The transnational movement of persons under general international law – Mapping the customary law foundations of international migration law

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1. INTRODUCTION: PRELIMINARY REMARKS ABOUT INTERNATIONAL MIGRATION LAW AS THE GLOBAL FRAME OF ANALYSIS

The role of international law in the sensitive field of migration is complex, ambiguous and frequently neglected. Such a situation is probably due to the dual nature of migration which is a question of both domestic and international concern. On the one hand, admission of non-citizens is traditionally considered as pertaining to the domestic jurisdiction of each State. On the other hand, the movement of persons across borders is international by nature since it presupposes a triangular relationship between a migrant, a State of emigration and a State of immigration.

The ambivalent posture of international law with regard to migration is exacerbated by the fragmentation of the legal norms governing the movement of persons across borders. The current legal framework is scattered throughout a wide array of principles and rules belonging to numerous branches of international law (including refugee law, human rights law, humanitarian law, labour law, trade law, maritime and air law, criminal law, nationality law, consular and diplomatic law, etc.). The great variety of applicable norms does not only reflect the multifaceted dimensions of migration but also its cross-cutting character which transcends existing branches of international law.

However, from a systemic angle, the international legal framework governing migration resembles 'a giant unassembled juridical jigsaw puzzle', for which 'the number of pieces is uncertain and the grand design is still emerging'.[1] Such fragmentation however undermines the understanding and application of existing norms. Encapsulating the great variety of applicable rules and principles within the generic label of 'international migration law' is thus critical for assembling the dispersed pieces of this jigsaw puzzle. This exercise of reconstruction follows the threefold purpose of providing a framework of analysis that is comprehensive, coherent and contextual.

First, comprehensiveness is inherently achieved through the design of this discrete field of international law, since its primary rationale is to gather the fairly substantial, albeit eclectic, set of applicable norms. International migration law thus provides the global picture encompassing the broad variety of rules regulating the movement of

[1] R. Lillich, *The Human Rights of Aliens in Contemporary International Law*, Manchester, Manchester University Press, 1984, 122.

persons across borders. Second, the blend of these rules within the same normative frame of reference promotes a more coherent approach for the purpose of articulating the various legal norms between themselves. While the applicable rules are located at the intersection of several branches of international law, they remain closely interconnected. None of them can be assessed in splendid isolation. They make sense only when understood in relation to one another. Third, and perhaps more fundamentally, bringing these rules together under the auspices of international migration law paves the way for their contextualized application in order to better take into account the specificities of migration. In sum, the main virtue of international migration law is a methodological – if not pedagogical – one: it encourages a more systemic and cogent approach in comprehending migration as a topic of analysis on its own.

With this aim, international migration law may be broadly defined as the set of international rules and principles governing the movement of persons between States and the legal status of migrants within host States.[2] It is meant to gather all relevant international norms applying to individuals who are leaving their own country, entering another one and/or staying therein. This working definition encompasses the whole migration circle: departure from the country of origin, entry and stay into a foreign country, as well as return to one's own country. It accordingly embraces emigration and immigration as the two sides of the migration process. While the specific legal regimes may vary from one group of persons to another, the scope of international migration law is deliberately broad and inclusive. It further covers any migrants irrespective of their motivations and grounds for admission (such as labour, family reunification, asylum, study), their legal status (documented or not) and the duration of their stay (transit, temporary stay, residence, permanent settlement).

Yet, international migration law does not supersede the other branches of international law, nor does it constitute a so-called 'self-contained regime'. On the contrary, international migration law is built on norms existing in different legal disciplines. Similarly to many other legal disciplines, international migration law is primarily a doctrinal construction inferred from the traditional sources and actors of public international law. However, international migration law is still poorly conceptualized and not always acknowledged as a branch of international law in its own right. This is probably due to the common belief that admission of non-citizens is 'the last major redoubt of unfettered national sovereignty'.[3] As will be underlined in this Chapter, although States retain a wide margin of appreciation, there nonetheless exists a non-negligible set of international norms regulating admission of non-citizens.[4] Furthermore, migration cannot be subsumed by admission; the latter is only one component of the migration circle among other key ones such as departure and sojourn. More generally one should observe that, from an historical perspective, migration has

[2] Internal displacement is outside the scope of this definition. While the causes of international migration and internal displacement largely coincide in practice, internally displaced persons are governed by a distinct legal regime which will not be addressed in this Chapter for the purpose of focusing analysis on the movement of persons between States and its related consequences.

[3] D.A. Martin, 'Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy', *International Migration Review*, 23(3), 1989, 547.

[4] See Part 3 of the present Chapter.

always been intimately connected with international law. It was even at the heart of the first reflections about the law of nations initiated by classical authors (such as Vitoria, Grotius or Vattel).[5]

The very expression 'international migration law' is indeed not a new term as such. It was first used in international legal scholarship by Louis Varlez in 1927.[6] Over 40 years ago, Richard Plender devoted to this field a seminal book (published in 1972) which was then reedited in 1988.[7] Since then, this emerging field has attracted considerable interest from both scholars and policy-makers. During the last decade, a substantial number of textbooks have been published for the purpose of mapping this growing field of international law. In 2003, T. Alexander Aleinikoff co-edited *Migration and International Legal Norms* to provide a concise guide to the international legal framework.[8] A few years later in 2007, the increasing interest surrounding migration prompted the International Organization for Migration (IOM) to publish another textbook with the aim of updating the above-mentioned one.[9] Several collections of international migration law instruments have also been published recently,[10] while another textbook came out in 2012.[11] The collective effort of the academic community for systematizing international migration law enriches the already substantial number of books analysing more specific aspects of migration (such as refugees,[12] human rights of

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[5] See V. Chetail, 'Migration, droits de l'homme et souveraineté: le droit international dans tous ses états', in V. Chetail (ed.), *Mondialisation, migration et droits de l'homme: le droit international en question/Globalization, Migration and Human Rights: International Law under Review*, Brussels, Bruylant, 2007, 13–133, and the bibliographical references contained therein.

[6] L. Varlez, 'Les migrations internationales et leur réglementation', *Recueil des cours de l'Académie de droit international*, 20, 1927–V, 171.

[7] R. Plender, *International Migration Law*, Leiden, Sijthoff, 1972. Another pioneering reference book focusing on the admission and expulsion of aliens was published in 1978 by G.S. Goodwin-Gill, *International Law and the Movement of Persons between States*, Oxford, Clarendon Press, 1978.

[8] T.A. Aleinikoff & V. Chetail (eds), *Migration and International Legal Norms*, The Hague, T.M.C. Asser Press, 2003. For a previous account published during the 1990s under the auspices of the American Society of International Law, see also L.B. Sohn & T. Buergenthal (eds), *The Movement of Persons Across Borders*, Studies in Transnational Legal Policy No. 23, Washington D.C., The American Society of International Law, 1992.

[9] R. Cholewinski, R. Perruchoud & E. MacDonald (eds), *International Migration Law. Developing Paradigms and Key Challenges*, The Hague, T.M.C. Asser Press, 2007. For a similar endeavour from a human rights based approach, see also: Chetail (ed.), *Mondialisation, migration et droits de l'homme*.

[10] V. Chetail (ed.), *Code de droit international des migrations*, Brussels, Bruylant, 2008; R. Plender (ed.), *Basic Documents on International Migration Law*, 3rd rev. edn, Leiden, Martinus Nijhoff Publishers, 2007; R. Perruchoud & K. Tomolova, *Compendium of International Migration Law Instruments*, The Hague, T.M.C. Asser Press, 2007.

[11] B. Opeskin, R. Perruchoud & J. Redpath-Cross (eds), *Foundations of International Migration Law*, Cambridge, Cambridge University Press, 2012.

[12] T. Gammeltoft-Hansen, *Access to Asylum International Refugee Law and the Globalisation of Migration Control*, Cambridge, Cambridge University Press, 2011; H. Lambert (ed.), *International Refugee Law*, Aldershot, Ashgate Publishing, 2010; J.C. Simeon (ed.), *Critical Issues in International Refugee Law. Strategies Toward Interpretative Harmony*, Cambridge, Cambridge University Press, 2010; C.W. Wouters, *International Legal Standards for the*

migrants,[13] labour migration[14] and irregular migration)[15] or focusing on a particular regional regime (mainly the European Union (EU)).[16]

This prolific literature coincides with the growing interest of States and international organizations in migration. Indeed, migration has become one of the highest priorities on the international agenda. The United Nations (UN) has played a leading role in such momentum from the creation of a Special Rapporteur on the human rights of migrants[17] in 1999 to the High-Level Dialogue on International Migration and Development[18] organized within the General Assembly in 2006. Among many other initiatives, new forms of multilateral collaboration have been set up for fostering global

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Protection from Refoulement, Antwerp/Oxford/Portland, Intersentia, 2009; A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford, Oxford University Press, 2009; G.S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd edn, Oxford, Oxford University Press, 2007; M. Foster, *International Refugee Law and Socio-Economic Rights. Refugee from Deprivation*, Cambridge, Cambridge University Press, 2007; J. McAdam, *Complementary Protection in International Refugee Law*, Oxford, Oxford University Press, 2006; J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge, Cambridge University Press, 2005.

[13] See for instance: G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*, Leiden, Martinus Nijhoff Publishers, 2010; D.S. Weissbrodt, *The Human Rights of Non-Citizens*, Oxford/New York, Oxford University Press, 2008; C. Tiburcio, *The Human Rights of Aliens under International and Comparative Law*, The Hague, Martinus Nijhoff Publishers, 2001.

[14] J.P. Trachtman, *The International Law of Economic Migration: Toward the Fourth Freedom*, Kalamazoo, W.E. Upjohn Institute for Employment Research, 2009; R. Cholewinski, P. de Guchteneire & A. Pécoud (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*, Cambridge, Cambridge University Press, 2009; R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford, Oxford University Press, 1997.

[15] See notably: B. Ryan & V. Mitsilegas (eds), *Extraterritorial Immigration Control*, Leiden/Boston, Martinus Nijhoff Publishers, 2010; C. Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law*, Cambridge/New York, Cambridge University Press, 2009; B. Bogusz, R. Cholewinski, A. Cygan & E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden, Martinus Nijhoff Publishers, 2004; A. Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Pacific Region*, The Hague, Martinus Nijhoff Publishers, 2003.

[16] See among a vast literature: E. Guild & P. Minderhoud (eds), *The First Decade of EU Migration and Asylum Law (Immigration and Asylum Law and Policy in Europe)*, Leiden, Martinus Nijhoff Publishers, 2011; A. Wiesbrock, *Legal Migration to the European Union*, Leiden, Martinus Nijhoff Publishers, 2010; K. Hailbronner (ed.), *European Immigration and Asylum Law*. A Commentary, Munich, Hart Publishing, 2010; P. Boeles, M. den Heijer, G. Lodder & K. Wouters, *European Migration Law*, Antwerp, Intersentia, 2009; J. Niessen & T. Huddleston (eds), *Legal Frameworks for the Integration of Third-Country Nationals*, Leiden/Boston, Martinus Nijhoff Publishers, 2009; S. Peers & N. Rogers (eds), *EU Immigration and Asylum Law. Text and Commentary*, Leiden, Martinus Nijhoff Publishers, 2006; G. Papagianni, *Institutional and Policy Dynamics of EU Migration Law*, Leiden, Martinus Nijhoff Publishers, 2006; E. Battjes, *European Asylum Law and International Law*, Leiden, Martinus Nijhoff Publishers, 2006.

[17] UN Human Rights Commission, Resolution 1999/44, 27 Apr. 1999.

[18] General Assembly, *Summary of the High-level Dialogue on International Migration and Development Note by the President of the General Assembly*, UN Doc. A/61/515, 13 Oct. 2006.

governance on migration.[19] Hence, the multilateral architecture of migration is currently based on two complementary pillars: the Global Migration Group at the inter-agency level and the Global Forum on Migration and Development at the inter-state level. The former was established by the Secretary-General in 2006 and gathers 16 international agencies meant to 'promote the wider application of all relevant international and regional instruments and norms relating to migration' and 'establish … a comprehensive and coherent approach in the overall institutional response to international migration.'[20] The latter is a state-owned consultative process launched in 2007 for strengthening multilateral dialogue and cooperation.[21] Though established outside the UN, the Global Forum on Migration and Development offers a unique platform convened every year (which is unusual for this kind of worldwide consultation).

The effervescence surrounding migration within inter-governmental circles underscores the need for a truly global approach to migration and the correlative role of international law. Migration has become a new field of international cooperation: it is increasingly considered as a matter of common interest which cannot be managed on a purely unilateral basis. Although migration is as old as humanity, it is now more visible than ever before. It affects virtually every State whether as a country of emigration, transit or immigration. This change in perception opens new perspectives for establishing international migration law as a global frame of analysis.

Comprehending the movement of persons through the sources of international law not only underlines that migration law is deeply rooted in international law but also

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[19] Among a luxurious literature discussing the notion of global governance in the field of migration, see especially: A. Betts (ed.), *Global Migration Governance*, Oxford, Oxford University Press, 2011; R. Kunz, S. Lavenex & M. Panizzon (eds), *Migration Partnerships: Unveiling the Promise*, London, Routledge, 2010; M. M. Geiger & A. Pécoud (eds), *The Politics of International Migration Management*, New York, Palgrave Macmillan, 2010; B. Badie, R. Brauman, E. Decaux, G. Devin & C. Wihtol de Wenden, *Pour un autre regard sur les migrations. Construire une gouvernance mondiale*, Paris, La Découverte, 2008; G.S. Goodwin-Gill, 'Migrant Rights and "Managed Migration"', in Chetail (ed.), *Mondialisation, migration et droits de l'homme*, 161–87; B. Ghosh (ed.), *Managing Migration. Time for a New International Regime?*, Oxford, Oxford University Press, 2000; as well as the special issues of *Refugee Survey Quarterly*, 29, 2010: 'Governance beyond Boundaries', and of *Global Governance*, 16, 2010: 'International Migration'.

[20] Global Migration Group, *Terms of Reference*, undated, available at: http://www.globalmigrationgroup.org/uploads/documents/Final%20GMG%20Terms%20of%20Reference_prioritized.pdf.

[21] General Assembly, *Summary of the High-Level Dialogue*, 2006, 5. For further discussions see: P. Martin & M. Abella, 'Migration and Development: The Elusive Link at the GFMD', *International Migration Review*, 43(2), 2009, 431–9; V. Chetail, 'Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue', *German Yearbook of International Law*, 51, 2008, 183–215; R. Matsas, *The Global Forum on Migration and Development: A New Path for Global Governance?*, Paper presented at the 2008 ACUNS Annual Meeting: The United Nations and Global Development Architecture, Bonn, Germany, 5–7 Jun. 2008.

provides an instructive mapping of the international normative framework.[22] Almost one century ago, L. Varlez underlined that 'the study of the law of migration shows an extremely luxurious and enduring regulation activity where it is possible, probably more than for any other phenomenon, to follow the life of Law in constant evolution'.[23]

Among the traditional sources of public international law, treaty law is bound to play a key role. Although commentators often lament that there is no comprehensive treaty governing all aspects of migration, this situation does not differ from that of several other branches of international law. To mention but a few, international humanitarian law, human rights law, labour law or environmental law are grounded on a broad variety of multilateral treaties focusing on specific issues and situations. International migration law is no exception. The plurality of international instruments is even further necessary in such a complex and multi-dimensional field.

At the universal level, multilateral treaties specifically adopted in this field by the UN focus on three main categories of migrants. First, refugees are primarily governed by the 1951 Convention Relating to the Status of Refugees, as amended by its 1967 Protocol. Second, migrant workers are dealt with in three multilateral treaties: the 1949 Convention Concerning Migration for Employment (Revised) (No. 97);[24] the 1975 Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143),[25] and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).[26] Third, smuggled and trafficked migrants have emerged as a new category of concern and prompted the adoption in 2000 of the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime.[27]

These seven multilateral treaties establish particularly detailed conventional regimes and accordingly represent the core instruments of international migration law. However, while the three categories of migrants covered by these treaties overlap both in law and practice, the ratification status of the relevant instruments provides a contrasted picture. Whereas treaties on refugees, smuggling and trafficking are ratified by a great majority of UN Member States (respectively 145, 136, and 155 States), those on migrant workers still suffer from a poor level of ratification: the 1949 Migration for Employment Convention has so far been ratified by 49 States and the 1975 Convention by 23, while 46 States are currently parties to the 1990 Migrant Workers Convention.

