The Role of Departure States in Combatting Irregular Emigration in International Law: A Historical Perspective

Andrew Wolman*

Abstract:

This paper examines the evolution over time of attempts to establish an international law principle that states have a legal responsibility, at least under certain circumstances, to combat irregular emigration, defined as the exit of individuals who would be arriving at their destination in a manner that is not compliant with the destination country's immigration laws. Through examination of contemporaneous statements and *travaux préparatoires* during six separate negotiating episodes, I shed light on attempts to develop such a norm since the beginning of the twentieth century, along with the evolving set of legal and ethical justification that were used in the process. I also examine the different practical and principled objections that other states and civil society actors employed to oppose the development of such a legal norm. I conclude by arguing that this historic research challenges current perceptions that home state controls are of recent origin, and that international migration law is inherently progressive.

International migration law, at least in its global incarnation, has mainly focused on the duties of destination states.[1] These duties have most prominently included *non-refoulement* and protection of migrants' rights. There are, however, other strands of international migration law that focus on the duties of states of origin and states of transit (collectively referred to here as departure states). In this paper, I explore one of these: namely the attempts over the past century to establish a duty to combat irregular emigration, defined here as the exit of individuals who would be arriving at their destination in a manner that is not compliant with the destination country's immigration laws.[2] In particular, I focus on the evolution of those legal and policy arguments used over time to try to establish such a duty, along with those arguments marshalled in opposition to the establishment of any such duty. This is a history that has to a certain extent been neglected by scholars, especially in contrast to the voluminous research on destination state duties in international migration law.[3]

* Lecturer, City Law School, City, University of London.

[1] See Christian Tomuschat, 'State Responsibility and the Country of Origin' in Vera Gowlland-Debas (ed) *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1995) 59.

[2] It should be acknowledged that while the term 'irregular' is commonly used in policy and academic circles (and among the state actors that are the focus of this article), some scholars have noted that characterising migrants' 'regularity' from a purely state-centric perspective can be problematic. See, eg, Anne McNevin, 'Irregular Migrants, Neoliberal Geographies and Spatial Frontiers of "The Political"' (2007) 33 Review of International Studies 655, 655.

[3] Catherine Dauvergne, 'Irregular Migration, State Sovereignty and the Rule of Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 84 (describing the 'dirty little secret of international cooperation to prevent people from leaving.')

This paper will specifically examine the arguments presented in favour of such a duty along with the arguments marshalled against it during six sets of negotiations over the course of the twentieth century, from the futile attempts at global migration policymaking during the 1920s to the successful negotiation of the Smuggling Protocol in the late 1990s. In doing so, I trace a history of repeated attempts to develop departure state duties, largely spearheaded by developed destination states. I show how the legal and ethical justifications for these attempts have changed over time, in response to changing migration dynamics and political contexts, along with the growing normative acceptance during this period of the human right to leave any country, including one's own. In my concluding section, I argue that this history challenges current perceptions that home state controls are of recent origin, and that international migration law is inherently progressive.

Besides shedding light on the past, this a history with continued relevance.[4] The imposition of a departure-state duty to combat irregular migration still presents a tempting prospect for destination states searching for a way to reduce irregular immigration without internalizing the costs of border securitization or mass deportations. While destination states have focused on bilateral efforts and anti-smuggling law in recent years, the basic idea of using legal and political toots to induce departure states to control irregular migration is now a prominent topic in migration management in Europe and elsewhere. Studying past efforts can provide insights into the arguments and justifications that have been successfully employed in the past (pro and contra) and which may be of similar use in contemporary discourse.

Early Efforts to Develop a Home State Duty

As has been well documented by McAdam and others, there is a long (although contested and imperfectly implemented) tradition of free movement in pre-twentieth century international law and practice, including widespread acceptance of both the right to enter countries as well as the right to leave them.[5] This started to change towards the end of the nineteenth century. Restrictive immigration laws emerged in the 1880s in the United States, with the passage of the 1882 Chinese Exclusion Act (prohibiting the immigration of Chinese labourers), soon followed by the 1882 Immigration Act (restricting immigration for the destitute and ill) and the 1885 Foran Act (restricting immigration for those under contract to perform labour in the US).[6] Soon after, governments in Canada, Australia, New Zealand and South Africa adopted race-based immigration restrictions, followed by more comprehensive immigration laws in the early twentieth century.[7] European countries experimented with a variety of migration policies during

[4] Edwin Odhiambo Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective' (2007) 19 International Journal of Refugee Law 51, 53 (a historical account can 'enable one to appreciate the current challenges facing asylum regimes').

[5] Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 Melbourne Journal of International Law 1; Vincent Chetail, 'The Transnational Movement of Persons under General International Law' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 31-32.

[6] Claudia Sadowski-Smith, 'Unskilled Labor Migration and the Illegality Spiral: Chinese, European, and Mexican Indocumentados in the United States, 1882-2007' (2007) 60 American Quarterly 779, 786.

[7] Daniel Ghezelbash, 'Legal Transfers of Restrictive Immigration Laws: A Historical Perspective' (2017) 66 International & Comparative Law Quarterly 235.

the 1800s, but by World War I, restrictive immigration controls had become widespread there as well.[8]

During this early period of immigration restrictions, destination countries such as the United States faced a difficult challenge in preventing the entry of those who did not comply with the newly restrictive laws.[9] In the case of the Chinese Exclusion Act, for example, US government agents were tasked with distinguishing whether prospective migrants were actually labourers (as opposed to merchants, clergy, diplomats, teachers, tourists and students, who were permitted entry), through interviews, certificates of identity and the like. This proved near-impossible; it was widely known at the time that fraudulent certificates and false identities were common.[10] Trans-Atlantic migration was similarly associated with widespread irregularities.[11] At Ellis Island, for example, corrupt officials reportedly provided thousands of prospective migrants with false entry documents, while ship officials were sometimes willing to illicitly ferry migrants to shore in return for a small bribe.[12]

In response to the perceived failures in preventing irregular immigration, pressure arose in the US and elsewhere to shift immigration law enforcement to the prospective migrants' home country. As one nativist commentator opined in 1905, '[f]or many years, the American people have carried on their fight single-handed against the admission of objectionable aliens. The day is apparently drawing near when the cooperation of foreign governments will be secured in reducing the volume of emigrant movement.'[13] Externalising immigration regulation was effectuated in three main ways. First, for the major trans-Atlantic routes, the shipping companies were authorised to reject passage to those suspected or being unqualified to immigrate.[14] According to one contemporaneous observer, 'the emigration from Italy, Austria-Hungary and Russia are carried by the English and German steamship lines, the officials of which exercise considerable vigilance in preventing the embarkation of passengers who are likely to be refused admission at American ports.'[15] Shipping companies in fact had a strong incentive to take on board only those assured of entry to the destination country, because they were often held

[8] James Nafziger, 'The General Admission of Aliens under International Law' (1983) 77 American Journal of International Law 804; John Torpey, 'Passports and the Development of Immigration Controls in the North Atlantic World during the Long Nineteenth Century' in Andreas Fahrmeir et al (eds), *Migration Control in the North Atlantic World* (Berghahn 2003).

[9] Sadowski-Smith (n 6) 784 ('The 1882 Chinese Exclusion Act was the first federal legislation to create significant undocumented immigrant movement.')

[10] Immigration agents estimated that 70 to 90 percent of Chinese immigrants entered the country due to fraudulent claims. Adam McKeown, 'Ritualization of Regulation: The Enforcement of Chinese Exclusion in the United States and China' (2003) 108 American Historical Review 377, 378.

[11] Sadowski-Smith (n 6) 789.

[12] Ronald Bayor, *Encountering Ellis Island: How European Immigrants Entered America* (Johns Hopkins U Press 2014) 113-115.

[13] James Davenport Whelpley, 'Control of Emigration in Europe' (1905) 180 North American Review 856, 857.

[14] In fact, carrier sanctions regarding arrival of unauthorised arrivals of Jews in Britain were put in place as far back as the 18th century. Gina Clayton, 'The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control' in Bernard Ryan and Valsalmis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Brill 2010) 398.

