the past 20 years... has been superimposed on a history of seasonal economic migration, within the Central Asian region and beyond, going back hundreds of years’. David Turton, *Conceptualizing Forced Migration*, Oxford Refugee Studies Centre, Working Paper 12, 2003.

⁸ Cairo Conference Programme of Action 1994, para.10.1.

⁹ *Towards a Fair Deal for Migrant Workers in the Global Economy*, ILO, 2004, para. 24. See generally, S. Castles, H. Crawley & S. Loughna, *States of Conflict: causes and patterns of forced migration to the EU and policy responses*, Institute for Public Policy, London, 2004

¹⁰ *Help Wanted: abuses against female migrant domestic workers in Indonesia and Malaysia*, 2004, Human Rights Watch, p. 15.

¹¹ Radika Coomeraswamy, UN Special Rapporteur on Violence against Women, 2001/73/Add.2, #20.

¹² Convention on the Rights of the Child, A.7.

¹³ *Trafficking in Human Beings, Especially Women and Children, in Africa*, UNESCO, 2004, p.7.

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- ¹⁴ *US Trafficking in Persons Report 2003*.
- ¹⁵ See generally *Human Rights and Poverty, a conceptual framework*, OHCHR, 2004.
- ¹⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, A.9(4) ; Potocol against the Smuggling of Migrants by Land, Sea and Air, A. 15(3); the Protocols supplement the United Nations Convention against Transnational Organised Crime of 2000.
- ¹⁷ *Poverty, International Migration and Asylum*, UNU, 2004, C.Boswell and J.Crisp p..13
- ¹⁸ SpRM 2002/94 #33.
- ¹⁹ *Report of Experts Group on Trafficking in Human Beings*, European Commission, Brussels, 2004.
- ²⁰ See generally Report by IACHR Rapporteur, in Inter American Commission Annual report, Chapter V, 2003; UN Special Rapporteur, *Report on Mission to the Border between Mexico and the USA*, E/CN.4/2003/85/Add.3.
- ²¹ UN Special Rapporteur on Migrants, *Report on Mission to Morocco*, E/CN.4/2003/85/Add.3. Between 1993 and 2003 'fees' paid to traffickers and smugglers rose from \$20/\$30 to \$1,500/\$2,000.
- ²² Annual Report 2003, IACHR, paras 117 – 118. From 1994 -2002 2,000 persons died trying to cross the border.
- ²³ UN Special Rapporteur on Migrants, E/CN.4/2004/76/Add.3, para 25 [citing figures from the Friends and Families of the Victims of Clandestine Migration].
- ²⁴ *New York Times*, 21 October, 2003
- ²⁵ See – eg – 'Greece: Immigration Control – Human Rights Abuses against Albanians', 14 November 2003, Amnesty International
- ²⁶ *ILO Fair Deal*. A number of countries highlighted problems in providing protection to workers in an irregular status. While most protections would cover such workers, some states make it obligatory to inform the immigration authorities if the workers concerned avail themselves of these provisions. See para 144.
- ²⁷ UN Special Rapporteur on Migrants, Report on Mission to Philippines, E/CN.4/2003/85/Add.1.
- ²⁸ See generally R. Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, presented to the Council of Europe's European Committee on Migration (CDMG), Strasbourg, 24 November 2004.
- ²⁹ *Declaration of the Hague on the Future of Refugee and Migration Policy*, 2002; European Commission *Communication on Immigration, Integration and Employment* [COM(2003) 336]; and *World Economic and Social Survey 2004: International Migration*, [UN, New York], pp. 153 et seq.
- ³⁰ Pecoud/Guchteneire, see above.
- ³¹ *Cultural Liberty in Today's Diverse World*, UNDP Human Development Report 2004.
- ³² UDHR A. 29; CMW A 34; ICCPR A 19(2); International Convention on the Status of Refugees, A. 2. See, generally, *Taking Duties Seriously: individual duties in international human rights law*. International Council on Human Rights Policy, 1999.
- ³³ For example, the UK enacted the Anti-terrorism, Crime and Security Act 2001, derogating from ECHR A. 5(1) and ICCPR A.9, and allowing detention, without charge or trial and without recourse to judicial review, of any non-UK national deemed a 'suspected international terrorist and national security risk'. The courts later found the unequal treatment of non nationals and citizens to be in breach of the ECHR, and the law has since been changed [see page 16 above].
- ³⁴ Human Rights Watch *World Report 2002*, p. 634; Amnesty International *Report 2003*, p.228.
- ³⁵ UN SC 1373 called on all 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 preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents'.
- ³⁶ See generally 'Biometrics, International Migrants and Human Rights', Rebekah Alys Lowri Thomas, *Global Migration Perspectives No. 17*, Global Commission on International Migration, Geneva, 2005.
- ³⁷ '...we face growing threats to ... security and prosperity ...from illegal migration and working, organised crime and terrorism, identity theft and fraud, and fraudulent access to public services, for example by illegal migrants who have no entitlement to them. That is why biometric passports are already being developed here, elsewhere in Europe and in the USA'. *Identity Cards, the next steps*, Cm 6020, London, November 2003, p. 4.
- ³⁸ 1951 Convention on the Status of Refugees, A. 31.
- ³⁹ "...by definition it is impossible to have a clear picture of the phenomenon of illegal immigration in the Member States of the European Union". COM (2001) 672, 15 November 2001.
- ⁴⁰ See Elspeth Guild, 'Who is an Irregular Migrant?', in Bogusz , above, pp 3 - 28.
- ⁴¹ For example, under UK immigration regulations, students may legally work for 20 hours a week in term time, and full time during vacation, but their passports are endorsed with a general restriction on employment.
- ⁴² ICCPR. A.13.
- ⁴³ See report of UN Special Rapporteur on Migrants, E/CN.4/2003/85 paras 15-22. '(U)nder the legislation of a considerable number of countries violations of immigration law constitute a criminal offence. Undocumented and irregular migrants therefore become particularly vulnerable to criminal detention, which is punitive in