However, this uneven number of ratifications does not reflect the normative density of the matter for two main reasons. First, a wide range of regional and bilateral treaties

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[22] For a brief overview see V. Chetail, 'Sources of International Migration Law', in Opeskin, Perruchoud, Redpath-Cross (eds), *Foundations of International Migration Law*, 56–92.

[23] Varlez, 'Les migrations internationales et leur réglementation', 343 (author's translation).

[24] 120 UNTS 70, 1 Jul. 1949 (entry into force: 22 Jan. 1952).

[25] 1120 UNTS 323, 24 Jun. 1975 (entry into force: 9 Dec. 1978).

[26] 2220 UNTS 3, 18 Dec. 1990 (entry into force: 1 Jul. 2003).

[27] Respectively, 2241 UNTS 507, 15 Nov. 2000 (entry into force: 28 Jan. 2004); and 2237 UNTS 319, 15 Nov. 2000 (entry into force: 25 Dec. 2003).

has been adopted for regulating various aspects of migration (including for labour purposes).[28] Second, many other multilateral agreements – though drafted for a more general purpose – are still plainly relevant in the field of migration. In particular, human rights treaties are generally applicable to everyone irrespective of nationality[29] and/or frequently include specific provisions on non-citizens.[30] The same observation can be made with regard to other general instruments, such as those concluded under the auspices of the International Labour Organization (ILO)[31] and the World Trade Organization (WTO).[32]

Besides treaty law, soft law has become the privileged avenue for clarifying applicable norms and promoting inter-state cooperation on migration. Though not a formal source of law as such, an impressive number of non-binding instruments has been adopted during the last decade. At the global level, the three main international organizations working on migration have been actively involved in the development of soft law standards and consultation processes within their respective mandates. The IOM launched in 2001 the International Dialogue on Migration[33] and promoted the International Agenda for Migration Management, which was adopted in 2004 as a result of a state-owned consultative process.[34] In echo to these initiatives, the ILO adopted in 2005 the Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration.[35] In the context of forced migration, the UN High Commissioner for Refugees (UNHCR)

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[28] See the numerous regional and bilateral treaties quoted in Part 3.2.

[29] See for instance at the universal level the International Covenant on Civil and Political Rights (ICCPR) (999 UNTS 171, 16 Dec. 1966 (entry into force: 23 Mar. 1976)) or the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (660 UNTS 195, 7 Mar. 1966 (entry into force: 4 Jan. 1969)).

[30] See especially Art. 10(1) of the Convention on the Rights of the Child (CRC) (1577 UNTS 3, 20 Nov. 1989 (entry into force: 2 Sep. 1990)); Art. 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1465 UNTS 113, 10 Dec. 1984 (entry into force: 26 Jun. 1987)); and Art. 16 of the International Convention for the Protection of All Persons from Enforced Disappearances (UN Doc. A/61/488, 20 Dec. 2006 (entry into force: 23 Dec. 2010)).

[31] See for instance Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (No. 118) (494 UNTS 271, 28 Jun. 1962 (entry into force: 25 Apr. 1964)); Convention concerning Private Employment Agencies (No. 181) (2115 UNTS 251, 19 Jun. 1997 (entry into force: 10 May 2000)); and Convention concerning Decent Work for Domestic Workers (No. 189) (16 Jun. 2011 (entry into force: 5 Sep. 2013)).

[32] See most notably the Mode 4 of the General Agreement on Trade in Services (GATS), 1869 UNTS 183, 15 Apr. 1994 (entry into force: 1 Jan. 1995).

[33] See the IOM webpage on the International Dialogue on Migration, available at: http://www.iom.int/cms/idm.

[34] Berne Initiative, *International Agenda for Migration Management: Common Understandings and Effective Practices for a Planned, Balanced, and Comprehensive Approach to the Management of Migration*, IOM, Bern, 16–17 Dec. 2004.

[35] Doc. TMMFLM/2005/1(Rev.), 2005.

approved in 2001 the Agenda for Protection[36] and further adopted in 2007 a Plan of Action on refugee protection and mixed migration.[37]

Such a trend is far from being confined to the main universal organizations. In parallel to the various regional consultation processes initiated over the last years,[38] a similar endeavour has been carried out by regional organizations, including the EU,[39] the Council of Europe,[40] the Organization of American States,[41] the African Union,[42] and the Association of Southeast Asian Nations.[43] This unprecedented use of soft law in the field of migration has raised considerable interest and expectations from both

[36] UN Doc. A/AC.96/965/Add.1, 26 Jun. 2002.

[37] UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, Geneva, UNHCR, 1 Jan. 2007, available at: http://www.unhcr.org/refworld/docid/45b0c09b2.html.

[38] See among the recent ones: *The Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin and Destination in Asia* (Abu Dhabi Dialogue), set up in 2008; *The Intergovernmental Authority on Development Regional Consultative Process on Migration* (IGAD-RCP), created in 2008; *The Ministerial Consultations on Overseas Employment and Contractual Labour for Countries of Origin in Asia* (Colombo Process), created in 2003; *The Mediterranean Transit Migration Dialogue* (MTM), created in 2003.

[39] See, for instance: European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, OJ C 115/1, 4 May 2010, esp. 27–31; Presidency of the European Union, *European Pact on Immigration and Asylum*, in EU Doc. 13440/08 ASIM 72, 24 Sep. 2008. See also: European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Maximising the Development Impact of Migration*, COM(2013) 292 final, 21 May 2013; European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Global Approach to Migration and Mobility*, COM(2011) 743 final, 18 Nov. 2011.

[40] Among recent recommendations adopted by the Committee of Ministers of the Council of Europe, refer to the following ones: *Recommendation CM/Rec(2011)13 of the Committee of Ministers to Member States on Mobility, Migration and Access to Health Care*, 16 Nov. 2011; *Recommendation CM/Rec(2011)5 of the Committee of Ministers to Member States on Reducing the Risk of Vulnerability of Elderly Migrants and Improving their Welfare*, 25 May 2011; *Recommendation CM/Rec(2011)1E of the Committee of Ministers to Member States on Interaction between Migrants and Receiving Societies*, 19 Jan. 2011; *Recommendation CM/Rec(2011)2E of the Committee of Ministers to Member States on Validating Migrants' Skills*, 19 Jan. 2011.

[41] See in particular: *Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, including Migrant Workers and their Families*, Resolution AG/RES. 2141 (XXXV-O/05), 2005.

[42] See in particular: the Executive Council of the African Union, *African Common Position of Migration and Development*, Doc. EX.CL/277 (IX), 2006. For African, Caribbean and Pacific (ACP) Member States, see as well: *Brussels Declaration on Asylum, Migration and Mobility*, Doc. ACP/28/025/06 Final, 2006.

[43] *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, 12th ASEAN Summit, Cebu, The Philippines, 13 Jan. 2007, available at: www.aseansec.org/19264.htm.

scholars and policy-makers.[44] This represents indeed a promising avenue for establishing migration as a topic of international concern and raising awareness for a collaborative approach among States and international organizations. Nevertheless its effective impact on migration law and policy should not be overestimated. The proliferation of non-binding standards and consultative processes among a plethora of actors with different – and sometimes conflicting – agendas can obfuscate the role of international migration law by aggravating the fragmentation and dispersion of its norms. This could even weaken international migration law, emphasising informal cooperation and non-binding statements to the detriment of binding rules of law.

This brief overview of treaty law and soft law highlights in turn their own limits for providing a comprehensive legal framework. On the one hand, treaties tailored to migration are unevenly ratified by States. On the other hand, the flourishing number of soft law standards does not formally bind States. Between the two, customary international law needs to be revisited as a major source of international migration law. Though neglected in the contemporary literature, it offers three comparative advantages for the purpose of establishing a truly global frame of analysis.

First, at the normative level, customary international law is the only vehicle for creating universal norms binding all States. Second, at the enforcement level, it is directly applicable by the domestic courts of a substantial number of States. Third, at the systemic level, customary international law provides the benchmark for comprehending international migration law as a global set of legal norms. It captures the multifaceted phenomenon of migration in one single continuum. Customary international law unveils and regulates each component of the migration circle: departure from the country of origin (Part 2), admission into the territory of the destination State (Part 3) and sojourn therein (Part 4). This Chapter will accordingly analyse the three essential features of migration through a systematic inquiry into their historical origin and their current legal stance under general international law.

2. DEPARTURE OF MIGRANTS: THE RIGHT TO LEAVE ANY COUNTRY UNDER GENERAL INTERNATIONAL LAW

Departure is the prerequisite to migration. It has been acknowledged in contemporary international law as the right to leave any country. Freedom to leave – whether for travel, emigration or expatriation – constitutes the founding act of international

[44] For vibrant testimony, see especially: R. Cholewinski, 'Labour Migration Management and the Rights of Migrant Workers', in A. Edwards & C. Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs*, Cambridge, Cambridge University Press, 2010, 273–313; A. Betts, 'Towards a "Soft Law" Framework for the Protection of Vulnerable Irregular Migrants', *International Journal of Refugee Law*, 22(2), 2010, 209–36; and L. Wexler, 'The Non-Legal Role of International Human Rights Law in Addressing Immigration', *University of Chicago Legal Forum*, 2007, 359–403. For a critical stance on the so-called 'hypocrite' use of soft law by States, see however Martin, 'Effects of International Law on Migration Policy and Practice', 547–78.

migration law for, without such a basic freedom, there is no room for international rules applicable to the transnational movement of persons.

From the broader perspective of public international law, the right to leave any country has a long historical pedigree primarily grounded on the philosophy of natural law, before it matured into a well-established principle of positive law (2.1). It is nowadays consecrated as an internationally protected right by a wide range of universal and regional instruments (2.2) and arguably constitutes a customary norm of international law (2.3).

2.1 The Origin and Rationale of the Right to Leave any Country: Freedom of Emigration as an Attribute of Individual Liberty

The right to leave any country is not only the very first right of potential migrants. It is more fundamentally at the heart of the theory of human rights. Freedom to leave is traditionally considered as an essential attribute of personal liberty. It is considered as 'the first and most fundamental of man's liberties',[45] 'the right of personal self-determination',[46] 'an indispensable condition for the free development of a person'.[47] From this last stance, 'there is no doubt that the right to "vote with one's feet" – whether to escape persecution, seek a better life, or for purely personal motives having nothing to do with larger political or economic issues – may be the ultimate means through which the individual may express his or her personal liberty'.[48] The right to leave any country constitutes to a large extent both the prerequisite and the product of human rights.

The philosophical underpinnings of the right to leave are grounded on natural law and classical liberalism which predated the modern formulation of human rights.[49] Under classical international law, it was acknowledged by the founding Fathers of the Law of Nations as an integral – albeit implicit – component of free movement. While discussing the legitimacy of the Spanish conquest in the New World, Francisco de

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[45] M. Cranston, 'The Political and Philosophical Aspects of the Right to Leave and to Return', in K. Vasak & S. Liskofsky (eds), *The Right to Leave and to Return: Papers and Recommendations of the International Colloquium held in Uppsala, Sweden, 19–20 June 1972*, The American Jewish Committee, 1976, 21.

[46] J.D. Inglès, *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including his Own, and to Return to his Country*, UN Doc. E/CN.4/Sub.2/220/Rev.1, 1963, 9.

[47] UN Human Rights Committee (HRC), *General Comment No. 27: Freedom of Movement (Art. 12)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 Nov. 1999, para. 1.

[48] H. Hannum, *The Right to Leave and Return in International Law and Practice*, Dordrecht, Martinus Nijhoff Publishers, 1987, 4.

[49] For further discussions about the philosophical origins of freedom to leave, see: J. McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty', *Melbourne Journal of International Law*, 12, 2011, 27–56; F. G. Whelan, 'Citizenship and the Right to Leave', *The American Political Science Review*, 75, 1981, 636–53; S.F. Jagerskiold, 'Historical Aspects of the Right to Leave and to Return', in Vasak & Liskofsky (eds), *The Right to Leave and to Return*, 3–17; M. Cranston, 'The Political and Philosophical Aspects of the Right to Leave and to Return', in Vasak & Liskofsky (eds), *The Right to Leave and to Return*, 21–35.

Vitoria (1480–1546) asserted that 'the Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them'.[50] According to the Spanish theologian, such a right to travel was grounded on 'the law of nations (*jus gentium*), which either is natural law or is derived from natural law.'[51] The right to travel was conceived as an integral part of a broader notion: the right to communication between peoples, which also included free trade and freedom of the seas.

Following the same stance, Hugo Grotius (1583–1645) reaffirmed the principle that 'every nation is free to travel to every other nation' as an 'unimpeachable axiom of the Law of Nations called a primary rule or first principle, the spirit of which is self-evident and immutable'.[52] For both Vitoria and Grotius, the right to travel included both departure (from one's own country) and admission (into another country) in one single continuum. The right to leave was accordingly merged with a general principle of free movement. It nevertheless retained its own stance for Grotius who devoted a particular attention 'to the Case … when a single Person leaves his Country'.[53] While endorsing Cicero's view of freedom to leave as 'the Foundation of Liberty', Grotius recognized that the right to leave one's own country was not absolute. It could be submitted to restrictions in the interest of the society for debtors as well as in times of war.[54] Except in such cases, the principle however remained that 'Nations leave to every one the Liberty of quitting the State'.[55]

Subsequent scholars of the Law of Nature and of Nations continued to pay tribute to freedom of emigration. While endorsing the legitimate restrictions identified by Grotius,[56] Samuel Pufendorf (1632–94) reasserted that 'every free man reserved to himself the privilege of migrating at his pleasure'.[57] With Pufendorf however, the right to leave was divorced from the general principle of free movement. Departure from one's own country constituted a proper right on its own, whereas admission in another country felt into the realm of the sovereign.[58] This has eventually become the conventional view about the movement of persons under international law. Such a normative disjuncture between departure and admission was notably acknowledged by Emer de Vattel (1714–67).

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[50] F. de Vitoria, *On the Indians Lately Discovered*, trans. John Pawley Bate, Lawbook Exchange, 2000, Sec. III, 386 (trans. of: *De Indis Noviter Inventis* (first published 1532)).

[51] Ibid.

[52] H. Grotius, *The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade*, trans. Ralph van Deman Magoffin, Oxford, Oxford University Press, 1916, 7 (first published 1609).

[53] H. Grotius, *On the Law of War and Peace*, trans. Francis W Kelsey, Oxford, Clarendon Press, 1925, Ch. V, para. XXIV (trans of: *De Jure Belli ac Pacis Libri Tres* (first published 1625)).

[54] Ibid.

[55] Ibid.

[56] S. Pufendorf, *De jure naturae et gentium libri octo*, trans. of the edition of 1688 by C.H. Oldfather & W.A. Oldfather, Oxford, Clarendon Press, 1934, Book VIII, Ch. XI, paras 2–3.

[57] Ibid., para. 2.

[58] Ibid., Book I, Ch. XIX, para. X.

While restating the territorial competence of the State with regard to the admission of aliens, Vattel devoted long passages on 'the liberty of emigration'.[59] He acknowledged as a principle that 'Every man has a right to quit his country, in order to settle in any other, when by that step he does not endanger the welfare of his country.'[60] Such qualified right to leave one's own country is only applicable in times of peace, while public interest may require return.[61] As a witness of his time, Vattel provided a fairly nuanced account of the prevailing practice. While observing that 'the political laws of nations vary greatly in this respect', he distinguished three types of state practice:

> In some nations, it is at all times, except in case of actual war, allowed to every citizen to absent himself, and even to quit the country altogether, whenever he thinks proper, without alleging any reason for it. … In some other states, every citizen is left at liberty to travel abroad on business, but not to quit his country altogether, without the express permission of the sovereign. Finally, there are states where the rigour of the government will not permit any one whatsoever to go out of the country, without passports in form, which are even not granted without great difficulty. In all these cases it is necessary to conform to the laws, when they are made by a lawful authority. But in the last-mentioned case, the sovereign abuses his power, and reduces his subjects to an insupportable slavery, if he refuses them permission to travel for their own advantage, when he might grant it to them without inconvenience, and without danger to the state.[62]

In support of his contention against undue restrictions on freedom of emigration, the Swiss author strongly reaffirmed that 'there are cases in which a citizen has an absolute right to renounce his country, and abandon it entirely – a right founded on reasons derived from the very nature of the social compact.'[63] Such a fundamental right is triggered in three cases: when the State is unable to provide subsistence to his own citizens; fails to discharge its obligations towards its citizens; or enacts intolerant laws (such as those interfering with freedom of conscience). Although his construction primarily relied on natural law, Vattel further observed that freedom of emigration may derive from several sources of positive law, such as the constitution of the State, the explicit permission granted by the sovereign and international treaties.[64]

Although state practice at the time was changing and not uniform, emigration was endorsed as an attribute of individual freedom in several domestic enactments, such as – to quote the most famous ones – the Magna Carta of 1215,[65] the French Constitution

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[59] E. de Vattel, *The Law of Nations or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early essays on the Origin and Nature of Natural Law and on Luxury*, Béla Kapossy & Richard Whatmore (eds), Liberty Fund, 2008, Book I, Ch. XIX, para. 225 (first published 1758).