[15] Ibid.

financially liable for repatriating individuals denied entry.[16] These early controls prefigure the current carrier sanction schemes that have been much debated in recent years.[17]

Second, the US and other destination states such as Canada and Australia requested permission from major departure states to allow their immigration officials to open offices in ports of embarkation in order to evaluate prospective immigrants as they boarded.[18] Some nations allowed this to take place; other did not.[19] Belgium, for example, did not welcome US agents to their ports.[20] Mexico also refused to allow US immigration officials to be stationed on its territory to stop Chinese migration (Mexicans at the time could freely enter the US).[21]

Third, departure states themselves enacted policies restricting emigration to those permitted to do so under the laws of the destination state. During the early twentieth century, Hungary, Czechoslovakia, and the Serb-Croat-Slovene Kingdom passed laws prohibiting the emigration of individuals who would not be permitted to enter the state to which they were travelling.[22] One related focus for some states was preventing emigration agents from promoting irregular migration. Thus, Portugal, for example, passed regulations providing that 'an agent's licence shall be withdrawn if … promotes clandestine emigration'.[23] In Switzerland, agents were 'forbidden to forward any person without a passport and identification paper or any person who cannot be admitted to the country of destination.'[24] These clauses were in part intended to protect potential emigrants from suffering the indignity of sailing across the ocean, often after having sold their property, only to be rejected and sent back home, but a secondary benefit for destination countries was to reduce the number of unqualified entrants likely to attempt an irregular entry upon arrival.[25] Many other departure states administered health checks at the port

[16] International Labour Conference, Twenty-Fourth Session, Report III, 'Recruiting, Placing and Conditions of Labour (Equality of Treatment) of Migrant Workers' (Geneva, 1938) 55; Bernard Ryan, 'Extraterritorial Immigration Control: What Room for Legal Guarantees?' in Bernard Ryan and Valsalmis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Brill 2010) 19 (describing 1901 Australian scheme to penalize carriers for bringing non-European passengers who were rejected by immigration officials); International Labour Office, Emigration and Immigration: Legislation and Treaties (1922) 24 (noting Greek, Italian and Spanish obligations for shipping companies to repatriate at their own cost or compensate emigrants denied entry at their destination).

[17] See eg, Tilman Rodenhäuser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control' (2014) 26 International Journal of Refugee Law 223; Tendayi Bloom and Verena Risse, 'Examining Hidden Coercion at State Borders: Why Carrier Sanctions Cannot be Justified' (2014) 7 Ethics & Global Politics 65.

[18] International Labour Conference, Twenty-Fourth Session (n 16) 58-59.

[19] Ibid 54 ('In order to obviate as far as possible the complications and expense which ensue when would-be immigrants are rejected in countries remote from their own, the immigration countries are to an increasing extent organising preliminary examinations in the country of origin or of departure'); Whelpley (n 13) 864 ('American officials stationed in Italy are given almost official authority for the inspection of emigrants and emigrant-ships leaving Italian ports').

[20] International Labour Conference, Twenty-Fourth Session (n 16) 54; Whelpley (n 13) 860-61.

[21] Sadowski-Smith (n 6) 787-88.

[22] International Labour Office (1922) (n 16) 24.

[23] International Labour Conference, Twenty-Fourth Session (n 16) 40.

[24] Whelpley (n 13) 861.

[25] Ibid.

of embarkation, both as a means of detecting individuals likely to be denied entry by the destination state for health reasons, and as a means of cutting down on the risk of shipboard disease transmission.[26] In other instances, departure states refused to cooperate in immigration law enforcement. For example, Chinese authorities issued assurances of merchant status for a year after passage of the Chinese Exclusion Act, but then ceased cooperation, leaving US authorities to their own devices.[27]

At the end of the nineteenth century, the first efforts emerged to improve migration management through international agreements. From the start, one widely embraced objective was to ensure that departure states helped prevent irregular migration. Thus article two of a set of principles proposed by the Institut de Droit International (IDI) in 1897 specified that emigration would be forbidden to persons prohibited from immigrating by the laws of the destination state.[28] A few years later, during bilateral negotiations between the USA and Italy in 1908 for the organization of an international immigration and emigration conference, the programme drawn up by Italy (a major state of origin at the time) included a proposal on 'whether, and if so under what conditions, it would be possible to organize special joint commissions which should verify at the ports of embarkation whether each person could or could not start for a certain destination, taking into account the laws in force in the countries of departure and arrival.'[29] Certainly the US viewed pre-departure checks as an important objective as well, as revealed in the 1917 Immigration Act, which authorised the President to call an international conference to, *inter alia*, 'secur[e] the assistance of foreign Governments in their own territories to prevent the evasion of the laws of the United States governing immigration' and enter into 'such international agreements as may be proper to prevent the immigration of aliens who, under the laws of the United States are or may be excluded from entering the United States'.[30]

International migration negotiations began in earnest after the First World War, when a set of worldwide conferences and meetings were held with the intention of rationalizing migration management through the development of international norms.[31] The first of these was the 1921 Conference of Emigration Countries, in Rome. Prior to the conference itself, the International Labour Office consulted member states on whether they wanted to unify departure and admissions formalities in the state of embarkation, and 'nearly all' agreed that this would be beneficial.[32] In response, it proposed a five-article draft convention for the members' consideration. The draft stated, *inter alia*, that parties shall establish examination offices in each port of emigration and at the chief frontier points through which emigrants pass, whose purpose

[26] International Labour Conference, Twenty-Fourth Session (n 16) 52 (citing policies in Poland, Czechoslovakia, China and Japan).

[27] McKeown (n 10) 385.

[28] Annuaire de l'Institut de Droit international, Vol. XVI, 253 ('*l'émigration sera interdite aux personnes auxquelles les lois de l'Etat d'immigration défendent d'immigrer*).

[29] International Labour Office, Report of the International Emigration Commission (August, 1921) 117.

[30] Immigration Act of 5 February 1917, 39 Stat 874, sec 29.

[31] International Labour Conference, Twenty-Fourth Session (n 16) 39-50. In parallel with these official meetings, trade unions and civil society groups also discussed migration governance at a series of meetings during these years, including at the Conference of the International Federation of Trade Unions, held in 1924 in Prague, and at the World Migration Congress, held in 1926 in London. Ibid, 50.

[32] Report of the International Emigration Commission (n 29) 115.

would include checking 'whether [emigrants] satisfy the legal provisions adopted in regard to entry into the country of immigration'.[33] In the end, the treaty was not adopted. Throughout the 1920s, a series of similar conferences also paid attention to the home state role in the migration process, although with more focus on medical and occupational qualification than on compliance with immigration laws *per se*.[34] However, these meetings, too, failed to produce any new treaties, due to a basic inability to bridge the gap between the objectives of departure states and destination states (which at the time were instituting more restrictive and discriminatory immigration laws).[35] Further attempts to reach agreement petered out amid the economic and political turmoil of the 1930s.[36]

Destination states justified the administration of immigration laws in the departure state as an additional safeguard against irregular migration that could, in the words of the US Commissioner General of Immigration, help 'to safeguard our country from the entrance of dangerous elements'.[37] However, the idea of a departure state role in enforcing the immigration laws of the destination state was at this time also commonly justified as protective of the individual (and secondarily of the transport company or departure state that would be likely to foot the bill in case of refusal).[38] Thus, the International Labour Organisation justified the administration of selection formalities in the port state by noting that [w]ould-be emigrants should be spared the distress and material loss which they suffer when, after having sold their goods and often even their small holdings … they are informed at the end of a long journey that they are rejected and must go back whence they came'[39] Similarly, Louis Varlez noted that such

[33] Ibid, 119.

[34] At the 1924 International Emigration and Immigration Conference, for example, attendees adopted a resolution asking states to 'take steps to provide for medical examinations, before departure, of a sufficiently thorough character to reduce to a minimum the possibility of the emigrant being rejected on medical grounds at the port of landing'. International Labour Conference, Twenty-Fourth Session (n 16) 64. At the Second International Emigration and Immigration Conference, held in Havana in 1928, a resolution was adopted recommending that 'an occupational selection of emigrants should be organised before their departure from the country of origin, so as to minimise the possibilities of conflicts arising in the country of immigration concerning the immigrants' occupational qualifications proper or their general occupational utility'. Ibid.

[35] See Aristide Zolber, 'Are the Industrial Countries under Siege?' in Giacomo Luciani (ed), *Migration Policies in Europe and the United States* (Springer 1993) 57.

[36] At the end of the 1930s, the International Labour Organization made a final pre-war attempt to address migration management with the 1939 Migration for Employment Convention (66), but the Convention never received any ratifications and was officially withdrawn in 2000.

[37] Report of the International Emigration Commission (n 29) 117. See also Whelpley (n 13) 261 (port state regulation is 'of great value to a country like the United States, for it guarantees the arrival at American ports of very few who need be regarded with suspicion').

[38] This anticipates contemporary narratives supporting anti-irregular migration laws as protective of the health and safety of smuggled migrants. See, eg, BS Chimni, 'The Birth of a Discipline: From Refugee to Forced Migration Studies' (2009) 22 Journal of Refugee Studies 11.