nature, for such infractions as irregularly crossing the state border, using false documents, leaving their residence without authorisation, irregular stay, overstaying or breaching conditions of stay. ... criminalisation of irregular migration is increasingly being used by governments to discourage it'.

⁴⁴ 'As a general principle, asylum seekers should not be detained. For detention ...to be lawful and not arbitrary, it must comply not only with applicable national law...and international law. It must be exercised in a non discriminatory manner and must be subject to judicial and administrative review to ensure that it continues to be necessary'. UNHCR *Guidelines on the Detention of Asylum seekers*, 1999, para. 5.

⁴⁵ In the UK, 91,000 citizens of eight of the new EU member states registered for work between May and September 2004; official figures suggest that 52,000 had been in the UK as irregular migrants in illegal employment before accession. Home Office, 10 November 2004, 351/2004.

⁴⁶ See generally *Forced Labour and Migration to the UK*, Bridget Anderson and Ben Rogaly, study prepared by COMPAS in collaboration with the Trades Union Congress, London, 2005.

⁴⁷ See generally *Is Trafficking in Human Beings Demand Driven?*, Bridget Anderson and Julia O'Connell Davidson, International Migration Organisation, 2004.

⁴⁸ 'Legal labour migration from Indonesia is dominated by women domestic workers. According to the Indonesian Government and the World Bank, in 2003 76% of 480,393 overseas workers from Indonesia were women, and 94% of these women were employed as domestic workers in Middle Eastern, East Asian, and Southeast Asian countries. *Help Wanted: abuses against Female Migrant Domestic Workers in Indonesia and Malaysia*, Human Rights Watch, 2004, p.13. '(I)n 2001 women represented 73% of newly hired overseas Philippine workers'. UN Special Rapporteur, *Mission to the Philippines*, E/CN.4/2003/85/Add.4, para. 8

⁴⁹ Special Rapporteur on Violence against Women, E/CN.4/1997/47, # 123.

⁵⁰ *World Survey on the Role of Women in Development*, report by the Secretary General; Addendum: *Women and International Migration*, A/59/287/Add.1

⁵¹ July 2003, the bodies of 37 Sri Lankans who had died in west Asia were brought home, of whom 22 had been employed as housemaids. ILO *Fair Deal*, para. 194.

⁵²;; CERD General Recommendation No. 30 # 34.

⁵³ Malaysia's Employment Act 1955 excludes domestic workers from regulations providing maternity benefits, rest days, hours of work, and termination benefits. Human Rights Watch, above.

⁵⁴ Foreign domestic workers are regularly reported to seek shelter in their national embassies in one Middle Eastern country. Report of Special Rapporteur on Violence against Women, E/CN.4/1997/47, para.133.