[60] Ibid., para. 220.

[61] 'In a time of peace and tranquillity, when the country has no actual need of all her children, the very welfare of the state, and that of the citizens, requires that every individual be at liberty to travel on business, provided that he be always ready to return, whenever the public interest recalls him.': ibid. para. 221.

[62] Ibid., para. 222.

[63] Ibid., para. 223.

[64] Ibid., para. 225.

[65] See Sec. 42 quoted, in J.C. Holt, *Magna Carta*, 2nd edn, Cambridge, Cambridge University Press, 1992, 463.

of 1791,[66] and the 1868 Act of the United States Congress.[67] At the inter-state level, freedom of emigration was also frequently secured in peace treaties. Among many other instances, it was notably acknowledged in the Augsburg Settlement (1555),[68] the Treaty of Westphalia (1648),[69] the Treaty of Paris (1763),[70] and the Treaty of Vienna (1809).[71] Besides the specific case of peace settlement, a large number of conventions and declarations were adopted at the end of the eighteenth and the beginning of the nineteenth centuries for the very purpose of prohibiting emigration tax.[72]

During the nineteenth century, the great majority of publicists considered freedom to emigrate as a fundamental principle inherent to individual liberty. This view was notably endorsed by J.M.G. de Rayneval (1736–1812),[73] T.A.H. von Schmalz (1760–1831),[74] and J.C. Bluntschli (1808–81).[75] According to the prevailing stance, 'the right to emigration is an alienable right'[76] which 'logically derives from the principle of individual freedom'.[77] At the end of the nineteenth century, F. de Martens (1845–1909) observed with the typical lyricism of his time:

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[66] Title 1, Constitution of 3 Sep. 1791, published in C. Debbash & J.-M. Pontier, *Les Constitutions de la France*, Paris, Dalloz, 1996, 11.

[67] *An Act concerning the Rights of American Citizens in Foreign States*, 15 Statutes at Large, Ch. 249, Sec. 1, enacted 27 Jul. 1868.

[68] See para. 24 of the Augsburg Treaty, published in E. Riech (ed.), *Select Documents Illustrating Medieval & Modern History*, King and Son, London, 1905, 230.

[69] Art. V of the Treaty of Westphalia, 24 Oct. 1648, published in Riech (ed.), *Select Documents*, 3.

[70] See Art. IV of the Treaty of Paris, 17 Feb. 1763, quoted in Riech (ed.), *Select Documents*, 69.

[71] Art. X of the Treaty of Vienna, 14 Oct. 1809, published in *The Edinburgh Annual Register for 1809*, Vol. 1, Part 1, Edinburgh, John Ballantyne and Co., 1811, xxviii.

[72] This tax (also called *gabelle d'émigration*) was usually required to emigrants by their State of origin before this practice was abolished by a hundred or so treaties and declarations. A list of these treaties and declarations can be found in G.F. de Martens, *Recueil des traités, conventions et transactions des puissances de l'Europe et d'autres parties du globe*, Gottingue, Dietercij, 1837.

[73] J.M.G. de Rayneval, *Du droit de la nature et des gens*, 2nd edn, Paris, Leblanc, 1803, 85–86.

[74] T.A.H. von Schmalz, *Le droit des gens européen*, trans. L. de Bohm, Paris, Maze, 1823, 168.

[75] M. Bluntschli, *Le droit international codifié*, trans. M.C. Lardy, Paris, Guillaumin, 1895, 207.

[76] A.G. Heffter, *Le droit international public de l'Europe*, trans. J. Bergson, Berlin/Paris, Schroeder/Cotillon, 1866, 116 (author's translation). For a similar acknowledgment of free emigration as an inalienable right, see also: T.D. Woolsey, *Introduction to the Study of International Law*, 3rd edn, New York, Scribner & Co., 1871, 97; T. Twiss, *The Law of Nations Considered as Independent Political Communities*, London, Oxford University Press, 1861, 231.

[77] H. Bonfil, *Manuel de droit international public*, Paris, Rousseau, 1894, 215 (author's translation). For a similar account see notably: F. Despagnet, *Cours de droit international public*, Paris, Larose, 1894, 342; P. Pradier-Fodéré, *Traité de droit international*, T. 1, Paris, Durand et Pedone-Lauriel, 1885, 401; C. Calvo, *Le droit international. Théorie et pratique*, 2nd edn, T. 1, Paris, Durant et Peonde-Lauriel/Guillaumin et Cie, 1870, 437.

> With the exception of Russia, all civilized modern states are imbued with the firm conviction that the right to emigrate is one of the inalienable rights belonging to every citizen … This modification took place mainly thanks to the profound transformation that the old political order has experienced in this century. Freedom to emigrate is the direct consequence of the new social and political order which is based on the respect for human beings and the interests that concern them.[78]

Although free emigration was generally considered as being endorsed in the state practice of the time, such endorsement was not without exception. Indeed, this well-recognized principle could be submitted to legitimate restrictions (mainly in times of war and in times of peace for military service, contractual and criminal obligations).[79] In 1897, the Institute of International Law even adopted a draft convention on emigration for the purpose of restating the prevailing practice.[80] It laid down the principle of 'freedom to emigrate … without any distinction based on nationality' and further specified that 'this liberty can be only restricted by decision duly published by governments and in the strict limits of social and political necessities'.[81]

This qualified right of emigration still reflected the conventional view during the first half of the twentieth century.[82] It was acknowledged in a substantial number of domestic legislations[83] and retained some recognition at the international level. For instance, the Spanish-American Congress held at Madrid in 1900 adopted a resolution

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[78] F. de Martens, *Traité de droit international*, trans. A. Léo, Tome 2, Paris, Maresq, 1886, 247 (author's translation).

[79] See for instance: Bluntschli, *Le droit international codifié*, 208 and 210; Despagnet, *Cours de droit international public*, 342; Pradier-Fodéré, *Traité de droit international*, 401; Woolsey, *Introduction to the Study of International Law*, 97; Heffter, *Le droit international public de l'Europe*, 119; F.G. de Martens, *Précis du droit des gens moderne de l'Europe*, 2nd edn, T. 1, Paris, Guillaumin et Cie, 1864, 255.

[80] The rapporteurs of the draft convention underlined that it broadly reflected the common principles consecrated by domestic legislations on emigration: *Annuaire de l'Institut de droit international*, Paris, Pedone, 1897, 57–8.

[81] *Principes recommandés par l'Institut de droit international, en vue d'un projet de convention en matière d'émigration*, ibid., 262–3 (author's translation).

[82] See most notably: M. Sibert, *Traité de droit international public*, T. 1, Paris, Dalloz, 1951, 528–529; G. Scelle, *Précis de droit des gens*, Part II, Paris, Sirey, 1934, 73–76; P. Fauchille, *Traité de droit international public*, T. 1, Paris, Rousseau & Cie, 1922, 820–40 (an English version of his long Chapter was also published under the title: 'The Rights of Emigration and Immigration', *International Labour Review*, IX, 1924, 317–33); E.M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, Banks Law Publishing, 1915, 674–706; E. Nys, *Le droit international*, T. 2, Brussels, Weissenbruch, 1912, 277–80; P. Fiore, *Le droit international codifié et sa sanction juridique*, trans. Ch. Antoine, Paris, Pedone, 1911, 315–7; A. Mérighnac, *Traité de droit international public*, T. 1, Paris, L.G.D.J., 1905, 254. Among the rare dissident authors, Oppenheim claimed – without developing further his assertion – that 'the Law of Nations does not, and cannot, grant a right of emigration to every individual, although it is frequently maintained that it is "a natural" right of every individual to emigrate from his own State': L. Oppenheim, *International Law. A Treatise*, Vol. I, Longmans, Green and Co., 1905, 351.

[83] A compilation of domestic legislations on emigration can be found in: Bureau international du Travail, *Emigration et immigration. Législation et traités*, Geneva, 1922, 1–153; *Conférence internationale de l'émigration et de l'immigration, Rome 15–31 mai 1924*, Vol. I:

reiterating the principle of free emigration and detailing the rules governing its implementation by the States concerned.[84] After the First World War – and despite the generalization of immigration control – emigration remained a topical issue of international concern. Among other similar initiatives, the International Conference on Emigration and Immigration held at Rome in 1924 approved a detailed set of recommendations on emigration. Its Final Act notably reasserted that 'the right to emigrate should be recognized, subject to restrictions imposed in the interests of public order or for economic reasons or for the protection of the moral and material interests of the emigrants themselves'.[85]

After the Second World War, the right to leave gained a new momentum by its clear-cut and worldwide endorsement in the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948.[86] Its Article 13(2) unequivocally proclaims: 'Everyone has the right to leave any country, including his own, and to return to his country.' During the drafting history of this provision, most States' representatives acclaimed the right to leave any country as 'a fundamental human right'.[87] Despite the strong reticence of the Union of Soviet Socialist Republics (USSR),[88] freedom to leave any country was eventually endorsed without any specific qualification.[89]

As a result of a long historical evolution, the natural law conception of freedom to emigrate as an integral attribute to personal liberty finds its formal consecration in the Universal Declaration of Human Rights. The right to leave any country is thus sanctioned as an internationally recognized right on its own. Although the Universal Declaration is as such a resolution of the General Assembly without binding force, most of the rights enshrined therein are currently considered as being part of customary international law. This begs the question whether the right to leave any country proclaimed by Article 13 of the Universal Declaration has matured into a norm of general international law. Before inquiring into the existence of such a customary norm, one should first observe that the right to leave any country is firmly grounded on treaty law.

Documents préparatoires et considérations générales sur les problèmes de l'émigration et de l'immigration, Commissariat général italien de l'émigration, Roma, 1925, 77–234.

[84] *Revue générale de droit international public*, IX, 1902, 319–21.

[85] *Conférence internationale de l'émigration et de l'immigration, Rome, 15–31 mai 1924*, Vol. III: Acte final, Commissariat général italien de l'émigration, Roma, 1925, 160 (official English translation).

[86] Universal Declaration of Human Rights, adopted by the General Assembly Resolution 217 A (III), 10 Dec. 1948.

[87] UN Commission on Human Rights, *Summary Record of the Fifty-Fifth Meeting*, Third Session, UN Doc. E/CN.4/SR.55, 15 Jun. 1948, 6 (India). See also among many other similar restatements: ibid., 9 (Chile), and 11 (Australia); Third Committee of the UN General Assembly, *Summary Record of the Hundred and Twentieth Meeting*, UN Doc. A/C.3/SR.120, 2 Nov. 1948, 317–26 (Belgium, Ecuador, Haiti, Lebanon, The Philippines, the United States of America, the United Kingdom, Uruguay); UN Commission on Human Rights, *Summary Record of the Three Hundred and Fifteenth Meeting*, UN Doc. E/CN.4/SR. 315, 17 Jun. 1952, 10 (Pakistan).

[88] UN Commission on Human Rights, *Summary Record of the Fifty-Fifth Meeting*, 7–8.

[89] The general limitation clause contained in Art. 29 of the Universal Declaration was still deemed applicable to it in the same way as the other fundamental rights proclaimed therein.

2.2 The Recognition of the Right to Leave any Country in Human Rights Treaties

The right to leave any country constitutes a prevalent feature of international human rights law restated in a wide range of universal and regional treaties. At the universal level, the most influential instrument is the ICCPR, which is currently ratified by 167 States from all the regions of the world. Its Article 12(2) reiterates in line with the Universal Declaration of Human Rights that '[e]veryone shall be free to leave any country, including his own'. During the drafting of the Covenant, several delegations 'emphasized the importance of the right recognized in that article, particularly in view of the great human migrations that had recently taken place'.[90]

As it was the case during the drafting of the Universal Declaration of Human Rights, discussions mainly focused on the range of permissible limitations to the right to leave any country. A few delegates argued that the legitimate restrictions were so many and so varied that a meaningful assertion of this right could not be provided in the Covenant.[91] This argument was however resoundingly rejected by most of the States' representatives. Indeed, 'the importance of a provision in the covenant on the right to liberty of movement was stressed by many representatives, who regarded such a right as a necessary complement of the other rights recognized in the covenant on civil and political rights and in the covenant on economic, social and cultural rights.'[92] As underscored by the Lebanese delegate, the right to leave any country was 'an important right' which constituted 'an essential part of the right to personal liberty'.[93] Thus, 'deprivation of that right would considerably limit the exercise of all the other human rights.'[94]

The right to leave any country was finally reaffirmed in the Covenant on the ground that it was one of the 'fundamental human rights'.[95] Like many other basic rights (such as freedom of religion or the right to peaceful assembly), it may be submitted to lawful restrictions.[96] The main concern of the drafters was to formulate them in a way in which the exercise of the right to leave remains the rule and limitations of this right the

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[90] UN Commission on Human Rights, *Summary Record of the Three Hundred and Fifteenth Meeting*, 10 (Pakistan). See also, ibid., 7 (Sweden); and *Summary Record of the Hundred and Fiftieth Meeting*, UN Doc. E/CN.4/SR.150, 17 Apr. 1950, 12 (Lebanon), 13 (India), and 14 (France).

[91] UN Commission on Human Rights, *Summary Record of the Hundred and Sixth Meeting*, UN Doc. E/CN.4/SR. 106, 8 Jun. 1949, 7 (USSR); UN Commission on Human Rights, *Summary Record of the Three Hundred and Fifteenth Meeting*, 5 (United Kingdom), and 6 (Australia).

[92] UN Commission on Human Rights, *Report to the Economic and Social Council on the Eighth Session of the Commission*, held in New York, from 14 Apr. to 14 Jun. 1952, 28.

[93] UN Commission on Human Rights, *Summary Record of the Hundred and Fifty-First Meeting*, UN Doc. E/CN.4/SR.151, 19 Apr. 1950, 12 (Lebanon).

[94] Ibid., 8 (Lebanon). See also ibid., 13 (France).

[95] Ibid., 3 (Uruguay). For similar statements, see also: UN Commission on Human Rights, *Summary Record of the Three Hundred and Fifteenth Meeting*, 5 (India), and 8 (Chile); UN General Assembly, Third Committee, Official Record of the Fourteenth Session, UN Doc. A/C.3/SR.954, 12 Nov. 1959, 232 (Belgium); UN Doc. A/C.3/SR.956, 13 Nov. 1959, 237 (France), 238 (Philippines), 240 (Spain); UN Doc. A/C.3/SR.957, 16 Nov. 1959, 241 (Ecuador).