[39] International Labour Conference, Twenty-Fourth Session (n 16) 54. The British government expressed similar sentiments in its 1917 report on emigration, stating that '[w]e can hardly speak too strongly of the hardship which is involved when, after a home has been broken up and its occupants have sailed for a distant land, one member is rejected on arrival, and has to return in bitter disappointment.' Report of the International Emigration Commission (n 29) 116.

controls were not only in the prospective emigrant's interest, but also in the interest of departure states that might, in the end, be forced to pay his or her repatriation costs.[40]

From a human rights perspective, Fauchille characterised state of origin controls on irregular emigration as a justifiable exception to the right to leave one's country, for similar reasons of individual protection.[41] Interestingly, however, one rights objection that arose (in discussion of the proposed 1897 IDI principles) was that home state prohibition of irregular emigration could potentially be used to legitimise unnecessary *immigration* laws, contrary to the tenor of article one of the principles, which provided for a general freedom of immigration except for restrictions necessary for the maintenance of social and political order.[42] In the end, the drafters duly noted this concern and clarified that the home state prohibition must be read in conjunction with the article one protections on the right to immigrate.[43]

Emigration to Palestine: 1945-48

After the end of the Second World War, the home state role in combatting irregular migration once again become a pertinent issue, albeit in a very different context. During 1945-48, there was a large scale migration of European Jews to the British Mandate of Palestine. This migration flow went against the wishes and regulations of the British government at the time, which was increasingly nervous about alienating Muslims from the Middle East and India.[44] At the end of the Second World War, Britain continued a monthly quota of 1,500 entry certificates per month for Jewish immigrants, but this was not large enough to satisfy the migratory demands of European Jews, who continued to irregularly arrive by boats at numbers far exceeding the quota.[45] With its attempts to confine or deport Jewish irregular migrants leading to unrest and criticism, Britain turned to diplomacy to persuade other European countries to prevent this exodus. These efforts were initially unsuccessful, with departure states such as France and Sweden asserting that they had no duty to concern themselves with whether emigrants had permission to legally enter their ultimate destination.[46] In response to this initial rebuttal, the

[40] Louis Varlez, 'Les Migrations Internationales et leur Réglementation' (1927) 20 Recueil de Cours 259-60.

[41] Paul Fauchille, 'The Rights of Emigration and Immigration' (1924) 9 International Labour Review 317, 321 ('the protection of its nationals is one of the preoccupations of the state and it should therefore refuse to admit the right of emigration on the part of those who would be excluded as immigrants by the laws of the country of destination'). While the right to leave one's country was not embraced in a multilateral negotiation until the adoption of the Universal Declaration of the Human Rights (followed some years later by its codification in the International Covenant on Civil and Political Rights), its existence as a norm of modern international law arguably dates back considerably further, and was explicitly acknowledged by Vattel, Grotius, and others. McAdam (n 5) 9-11.

[42] Annuaire de l'Institut de Droit international (n 28) 253.

[43] Ibid. Lawyers in the IDI at the time were vigorous advocates of the right to migrate. Frédéric Mégret, 'Transnational Mobility, the International Law of Aliens, and the Origins of Global Migration Law' (2017) 111 AJIL Unbound 13, 14.

[44] Arieh Kochavi, 'The Struggle against Jewish Immigration to Palestine' (1998) 34 Middle Eastern Studies 146, 147; Ritchie Ovendale, *Britain, the United States, and the End of the Palestinian Mandate: 1942-1948* (Royal Hist Soc 1990) 215; Steven Wagner, 'British Intelligence and the 'Fifth' Occupying Power: The Secret Struggle to Prevent Jewish Illegal Immigration to Palestine' (2014) 29 Intelligence & National Security 698, 706..

[45] Kochavi (n 44) 146.

[46] Freddy Leibreich, *British Naval and Political Reaction to the Illegal Immigration of Jews to Palestine, 1945-1948* (Routledge 2005) 78-79 (citing French and Swedish correspondence).

Foreign Office's Legal Advisor was tasked with studying whether a case could actually be made for an international legal duty for the states of departure to combat irregular migration.

The Legal Advisor eventually replied that there was no specific rule of international law requiring a State to concern itself with the ultimate destination of persons leaving its territory.[47] However, he did qualify that conclusion by citing Oppenheim to claim that there was a general rule of international law that a state should 'exercise due diligence to prevent persons within its territory from committing acts injurious to foreign states.'[48] In the Palestinian context, he argued that departure states were violating this rule for five reasons: '(a) illegal immigration promotes civil strife; (b) its scale causes embarrassment to the government of Palestine; (c) it interferes with the fulfillment of HMG's obligations; (d) it is a movement organised by states outside Palestine; (e) ships carrying immigrants are frequently armed'.[49] In addition, the Legal Advisor noted that the burden of additional travel control that states of departure would bear would not be out of proportion to the injury caused by irregular migration.[50]

When the Legal Advisor's assertion of the international legal duty to prevent irregular migration to Palestine was conveyed to various European countries, it was uniformly rejected.[51] This is perhaps unsurprising; within Europe there was very little political benefit to attempts to stop Jewish emigration to Palestine. In France and Italy in particular there was considerable empathy among politicians both for the fate of Jewish holocaust survivors and for Zionist national aspirations.[52] Elsewhere, as in Poland, Jewish emigration was seen as a means of avoiding property claims (from Jews returning to find their homes seized) and currying favour with the US, which at this time supported Jewish migration to Palestine.[53] Sweden simply objected that their domestic law did not empower the examination of emigrants to see if they had a valid exit visa or not.[54] While the 'right to leave one's country' does not seem to have been a prominent objection at this time, by early 1948 the British apparently foresaw it as a potential hurdle, and proposed that the newly formed UN Human Rights Commission specify in the International Covenant on Human Rights that restrictions on the right to emigrate are permitted in order to fight illegal immigration.[55] This request was eventually refused, with drafters

[47] Ibid, 79.

[48] Ibid.

[49] Ibid, 80.

[50] Ibid.

[51] Ibid (noting reactions from Paris, Brussels, Stockholm, the Hague, Athens and Belgrade). The British later used other methods to get the attention of departure states, including the sabotage of five ships in Italian ports, and the *refoulement* of Jewish migrants in the *Exodus 1947* incident, where French agents famously refused to force disembarkation. Wagner (n 44).

[52] Liebreich (n 46) 60; 74-6.

[53] Laurent Rucker, 'Moscow's Surprise: The Soviet-Israeli Alliance of 1947-1949', Cold War International History Project Working Paper No 46 (2005) 13. Romania, meanwhile, permitted such emigration on condition that the Jews give up their property and money before leaving. Ibid, 29.

[54] Liebreich (n 46) 78.

[55] UN Commission on Human Rights, Report of the Third Session of the Commission on Human Rights at Lake Success, 24 May to 18 June 1948, UN Doc E/800 (28 June 1948), 26.

preferring to list broad grounds for limiting right to free movement in the International Covenant on Civil and Political Rights (ICCPR).[56]

Setting aside practical and political objections, the British legal assertion that irregular migration should be considered an injurious act covered by the general duty to prevent the private commission of injurious acts was not particularly convincing. In practice, this duty had previously been cited by states mainly in the context of the prevention of acts of violence against foreign states from being plotted or undertaken from within another state's borders.[57] While the British legal argument was new, it did not emerge entirely out of the blue. In his 1930 Hague lecture, Charles Dupuis had argued that states should discourage emigration towards destinations where emigrants were not wanted by analogising to the imprudence of an individual forcing open the door of a household where he was not welcome.[58] More prominently, Sir Robert Jennings had in 1939 proposed that Nazi Germany should be held liable under international law for damages suffered by Britain and other states in supporting destitute Jewish refugees who had been forced to leave the country in penury.[59] This proposition of home-state responsibility for refugee support did not gain any diplomatic traction, but has proved relatively popular among succeeding generations of refugee law scholars.[60] The idea of a customary international law duty to prevent irregular migration, on the other hand, has largely fallen by the wayside.

ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143)[61]

During the period from World War II until the early 1970s, curtailing irregular migration was – with certain exceptions – not a major priority in most of the world.[62] Sustained economic

[56] Specifically, the right was not to be subject to any restrictions except 'those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 12(3).

[57] Liebreich (n 46) 128.

[58] Charles Dupuis, 'Règles Générales du Droit de la Paix' (1930) 32 Recueil de Cours 140. The analogising of migration ethics to individual behaviour has a long history dating back to Francisco de Vitoria's famous grounding of an international law duty to allow free movement of foreigners on the natural (and biblically commended) hospitality of individuals. Vincent Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vittoria to Vattel' (2016) 27 European Journal of International Law 901, 904.