⁵⁵ Special Rapporteur on violence against Women E/CN.4/1997/47 #133.

⁵⁶ ILO *Labour Legislation Guidelines*, Chapter VI, The Elimination of All Forms of Forced or Compulsory Labour.

⁵⁷ The US *Trafficking in Persons Report 2003* estimates the annual figure at between 800,000 and 900,000.

⁵⁸ Special Rapporteur on Violence against Women, E/CN.3/2000/68, para.74.

⁵⁹ Bridget Anderson and Ben Rogaly, op. cit.

⁶⁰ 'Migrants may be unaware of their fate and think they are being smuggled, but are in fact being trafficked': UK Home Office *Toolkit on Trafficking of People*'.

⁶¹ CRC Articles 32 –36.

⁶² UNICEF, above.

⁶³ *Annual Report* of Inter American Commission on Human Rights, 2002., para. 44.

⁶⁴ In West and Central Africa trafficking is recognised as a problem in more than 70% of countries. In East and Southern Africa, it is identified as a problem in 33% of countries. *Trafficking in Human Beings, Especially Women and Children, in Africa*, UNICEF Innocenti Research Centre, 2003, p. 9, 23

⁶⁵ Parliamentary Assembly of Council of Europe, Recommendation 1547 (2002)1, *Expulsion Procedures in Conformity with human rights and enforced with respect for safety and dignity*.

⁶⁶ *A(FC) and others (FC) (Appellants) v. SSHD (Respondent)*, [2004] UKHL 56

⁶⁷ Convention on the Status of refugees (1951) and Protocol.

⁶⁸ . See generally Richard B.Lillich, *The Human Rights of Aliens*, Manchester University Press, 1984, p.3, 122.

⁶⁹ See CESCR, A.7 & A.8.

⁷⁰ IACtHR *Advisory Opinion* OC-18/13 of 17 September 2003. The Court advised that 'the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labour related nature. When assuming an employment relationship, the migrant acquires rights that must be recognised and ensured because he is an employee irrespective of his regular or irregular status in the State where he is employed. The rights are a result of the employment relationship.' IACtHR *Advisory opinion*, above. .

⁷¹ See Jorge A. Bustamante, 'Immigrants' Vulnerability as Subjects of Human Rights', *International Migration Review*, Vol.36, No. 2, p. 345.

⁷² Human Rights Committee, *General Comment 15*, on the rights of aliens.