[96] Ibid.

exception. The limitation clause contained in Article 12(3) has been accordingly worded in the same terms as those provided for other basic human rights:

> The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

As the universal pillar of international human rights law, the ICCPR ensures a solid and widespread conventional basis to the right to leave, which has been reinforced by many other universal treaties. It has been steadily acknowledged in more specific UN treaties: the 1965 ICERD (Article 5(d)(i)); the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid (Article 2(c));[97] the 1989 CRC (Article 10(2)); the 1990 ICMRW (Article 8(1)); and the 2006 International Convention on the Rights of Persons with Disabilities (ICRPD, Article 18(1)(c)).[98] Furthermore, the plain applicability of freedom to leave in times of armed conflict was integrated within the widely ratified 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Articles 35, 37 and 48).[99]

In addition to this already substantial number of universal treaties, the benefit of the right to leave any country has been restated for several specific categories of persons. This notably concerns the diplomatic, consular or other related staff, as acknowledged by the 1961 Vienna Convention on Diplomatic Relations (Article 44)[100] and then reiterated in a similar language by several other instruments, such as the 1963 Vienna Convention on Consular Relations (Article 26),[101] the 1969 Convention on Special Missions (Article 45(1)),[102] and the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (Article 80).[103] The benefit of the right to leave has been equally restated for another specific – and much more significant – group of people: refugees and stateless persons. Although the 1951 Convention Relating to the Status of Refugees[104] and the 1954 Convention Relating to the Status of Stateless Persons[105] do not mention the right to leave *expressis verbis*, the obligation to issue travel documents under their common Article 28 'can be regarded as a realization of the principle laid down in Art. 13, para. 2 of the Universal Declaration of Human Rights'.[106]

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97 1015 UNTS 243, 30 Nov. 1973 (entry into force: 18 Jul. 1976).
98 2515 UNTS 3, 13 Dec. 2006 (entry into force: 3 May 2008).
99 75 UNTS 287, 12 Aug. 1949 (entry into force: 21 Oct. 1950).
100 500 UNTS 95, 18 Apr. 1961 (entry into force: 24 Apr. 1964).
101 596 UNTS 261, 24 Apr. 1963 (entry into force: 19 Mar. 1967).
102 1400 UNTS 231, 8 Dec. 1969 (entry into force: 21 Jun. 1985).
103 UN Doc. A/CONF.67/16, 14 Mar. 1975 (not yet into force).
104 189 UNTS 137, 28 Jul. 1951 (entry into force: 22 Apr. 1954).
105 360 UNTS 117, 28 Sep. 1954 (entry into force: 6 Jun. 1960).
106 J. Vedsted-Hansen, 'Article 28/Schedule (Travel Documents/Titres de Voyage)', in A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Oxford, Oxford University Press, 2011, 1201. See also in this sense: Hathaway, *The Rights of Refugees under International Law*, 851. According to Article 28 of the two conventions mentioned above, 'The Contracting States shall issue to refugees [and stateless persons] lawfully

The principle laid down in the Universal Declaration is also reinforced in all the regional human rights conventions, thus covering almost all the continents. These regional instruments include the 1963 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 2(2)),[107] the 1969 American Convention on Human Rights (ACHR) (Article 22(2)),[108] the 1981 African Charter on Human and Peoples' Rights (ACHPR) (Article 12(2)),[109] the 1995 Commonwealth of Independent States (CIS) Convention on Human Rights and Fundamental Freedoms (Article 22(2)),[110] and the 2004 Arab Charter on Human Rights (Article 27(a)).[111] The right to leave has been further reiterated in a substantial number of regional instruments devoted to refugees.[112]

Beyond its widespread endorsement in treaty law, the importance of the right to leave is exemplified by the very few reservations made by States to the provisions endorsing this basic right.[113] In fact, most of the relevant reservations are not directly addressed to the right to leave as such. Instead, they correspond to lawful restrictions (mainly for

staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require …' See also Arts 2 and 3 of the Agreement relating to Refugee Seamen (506 UNTS 125, 23 Nov. 1957 (entry into force: 27 Dec. 1961)).

[107] ETS No. 46, 1 Sep. 1963 (entry into force: 2 May 1968). See also for more specific categories of persons: the European Agreement on Travel by Young Persons on Collective Passports between the Member Countries of the Council of Europe (ETS No. 037, 16 Dec. 1961 (entry into force: 17 Jan. 1962)); and the European Convention on the Legal Status of Migrant Workers (Art. 4(1), ETS No. 093, 24 Nov. 1977 (entry into force: 1 May 1983)). The right to leave any country is surprisingly not mentioned in the Charter of Fundamental Rights of the European Union (OJ C 364/01, 18 Dec. 2000 (entry into force: 1 Dec. 2009)).

[108] 1144 UNTS 123, 22 Nov. 1969 (entry into force: 18 Jul. 1978).

[109] 1520 UNTS 217, 27 Jun. 1981 (entry into force: 21 Oct. 1986).

[110] 26 May 1995 (entry into force: 11 Aug. 1998), reprinted in *International Human Rights Reports*, 3, 1996, 212.

[111] 23 May 2004 (entry into force: 15 May 2008), reprinted in *International Human Rights Reports*, 12, 2005, 893.

[112] For the European continent, see: the European Agreement on the Abolition of Visas for Refugees (ETS No. 31, 20 Apr. 1959 (entry into force: 4 Sep. 1960)); the European Agreement on Transfer of Responsibility for Refugees (ETS No. 107, 16 Oct. 1980 (entry into force: 1 Dec. 1980)); the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337/9, 20 Dec. 2011). See also in other regions: Art. 10 of the Convention on Territorial Asylum (OAS Treaty Series No. 19, 28 Mar. 1954 (entry into force: 29 Dec. 1954)); Art. 6(1) of the Convention Governing the Specific Aspects of Refugee Problem in Africa (1001 UNTS 45, 10 Sep. 1969 (entry into force: 20 Jun. 1974)); and Art. 10 of the Arab Convention Regulating the Status of Refugees in Arab Countries (adopted by the League of Arab States, 1994).

[113] The text of the reservations to UN treaties are available at: http://treaties.un.org/Pages/Treaties.aspx?id=4&clang=_en.

preventing tax evasion)[114] or they are primarily aimed at preserving immigration legislation with regard to the distinctive issue of the right to enter and to remain of non-citizens.[115] Besides these cases, reservations specifically excluding the right to leave or subordinating its application to domestic legislation remain extremely rare and have steadily prompted objections from other States Parties. It is noteworthy that the reservation formulated by Pakistan to Article 12 of the ICCPR was objected by several States and Pakistan eventually withdrew it in June 2011.[116]

As far as UN treaties are concerned, only two States – Malaysia and Thailand – have maintained their reservations excluding the relevant provision or subordinating it to domestic law. This concerns Article 18 of the ICRPD governing liberty of movement (including the right to leave) and nationality. Both reservations have raised objections from other States Parties on the ground that 'Article 18 concerns fundamental provisions of the Convention and is incompatible with the object and purpose of that instrument'.[117] It was even asserted that:

> Articles 15 [on freedom from torture, inhuman or degrading treatment] and 18 [on freedom of movement] of the Convention address core human rights values that are not only reflected in several multilateral treaties, such as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights, but also form part of the international customary law.[118]

This acknowledgement deserves further inquiry into the customary law nature of the right to leave.

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[114] See especially the reservations of Belize and of Trinidad and Tobago to Art. 12(3) ICCPR. For the text of these reservations, see the ratification status of the ICCPR available at: http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[115] See mainly the reservations of the United Kingdom to the ICCPR and the ICRPD, the similar one made by China (with respect to Hong Kong) to the CRC and the ICRPD, as well as those of the Cook Islands and Singapore to the CRC and the one of Australia to the ICRPD. For reservations to the ICRPD, see: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-15&chapter=4&lang=en. For reservations to the CRC, see: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en.

[116] According to the reservation of Pakistan, 'the provisions of Articles 12 shall be so applied as to be in conformity with the Provisions of the Constitution of Pakistan.' It has been objected to by Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, the United Kingdom, and the United States of America.

[117] Objection of Belgium to the Malaysian reservation. See also the similar objection raised by Austria, Germany, Hungary, Portugal, Slovakia and Sweden. Thailand has also formulated a reservation according to which 'the application of Article 18 of the Convention shall be subject to the national laws, regulations and practices in Thailand.' This reservation has been objected on the same ground by the Czech Republic, Portugal, Spain and Sweden.

[118] Objection of Hungary to the Malaysian reservation.

2.3 The Foundation of the Right to Leave any Country in Customary International Law

The large number of treaties consecrating the right to leave any country, the similarity of their respective wording, their wide ratification and the rare reservations militate in favour of the existence of a customary norm. When identifying the usual requirements for considering if a conventional rule has become a custom, the International Court of Justice (ICJ) has underlined in the well-known *North Sea Continental Shelf Cases* that 'even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.'[119]

Against such a frame, one cannot fail to notice that participation to the seven UN conventions and five regional human rights conventions is much more than 'very widespread and representative', for it is almost unanimous, gathering virtually all UN Member States from all regions of the world. In fact, only one Member State – the newly independent South Sudan – is not yet party to one of the 12 above-mentioned conventions.[120] Among them, the three most ratified treaties endorsing the right to leave are the CRC, the ICERD and the ICCPR. They respectively gather 98.4, 90.2 and 86.5 per cent of the total number of UN Member States.[121]

As acknowledged by the ICJ, the conviction of being bound by a customary norm can be further inferred from non-binding resolutions – particularly those of the General Assembly – adopted by consensus or by a broad and representative majority.[122] From this angle, it is noteworthy that the various resolutions and declarations endorsing the right to leave have been adopted without a vote and thus even the rare States which have not ratified one of the above-mentioned conventions have consented to their adoption. Evidence of such *opinio juris* can be found in the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, adopted in December 1985 without a vote by the General Assembly.[123] Among other examples, the right to leave has been restated in the Guiding Principles on Internal Displacement,[124] which have been referred to in various resolutions of the General Assembly.[125]

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[119] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, para. 73.

[120] This estimate and the following ones are based on the ratification statuses available online in September 2012.

[121] If one excludes the CRC, only 11 UN Member States have not ratified one of the other universal and regional conventions. These are Bhutan, Brunei Darussalam, Kiribati, Marshall Islands, Micronesia (Federated States of), Myanmar, Nauru, Palau, Singapore, South Sudan, and Tuvalu.

[122] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Judgment (Merits), ICJ Reports 1986, 14, 100; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 254–5.

[123] Art. 5(2), UN Doc. A/RES/40/144, 13 Dec. 1985.

[124] Principle 15, UN Doc. E/CN.4/1998/53/Add.2, 11 Feb. 1998, annex.

[125] UN Doc. GA/RES/66/135, 19 Dec. 2011, op. para. 29; UN Doc. GA/RES/65/193, 21 Dec. 2010, op. para. 29; UN Doc. GA/RES/63/149, 18 Dec. 2008, op. para. 28; UN Doc.

More generally, all General Assembly resolutions on the protection of migrants ritually start by reaffirming Article 13(2) of the Universal Declaration of Human Rights before 'request[ing] all Member States, in conformity with their respective constitutional systems, effectively to promote and protect the human rights of all migrants, in conformity with the Universal Declaration of Human Rights'.[126] While the exact wording may slightly change from one resolution to another, all of them have been adopted by consensus and are conspicuously addressed to *all* Member States.[127] Furthermore, the right to leave any country has been restated at the regional level in several declarations, including the 1948 American Declaration of the Rights and Duties of Man (Article VIII),[128] the 1990 Cairo Declaration on Human Rights in Islam (Article 12)[129] and, more recently, the 2012 ASEAN Declaration of Human Rights (Article 15).[130]

GA/RES/62/125, 18 Dec. 2007, op. para. 28; UN Doc. GA/RES/60/128, 16 Dec. 2005, op. para. 26; UN Doc. GA/RES/59/172, 20 Dec. 2004, op. para. 25; UN Doc. GA/RES/58/149, 22 Dec. 2003, op. para. 25; UN Doc. GA/RES/57/183, 18 Dec. 2002, op. para. 33; UN Doc. GA/RES/56/135, 19 Dec. 2001, op. para. 29; UN Doc. GA/RES/55/77, 4 Dec. 2000, op. para. 34; UN Doc. GA/RES/54/147, 17 Dec. 1999, op. para. 27; UN Doc. GA/RES/53/125, 9 Dec. 1998, op. para. 16. See also the *World Summit Outcome*, UN Doc. GA/RES/ 60/1, 24 Oct. 2005, para. 132. See also Security Council, UN Doc. S/RES/1286, 19 Jan. 2000, preambular para. 6 (on Burundi).

[126] See UN Doc. GA/RES/65/212, 1 Apr. 2011, preambular para. 2 and op. para. 3; UN Doc. GA/RES/64/166, 19 Mar. 2010, preambular para. 3 and op. para. 3; UN Doc. GA/RES/63/184, 17 Mar. 2009, preambular para. 3 and op. para. 1; UN Doc. GA/RES/62/156, 7 Mar. 2008, preambular para. 3 and op. para. 1; UN Doc. GA/RES/61/165, 23 Feb. 2007, preambular para. 3 and op. para. 1; UN Doc. GA/RES/60/169, 7 Mar. 2006, preambular para. 1 and op. para. 5; UN Doc. GA/RES/59/193, 17 Feb. 2005, preambular para. 3 and op. para. 3; UN Doc. GA/RES/58/190, 22 Mar. 2004, preambular para. 2 and op. para. 2; UN Doc. GA/RES/57/218, 27 Feb. 2003, preambular para. 2 and op. para. 2; UN Doc. GA/RES/56/170, 28 Feb. 2002, preambular para. 2 and op. para. 2; UN Doc. GA/RES/55/92, 26 Feb. 2001, preambular para. 2 and op. para. 2; UN Doc. GA/RES/54/166, 24 Feb. 2000, preambular para. 1 and op. para. 1.

[127] A similar pattern can be observed with regard to the resolutions of the UN Human Rights Council. See in particular: UN Doc. A/HRC/RES/17/22, 19 Jul. 2011, preambular para. 5; and UN Doc. A/HRC/RES/14/16, 23 Jun. 2010, preambular para. 5 and op. para. 6. See also among other endorsements of the right to leave the following conclusions of the UNHCR Executive Committee (ExCom): *Conclusion on the Return of Persons Found Not to Be in Need of International Protection*, No. 96 (LIV), 2003, para. (a); *Conclusion on International Protection*, No. 85 (XLIX), 1998, para. (z); *Conclusion on Comprehensive and Regional Approaches within a Protection Framework*, No. 80 (XLVII), 1996, para. (e)(i); *Family Reunification*, No. 24 (XXXII), 1981, para. 4; *Establishment of the Sub-Committee and General Conclusion on International Protection*, No. 1 (XXVI), 1975, para. (f).

[128] OAS Res. XXX, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 2 May 1948.

[129] Adopted on 5 Aug. 1990, reproduced in English in UN Doc. A/CONF.157/PC/62/Add.18, 9 Jun. 1993.

[130] Adopted by ASEAN Heads of State/Government, Phnom Penh, Cambodia, 18 Nov. 2012, available at: http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration. One should add that several declarations restating the right to leave were also adopted by independent experts. See the Uppsala Declaration on the Right to Leave and to Return adopted in 1972, reprinted in *Israel Yearbook on Human Rights*, 4, 1974, 432–5; the

Besides the breadth of universal and regional endorsements, the end of the persistent objection raised by communist countries was a turning point in this customary law process, since the traditional opponents of the right to leave eventually acknowledged it as an internationally protected right.[131] This change of behaviour was already perceptible in the Final Act of the Conference on Security and Cooperation in Europe adopted at Helsinki in August 1975.[132] The clearest commitment to the principle of freedom to leave was endorsed later on in the concluding document of the Vienna Conference adopted in January 1989. In a prophetic announcement of what would happen a few months later with the fall of the Berlin Wall, the participating States affirmed in unequivocal terms that 'they will fully respect their obligations under international law … , in particular that everyone shall be free to leave any country, including his own, and to return to his country.'[133] This formal endorsement by the former communist countries was subsequently restated at several other Conferences on Security and Cooperation in Europe[134] and enshrined in the 1995 CIS Convention on Human Rights and Fundamental Freedoms.

Strasbourg Declaration on the Right to Leave and to Return adopted in 1986, reprinted in *Human Rights Law Journal*, 8, 1987, 478–84; and the 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World (Art. 1), *Fourth Seminar of Arab Experts on Asylum and Refugee Law*, International Institute of Humanitarian Law, Geneva, 1992, 36.

[131] The USSR attempted – without success – to delete any mention to the right to leave or to subordinate its benefit to domestic legislation during the drafting of the Universal Declaration and of the ICCPR. For a telling description of the domestic legislation and practice prevailing at that time in communist countries, see notably: V. Chalidze, 'The Right of a Convicted Citizen to Leave his Country', *Harvard Civil Rights-Civil Liberties Law Review*, 8(1), 1973, 113; J. Toman, 'The Right to Leave and to Return in Eastern Europe', in Vasak & Liskofsky (eds), *The Right to Leave and to Return*, 119–64; L.E. Pettiti, 'The Right to Leave and to Return in the USSR', in Vasak & Liskofsky (eds), *The Right to Leave and to Return*, 171–89.

[132] Among the specific measures consented in the Helsinki Final Act, 35 States – including all European States (except Albania and Andorra), the United States and Canada – committed to 'favourably consider applications for travel with the purpose of allowing persons to enter or leave their territory temporarily, and on a regular basis if desired,' for family, personal or professional reasons: *International Legal Materials*, 14, 1975, 1293. For a comment of the provisions on free movement of persons in the Helsinki Final Act and their subsequent implementation, see: V.Y. Ghebali, 'Immigration et émigration dans les rapports Est-Ouest: les recommandations de la Conférence sur la sécurité et la coopération en Europe', in D. Turpin (ed.), *Immigrés et réfugiés dans les démocraties occidentales – défis et solutions*, Aix, Economica, Presses Universitaires d'Aix-Marseille, 1989, 287–97; D.C. Turack, 'Freedom of Transnational Movement: The Helsinki Accord and Beyond', *Immigration & Nationality Law Review*, 4, 1980–1981, 43–66; and J.A.R. Nafziger, 'The Right of Migration under the Helsinki Accords', *Southern Illinois University Law Journal*, 5, 1980, 395–438.