[59] Jennings relied on abuse of rights doctrine to assign liability to states of origin. Robert Jennings, 'Some International Law Aspects of the Refugee Question' (1939) 20 British Yearbook of International Law 98, 111.

[60] See, eg, Guy Goodwin-Gill, *The Refugee in International Law* (OUP 1983) 228; James Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 Journal of Refugee Studies 113, 119; Christian Tomuschat, 'State Responsibility and the Country of Origin' in Vera Gowlland-Debas (ed) *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff 1995); Rainer Hofmann, 'Refugee-Generating Policies and Law of State Responsibility' (1985) 45 Zeitschrift far ausländisches öffentliches und Völkerrechtpp 694.

[61] Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, ILO No 143 (adopted 24 June 1975, entered into force 9 December 1978) 1120 UNTS 324 (ILO Convention 143).

[62] Mexican irregular migration to the US was at times one of these exceptions, and also provided examples of close governmental cooperation to combat irregular emigration. See Sadowski-Smith (n 6) 792; Kelly Lytle Hernández, 'The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954' (2006) 37 Western Historical Quarterly 421, 432.

growth led to a demand for manpower in many western countries, which could only be met by migrants, whether or not they had legal status.[63] Thus when the International Labour Conference adopted the 1949 Migration for Employment Convention (Revised), the focus was on assuring prospective migrants possessed accurate information and ensuring equal treatment for migrant workers and nationals in various respects.[64] There were no provisions regarding a home state obligation to combat irregular migration, although the Annexes did contain clauses mandating the punishment of any person who promoted clandestine or illegal immigration.[65]

The number of irregular immigrants accelerated sharply in the 1970s, however, just as the oil crises and subsequent economic pressures began to reduce economic growth, priming politicians in western countries to pay renewed attention to effectively combatting irregular migration.[66] Within this context, the immediate factors prompting renewed international attention to irregular migration were a series of incidents involving the death or injury of smuggled migrants.[67] Most notable among them was the 1972 discovery of a sealed truck transporting 59 'barely alive' migrant workers from West Africa that broke down in the Mont Blanc tunnel, a short distance away from Geneva, where the UN Economic and Social Council (ECOSOC) was meeting at the time. [68] At the behest of the Kenyan delegate, ECOSOC passed a resolution soon thereafter condemning clandestine trafficking in migrant workers, and their exploitation, and requesting governments to act against those responsible. ECOSOC also requested that the Commission of Human Rights consider the question and that the ILO energetically examine the matter.[69] In time, this led to the negotiation of Convention 143 at the International Labour Conference, along with the adoption of various resolutions by the UN General Assembly and ECOSOC condemning abuses of smuggled and trafficked migrants.[70]

Initially the negotiations for ILO Convention 143 were focused on stopping the abusive or clandestine movement of migrant workers (including by combatting irregular migration itself and by combatting the employment of irregular migrants).[71] Soon, however, there was pressure to address migrant worker rights in the same document. Most employers groups argued in favour

[63] G Bertinetto, 'International Regulations on Illegal Migration' (1983) 21 International Migration 189, 190 (noting that previously 'clandestine immigration had often been tolerated, since it provided a source of efficient and cheap labour for some of the receiving countries').

[64] Convention Concerning Migration for Employment (Revised), ILO No 97 (adopted 1 July 1949, entered into force 22 January 1952) 20 UNTS 79.

[65] Ibid, art 8 of Annex I; art 13 of Annex II.

[66] See Bertinetto (n 63) 189.

[67] Ryszard Cholewinski, *European Union Policy on Irregular Migration: Human Rights Lost?* in Barbara Bogusz et al, eds, Irregular Migration and Human Rights: Theoretical, European and International Perspectives (Martinus Nijhoff 2004) 160.

[68] Ibid.

[69] Bertinetto (n 63) 191.

[70] Ibid 190; OSCE, 'Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination' (OSCE 2006) 163.

[71] Bertinetto (n 63) 192. Unlike the earlier British efforts, the negotiators did not specifically target states of origin with a new duty to prevent irregular migration, but rather applied it throughout to all parties, although destination states would not have generally seen this a burdensome given that they would necessarily already have a (domestic) legal duty to prevent migrants from arriving irregularly.

of maintaining an exclusive focus on 'combat[ting] illicit and clandestine migrations', perhaps with the addition of a separate recommendation on equality of opportunity and treatment.[72] However, the majority opinion was that preventing abusive or clandestine migration and migrant rights should be included in two parts of the same Convention.[73] Eventually, the Convention evolved to contain two parts: the first dealt with migration in abusive conditions, and the second provided for equal rights between migrant workers and nationals in various respects.[74] The resulting link between the prevention of irregular migration and the rights of migrants has endured through ensuing treaty negotiations.

While the negotiations surrounding the treaty were clearly focused on protecting the safety of migrants and preventing their exploitation, one early question in the discussion was whether the treaty should attempt to curtail migration 'in abusive conditions' or rather all forms of irregular migration. The US governmental delegate, supported by the Canadian government delegate, argued for the latter, submitting a proposal to alter the proposed treaty title so that it referred to 'illicit and clandestine migrations' instead of 'migrations in abusive conditions'.[75] This was rejected, but a certain ambiguity characterised the debate going forward. For example, the Holy See delegate discussed abusiveness and clandestineness as if they were synonyms, stating that 'migrations in abusive conditions [represented] a veritable scandal of our age. No words are too strong to condemn clandestine migration'.[76] A separate issue arose as to whether the right to leave should be specifically cited, as demanded by the US government and worker delegates and the Migrant Worker Committee's employer members.[77] Discussion surrounding this issue was highly politicised (as it was throughout the 1970s), with the US workers' delegate decrying widespread violations of the right to migrate in the Communist bloc.[78] The records show no questioning of potential tension between the right to leave and the duty to combat abusive or clandestine migration.

In the end, the preamble did explicitly cite the right to leave, although it was omitted from the operative clauses, due to a stated fear of encouraging a 'brain drain'.[79] Meanwhile the treaty's final language awkwardly conflated the duty to address clandestine migration and the duty to address abusive migrations. Article three states that:

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[72] International Labour Conference, Record of Proceedings, 59th session (1974) 717.

[73] Bertinetto (n 63) 192.

[74] States were free to exclude either of these parts at the time of ratification. Richard Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester Univ Press 1984) 73.

[75] International Labour Conference, Record of Proceedings, 60th session (1975) 639.

[76] International Labour Conference (1974) (n 72) 266. Thus, as noted by Frelick et al., '[c]ontrol of migration flows is cast as an effort to prevent 'illegal' (or irregular) immigration or to protect migrants from the dangers of the journey' Bill Frelick et al, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and other Migrants' (2016) 4 J Migration & Human Security 190, 193.

[77] International Labour Conference (1975) 792.

[78] International Labour Conference (1974) (n 72) 622; 719.

[79] ILO Convention 143 (n 61) preamble. However, the final language rejected the proposal by the Employers' members that the preamble also 'deplor[e] that these fundamental rights are not observed by all ILO members'. International Labour Conference (1975) 840.

> [e]ach Member shall adopt all necessary and appropriate measures, both within its jurisdiction and in collaboration with other Members—(a) to suppress clandestine movements of migrants for employment […] in order to prevent and to eliminate the abuses referred to in Article 2 of this Convention.[80]

However, article two does not mention any 'abuses'; rather it requires states to investigate whether migrant workers have been subjected to any 'conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations'.[81] According to the ILO Committee of Experts, 'abusive conditions' therefore refers to any conditions which are prohibited by international instruments or national laws or regulations, and thus applies to irregular migrants travelling on their own, as well as those being trafficked or smuggled.[82]

The International Convention on the Rights of Migrant Workers[83]

ILO Convention 143 proved unpopular among both departure and destination states. Adopted in June 1975, it only received nine ratifications by the end of 1980, and currently has 23 parties.[84] Destination countries were reluctant to endorse the recognition of rights of irregular migrants, while other countries, such as Mexico, felt that the convention did not go far enough in recognizing the rights of irregular but tolerated migrants.[85] Some developing countries were also unhappy with the convention's stance against clandestine migration.[86] By 1979, Mexico and Morocco took the lead in proposing a resolution at the UN General Assembly for the elaboration of a new rights-focused legal instrument.[87] The UN forum was seen as more receptive to developing country needs, as it would allow for a majority of developing country governmental representatives, which was not the case in the tripartite ILO.[88]

In contrast to ILO Convention 143, it was always understood that migrant rights would be at the heart of the UN treaty. However, it soon became clear that destination states also wanted to include a duty to address irregular migration.[89] As negotiations continued in meetings of the Working Group, the precise language regarding a duty to address clandestine or irregular

[80] ILO Convention 143 (n 61) art 2.