- ⁷³ Committee on Economic, Social and Cultural Rights, *General Comment 14*, on the right to health. See also R.Cholewinski, above, at Note 28, above.
- ⁷⁴ CERD Gen recommendation 30 1.7.
- ⁷⁵ See CERD, A.2(1).
- ⁷⁶ See generally ‘The Rights of Migrant Workers One Year On: transformation or consolidation’, Sandesh Sivakumaran, *Georgetown Journal of International Law*, (2004), 36(1).
- ⁷⁷ Opinion of the European Economic and Social Council on the MWC [SOC/173], 30 June 2004.
- ⁷⁸ Trafficking Protocol, A. 3..
- ⁷⁹ Smuggling Protocol, A.3.
- ⁸⁰ Article 68 (1). ‘States shall take all adequate and effective measures to eliminate employment...of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers...’. A.68(2).
- ⁸¹ Lillich, above, p.3.
- ⁸² *Bad Dreams: Exploitation and Abuse of Workers in Saudi Arabia*, Human Rights Watch, 2004, p.5.
- ⁸³ Vienna Convention on Consular Relations, A.36.
- ⁸⁴ *Migrant Workers and Human Rights: Outmigration from South Asia*, edited Pong-Sul Ahn, ILO, 2004.
- ⁸⁵ International Court of Justice, *Avena & Other Mexican Nationals (Mexico v United States of America)*.
- ⁸⁶ ‘*Bad Dreams: Exploitation of Migrant Workers in Saudi Arabia*, Human Rights Watch, 2004, p.110.
- ⁸⁷ Communication No. R.9/35, Supp. No. 40 (A/36/40) at 134 (1981).
- ⁸⁸ Individual complaints can also be made under CAT, CERD and CEDAW.
- ⁸⁹ This has been recommended by the Sub Commission Special Rapporteur on the Rights of Non Citizens in his *Final Report*, E/CN.4/Sub.2/2003/23 (2003), para. 33.
- ⁹⁰ See Erika Szyszczak, ‘Regularising Migration in the European Union’, in Bogusz, above, p. 424. ECHR cases under Article 8 are summarised in Weissbrodt, Progress Report on the Rights of Non Citizens, Addendum, E/CN.4/Sub.2/2002/25/Add.2, paras 36 – 52.
- ⁹¹ IACtHR *Advisory Opinion OC-18/13*, above.
- ⁹² R (Limbuela) v Secretary of State for the Home Department [2004] EWCA Civ 540.
- ⁹³ *The UN Human Rights Treaty System: universality at the crossroads*, Anne F. Bayevsky, Transnational Publishers, 2001, pp 125-7; Weissbrodt, *Final Report on the Rights of Non Citizens*, UN, E/CN.4/Sub.2/2003/23.
- ⁹⁴ ILO Migrant Workers and Human Rights: Outmigration from S.Asia., above.
- ⁹⁵ See UNICEF, op. cit, p.34.
- ⁹⁶ UN Special Rapporteur on Migrants E/CN.4/2003/85 # 34. E/CN.4/2003/85/Add.2 # 32, UNICEF op cit, p.30; International Labour Conference, 92 session, 2004, Resolution concerning a fair deal for migrant workers.
- ⁹⁷ Summary and Conclusions by the Chair, International Symposium on Migration, Berne, June 2001, p.5. Resource Document, *Towards the Development of an International Agenda for Migration Management*, Berne Initiative, pp 29 – 29.
- ⁹⁸ ILO. International Labour Conference 2004, Resolution on Migrant Workers.
- ⁹⁹ Patrick Taran, op. cit, p. 266. Speaking to the TUC Conference, the Deputy General Secretary of the T & G defined the unions’ task as to organise migrant workers, not to exclude them; 15 September 2004.
- ¹⁰⁰ Algeria, Egypt, Israel, Jordan, Libya, Morocco, Palestinian Authority, Syria, and Tunisia.
- ¹⁰¹ *Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, Commission of the European Communities, COM (2003) 104 final.
- ¹⁰² UK Parliament Select Committee on International Development, *Report on Migration and Development*, 8 July 2004, Conclusions & Recommendations, para. 4.
- ¹⁰³ SRM E/CN.4.2002/94 para. 27; E/CN.4/2003/85 para. 65; UNICEF, supra, p.30
- ¹⁰⁴ See, eg, Reports of the UN Special Rapporteur on the Right to Health [E/CN.4/2003/58, #82], and Committee on the Rights of the Child General Comment 5: # 12; E/CN.4/2003/58, #82.
- ¹⁰⁵ See *General Recommendation 30*, issued by the UN Committee on the Elimination of Racial Discrimination [‘CERD Committee’] to guide the 169 states parties in implementation of that Convention
- ¹⁰⁶ UN Special Rapporteur on Migrants, Report on Visit to Morocco, supra, para 29
- ¹⁰⁷ *Financial Times*, 7 October 2004; the programme is co-sponsored by UNODC and the government of Portugal.
- ¹⁰⁸ Birth registration is a human right under the CRC [A.7]. See also UNICEF, supra.
- ¹⁰⁹ *World Survey on the Role of Women in Development*, report by the Secretary General, Addendum: *Women and International Migration*, A/59/287/Add.1
- ¹¹⁰ The Agreement was signed under the aegis of UNICEF; supra, p.39.
- ¹¹¹ Inter American Human Rights Commission Annual report, 2003, paras 361-364, 420.
- ¹¹² Inter American Human Rights Commission Annual report 2003, para. 185
- ¹¹³ 2000 Statute for the Protection of Victims of Human Trafficking.
- ¹¹⁴ Home Office, 351/2004, 10 November 2004; this reflects CMW A. 21.

¹¹⁵ Annual Report 2002, Inter American Human Rights Commission, para. #404.

¹¹⁶ Inter American Human Rights Commission Annual Report 2003, Para 6.

¹¹⁷ See 'Globalization/Migration: Imperatives for Civil Society and International Organisations', Patrick Taran, in Bogusz, *supra*, p.259.

¹¹⁸ *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, OHCHR, Geneva, 2002.

¹¹⁹ ILO Fair Deal, #274

¹²⁰ Alex Aleinikoff, in *Citizenship Today: Global Perspectives and Practices*, ed. Aleinikoff and Klusmeyer, 2001.