[133] Concluding Document of the Vienna Conference on Security and Cooperation in Europe, reprinted in *Human Rights Law Journal*, 10, 1989, 270. For an overview of the subsequent changes of the state practice in Eastern countries, see: D.C. Turack, 'The Movement of Persons: The Practice of States in Central and Eastern Europe Since the 1989 Vienna CSCE', *Denver Journal of International Law and Policy*, 12, 1993, 289–309; and F.A. Gabor, 'Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain"', *Tulane Law Review*, 65, 1991, 849–81.

[134] See in particular the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, reprinted in *International Legal Materials*, 29, 1990, 1305; the

This has arguably proved to be instrumental in crystallising a customary law process initiated and consolidated by a wide range of treaties and other similar declarations and resolutions adopted at both the universal and regional level. The customary law nature of the right to leave finds an additional support in the plethoric number of domestic enactments. In particular, no fewer than 116 States have consecrated it within their own constitutions.[135]

Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Oct. 1991, reprinted in *International Legal Materials*, 30, 1991, 1671; the 1991 Charter of Paris for a New Europe, reprinted in *International Legal Materials*, 30, 1991, 193, at 193–4 and 199–200 and the Budapest Document adopted at the summit of Heads of States on 6 Dec. 1994, paras 40–41, reproduced in *International Legal Materials*, 34, 1995, 773.

[135] See: 2004 Constitution of the Islamic Republic of Afghanistan (Art. 39), 1998 Constitution of Albania (Art. 38), 1989 Constitution of the People's Democratic Republic of Algeria, as amended to 2008 (Art. 44), 2010 Constitution of the Republic of Angola (Art. 46(2)), 1981 Constitution of Antigua and Barbuda (Art. 8(1)), 1994 Constitution of the Argentine Republic (Sec. 14), 1995 Constitution of the Azerbaijan Republic, as amended to 2009 (Art. 28), 1973 Constitution of The Commonwealth of The Bahamas (Art. 25(1)), 1972 Constitution of the People's Republic of Bangladesh, as amended to 2011 (Art. 36), 1966 Constitution of Barbados, as amended to 2007 (Art. 22(1)), 1994 Constitution of the Republic of Belarus, as amended to 2004 (Art. 30), 1988 Constitution of the Federative Republic of Brazil, as amended to 2013 (Art. 5(15)), 2007 Constitution of the Virgin Islands (Art. 18(1)), 1991 Constitution of the Republic of Bulgaria, as amended to 2007 (Art. 35(1)), 2005 Constitution of the Republic of Burundi (Art. 33), 1993 Constitution of the Kingdom of Cambodia, as amended to 2008 (Art. 40), 1982 Canadian Charter of Rights and Freedom (Art. 6(1)), 1996 Constitution of the Republic of the Chad, as amended to 2005 (Art. 44), 1992 Constitution of the Republic of Cape Verde, as amended to 2010 (Art. 51(1)), 2009 Constitution of the Cayman Islands (Art. 13(1)), 1980 Constitution of the Republic of Chile, as amended to 2012 (Art. 19(7)(a)), 1991 Constitution of Colombia, as amended to 2012 (Art. 24), 2002 Constitution of the Republic of the Congo (Art. 16), 2006 Constitution of the Democratic Republic of Congo, as amended to 2011 (Art. 30), 1949 Constitution of Costa Rica, as amended to 2011 (Art. 22), 1990 Constitution of the Republic of Croatia, as amended to 2010 (Art. 32), 1960 Constitution of the Republic of Cyprus, as amended to 2010 (Art. 13(2)), 1991–1992 Charter of Fundamental Rights and Basic Freedoms of the Czech Republic, as amended to 1998 (Art. 14), 2010 Constitution of the Dominican Republic (Art. 46), 2002 Constitution of the Democratic Republic of East Timor (Sec. 44), 2008 Constitution of Ecuador (Art. 66(14)), 2012 Constitution of the Arab Republic of Egypt (Art. 42), 1983 Constitution of the Republic of El Salvador, as amended to 2009 (Art. 5), 1997 Constitution of Eritrea (Art. 19(9)), 1992 Constitution of the Republic of Estonia, as amended to 2011 (para. 35), 1990 Constitution of the Sovereign Democratic Republic of Fiji (Sec. 15(1)), 1999 Constitution of Finland, as amended to 2011 (Sec. 9), 1991 Constitution of the Gabonese Republic, as amended to 2003 (Art. 1(3)), 1997 Constitution of the Republic of the Gambia, as amended to 2004 (Art. 25(2)), 1995 Constitution of Georgia, as amended to 2011 (Art. 22(2)), 1992 Constitution of the Republic of Ghana (Art. 21(1)(g)), 2006 Constitution of Gibraltar (Art. 13(1)), 1975 Constitution of Greece, as amended to 2008 (Art. 5(4)), 1973 Constitution of Grenada, as amended to 1992 (Sec. 12), 1985 Constitution of the Republic of Guatemala, amended to 1993 (Art. 26), 1980 Constitution of the Co-operative Republic of Guyana, as amended to 2007 (Art. 148(1)), 1982 Constitution of the Republic of Honduras, as amended to 2012 (Art. 81), 1944 Constitution of the Republic of Iceland, as amended to 1999 (Art. 66), 1945 Constitution of the Republic of Indonesia, as amended to 2002 (Art. 28 E(1)), 1937 Constitution of Ireland, as amended to 2012 (Art. 40), 1992 Basic Law: Human Dignity and Liberty of Israel, as amended to 1994 (Art. 6(a)), 1947 Constitution of the Italian Republic,

Against such an impressive background of international, regional and domestic materials, it comes as no surprise that a majority of scholars have acknowledged the

as amended to 2012 (Art. 16), 1946 Constitution of Japan (Art. 22(2)), 1995 Constitution of the Republic of Kazakhstan, as amended to 2011 (Art. 21(2)), 2010 Constitution of Kenya (Art. 39(2)), 1979 Constitution of Kiribati, as amended in 1995 (Art. 14(1)), 2008 Constitution of the Republic of Kosovo (Art. 35(2)), 2010 Constitution of the Kyrgyz Republic (Art. 25(2)), 1922 Constitution of the Republic of Latvia, as amended to 2009 (Art. 98), 1993 Constitution of Lesotho (Sec. 7(1)), 1986 Constitution of the Republic of Liberia (Art. 13), 1991 Constitution of the Republic of Macedonia, as amended to 2011 (Art. 27), 2010 Constitution of the Republic of Madagascar (Art. 12), 1994 Constitution of the Republic of Malawi, as amended to 2010 (Art. 39(2)), 1964 Constitution of Malta, as amended to 2011 (Art. 44(1)), 2008 Constitution of the Republic of Maldives (Art. 41(1)), 1991 Constitution of the Islamic Republic of Mauritania, as amended to 2012 (Art. 10), 1968 Constitution of Mauritius, as amended to 2003 (Art. 15(1)), 1917 Political Constitution of the United Mexican States, as amended to 2013 (Art. 11), 1994 Constitution of the Republic of Moldova, as amended to 2006 (Art. 27(2)), 1992 Constitution of Mongolia, as amended to 2000 (Art. 16(18)), 2007 Constitution of Montenegro (Art. 39), 2004 Constitution of the Republic of Mozambique, as amended to 2007 (Art. 55(2)), 1990 Constitution of the Republic of Namibia, as amended to 2010 (Art. 21(1)(i)), 2008 Constitution of the Kingdom of the Netherlands (Art. 2(4)), 1986 Political Constitution of the Republic of Nicaragua, as amended to 2010 (Art. 31), 1981 Constitution of the Republic of Palau (Art. 4, Sec. 9), 1975 Constitution of the Independent State of Papua New Guinea, as amended to 2006 (Art. 52(1)), 1992 Political Constitution of the Republic of Paraguay, as amended to 2011 (Art. 41), 1993 Political Constitution of Peru, as amended to 2009 (Art. 2(11)), 1987 Constitution of the Republic of Philippines (Art. 3, Sec. 6), 1997 Constitution of the Republic of Poland, as amended to 2009 (Art. 52(2)), 1976 Constitution of the Portuguese Republic, as revised in 2005 (Art. 44(2)), 1991 Constitution of Romania, as republished in 2003 (Art. 25), 1993 Constitution of the Russian Federation, as amended to 2008 (Art. 27(2)), 2003 Constitution of the Republic of Rwanda, as amended to 2010 (Art. 23), 1983 Constitution of Saint Kitts and Nevis (Art. 14(1)), 1979 Constitution of Saint Vincent and the Grenadines (Sec. 12), 2001 Constitution of the Republic of Senegal, as amended to 2009 (Art. 14), 2006 Constitution of the Republic of Serbia (Art. 39), 1993 Constitution of the Republic of Seychelles, as amended to 2011 (Art. 25(1)), 1991 Constitution of Sierra-Leone (Art. 18(1)), 1992 Constitution of the Slovak Republic (Art. 23(2)), 1991 Constitution of the Republic of Slovenia, as amended to 2013 (Art. 32), 1996 Constitution of the Republic of South Africa, as amended to 2009 (Art. 21(2)), 2011 Transitional Constitution of the Republic of South Sudan (Art. 27(2)), 1978 Constitution of Spain, as amended to 2011 (Sec. 19), 2005 Interim National Constitution of the Republic of Sudan (Art. 42(2)), 2005 Constitution of the Kingdom of Swaziland (Sec. 26(1)), 1975 Constitution of the Kingdom of Sweden, as amended to 2011 (Ch. 2, Art. 8), 1999 Federal Constitution of the Swiss Confederation, as amended to 2013 (Art. 24(2)), 1994 Constitution of the Republic of Tajikistan, as amended to 2003 (Art. 24), 1977 Constitution of the United Republic of Tanzania, as amended to 2005 (Art. 17(1)), 2007 Constitution of the Kingdom of Thailand (Sec. 34), 1992 Constitution of the Republic of Togo, as amended to 2007 (Art. 22), 1959 Constitution of Tunisia, as amended to 2008 (Art. 10), 1982 Constitution of the Republic of Turkey, as amended to 2011 (Art. 23), 1986 Constitution of Tuvalu, as amended to 2007 (Art. 26(1)(i)), 1995 Constitution of the Republic of Uganda, as amended to 2005 (Art. 29(2)(b)), 1996 Constitution of Ukraine (Art. 33), 1967 Constitution of the Oriental Republic of Uruguay, as amended to 2004 (Art. 37), 1991 Constitution of the Republic of Uzbekistan, as amended to 2007 (Art. 28), 1999 Constitution of the Bolivarian Republic of Venezuela, as amended to 2009 (Art. 50), 1992 Constitution of the Socialist Republic of Vietnam, as amended to 2001 (Art. 68), 1991 Constitution of the Republic of Zambia, as amended to 1996 (Art. 22(1)(c)), 1979 Constitution of Zimbabwe, as amended to 2009 (Art. 22(1)). The text of these constitutions is available on

customary law nature of the right to leave,[136] even if some others have expressed a more nuanced opinion.[137] It is true that violations are still regularly committed by States in different parts of the world. Overall it is nevertheless fairly difficult to conclude that this particular right is much more violated than other customary norms, such as the prohibition of discrimination and the prohibition of torture and inhuman or degrading treatment. Furthermore, it is noteworthy that, when States are accused of violating the right to leave any country, they either invoke the forthcoming adoption of a legislative act for duly taking it into account[138] or they argue that alleged violations correspond to lawful restrictions based on criminal convictions.[139]

World Constitutions Illustrated through the database HeinOnline at: http://heinonline.org/HOL/Index?collection=cow&set_as_cursor=clear.

[136] See among other instances: G. Liu, *The Right to Leave and Return and Chinese Migration Law*, Leiden/Boston, Martinus Nijhoff Publishers, 2007, 32; R. Boed, 'The State of the Right of Asylum in International Law', *Duke Journal of Comparative & International Law*, 5, 1994–1995, 6; Sohn & Buergenthal (eds), *The Movement of Persons Across Borders*, 7; O. Schachter, *International Law in Theory and Practice*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1991, 339; T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, Oxford, 1989, 23; R. Hofmann, *Die Ausreisefreiheit nach Völkerrecht und staatlichen Recht*, Berlin, Heidelberg, New York, London, Paris, Tokyo, Springer-Verlag, 1988, 309; *Analysis of the Current Trends and Developments Regarding the Right to Leave Any Country Including One's Own, and to Return to One's Own Country, and Some Other Rights or Consideration Arising Therefrom*, Final Report prepared by C.L.C. Mubanga-Chipoya, UN Doc. E/CN.4/Sub.2/1987/10, 10 Jul. 1987, 11; Plender, *International Migration Law*, 119; J. Barist et al., 'Who May Leave: A Review of Soviet Practice Restricting Emigration on Grounds of Knowledge of "State Secrets" in Comparison with Standards of International Law and the Policies of Other States', *Hofstra Law Review*, 15, 1987, 384–5; Nafziger, 'The Right of Migration under the Helsinki Accords', 401; Y. Dinstein, 'Freedom of Emigration and Soviet Jewry', *Israel Yearbook on Human Rights*, 4, 1974, 266.

[137] R. B. Lillich, 'Civil Rights', in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Oxford, Clarendon Press, 1984, 151 ('both the right to leave and the right to return seem well-established in conventional and perhaps even customary international human rights law'); W. Goralczyk, *Proceedings of the Annual Meeting (American Society of International Law)*, 85, 1991, 56 ('it is not clear whether it also constitutes a general, customary rule, binding all States. The prevailing view is in favor of its customary character'). Among the rare authors denying the customary law nature of the right to leave see: G.S. Goodwin-Gill, 'The Right to Leave, the Right to Return and the Question of a Right to Remain', in V. Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues*, The Hague/Boston/London, Martinus Nijhoff Publishers, 1996, 97; Hannum, *The Right to Leave and Return in International Law and Practice*, 126.

[138] See, for instance, the following summary records of the HRC meetings: UN Doc. CCPR/C/SR.2835, 18 Oct. 2011, para. 6 (Iran); UN Doc. CCPR/C/SR.1711, 26 Oct. 1998, para. 20 (Armenia); UN Doc. CCPR/C/SR.1635, 31 Oct. 1997, para. 11 (Lithuania).

[139] HRC: *Eighty-Second Session, Summary Record of the 2236th Meeting*, UN Doc. CCPR/C/SR.2236, 25 Oct. 2004, para. 50 (Morocco); *Comments by the Government of the Syrian Arab Republic on the Concluding Observations of the Human Rights Committee*, UN Doc. CCPR/CO/71/SYR/Add.1, 28 May 2002, para. 41; *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fourth Periodic Reports of States Parties, Cameroon*, UN Doc. CCPR/C/CMR/4, 11 May 2009, paras 186–9.

Whatever is their real merit, this kind of justification must be seen as a confirmation of the existence of a customary norm. While acknowledging that the practice does not have to be entirely consistent with the purported customary rule,[140] the ICJ underlines in this regard that:

> If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[141]

Besides its customary law nature, the right to leave is frequently conflated – and confused – with other related but distinct notions, such as freedom of movement and admission to the territory of other States. This is probably the main source of recurrent misunderstandings surrounding academic discussions about the right to leave. Indeed, scholars – including the present author – are used to lament that the right to leave any country is an incomplete right without the concomitant obligation of admission in another country. Though intellectually grounded,[142] such *de lege ferenda* assertion does not reflect the specific meaning and normative stance of the right to leave as constantly reiterated by human rights instruments.

As a result of the long normative process described above, departure has been divorced from admission to constitute a distinctive norm primarily addressed to the States of origin and reinforced by the right to return. Quite ironically, those who deny the customary law nature of the right to leave consider the right to return as a norm of general international law.[143] With due respect and except in rare situations (mainly circumscribed to citizens born abroad), one must have left a country before returning to it. As a matter of pure logic, assuming the customary law nature of the right to return suggests that the same conclusion should be drawn for its prerequisite, i.e., the right to leave.

Furthermore, the absence of explicit provisions on admission in human rights instruments does not mean that entry into the territory of another State evolves in a legal vacuum. Nor does it imply that admission of non-citizens is generally proscribed. As it will be demonstrated in the second part of this Chapter, the relevant state practice is much more subtle than an impermeable regime of closed borders. In sum, as recalled

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[140] 'In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule': ICJ, *Military and Paramilitary Activities in and against Nicaragua*, 98.

[141] Ibid.