[81] Ibid, art 3.

[82] International Labour Office, *International Labour Standards: A Global Approach* (ILO 2002) 144 (noting that the Convention applies to individuals acting on their own, although it is aimed primarily at movements organized by traffickers).

[83] International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW).

[84] International Labour Organisation, Ratifications of C143 – Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143).

[85] Bertinetto (n 63) 199.

[86] Roger Böhning, 'The ILO and the New UN Convention on Migrant Workers: the Past and Future' (1991) 25 International Migration Review 698, 699.

[87] Bertinetto (n 63) 199.

[88] Jeannette Money et al, 'Why Migrant Rights are Different than Human Rights' in Gary Freeman and Nikola Mirilovic (eds), *Handbook on Migration and Social Policy* (Edward Elgar 2016) 407.

[89] Bertinetto (n 63) 201.

migration became a point of debate between departure and destination states. European countries, with the support of the United States, proposed that the treaty require collaboration with a view to 'preventing' and 'eliminating' or 'suppressing' illegal or clandestine movements of migrant workers and their families.[90] However, the Mexican representative objected to the notion of prevention and suppression, arguing that this could seriously restrict the right to leave one's country.[91] A group of developing countries including Turkey, India, Jamaica, Algeria, and the Dominican Republic proposed replacing the word 'suppressing' by words such as 'discouraging', 'curbing' or 'combating'.[92] Sweden and France objected, arguing that the phrase 'suppress clandestine movement of migrants for employment' should be maintained because it was already commonplace in the UN and other international organizations, and had been recently agreed to in Convention 143.[93] In fact, this appeal to precedent becomes more understandable when one considers that the ILO had in 1981 been drawn in as draftsman for the MESCA (Mediterranean and Scandinavian) group, and was institutionally concerned with ensuring the continued relevance of its past treaties, including Convention 143.[94]

Another debate emerged over the Convention's purpose during discussion of the preambular clauses. Some European delegations thought that the purpose should be to 'prevent illegal migration, to suppress clandestine movements of migrants and combat the illicit traffic of workers' and that therefore reference to the rights of undocumented workers should be omitted in order to avoid encouraging illicit migration.[95] A group of developing countries led by Mexico and Algeria rejected this idea, however, arguing that basic labour rights must be provided to irregular workers, and that this should not be seen as an encouragement to illicit migration.[96]

In the end, prevention of clandestine migration was included in a preambular clause, albeit couched in human rights-friendly language.[97] Meanwhile, the final version of article 68

[90] See Open-ended Working Group of the General Assembly on the drafting of an International Convention on the Protection of the Rights of All Migrant Workers and their Families, 'Text of the Preamble and Articles of the International Convention on the Protection of the Rights of all Migrant Workers and their Families Provisionally Agreed by the Working Group during the First Reading, A/C.3/39/WG.I/WP.1 (26 Oct 1984) art 67(1); UN General Assembly, Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/43/7 17 (17 October 1988) para 110-12.

[91] UN General Assembly, Report of the Open-ended working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/38/1 (16 June 1983) para 107.

[92] Ibid. According to Ahmed, 'sending states like India and Mexico … resorted to what resembled a game of semantics in order to block provisions that would prohibit clandestine emigration from their territories.' Syed Refaat Ahmed, *Forlorn Migrants: An International Legal Regime for Undocumented Migrant Workers* (Univ Press 2000) 22.

[93] UN General Assembly, Report of the Open-ended Working Group (1983) (n 87) para 107.

[94] Böhning (n 86) 703-03.

[95] UN General Assembly, Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/36/378 (21 September 1981) p 7.

[96] Ibid.

[97] ICRMW (n 83) preamble ('Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to

calls for state parties, specifically including transit states, to 'collaborate with a view to preventing and eliminating illegal or clandestine movements', including through measures to 'detect and eradicate illegal or clandestine movements of migrant workers and members of their families'.[98] This final language represents a surprisingly forceful approach to irregular migration, and has led to divergent interpretations by commentators. According to Bosniak, article 68 requires 'states to undertake control measures to end the process of clandestine migration'.[99] However, Ryan argues that the language in article 68 'potentially covers both control measures and pre-emptive policies designed to remove the basis for irregular migration.'[100] The article has been cited by the Committee on the Rights of Migrant Workers either in very general terms, or with recommendations of compliance through non-coercive measures and anti-smuggling policies.[101] The Committee has spoken out against the criminalisation of irregular emigration.[102]

Indo-Chinese Refugee Crisis

Just as negotiations for the ICRMW were getting started in 1979, what has been called the Indo-Chinese Refugee Crisis was receiving increased international attention. Over the preceding years, hundreds of thousands of (mainly) Vietnamese had fled their country by land and, more prominently, by sea, for a range of political and socio-economic reasons related largely to tensions stemming from the end of the Vietnam War and Vietnam's ensuing conflicts with Kampuchea and China.[103] By early 1979, initial asylum countries in East and Southeast Asia felt unable to handle the outflow, and in many cases pushed boats back out to sea, with predictably grave humanitarian consequences.[104]

While neighbouring countries tended to avoid explicit references to international law, perhaps reflecting a general reluctance to legalize disputes in the region, by early 1979 they were

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prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights').

[98] Ibid, art 68.

[99] Linda Bosniak, 'Human Rights, State Sovereignty, and the Protection of Undocumented Migrants under the International Migrant Workers Convention' (1991) 25 International Migration Review 737, 741.

[100] Bernard Ryan, 'In Defence of the Migrant Workers Convention: Standard Setting for Contemporary Migration', in Satvinder Juss (ed) *Ashgate Research Companion to Migration Law, Theory and Policy* (Routledge 2012) 500.

[101] UN General Assembly, Report of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, A/64/48 (2009) 37 (recommending that the Philippines 'step up its efforts to prevent irregular migration of Filipino nationals'); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding observations on the second periodic reports of El Salvador, CMW/C/SLV/CO/2 (2 May 2014) para 43 (recommending the adoption of 'measures to detect, prevent and curtail irregular flows of migrant workers … [and urging] the State party to intensify local public information campaigns on the risks of irregular migration'); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding observations on the combined second and third periodic reports of Senegal, CMW/C/SEN/CO/2-3 (20 May 2016) para 59 (recommending that Senegal work to increase the number of regular migration channels; combat migrant smuggling; step up outreach campaigns on the dangers of irregular migration; and take all necessary measures to address the root causes of irregular migration).

[102] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding observations on the initial report of Morocco adopted by the Committee at its nineteenth session, CMW/C/MAR/CO/1 (8 October 2013) paras 23-26.

[103] Frank Frost, 'Vietnam, ASEAN and the Indochinese Refugee Crisis' [1980] Southeast Asian Affairs 347, 348-49.

[104] Court Robinson, *Terms of Refuge: The Indochinese Exodus & the International Response* (Zed 1998) 59-60.

making clear statements that Vietnam was responsible for the exodus, and should put a stop to unauthorised boat departures.[105] Just as Britain had done earlier in the Palestinian case (and so many states do today), neighbouring countries characterised the maritime departures as a destabilising security concern.[106] Vietnam's response was essentially defensive. It argued (not entirely unconvincingly) that the deprivation and tensions leading to widespread departures were not of its own making, rather stemming from difficulties associated with the aftermath of American depredation during the Vietnam War, along with Chinese interference.[107] It also argued (far less convincingly) that it was doing its best to prevent irregular emigration, which was in fact severely dealt with by Vietnamese law.[108]

With the situation threatening to spiral out of control, the UN Secretary General called together a conference of 65 countries in Geneva to try to find a comprehensive solution. The conference led to a variety of commitments by relevant parties, at the heart of which were the provision of thousands of new places by resettlement countries, the agreement of initial asylum countries to cease push-backs, an increase in funding for UNHCR and other parties addressing the situation on the ground, and the Vietnamese acceptance of an orderly departure program and a six-month moratorium (originally proposed by France, and supported by the US and UK) on irregular departures.[109] The agreement that emerged out of Geneva was not in the form of a legally binding treaty, but the Geneva discourse can nevertheless shed light on the evolution of legal arguments surrounding the prevention of irregular emigration. While Vietnam, with its ambivalent attitude towards international human rights law, may not have felt comfortable relying on the 'right to leave', the UN and Western countries could no longer simply ignore this principle, which had been incorporated into binding international law three years earlier with the entry into force of the ICCPR.[110] Rather, some sort of justification was necessary for pressuring Vietnam into a moratorium on unauthorised exits, and in this case the justification commonly chosen by France and the UN was the protection of human lives.[111] This contrasts with the tenor

[105] ASEAN 1979, 'Joint Communique of The Twelfth ASEAN Ministerial Meeting Bali, 28-30 June 1979'; Frost (n 103) 361 (quoting Indonesian Foreign Minister statement that 'Vietnam must be made to accept its responsibility with regards to the problem'). Regarding the low level of legalisation of international relations in Southeast Asia, see Miles Kahler, 'Legalization as Strategy: The Asia-Pacific Case' (2000) 54 International Organisation 549, 549.