[142] See also among an abundant literature: A. Pécoud & P. de Guchteneire (eds), *Migration without Borders. Essays on the Free Movement of People*, Paris & New York, UNESCO & Berghahn Books, 2007; S.S. Juss, *International Migration and the Global Justice*, Aldershot, Ashgate Publishing, 2006, 297; K.R. Johnson, 'Open Borders?', *UCLA Law Review*, 51, 2003, 193–265; C. Wihtol de Wenden, *Faut-il ouvrir les frontières?*, Paris, Presses de Sciences Po, 1999.

[143] See mainly Hannum, *The Right to Leave and Return in International Law and Practice*; Goodwin-Gill, 'The Right to Leave, the Right to Return', 100–101 specifically.

by Harvey and Barnidge, 'the temptation … to dismiss the right to leave as of theoretical value only … would be a mistake: the right to leave one's own country remains significant in international human rights law. It has potential, and its requirements could usefully be mainstreamed into existing attempts to manage international migration more effectively.'[144]

3. ADMISSION OF MIGRANTS: IMMIGRATION CONTROL AND STATE SOVEREIGNTY UNDER GENERAL INTERNATIONAL LAW

Admission of non-citizens remains one of the most controversial and frustrating issues of contemporary international law. It is closely associated with the highly debated notion of sovereignty, which constitutes both the limit and the basis of general international law. The dual nature of state sovereignty fairly reflects the ambivalence of the current regime governing admission of migrants. The origin and rationale of this state competence is traditionally grounded on territorial sovereignty (3.1) even if general international law provides some limits regarding refusal of entry (3.2) and the procedural guarantees governing immigration control (3.3).

3.1 The Origin and Rationale of Immigration Control: Territorial Sovereignty, Domestic Jurisdiction and the Changing Pattern of International Law

The competence of States to regulate the entry of non-citizens is traditionally considered as a well-established principle of positive international law restated in treaties,[145] declarations[146] and jurisprudence.[147] The customary law nature of this sovereign prerogative has been conventionally affirmed in textbooks on international

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[144] C. Harvey & R.P. Barnidge, 'Human Rights, Free Movement, and the Right to Leave in International Law', *International Journal of Refugee Law*, 19(1), 2007, 20.

[145] Havana Convention on the Status of Aliens, OAS Treaty Series No. 34, 20 Feb. 1928 (entry into force: 29 Aug. 1929), Art. 1: 'States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory'. See as well Art. 79 ICRMW.

[146] See for instance the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, Art. 2(1): 'Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens'.

[147] European Court of Human Rights (ECtHR) Abdulaziz, *Cabales and Balkandali v. the United Kingdom* (Judgment) (1985) Series A No. 94, 33–4, para. 67: 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory'.

law. Alongside the writings of Kelsen,[148] Rousseau,[149] Brownlie,[150] and many others,[151] the 1992 edition of *Oppenheim's International Law* restates that:

> By customary international law no state can claim the right for its nationals to enter into, and reside on, the territory of a foreign state. The reception of aliens is a matter of discretion, and every state is, by reasons of its territorial supremacy, competent to exclude aliens from the whole, or any part, of its territory.[152]

The traditional rationale for such competence lies in the very notion of territorial sovereignty which entails the right of the State to regulate and control activities, goods, capital and persons within its own territory. While no other basic concept of public international law has raised so many disputes than territorial sovereignty, the traditional function assigned to it is to 'mark a link between a particular people and a particular territory, so that within that area that people may exercise through the medium of the state its jurisdiction while being distinguished from other peoples exercising jurisdiction over other areas.'[153] This underlying principle reflects the basis axiom of classical international law built on Nation-States as the paradigmatic units of the Westphalian order.

Against such a traditional frame, a State would possess a primary authority over its territory and population. It may therefore decide if and how it permits non-citizens to enter its own territory. This conventional assertion was formulated in the oft-quoted *dictum* of the US Supreme Court held in 1892:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[154]

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[148] H. Kelsen, *Principles of International Law*, 2nd edn, New York, Chicago, San Francisco, Toronto, London, Holt, Rinehart and Winston Inc., 1966, 366: 'Under general international law no state is obliged to admit aliens into its territory'.

[149] C. Rousseau, *Droit international public*, T. III, Paris, Sirey, 1977, 15: 'l'admission des étrangers, sauf engagement conventionnel précis, reste encore largement discrétionnaire'.

[150] I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, Oxford University Press, 2003, 498: 'In principle this is a matter of domestic jurisdiction: a state may choose not to admit aliens or may impose conditions on their admission'.

[151] M.N. Shaw, *International Law*, 6th edn, Cambridge, Cambridge University Press, 2008, 826: 'It is … unquestioned that a state may legitimately refuse to admit aliens or may accept them subject to certain conditions being fulfilled'.

[152] R. Jennings & A. Watts (eds), *Oppenheim's International Law*, 9th edn, New York, Longman, 1992, 897–8.

[153] M.N. Shaw, 'Territory in International Law', *Netherlands Yearbook of International Law*, XIII, 1982, 73.

[154] *Nishimura Ekiu v. United States* [1982] 142 U.S. 651, Gray J., 659. See also: *Attorney-General for Canada v. Cain* [1906] AC 542, 546: 'One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace order, and good government, or to its social or material interest'.

More recently, in 2004, the United Kingdom (UK) House of Lords reasserted that, 'The power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign State.'[155]

However this conventional wisdom is grounded on false premises for both historical and normative reasons. Indeed assuming the power to exclude aliens as the earliest prerogative of the State is highly disputable.[156] On the contrary, free movement across borders has long been the rule, rather than the exception, in the history of mankind.[157] Furthermore, the establishment of the Nation-State and its implicit corollary – territorial sovereignty – did not coincide with the introduction of border controls. For a long time, restrictions were instead primarily imposed on the internal movement of both nationals and non-nationals within the territory of each State. By contrast, the admission of aliens was traditionally viewed as a means for strengthening the power of host States (primarily for demographic and economic reasons). Even Vattel observed in the middle of the eighteenth century that 'in Europe, the access is everywhere free to any person who is not an enemy of the state, except, in some countries, to vagabonds and outcasts.'[158] The prevailing *laissez-faire, laissez-passer* was still the rule during most of the nineteenth century in Europe and the Americas. While admitting that the State could prohibit the entry of aliens by virtue of its territorial sovereignty, F.G. de Martens acknowledged in 1864 that 'the liberty of entry and passage … is grounded on a generally established practice [in Europe]'.[159]

One could still argue that States generally abstained from carrying out immigration controls only because at the time they did not have the practical means to do so in an effective way. However, the UK – one of the rare States which was able to do so as a result of its insularity – provided a telling counter-example. From the end of the

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[155] *European Roma Rights Centre and Others v. Immigration Officer at Prague Airport* [2004] *UKHL* 55, para. 11 (Lord Bingham).

[156] For a similar account and further discussions, see notably: S. Saroléa, *Droits de l'homme et migrations. De la protection du migrant aux droits de la personne migrante*, Brussels, Bruylant, 2006, 442 and ff.; Plender, *International Migration Law*, 62 and ff.; G. Fourlanos, *Sovereignty and the Ingress of Aliens. With Special Focus on Family Unity and Refugee Law*, Stockholm, Almqvist & Wiksell International, 1986, 9 and ff.; J.A.R. Nafziger, 'The General Admission of Aliens under International Law', *American Journal of International Law*, 77, 1983, 807 and ff.

[157] For an historical overview of global migrations, see P. Manning, *Migration in World History*, New York & London, Routledge, 2005; G. Wang, *Global History and Migrations*, Boulder, Westview Press, 1997.

[158] Vattel, *The Law of Nations or the Principle of Natural Law (1758)*, Book II, Ch. VIII, para. 100, 329. This starkly contrasts with the forced migration organized at a large scale through the slave trade.

[159] De Martens, *Précis du droit des gens moderne de l'Europe*, 232 (author's translation). For a similar observation, see: C. Calvo, *Le droit international. Théorie et pratique*, 4th edn T. 2, Paris, Durant et Peonde-Lauriel/Guillaumin et Cie, 1888, 189; L. Neumann, *Eléments du droit des gens modernes européen*, trans. M.A. de Riedmatten, Paris, Rousseau, 1886, 37; J. Reddie, *Inquiries in International Law*, 2nd edn, Edinburgh, Blackwood and Sons, 1851, 204–5; von Schmalz, *Le droit des gens européen*, 165. See however: J. Torpey, *The Invention of Passport: Surveillance, Citizenship and the State*, Cambridge, Cambridge University Press, 2000.

Napoleonic Wars until 1905, no aliens were excluded or expelled from its territory.[160] The Foreign Secretary explained in 1852: 'By the existing law of Great Britain, all foreigners have the unrestricted right of entrance and residence in this country; and while they remain in it, are, equally with British subjects, under the protection of the law.'[161]

Such a right of entry was even enshrined in the constitutions of several other States,[162] as well as in a number of bilateral treaties.[163] More occasionally, domestic law provided for the right of the State to deport aliens but this competence was rarely applied in practice and generally limited to troublemakers and other enemies of the State.[164] While witnessing a period of transition, the resolution adopted by the Institute of International Law in 1892 fairly reflects the prevailing view of the time. Article 6 of its International Rules on Admission and Expulsion of Aliens restates that 'free entrance of aliens into the territory of a civilized state cannot be prohibited in a general and permanent manner other than in the interest of public welfare and for the most serious reasons.'[165]

Thus, immigration control is a relatively recent invention of States. With few exceptions (in some regions – such as in China and Japan – or in times of war and domestic turmoil), immigration controls only emerged at the end of the nineteenth century in certain countries and for specific categories of aliens. The US was among the first States which broke up the time-honoured tradition of immigration liberalism. In 1875, the Congress prohibited the entry of non-national convicts and prostitutes.[166] A few years later, the Chinese Exclusion Act of 1882 suspended immigration of

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[160] B. Porter, *The Refugee Question in Mid-Victorian Politics*, Cambridge, Cambridge University Press, 1979, 1.

[161] 'Circular Dispatch to H.M. Representatives in European Capitals, January 13, 1852', *State Papers*, 42, 1852–1853. See also: W.F. Craies, 'The Right of Aliens to Enter British Territory', *Law Quarterly Review*, 6(21), 1890, 27–41.

[162] See in particular the 1876 Constitution of Spain (Art. 2) quoted in: A. Jeancourt-Galignani, *L'immigration en droit international*, Paris, Rousseau, 1908, 128. See also among other instances of American States the 1860 Constitution of Bolivia (Art. 4); the 1879 Constitution of Guatemala (Art. 19); the 1853 Constitution of Argentina (Art. 25); and the 1891 Constitution of Brazil (Art. 72), quoted in: Fauchille, *Traité de droit international public*, 897–8.

[163] See for instance the 1860 Convention of Friendship (Britain-China), *II Hertslet's Commercial Treaties 112* and the 1873 Treaty of Friendship (France-Burma), published in *Recueil des traités conclus par la France en Extrême-Orient (1684–1902)*, Paris, Leroux, 1902, 113.

[164] For an overview of the law and practice governing expulsion at the time see notably: A. Chantre, *Du séjour et de l'expulsion des étrangers*, Geneva, Aubert-Schuchardt, 1890; L. von Bar, 'L'expulsion des étrangers', *Journal du droit international*, 1886, 1–20.

[165] 'Règles internationales sur l'admission et l'expulsion des étrangers, session de Genève – 1892', in *Annuaire de l'Institut du droit international*, 12, 1892–1894, 220 (author's translation). According to its Art. 7, the protection of national labour force is not in itself a justification for refusing admission.

[166] Immigration Act of 1875, 18 *Stat*. 477. For previous immigration regulations adopted at the state level see: G.L. Neuman, 'The Lost Century of American Immigration Law (1776–1875)', *Columbia Law Review*, 93(8), 1993, 1833–1901.

Chinese labourers for ten years and forbade any court to admit Chinese people for citizenship.[167] This temporary exclusion was perpetuated and strengthened by subsequent statutes,[168] while further grounds of exclusion were introduced in 1891 for nationals of other countries (including persons with mental or physical incapacities, those suffering from contagious diseases and persons likely to become a public charge).[169] Although both the Senate and the House of Representatives have recently expressed their regret as regard to the Chinese Exclusion Act,[170] this first battery of domestic legislation had a disastrous domino effect on other traditional countries of immigration: Australia,[171] Canada,[172] and Latin American States[173] considerably hardened their existing legislation along the US line.

In Europe, the new era of immigration controls was inaugurated at the beginning of the twentieth century by the UK with the view to restricting Jewish immigration from Eastern Europe.[174] According to the Alien Act of 1905, 'undesirable immigrants' were not permitted to enter: (a) if they did not have the means of decently supporting themselves and their dependants; (b) if they were insane or were likely to become a public charge owing to disease or infirmity; (c) if they had been sentenced in a foreign country for a non-political crime; or (d) if an expulsion order had been made against them.[175] During the First World War, immigration controls became generalized in the domestic law of many other countries and reinforced with the generalization of passports.[176] The wartime legislation was then maintained after the First World War and

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[167] Chinese Exclusion Act of 1882, 22 *Stat*. 58.

[168] The Chinese Exclusion Act was made permanent in 1902 and repealed only in 1943: Chinese Exclusion Repeal Act of 1943, 64 *Stat*. 427.

[169] Immigration Act of 1891, 26 *Stat*. 1084.

[170] H.Res. 683, 112th Congress, Jun. 2012; S. Res. 201, 112th Congress, May 2011.

[171] See in particular Immigration Restriction Act of 1901, No. 17, which was regularly amended and reinforced until 1949.

[172] Chinese Immigration Act of 1885, 48–49 Vict., c. 71. This Act was further strengthened in 1900, 1903 and 1923 before it was repealed in 1947. See also with regard to other non-citizens: Immigration Act of 1906, 6 *Edward* VII, c. 19 and Immigration Act of 1910, 9–10 *Edward* VII, c. 27.

[173] See especially the restrictive immigration laws introduced by Equador in 1889, Venezuela in 1894, Costa Rica in 1896 and 1905, Uruguay in 1890 and 1907, Bolivia in 1907, Honduras in 1906, Mexico in 1908, Guatemala and Peru in 1909, quoted in *Conférence internationale de l'émigration et de l'immigration, Rome 15–31 mai 1924*, Vol. I, 246–304.

[174] On the political context prevailing at the time, see B. Gainer, *The Alien Invasion: The Origins of the Alien Act of 1905*, London, Heinemann, 1972.

[175] Aliens Act 1905, Sec. 1(3), 5 *Edward* 7, c. 13. For further comments see: N.-W. Sibley & A. Elias, *The Aliens Act and the Right of Asylum*, London, Clower and Sons, 1906; E. Pépin, *L'Aliens Act de 1905. Causes et résultats*, Paris, Rousseau, 1913.

[176] E. Reale, 'Le problème des passeports', *Recueil des cours de l'Académie de droit international*, 50, 1934, 85–188.

perpetuated due to the economic depression of 1929.[177] Commentators of the time concurred to observe that 'the doors which once were opened wide are now but slightly ajar'.[178]

In short, one can advance without too much exaggeration that, from the end of the nineteenth century until the mid-twentieth century, immigration control was primarily introduced for racial reasons, then generalized as wartime legislation and further reinforced by the economic crisis for becoming the standard of the so-called modern States. Still today, the vicious circle of armed conflicts, terrorism and economic recession constitute influential factors for justifying immigration control. In the meanwhile, on a more conceptual plane, immigration control has become conventionally associated with territorial sovereignty. Though the former is not concomitant with the latter, the very notion of territorial sovereignty has proven to be a powerful tool not only for vindicating a radical break from the past but also for ensuring the permanence of immigration control.

Contemporary international law presents however one major difference from the early twentieth century: territorial sovereignty is no longer an absolute and discretionary power of the State. This evolution is not peculiar to migration; it mirrors a broader transformation of the international legal order which has evolved from a law of coexistence towards a law of interdependence. Against such a normative background, territorial sovereignty is both a competence and a responsibility. As a result, the competence of regulating admission in domestic legislation must be exercised in due accordance with the legal norms of international law.

Following such a stance, the authority of States and their correlative responsibilities can be better appraised by reference to the concept of domestic jurisdiction as notably enshrined in Article 2(7) of the UN Charter.[179] Domestic jurisdiction is traditionally understood as the domain of activities in which the State is not bound by international law. But it is not a monolithic notion; it has evolved along with developments in international law. As early as 1923, the Permanent Court of International Justice explained in the *Nationality Decrees Case* that '[t]he question whether a certain matter is or is not solely within the [domestic] jurisdiction of a State is an essentially relative question; it depends upon the development of international relations'.[180]

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[177] For an overview of the numerous immigration legislation at the time, see: Bureau international du Travail*, Emigration et immigration. Législation et traités*, 167–226; *Conférence internationale de l'émigration et de l'immigration, Rome 15–31 mai 1924*, Vol. I, 241–304.