[106] In the words of Singapore's foreign minister, 'each junkload of men, women and children sent to our shores is a bomb to destabilise, disrupt, and cause turmoil and dissension in ASEAN states.' Frost (n 103) 361.

[107] William Chapman, 'Geneva Conference on Refugees Faces Divisions' *Washington Post* (19 July 1979) <https://www.washingtonpost.com/archive/politics/1979/07/19/geneva-conference-on-refugees-faces-divisions/fa6dd59b-2b5a-469a-86c6-866b41129ce3/> (accessed 3 April 2018).

[108] Frost (n 103) 352 (quoting Vietnamese government's assertion that '[w]e have not adopted a policy of permitting Vietnamese people to leave the country. We have tried to stop them but they however managed to escape.') This claim was of course belied by the later success of the moratorium in stopping irregular departures. Ibid 365.

[109] W Courtland Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees: Sharing the Burden and Passing the Buck' (2004) 17 Journal of Refugee Studies 319, 319.

[110] ICCPR (n 56) art 12(2) ('Everyone shall be free to leave any country, including his own.')

[111] Thus UN Sec Gen Waldheim 'emotionally' admitted a contradiction between the moratorium and the right to leave but added 'these people are drowning in the sea. We've got to do something about it.' Ronald Koven, 'Vietnam Vows to Restrict Departures of Boat People' *Washington Post* (22 July 1979) <https://www.washingtonpost.com/archive/politics/1979/07/22/vietnam-vows-to-restrict-departures-of-boat-people/0713b0fe-f43d-4052-b487-606689895aa9> (accessed 3 April 2018). Meanwhile, the French Foreign

of arguments from a few years earlier, which (in a very different context) were more focused on combatting 'abusiveness'. UNHCR was less willing to vocally support the outcome; many of its staff expressed reservations to the moratorium, and in the end it silently acquiesced to this element of the agreement.[112] What is also clear from this episode is that the international community was asking Vietnam to undertake exceptional action in stopping unauthorised departures, and not to fulfil their pre-existing legal duties (in contrast to the British argument of thirty years prior).

There was some public criticism that the plan denied Vietnamese the right to leave.[113] However, the commitments made at the Geneva Conference were relatively promptly carried out, and largely (if temporarily) achieved the objective of curtailing maritime departures.[114] The Geneva Conference has since been lauded as an important example of successful international cooperation on refugee matters.[115] However, commentators have also been critical of the techniques used by the Vietnamese government to combat irregular emigration, which included the arrests of thousands, some of whom were executed.[116] While the moratorium on irregular departures was a country-specific measure to deal with a crisis, the experience also led to renewed attention to the broader issue of preventing refugee outflows at the global level and initiatives to study the topic were introduced by Canada in the UN Human Rights Commission and Germany in the UN General Assembly.[117] The latter resulted in a General Assembly resolution calling for international cooperation to avert new refugee flows.[118] Both the Canadian and German initiatives were focused on the prevention of conflict, persecution and other humanitarian disasters rather than on keeping desperate people at home, but the initiatives nevertheless raised concerns that the right to leave one's country was being weakened.[119]

Minister defensively argued that 'the moratorium is better than death at sea'. Robinson, *Terms of Refuge* (n 104) 145.

[112] Robinson, *Terms of Refuge* (n 104) 57.

[113] See, eg, Olivier Todd, 'Le mur des moratoires', *L'Express* (4 August 1979) ('*Ce moratoire de Genève, scandale moral et juridique, secrète déjà un immense malaise à l'Onu même, et surtout au Haut-Commissariat aux réfugiés : c'est la première fois qu'une organisation internationale encourage un de ses membres à limiter le droit de libre circulation de ses citoyens*')

[114] Leon Gordenker, *Refugees in International Politics* (Croom Helm 1987) 162; Luise Drüke, *Preventive Action for Refugee Producing Situations* (2d edn, Peter Lang 1993) 80.

[115] By 1988, irregular emigration from Vietnam had once again reached significant levels, and the international community responded by agreeing to the Comprehensive Plan of Action, which resembled the 1979 agreement in many ways, including in Vietnam's commitment to reduce clandestine emigration. Robinson, 'The Comprehensive Plan of Action' (n 109) 320; Alexander Betts, 'Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA', UNHCR Working Paper No 120 (January 2006) 61.

[116] Sara Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Martinus Nijhoff 2008) 111; Barry Stein, 'The Geneva Conferences and the Indochinese Refugee Crisis' (1979) 13 International Migration Review 716, 722-23.

[117] David Martin, 'Large-Scale Migrations of Asylum Seekers' (1982) 76 American Journal of International Law 598, 599-600.

[118] UN General Assembly, International Co-operation to Avert New Flows of Refugees, 16 December 1981, A/RES/36/148.

[119] Martin (n 117) 601.

The Migrant Smuggling Protocol[120]

The question of how best to keep people at home also emerged during negotiations for the Smuggling Protocol. Unlike the ICRMW, negotiation towards the Smuggling Protocol was largely a developed country initiative: Italy first called for a treaty on 'smuggling of people by sea', setting the process in motion, however the mandate soon evolved so as to encompass land-based smuggling as well.[121] These negotiations took place under the aegis of the UN General Assembly Commission on Crime Prevention and Criminal Justice. Unlike the other negotiations discussed in this paper, the focus here was never on preventing irregular emigration *per se*; rather, the aim was combatting and criminalizing human smuggling. Nevertheless, it was always evident that this would in fact have an effect on home state suppression of irregular emigration, in two principal ways.

First, to the extent that smuggling is suppressed, irregular emigration will in many areas naturally decrease, given the large proportion of irregular migrants who rely on the assistance of smugglers (and the difficulty of migrating without them).[122] According to 2003 figures from IOM, approximately half of global irregular migration takes place with the assistance of people smugglers.[123] For some migration routes, the percent is far higher: according to Europol, over 90% of irregular migrants to arrive in Europe in 2015 used a smuggler or other service to facilitate their voyage.[124] Without the assistance of human smugglers, the number of people attempting these migration routes would be likely to decrease considerably.

Second, many of the measures that would potentially be useful for combat human smuggling are also effective in combatting irregular emigration undertaken independently. During the Protocol's negotiations, there was considerable discussion regarding which tools states should use. Developing countries (and the Vatican) advocated for the specific inclusion of clauses that would require states of origin to encourage the negotiation of more multilateral and bilateral migration agreements[125] and promote economic and social development in the regions

[120] Protocol Against the Smuggling of Migrants by Land, Sea and Air (adopted 12 December 2000, entered into force 28 January 2004) 2241 UNTS 507 (Smuggling Protocol).

[121] See Andree Kirchner & Lorenzo Schiano di Pepe, 'International Attempts to Conclude a Convention to Combat Illegal Migration' (1998) 10 International Journal of Refugee Law 665.

[122] Many of these irregular migrants are in fact refugees. See Claire Brolan, 'An Analysis of Human Smuggling Trade and the Protocol Against Smuggling of Migrants by Land, Air and Sea from a Refugee Protection Perspective' (2002) 14 International Journal of Refugee Law 561, 577-580; Tendayi Achiumi, 'Governing Xenophobia' UCLA School of Law, Public Law Research Paper No 17-34 (2017) 54.

[123] International Organization for Migration, World Migration 2003: Managing Migration - Challenges and Responses for People on the Move (2003) 60.

[124] EUROPOL, 'Migrant Smuggling in the EU' (February 2016) 5.

[125] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Colombia, Mexico and Morocco: Amendments to the preamble and article 11 of the revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime, A/AC.254/5/Add.37 (26 September 2000) 2.

where prospective migrants originated.[126] These measures would presumably help reduce irregular emigration as well as human smuggling, but in a fundamentally non-coercive manner.