[178] H. Fields, 'Closing Immigration throughout the World', *American Journal of International Law*, 26, 1932, 671. For a similar account, see for instance: L. Varlez, 'Migration Problems and the Havana Conference of 1928', *International Labour Review*, XIX(1), 1929, 9: 'Under the influence of many causes, accentuated by the war frame of mind, the freedom to migrate has disappeared almost everywhere'.

[179] Adopted on 26 Jun. 1945 (entry into force: 24 Oct. 1945).

[180] *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923, PCIJ (ser B) No 4, 24. See also resolution 'The Determination of the "Reserved Domain" and its Effects' adopted in Aix en Provence on 29 Apr. 1954 by the Institute of International Law. According to Art. 1: 'The reserved domain is the domain of State activities where the jurisdiction of the State is not bound by international law. The extent of this domain depends on international law and varies according to its development'.

From this angle, the movement of persons – although in principle a domestic issue – has been internationalized by a complex and heteroclite set of both conventional and customary norms. Treaty law is composed of three normative layers at the universal, regional and bilateral levels. Their respective importance is still relative and unequal. At the global level, the only multilateral treaty specifically addressing admission for labour purposes is the General Agreement on Trade in Services (GATS) and its Annex on the Movement of Natural Persons (also called Mode 4). In practice however, while 'the WTO may become a fertile source of migration law norms',[181] this is largely a work in progress with few significant achievements. By contrast, States have increasingly concluded agreements liberalising the movement of persons at the regional plane, when participating countries are geographically proximate and with similar levels of economic development.

While the most accomplished free movement regime has been established within the European Union,[182] a wide range of economic integration regimes has been concluded in all continents for facilitating the free movement of persons. The most significant number of these agreements has been adopted in Africa (including notably the Common Market for Eastern and Southern Africa (COMESA),[183] the East Africa Community (EAC),[184] the Economic Community of West African States (ECOWAS),[185]

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[181] S. Charnovitz, 'Trade Law Norms on International Migration', in Aleinikoff & Chetail (eds), *Migration and International Legal Norms*, 248. See also: J.P. Trachtman, *The International Law of Economic Migration: Toward the Fourth Freedom*, Kalamazoo, W.E. Upjohn Institute, 2009.

[182] Treaty on the Functioning of the European Union, OJ C 83/47, 2010, Arts 20(2)(a) and 21; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77, 30 Apr. 2004. The creation of an 'area without border' has also initiated the harmonisation of national legislation through the adoption of a myriad of EU directives and regulations on asylum and migration. With regard to labour migration, see especially the EU Blue Card Directive (Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, OJ L 155/17, 18 Jun. 2009).

[183] Art. 164(1) and (2) of the Treaty Establishing the Common Market for Eastern and Southern Africa, 2314 UNTS 265, 5 Nov. 1993 (entry into force: 8 Dec. 1994); and Protocol on Free Movement of Persons, Labour, Services and the Rights of Establishment, 29 Jun. 1998, available at: http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Free_Movement_Protocol_Kinshasa_19980629.pdf.

[184] See Arts 5(2)(b), and 7 to 9 of the Protocol on the Establishment of the East African Community Common Market, 20 Nov. 2009; and the East African Community Common Market (Free Movement of Persons) Regulations – Annex I, Nov. 2009, both available at: http://www.eac.int/commonmarket/documentation/cat_view/24-documents-a-downloads/30-common-market-protocol-a-annexes.html.

[185] See Art. 3(2)(d)(iii) of the Revised Treaty of the Economic Community of West African States, 24 Jul. 1993, in *International Legal Materials*, 35, 1996, 660; the Protocol on Free Movement of Persons, Residence and Establishment, A/P1/5/79, 29 May 1979; the Supplementary Protocol on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment, A/SP.1/7/85, 6 Jul. 1985; the Supplementary Protocol on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment, A/SP.1/7/86, 1 Jul. 1986; and the

the Southern Africa Development Community (SADC),[186] and the Economic Community of Central African States (ECCAS)).[187] Similar economic integration processes can also be found in Asia (including the Association of South East Asian Nations (ASEAN),[188] and the Asia-Pacific Economic Cooperation (APEC)),[189] as well as in the Americas and the Caribbean (such as the Andean Pact,[190] the Caribbean Community (CARICOM),[191] the Central America Integration System (SICA/CAIS),[192] the Common Market of the South (MERCOSUR),[193] and the North American Free Trade Agreement (NAFTA)).[194]

Supplementary Protocol on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment, A/SP.2/5/90, 29 May 1990.

[186] See Art. 5(2)(d) of the Consolidated Text of the Treaty of the Southern African Development Community, 14 Aug. 2001, available at: http://www.sadc.int/english/key-documents/declaration-and-treaty-of-sadc/; and the Protocol on the Facilitation of Movement of Persons, 18 Aug. 2005, available at: http://www.sadc.int/english/key-documents/protocols/protocol-on-the-facilitation-of-movement-of-persons/.

[187] See Arts 4(2)(e) and 40 of the Treaty Establishing the Economic Community of Central African States, 19 Oct. 1983, in *International Legal Materials*, 23, 1984, 945; and the Protocol on Freedom of Movement and Rights of Establishment of Nationals of Member States within the Economic Community of Central African States (Annex VII to the Treaty), 19 Oct. 1983, in *International Legal Materials*, 23, 1984, 989.

[188] See Art. 1(5) of the Association of Southeast Asian Nations Charter, 20 Nov. 2007, available at: http://www.aseansec.org/publications/ASEAN-Charter.pdf. See also the Association of Southeast Asian Nations Economic Community Blueprint (the AEC is planned to be created by 2015), 20 Nov. 2007, paras 4, 6, 21, and 33–4, available at: http://www.aseansec.org/5187-10.pdf.

[189] The APEC established a Business Travel Card in 1997 (ABTC), facilitating movement of business travellers between participating economies. For more information, see: http://www.apec.org/About-Us/About-APEC/Business-Resources/APEC-Business-Travel-Card.aspx.

[190] See notably the following decisions of the Andean Council of Foreign Affairs: *Andean Labour Migration Instrument*, Dec. No. 545, 25 Jun. 2003; *Recognition of National Identity Documents*, Dec. No. 503, 22 Jun. 2001; *Border Integration Zones in the Andean Community*, Dec. No. 501, 22 Jun. 2001.

[191] Chapter Three of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, 2259 UNTS 293, 5 Jul. 2001 (entry into force: 2 Apr. 2002).

[192] Arts 2, 3 and 4 of the Protocol to the Charter of the Organization of Central American States (ODECA) (Tegucigalpa Protocol), 1695 UNTS 400, 13 Dec. 1991.

[193] See in particular the Agreement on Movement Across Neighbouring Borders between the Member States of the MERCOSUR, MERCOSUR/CMC/DEC No. 18/99 and No. 14/00; the Agreement on Visa Exemption between the Member States of MERCOSUR, MERCOSUR/CMC/DEC No. 48/00; the Agreement on the Regularization of Internal Migration for MERCOSUR Citizens, MERCOSUR/CMC/DEC No. 28/02 and the Agreement on Residence for MERCOSUR State Party Nationals, MERCOSUR/CMC/DEC No. 28/02.

[194] Art. 102 (Objectives) and Chapter 16 (Temporary Entry for Business Persons) of the North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States, 8–17 Dec. 1992, in *International Legal Materials*, 32, 1993, 289 and 605, also available at: http://www.nafta-sec-alena.org/en/view.aspx?conID=590.

Their level of effectiveness and the categories of eligible persons greatly varies from one regional process to another. Overall, it is nevertheless worth mentioning that more than 120 States are involved in regional economic integration schemes aimed at facilitating the movement of persons.[195] This figure is particularly significant for more than half of international migration occurs within a continent or a sub-region.[196]

In parallel to this rather impressive number of regional instruments, bilateral agreements between sending and receiving States have been regularly concluded for facilitating labour mobility. Although they are less important than in the past, bilateral treaties still represent a prominent source of international migration law. To mention only one example, countries from the Organisation for Economic Co-operation and Development (OECD) have alone entered into more than 176 bilateral labour recruitment agreements in 2004, a fivefold increase since 1990.[197]

3.2 The Obligation of Admission under Customary International Law

Compared to treaty law, the impact of customary international law on admission of non-citizens is modest. Three main categories of persons arguably benefit from a ground for admission under customary international law: nationals, refugees and persons eligible for family reunification. While the first one is beyond any dispute,[198] the principles of *non-refoulement* (3.2.1) and family reunification (3.2.2) require further analysis.

3.2.1 The principle of *non-refoulement* under customary international law

The key customary norm governing admission of non-citizens relies on the principle of *non-refoulement*. The prohibition of removing anyone to a country where there is a real risk of persecution or serious violations of human rights is a common principle of the branches of international law devoted to the protection of individuals, namely human rights law,[199] humanitarian law,[200] refugee

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[195] P. Taran, *Rethinking Development and Migration. Some Elements for Discussion,* unpublished working paper, 4 (on file with the author).

[196] Badie et al., *Pour un autre regard sur les migrations*, 88.

[197] D. Bobeva & J.-P. Garson, 'Overview of Bilateral Agreements and Other Forms of Labour Recruitment', in OECD & Federal Office of Immigration, Integration and Emigration, *Migration for Employment. Bilateral Agreements at a Crossroads*, OECD Publishing, 2004, 12.

[198] On the customary law nature of States' duty to admit their own nationals, see notably the well-known statement of the European Court of Justice in *Van Duyn v. Home Office* (1974) ECR 1337 at 1351 and more recently *Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106 of 2011 v. Minister for Immigration and Citizenship* [2011] HCA 32, Australia: High Court (31 Aug. 2011).

[199] See at the universal plane Art. 3 CAT and Art. 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, as well as, at the regional level, Art. 22(8) ACHR, Art. 13(4) of the Inter-American Convention to Prevent and Punish Torture (OAS Treaty Series No. 67, 9 Dec. 1985 (entry into force: 28 Feb. 1987)), Art. 19(2) of the Charter of Fundamental Rights of the European Union, and Art. 28 of the Arab Charter on Human Rights.

[200] Art. 45(4) of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

law,[201] and criminal law.[202] This 'principle of civilization'[203] is not only endorsed in numerous universal, regional and bilateral conventions.[204] Even in the absence of a specific provision, an implicit prohibition of *refoulement* has been inferred by treaty bodies from the other major human rights treaties.[205]

Quite logically, its customary law nature has been acknowledged by the vast majority of the legal doctrine.[206] This conclusion is based on three main observations. First, the relevant practice is particularly widespread and representative, since more than 90 per cent of UN Member States are party to one or more treaties explicitly endorsing the principle of

[201] See essentially Art. 33 of the Convention Relating to the Status of Refugees, as amended by the Protocol (606 UNTS 267, 31 Jan. 1967 (entry into force: 4 Oct. 1967)); Art. 10 of the Agreement Relating to Refugee Seamen, supplemented by the Protocol to the Agreement Relating to Refugee Seamen (965 U.N.T.S. 445, 30 Mar. 1975); Art. II(3) of the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa (1001 UNTS 45, 10 Sep. 1969 (entry into force: 20 Jun. 1974)); and Art. 21 of the EU Qualification Directive 2011/95/EU.

[202] This primarily concerns trafficking, smuggling and extradition law. See notably the safeguarding clauses contained in Art. 14(1) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime; Art. 19(1) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime; Art. 4(5) of the Inter-American Convention on Extradition (OAS Treaty Series No. 60, 25 Feb. 1981 (entry into force: 28 Mar. 1992)); and Arts 9(1) and 15 of the International Convention against the Taking of Hostages (1316 UNTS 205, 17 Dec. 1979 (entry into force: 3 Jun. 1983)).

[203] A. Grahl-Madsen, 'International Refugee Law Today and Tomorrow', *Archiv des Völkerrechts*, 1982, 439.

[204] Besides the universal and regional treaties mentioned above, the principle of *non-refoulement* has also been restated in bilateral treaties, including most notably readmission agreements. See, among many other instances: Art. 13 of the Agreement between the Government of the French Republic and the Government of the Commonwealth of Dominica on the Readmission and Transit of Persons in an Irregular Situation (2424 UNTS 57, 9 Mar. 2006); Art. 8 of the Agreement between the Government of the Republic of Latvia and the Government of the Republic of Uzbekistan on the Readmission of Persons Residing Illegally (2421 UNTS 37, 7 Apr. 2004); Art. 10 of the Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Albania on the Readmission of Persons (2432 UNTS 86, 18 Nov. 2002); Art. 8 of the Agreement between the Government of the Republic of Estonia and the Government of the Republic of Hungary (2211 UNTS 66, 13 Mar. 2002); Art. 9 of the Agreement between the Government of the French Republic and the Government of the Republic of Venezuela on the Readmission of Persons in Irregular Situation (2345 UNTS 140, 25 Jan. 1999).

[205] ECtHR, *Soering v. The United Kingdom* (Judgment) (1989) Series A No. 161, paras 87–8; HRC, *General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)*, UN Doc. HRI/GEN/1/Rev.9, Vol. I, 1992, para. 9; Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc. CRC/GC/2005/6, 1 Sep. 2005, para. 27; Inter-American Commission on Human Rights, *The Haitian Centre for Human Rights et al. v. United States* (1997) Case 10.675, Report No. 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev., 550, para. 167.

[206] The customary law nature of the *non-refoulement* duty has been endorsed in several declarations adopted by scholars and independent experts: San Remo Declaration on the

non-refoulement.[207] Furthermore, among these States, only one has expressed a reservation (namely Pakistan with regard to Article 3 of the CAT).[208] This reservation raised objections from several other States and was eventually withdrawn by Pakistan.

Secondly, of the few States that have not ratified one of these instruments, none claims to possess an unconditional right to return a refugee to a country of persecution.

Principle of Non-Refoulement, Sep. 2001, available at http://ebookbrowse.com/san-remo-declaration-on-the-principle-of-non-refoulement-doc-d180881999; International Law Association, Res. 6/2002 on Refugee Procedures (Declaration on Minimum Standards for Refugee Procedures), 70th conference, New Dehli, India, 2002, available at: http://www.unhcr.org/refworld/publisher,ILA,4280b2404,0.html; the 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World, 36. Among many other similar doctrinal acknowledgements, see: W. Kälin, M. Caroni & L. Heim, 'Article 33, para. 1 (Prohibition of Expulsion or Return ("Refoulement")/Défense d'expulsion et de refoulement)', in Zimmermann (ed.), *The 1951 Convention Relating to the status of Refugees and its 1967 Protocol*, 1343–1346; G.A. Duffy, 'Expulsion to Face Torture? Non-Refoulement in International Law', *International Journal of Refugee Law*, 20(3), 2008, 389; S. Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection', *Max Planck Yearbook of United Nations Law*, 12, 2008, 215; Goodwin-Gill & McAdam, *The Refugee in International Law*, 345–54; R. Bruin & K. Wouters, 'Terrorism and the Non-Derogability of Non-Refoulement', *International Journal of Refugee Law*, 15(1), 2003, 25–6; E. Lauterpacht & D. Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in E. Feller, V. Türk & F. Nicholson (eds), *Refugee Protection in International Law*, *UNHCR's Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2003, 140–64; C.M.-J. Bostock, 'The International Legal Obligations Owed to the Asylum-Seekers on the MV Tampa', *International Journal of Refugee Law*, 14(2–3), 2002, 288–90; V. Vevstad, *Refugee Protection: A European Challenge*, Oslo, Tano Aschehong, 1998, 161; F. Crépeau, *Droit d'asile. De l'hospitalité aux contrôles migratoires*, Brussels, Bruylant, 1995, 180–81; R. Marx, 'Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims', *International Journal of Refugee Law*, 7(3), 1995, 391; Sohn & Buergenthal (eds), *The Movement of Persons Across Borders*, 123; G. Stenberg, *Non-Expulsion and Non-Refoulement*, Uppsala, University Swedish Institute of International Law, Iustus Förlag, 1989, 268–80; Meron, *Human Rights and Humanitarian Norms as Customary Law*, 23; R.C. Sexton, 'Political Refugees, Non-Refoulement and State Practice: A Comparative Study', *Vanderbilt Journal of Transnational Law*, 18(4), 1985, 738; M. Pellonpää, *Expulsion in International Law: A Study in International Aliens Law and Human Rights with Special Reference to Finland*, Helsinki, Suomalainen Tiedeakatemia, 1984, 332–7; D.W. Greig, 'The Protection of Refugees and Customary International Law', *The Australian Year Book of International Law*, 8, 1983, 129–32; P. Hyndman, 'Asylum and Non-Refoulement – Are these Obligations Owed to Refugees under International Law?', *Philippine Law Journal*, 1982, 68; Plender, *International Migration Law*, 427. See however: J.-Y. Carlier, 'Droit d'asile et des réfugiés: de la protection aux droits', *Recueil des cours de l'Académie de droit international*, 332, 2007, 123–30; Hathaway, *The Rights of Refugees under International Law*, 363–70; and N. Coleman, 'Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law', *European Journal of Migration & Law*, 5(1), 2003, 49.