Developed destination countries also advocated for a range of strengthened border controls, which would naturally lead to greater apprehension of irregular emigrants along with human smugglers. For example, the early proposal for prevention language stated that all parties shall strengthen 'border controls, including by checking persons and travel or identity documents, and, where appropriate, by inspecting and seizing vehicles and vessels'.[127] These developed country proposals were viewed with some wariness by UNHCR, UNESCO and IOM; in a joint set of comments, these agencies argued that '[t]he strengthening of border controls and other measures foreseen in the draft Protocol to prevent the smuggling of migrants should be implemented in such a manner that they will not undermine the rights of individuals to seek asylum'.[128] In fact, some argue that stronger border controls exacerbate the problem of migrant smuggling by making irregular migration more difficult to independently engage in.[129]

In the end, both types of preventive tools were included in the Protocol. Article 15 requires State Parties to increase public awareness of the criminal nature of human smuggling; cooperate in the field of public awareness, and promote or strengthen development programs that combat the root socio-economic causes of migrant smuggling.[130] Meanwhile, border control is addressed in article 11. Article 11(1) states that '[w]ithout prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants' and Article 11(3), provides (in language proposed by the European Community) that '[w]here appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.'[131] The concerns brought up by UNHCR and others were dealt with in a savings clause.[132] In addition, an entry was placed in the *travaux préparatoires* to specifically note that 'measures and sanctions applied in accordance with [article 11] should take into account other international

[126] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Proposals and contributions received from Governments, A/AC.254/5/Add.15 (24 November 1999) 2-3 (proposals from China and the Holy See, endorsed by Syria).

[127] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime Fifth session Vienna, 4-15 October 1999 Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime, A/AC.254/4/Add.3/Rev.5 (1 January 2000).

[128] UN General Assembly, Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons (8 February 2000) para 17.

[129] Anne Gallagher & Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 504.

[130] Smuggling Protocol (n 120) art 15.

[131] Ibid, art 11. On negotiating history, see Tom Obokota, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Bernard Ryan and Valsalmis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Brill 2010) 155.

[132] Smuggling Protocol (n 120) art 19. So far, however, there has been no guidance on the precise meaning of this caveat. Gallagher and David (n 129) 505.

obligations of the State Party concerned'.[133] Nevertheless, article 11 of the Protocol has met with criticism; according to Rodenhäuser, 'under the guise of crime prevention, migration destination states have succeeded in furthering stricter migration policies internationally. Rejecting a person at the point of embarkation without further investigation does not address the crime of smuggling, but enhances border control'.[134]

The Smuggling Protocol thus represents an interesting shift in the discourse on home state duties. Departure states (and indeed all state parties) are not specifically required to combat irregular migration *per se*; rather, they must combat human smuggling.[135] This shift is noticeable elsewhere in the global discourse as well, one example being the Global Migration Group's Statement that it will support: 'efforts to address the root causes of irregular migration [along with] prevention, cooperation and protection measures in respect of trafficking and smuggling of human beings'[136] Yet, for many observers, the distinction between combatting smuggling and combatting irregular emigration is a distinction without a difference. As one Working Group report notes, 'often the focus on border controls is on preventing and detecting irregular migration rather than on preventing and detecting smuggling of migrants'.[137] This is particularly evident with the carrier sanctions of article 11(3). From a human smuggling perspective, forcing prospective irregular emigrants off of common carriers may in fact be counter-productive, as it would force them to use more clandestine means of emigration, for which they would more likely require the assistance of smugglers.

Conclusion

As this paper shows, there have been efforts since the early days of modern international migration law to impose a duty to combat irregular emigration upon states of origin and transit. These efforts, largely spearheaded by destination states, have employed a shifting set of legal principles, normative arguments, and institutional frameworks. They have met with only very limited success, perhaps surprisingly given that such norms have been periodically embraced by

[133] UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, A/55/383/Add.1 (3 November 2000) para 103.

[134] Rodenhäuser (n 17) 228.

[135] There has, however, been some debate as to whether the Smuggling Protocol nevertheless legitimises or even requires the prevention of irregular emigration. See Colin Harvey & Robert Barnidge, 'The Right to Leave One's Own Country under International Law', Paper Prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (September 2005) 12 ('Given the Protocol's imposition of significant legal obligations on states with regard to the smuggling of migrants, international law seems to allow, if not require, states to prevent their nationals from leaving their own states by unauthorized or irregular means.'); Richard Perruchoud, 'State Sovereignty and Freedom of Movement' in Brian Opeskin et al (eds) *Foundations of International Migration Law* (2012) 139 (Smuggling Protocol 'requires States to prevent migrants from leaving their territory by unauthorized or irregular means'). Cf Ruth Weinzierl and Urszula Lisson, *Border Management and Human Rights* (German Inst for Hum Rts 2007) 68 ('The Protocol against the Smuggling of Migrants by Land, Sea and Air cannot be introduced as legitimising such migration-control measures, because these provisions are only valid subject to human rights); Gallagher & David (n 129) 154 (refuting Perruchoud's claim).

[136] Global Migration Group, Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation (30 September 2010).

[137] United Nations Convention against Transnational Organized Crime, Working Group on the Smuggling of Migrants, 'Challenges and good practices in the prevention of the smuggling of migrants', CTOC/COP/WG.7/2012/4, 23 March 2012, para 11.

relatively powerful states. Early attempts at establishing treaty norms based largely on a protective justification faltered, as did the British assertion of a customary international law duty not to harm other states. Expectations that ILO negotiations would firmly establish a duty to combat clandestine migration were only partially fulfilled, as drafters focussed on combatting migrations in abusive conditions. Western states managed to preserve the idea of a departure state duty in the ICRMW, but saw it de-emphasized, with the prevention of irregular migration shifted down to article 68 of a convention firmly focused on individual rights.

Most recently, western proponents of a departure state duty have met with more success by addressing the issue in a roundabout way, through the establishment of international norms concerning human smuggling. In essence this is an admission of the impossibility of negotiating a departure state duty at the global level, but at the same time it manages to target most irregular migration flows (which now rely on smugglers), while adhering to the protective justification. They have also turned to bilateral deals, thus negating the bargaining power of developing countries in multilateral settings and allowing for a more nakedly transactional approach to the issue.[138] This shift towards bilateral attempts to induce departure states to combat irregular emigration was evident in the European Union's agreements with its eastern neighbours (and prospective members) since the late 1990s, and has more recently influenced the policies of both the EU itself and certain member states with respect to several African, Middle Eastern and Latin American partners.[139] Perhaps the most prominent bilateral agreement has been the 2016 EU-Turkey deal, which the parties pledged to end irregular migration of mainly Syrian asylum-seekers from Turkey to the EU 'in order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk'.[140] These bilateral deals show no sign of abating, as can be seen by the controversial recent agreement between Italy and Libyan authorities aimed (in part) at combatting irregular departures of migrants across the Mediterranean.[141] With negotiations for a Global Migration Compact in full swing, it will be interesting to see whether destination states will show renewed interest in establishing the idea of a general home state duty to combat irregular migration in international law. The presence of such efforts throughout recent history implies that their renewal is not an impossibility, perhaps (as discussed by Wilde) in response to progressive developments elsewhere.[142]

This paper can be interpreted as challenging current conceptions of migration governance in two principal ways. First, it challenges the perceived 'newness' of current extraterritorial

[138] Thomas Gammeltoft-Hansen & Nikolas Feith Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) 5 Journal of Migration & Human Security 28, 36.

[139] See, eg, Steve Peers, 'Irregular Immigration and EU External Relations' in Barbara Bogusz et al, eds, Irregular Migration and Human Rights: Theoretical, European and International Perspectives (Martinus Nijhoff 2004) 201; Aderanti Adepoju et al, 'Europe's Migration Agreements with Migrant-Sending Countries in the Global South: A Critical Review' (2010) 48 *International Migration* 42; International Labour Office, 'Bilateral Agreements and Memoranda of Understanding on Migration of Low-Skilled Workers: A Review' (ILO 2015) 38.

[140] EU Turkey Statement 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 9 April 2018 (stating that 'Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU').

[141] See Andrea de Guttry et al, 'Dealing with Migrants in the Central Mediterranean Route: A Legal Analysis of recent Bilateral Agreements Between Italy and Libya' (2018) 56 *International Migration* 44.

[142] Ralph Wilde, 'The Unintended Consequences of Expanding Migrant Rights Protections' (2018) 111 AJIL Unbound 487.

migration deterrence policies. Hathaway & Gammeltoft-Hansen characterise cooperation based non-entrée policies as a 'new generation' that emerged from the diminished viability of traditional non-entrée policies over the past two decades.[143] Others commonly date the origin of deterrence policies to the 1980s.[144] It is certainly true that non-entrée policies have become far more prominent during this period, including attempts by destination states to pressure or induce departure states to reduce migration flows. However, as this paper shows, the desire to extraterritorialise migration control has deep roots, and contemporary agreements such as the Smuggling Protocol or EU-Turkey Agreement can be seen as the continuation of long-standing efforts. Of course, while efforts to induce departure states to crack down on irregular departures may not be entirely new, there certainly are important differences between current policies and those which came before, perhaps most notably as relates to motivation: contemporary states seem focused on externalising migration controls as a means of avoiding Refugee Convention *non-refoulement* obligations that become effective upon reaching the border, which was not a focal point in prior negotiations.[145]

Second, it challenges the perception of global migration law as a necessarily progressive or border-opening discipline, at least within what Spiro terms its 'human rights track'.[146] In this standard conception, international migration law norms and principles are liberalising by nature, and generally butt up against the external (to the discipline) defensive principle of sovereignty (as wielded by states, judges, etc) in the discourse regarding international regulation of human mobility.[147] This fundamental dialectic has been observed by many scholars in relation to both international migration law and international human rights law.[148] However, my paper illustrates

[143] James Hathaway & Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235, 244-49.

[144] François Crépeau et al, 'International Migration: Security Concerns and Human Rights Standards' (2007) 44 Transcultural Psychology 311, 323 ('Beginning in the early 1980s, a number of immigration policy measures, notably visa regimes and carrier sanctions, were either initiated or retooled in order to prevent the arrival of irregular migrants or asylum seekers'); Francesca Mussi & Nikolas Feith Tan, 'Comparing Cooperation on Migration Control' (2015) 10 Irish Yearbook of International Law 87, 87 ('Since the 1980s, Western states have used deterrence or non-entrée measures to keep asylum seekers from accessing their territories and asylum procedures'); Matthew Gibney & Randall Hansen, 'Asylum Policy in the West: Past Trends, Future Possibilities', UNU WIDER Discussion Paper No 2003/68 (2003) 5 ('Beginning in the early 1980s a number of traditional immigration policy measures, notably visas and carrier sanctions, were either re-tooled or initiated to prevent the arrival of asylum seekers.')

[145] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart 2012); Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (CUP 2011).

[146] Peter Spiro, 'The Possibilities of Global Migration Law' (2017) 111 AJIL Unbound 3.

[147] See Chantal Thomas, 'What does the Emerging International Law of Migration mean for Sovereignty?' (2013) 14 Melbourne Journal of International Law 392, 401-2 ('An emerging body of international law inscribing rights of migrants appears to be challenging what has been conventionally thought a cornerstone of statehood').

[148] Chetail, 'Sovereignty and Migration' (n 58) 902 (describing the 'the enduring dialectic between sovereignty and hospitality'); Khaled Koser, Irregular Migration, State Security and Human Security, Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (2005) 4 ('One of the key dilemmas for policy-making in the realm of irregular migration is that at times [sovereignty and human rights] are difficult to reconcile'); Frédéric Mégret, 'The Apology of Utopia: Some Thoughts on Koskenniemian Themes, with Particular Emphasis on Massively Institutionalized International Human Rights Law' (2013) 27 Temple Comparative & International Law Journal 455, 463 ('international human rights law is often presented as radically

that even within those norms and institutions that form the backbone of human rights-oriented international migration law, there have been counter-currents and attempted counter-currents of border tightening. In short, the discipline of international migration law is a product of state action, and, perhaps unsurprisingly, there have thus been efforts by states to endow its norms with a less progressive character in times when irregular migration is seen as a threat.

It is also clear, however, that this paper should not be seen as challenging the quite widespread legal and moral condemnation of current regional and bilateral efforts to impose duties on states of origin and transit to prevent irregular emigration.[149] Numerous international law scholars have concluded that in many or all cases, policies of preventing irregular emigration represent a violation of international law by states of departure (normally focusing specifically on the ICCPR or the Fourth Optional Protocol of the European Convention of Human Rights).[150] Others have convincingly argued that destination states can also be responsible under those same treaties for their complicity in preventing departures.[151] At the very least, extraterritorial immigration controls represent a legal regime that is favourable to destination states and is premised on an imbalance in power between the departure and destination states.[152] Meanwhile, a range of academic and media commentators have highlighted the negative humanitarian

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different, and in fact in almost perfect opposition to the tenets of a hypothesized "sovereignist" international law of coexistence').

[149] EU Turkey Statement 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-euturkey-statement/> accessed 9 April 2018.

[150] Weinzierl & Lisson (n 135) 68 ('violations of the right to leave occur where emigration restrictions are conducted through tight controls, the emigration control is discriminatory, or when this serves the illegitimate purpose of preventing applications for international protection'); Nora Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries (2016) 27 European Journal of International Law 591, 606 ('neither the ECtHR's jurisprudence nor the CCPR's General Comment No 27 and views suggest that protecting the laws of another state could justify interferences with the right to leave); den Heijer (n 145) 157 (the 'aggregate right to leave to seek asylum' constitutes a *lex specialis* of absolute character to the general and qualified right to leave'). On the other hand, the European Court of Human Rights, has (albeit as *obiter dicta*) repeatedly defined the right to leave as pertaining to departure for countries to which entry would be permitted. See ECtHR, 22 May 2001, *Baumann v France*, no 33592/96, para 61; ECtHR, 27 November 2012, *Stamose v Bulgaria*, no 29713/05, para 30; ECtHR, 2 December 2014, *Battista v Italy*, no 43978/09, para 37.

[151] Violeta Moreno-Lax & Mariagiulia Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows', forthcoming in Satvinder Juss (ed), *The Research Handbook on International Refugee Law*, (Edward Elgar) 25 (arguing that 'action that fosters the curtailment of the right to leave' is 'incompatible with Article 2 Protocol 4 ECHR and may lead to responsibility on the part of the EU Member States'); Evelien Brouwer, 'Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and its Member States' in Bernard Ryan and Valsalmis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Brill 2010) 225 (claiming that cooperation with measures infringing the right to leave violate the ECHR); Weinzierl & Lisson (n 135) 68 (regarding joint liability for violations of the ICCPR right to leave).

[152] See, Elspeth Guild, 'Who is Entitled to Work and Who is in Charge? Understanding the Legal Framework of European Labour Migration' in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement into and Within Europe* (Ashgate 2005); Valsamis Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed' in Bernard Ryan and Valsalmis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Brill 2010) 67.

consequences (intended and unintended) of coercive policies to prevent asylum seekers from leaving states of origin and transit.[153]

This paper does not affect these conclusions. While there may be a history of attempts to establish a legal duty to prevent irregular departure, these attempts have been largely unsuccessful, and surely do not show sufficient state practice or *opinio juris* to from any customary international law obligation to prevent irregular emigration. Nor does a history of attempts to prevent irregular emigration make current attempts to do so any less ethically objectionable. Motivations, techniques and results matter, and even if the prevention of irregular emigration might be defensible in some situations, prominent scholars have argued (convincingly, in my opinion) that it is morally wrong to forcibly preventing desperate asylum seekers from leaving for Europe when the end result is (for example) for them to face confinement and exploitation in war-torn Libya, languish in destitution in Lebanon or Niger, or face potential *refoulement* to Iraq or Afghanistan.[154]

[153] See, eg, Amnesty International, 'The Human Rights Risks of External Migration Policies', POL 30/6200/2017 (2017) 6 (noting concerns with goals of current policies and means used to achieve those goals); Gammeltoft-Hansen & Tan (n 138) 28-9; Héléna van Aelst, 'The Humanitarian Consequences of European Union Immigration Policy's Externalisation in Libya: The Case of Detention and its Impact on Migrants' Health' (2011) 8 BSIS Journal of International Studies; FIDH, 'The Externalisation of Migration Policies: A Scourge for Human Rights' (28 November 2017) <https://www.fidh.org/en/issues/migrants-rights/the-externalization-of-migration-policies-a-scourge-for-human-rights> accessed 19 April 2018.

[154] See, eg, Joseph Carens, 'How Should we Think about the Ethics of International Migration' EUI Forum (17-18 November 2014) 5 ('it is morally wrong to create a system to protect refugees and then to prevent refugees from gaining access to that system'); David Miller, 'Justice in Immigration' (2015) 14 Eur J Pol Theory 391, 397 ('At present, states (such as the UK) which are among the more popular destinations for asylum seekers expend considerable effort in preventing refugees from reaching their borders ... This is clearly indefensible at the bar of justice.')