[207] The exact figure is 92 per cent (without including the universally ratified 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War).

[208] A declaration of interpretation has also been done by the US to Art. 3 of the CAT and by Germany to the last provision and Art. 16 of the International Convention for the Protection of All Persons from Enforced Disappearance.

On the contrary they are used to endorse the principle of *non-refoulement* despite the absence of any explicit duty under treaty law. Myanmar, for instance, declared that it 'respected the principle of non-refoulement'.[209] Bangladesh concurred in the following terms: 'Notwithstanding the fact that it had not yet been a party to the 1951 Convention or the 1967 Protocol, Bangladesh had fulfilled its obligation to protect refugees and observed the principle of non-refoulement.'[210]

This conviction of being bound by the duty of *non-refoulement* is particularly telling since Bangladesh was not party to any other treaty at the time. It even endorsed its 'non-derogable'[211] nature and acknowledged 'the fact that countries in general respected the principle of non-refoulement when faced with refugee flows, regardless whether they had acceded to instruments concerning refugees'.[212] Inversely, States accused of violating this duty attempt to justify such a conduct by alleging that there is no risk of persecution and degrading treatment in the country of destination.[213]

Third, and finally, its customary law nature has been expressed and reiterated in a large number of various statements and other related material. For instance, speaking on behalf of the EU and 13 other States (including Turkey), Belgium declared in 2001 that 'the principle of non-refoulement had long been part of international customary law'.[214] Similar acknowledgements have been regularly made by other States from all continents.[215] Its customary law character has been also consecrated in some domestic

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[209] UN Doc. A/AC.96/SR.556, 9 Oct. 2001, para. 21.

[210] UN Doc. A/AC.96/SR.519, 28 Nov. 1997, para. 16.

[211] Ibid., para. 20.

[212] UN Doc.A/AC.96/SR.509, 8 Jan. 1997, para. 53. Since then Bangladesh has ratified the CAT (but not the Refugee Convention nor the Convention against Enforced Disappearances).

[213] Though not parties to the Refugee Convention, 'the Governments approached [by UNHCR] have almost invariably reacted in a manner indicating that they accept the principle of non-refoulement as a guide for their action. They indeed have in numerous instances sought to explain a case of actual or intended refoulement by providing additional clarifications and/or by claiming that the person in question was not to be considered a refugee. The fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit confirmation of their acceptance of the principle.': UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, Geneva, UNHCR, 1994, para. 5.

[214] UN Doc. A/AC.96/SR.552, 5 Oct. 2001, para. 50.

[215] See notably the statements of Canada (UN Doc. A/AC.96/SR.571, 16 Oct. 2003, para. 28), Costa Rica (UN Doc. A/56/PV.13, 1 Oct. 2001, 2), Liechtenstein, (UN Doc. A/C.3/63/SR.37, 13 Jan. 2009, para. 28), and Switzerland (UN Doc. A/AC.96/SR.557, 6 Aug. 2002, para. 33; see also *Déclaration du Conseil fédéral à l'occasion de la publication du rapport de la Commission indépendante d'experts sur les réfugiés intitulé 'La Suisse et les réfugiés à l'époque du national-socialisme'*, 11 Dec. 1999, para. 7). For more indirect evidences asserting that the principle of *non-refoulement* applies to all States without regard to their ratification of the relevant instruments, see also the statements of Denmark (UN Doc. A/AC.96/SR.522, 23 Oct. 1997, para. 65), Bangladesh (UN Doc. A/AC.96/SR.509, 8 Jan. 1997, para. 53), Hungary (UN Doc. A/AC.96/SR.501, 20 Oct. 1995, para. 22), Austria (UN Doc. A/AC.96/SR.600, 26 Oct. 2006, para. 17), and South Korea (UN Doc. A/AC.96/SR.619, 10 Oct. 2008, para. 72).

case-law[216] and a substantial number of intergovernmental resolutions.[217] Notably, in 2001 a declaration of States Parties to the Refugee Convention and its Protocol acknowledged 'the principle of *non-refoulement*, whose applicability is embedded in customary international law'.[218] The Kampala Declaration adopted by the African Union in 2009 further repeated 'the fundamental principle of non-refoulement as recognised in International Customary Law.'[219]

More generally, alongside other intergovernmental bodies,[220] the General Assembly has 'urge[d] *all States* to respect the fundamental principle of non-refoulement'[221] which is thus presumably binding on all of them regardless of their respective treaty ratifications. Though not equating with state practice *stricto sensu*, various international bodies have also confirmed it as a norm of international customary law. They not only

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[216] See especially New Zealand Court of Appeal, *Zaoui v. Attorney General* [2005] 1 NZLR 690, para. 34; Hong Kong High Court, *C. and Others v. Director of Immigration and Another* [2011] Civil appeals No. 132-137 OF 2008, paras 47–67.

[217] See in particular the following ExCom conclusions: No. 17, (XXXI), 1980, para. (b); No. 25 (XXXIII), 1982, para. (b). See also the 1984 Cartagena Declaration on Refugees, OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–193 (1984–1985), para. 5 and the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, 16 Nov. 2004, Recital 7, available at: http://www.unhcr.org/refworld/publisher,AMERICAS,424bf6914,0.html.

[218] Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/MMSP/2001/09, 16 Jan. 2002, 4.

[219] Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa adopted by the African Union at the Special Summit on Refugees, Returnees and Internally Displaced Persons in Africa held in Kampala, Uganda, Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1, 22–23 Oct. 2009, para. 6.

[220] At the universal level, see in particular UN Human Rights Council, *Persons Deprived of their Liberty in the Context of Counter-Terrorism Measures*, UN Doc. A/HRC/DEC/2/112, adopted without a vote, 27 Nov. 2006, para. 5 and UN Commission on Human Rights, *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. E/CN.4/RES/2005/80, adopted without a vote, 21 Apr. 2005, preambular para. 7. Regarding regional intergovernmental bodies, see for example the following resolutions of the General Assembly of the Organization of American States: *Protection of Asylum-Seekers and Refugees in the Americas*, AG/RES. 2678 (XLI-O/11), 7 Jun. 2011, para. 1; AG/RES. 2597 (XL-O/10), 8 Jun. 2010, para. 1; AG/RES. 2232 (XXXVI-O/06), 6 Jun. 2006, para. 6; AG/RES. 2047 (XXXIV-O/04), 8 Jun. 2004, para. 4.

[221] UN Doc. A/RES/65/225, 21 Dec. 2010, para. 1 (iii) (emphasis added). For similar statements see: UN Doc. A/RES/66/174, 19 Dec. 2011, para. (1)(a)(iii); UN Doc. A/RES/64/175, 18 Dec. 2009, para. 1(a)(iii); UN Doc. A/RES/63/190, 18 Dec. 2008, para. 1(a)(ii); UN Doc. A/RES/55/74, 4 Dec. 2000, para. 6; UN Doc. A/RES/54/146, 17 Dec. 1999, para. 6; UN Doc. A/RES/53/125, 9 Dec. 1998, para. 5; UN Doc. A/RES/52/103, 12 Dec. 1997, para. 5; UN Doc. A/RES/51/75, 12 Dec. 1996, para. 3; UN Doc. A/RES/50/152, 21 Dec. 1995, para. 3; UN Doc. A/RES/49/169, 23 Dec. 1994, para. 4; UN Doc. A/RES/48/116, 20 Dec. 1993, para. 3; UN Doc. A/RES/47/105, 16 Dec. 1992, para. 4; UN Doc. A/RES/46/106, 16 Dec. 1991, para. 4; and UN Doc. A/RES/44/137, 15 Dec. 1989, para. 3.

include the UNHCR,[222] but also IOM,[223] the UN special procedures,[224] as well as the International Criminal Court.[225]

In sum, the almost universal ratification of treaties, the general practice of States (including that of non-States Parties) and the numerous manifestations of *opinio juris* anchor the principle of *non-refoulement* within general international law. As very few norms have attained such a degree of consensus, denying such evidence would amount to negating other well-established rules of customary law (including the prohibitions of the use of force and of torture).

The customary law principle of *non-refoulement* is bound to play a pivotal role in the absence of an individual right to be granted asylum. Although it is an obligation of abstention (not to return) rather than an obligation of conduct (to admit), admission is generally the only practical means to respect and ensure respect for the cardinal principle of *non-refoulement*. Indeed, how can a State remove an asylum-seeker without, beforehand, granting temporary admission for assessing whether his/her life or liberty may be threatened in the country of destination? Such constructive ambiguity was probably the price to pay for preserving the appearance of State sovereignty with due regard to the most essential rights of refugees.

In practice, States have two options for complying with their duty of *non-refoulement*: granting temporary asylum in order to assess the risk of persecution and serious violation of human rights in the country of destination, or sending him/her to a country where there is no such risk. Even in the latter case, removal to a safe third country requires some form of temporary admission for asserting that the third country is not a country of persecution and provides an effective protection against any subsequent *refoulement*.[226] It further presupposes that the asylum-seeker would be

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[222] UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law.*

[223] *Amicus Curiae submitted to the Inter-American Court of Human Rights by the International Organization for Migration (IOM)*, Request for Advisory Opinion on Migrant Children, CDH-OC-21/272, 2012, para. 167.

[224] See in particular: *Report of the Working Group on Arbitrary Detention, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council'*, UN Doc. A/HRC/4/40, 9 Jan. 2007, para. 44; *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/13/42, 19 Feb. 2010, para. 43. The same opinion was also expressed by several members of the HRC: *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Uzbekistan*, UN Doc. CCPR/C/SR.1910, 4 May 2001, para. 18 (Mr. Henkin); *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Hong Kong Special Administrative Region of the People's Republic of China*, UN Doc. CCPR/C/SR.2351, 31 Mar. 2006 para. 53 (Mr. Shearer).

[225] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Trial Chamber II) (Decision on *Amicus Curiae* Application and on the 'Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC,D-02-P-0228 aux autorités néerlandaises aux fins d'asile') (2011) Case No. ICC-01/04-01/07-3003-tENG, para. 68.

[226] For an overview of the safe third country notion, see: A. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford, Oxford University Press, 2009; Goodwin &

admissible in the safe third country – a condition which is hardly met in the absence of a specific obligation spelt out in readmission agreements or other related schemes for allocating the responsibility of examining the asylum request. Thus, whatever are the different options available to States for implementing their obligation, due respect for the principle of *non-refoulement* implicitly requires a *de facto* duty of admission.[227]

3.2.2 The principle of family reunification in customary international law

Besides the principle of *non-refoulement*, the other key norm governing admission of non-citizens is family reunification. As observed by the ILO, '[i]n many countries family reunification remains almost the only legal means of immigration for prospective migrants.'[228] Persons admitted in foreign countries on this ground represent around one third of the total international population of migrants and even more in some industrialized countries.[229]

The principle of family reunification is grounded on the right to respect for family life 'as an indispensable component of international migration law'.[230] As codified by a broad range of conventions, the right to respect for family life typically includes both a positive obligation to protect the family[231] and a negative obligation prohibiting any

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McAdam, *The Refugee in International Law*, 390–420; M. Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State', *Michigan Journal of International Law*, 28, 2007, 223–86; S.H. Legomsky, 'Secondary Refugee Movements and the Return of Asylum-Seekers to Third Countries: The Meaning of Effective Protection', *International Journal of Refugee Law*, 15(4), 2003, 567–677; V. Chetail, 'Le principe de non-refoulement et le statut de réfugié en droit international', in V. Chetail & J. Flauss (eds), *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés – 50 ans après: bilan et perspectives*, Brussels, Bruylant, 2001, 25–34; R. Marx, 'Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims', *International Journal of Refugee Law*, 7(3), 1995, 383–406.

[227] For a similar interpretation of the impact of *non-refoulement* on admission see most notably: Hathaway, *The Rights of Refugees under International Law*, 301; Goodwin-Gill & McAdam, *The Refugee in International Law*, 384; Carlier, 'Droit d'asile et des réfugiés', 85.

[228] ILO, International Labour Conference, *Migrant Workers*, Report III (I B), Jun. 1999, para. 472 (hereinafter, *ILO Committee of Experts Report on Migrant Workers*).

[229] Bertelsmann Foundation et al. (eds), *Migration in the New Millennium*, Gütersloh, Bertelsmann Foundation Publishers, 2000, 33. Within OECD countries, family reunification is the main category of entry accounting for 36 per cent (and 45 per cent if accompanying family of workers are included): OECD, *International Migration Outlook 2012*, OECD, 2012, 22. The US has the largest share of family migrants in the OECD – about three out of four new permanent immigrants are in this category: ibid., 33 and 283. This represents around two-third in Australia and Canada: ibid., 211 and 219.

[230] J. Vedsted-Hansen, 'Migration and the Right to Family and Private Life', in Chetail (ed.), *Mondialisation, migration et droits de l'homme*, 722.

[231] See notably Art. 23 ICCPR; Art. 10(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (993 UNTS 3, 16 Dec. 1966 (entry into force: 3 Jan. 1976)); Arts 7 and 33 of the EU Charter of Fundamental Rights; Art. 18(1) ACHPR; Art. 18(1) of the African Charter on the Rights and Welfare of the Child (OAU Doc. CAB/LEG/24.9/49, 1990 (entry into force: 29 Nov. 1999)); Art. 33(2) of the Arab Charter on Human Rights; Art. 8(1) of the 2005

unlawful or arbitrary interference with the exercise of the right to family life.[232] Human rights treaty bodies have made abundantly clear that this twofold obligation may require in some circumstances a correlative duty of family reunification. The general obligation to protect the family enshrined in Article 23 of the ICCPR has been interpreted as including 'the adoption of appropriate measures … to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.'[233] Furthermore, a refusal of family reunification can be considered an arbitrary or unlawful interference with the right to family life under Article 17 of the Covenant.[234]

The circumstances in which the right to respect for family life may require family reunification have been considered most comprehensively by the ECtHR.[235] While

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Covenant on the Right of the Child in Islam (OIC/9-IGGE/HRI/2004/Rep.Final, Jun. 2005); Art. 13(3) of the CIS Convention on Human Rights and Fundamental Freedoms; and Art. 17(1) of the ACHR.

[232] See especially Art. 17 ICCPR; Art. 16 CRC; Art. 11(2) ACHR; Art. 8 of the European Convention on Human Rights (ECHR) (213 UNTS 222, 4 Nov. 1950 (entry into force: 3 Sep. 1953)); Art. 21 of the Arab Charter on Human Rights; Art. 10 of the African Charter on the Rights and Welfare of the Child; and Art. 9 of the CIS Convention on Human Rights and Fundamental Freedoms.

[233] HRC, *General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art. 23)*, UN Doc. HRI/GEN/1/Rev. 5, 1990, at para. 5. See also: HRC, *Ngambi v. France*, UN Doc. CCPR/C/81/D/1179/2003, 2004, at para. 6.4 ('Article 23 of the Covenant guarantees the protection of family life including the interest in family reunification'). Concerns about family reunification have been regularly raised by the human rights treaty-bodies in their concluding observations on States' reports. See for instance for the Committee on Economic, Social and Cultural Rights (CESCR): *Concluding Observations on Denmark*, UN Doc. E/C.12/1/Add.102, 14 Dec. 2004, paras 16 and 24; *Concluding Observations on Hungary*, UN Doc. E/C.12/HUN/CO/3, 16 Jan. 2008, paras 21 and 44; and for the HRC: *Concluding Observations on Austria*, UN Doc. CCPR/C/AUT/CO/4, 30 Oct. 2007, para. 19; *Concluding Observations on France*, UN Doc. CCPR/C/FRA/CO/4, 31 Jul. 2008, para. 21; *Concluding Observations on Switzerland*, UN Doc. A/52/40, 1997, paras 103 and 114.

[234] HRC, *General Comment No. 15*, paras 5 and 7 ('in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when … respect for family life arise. … They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence.'). See also with regard to deportation cases: *Gonzalez v. Republic of Guyana*, UN Doc. CCPR/C/98/D/1246/2004, 2010, para. 14.3; *Dauphin v. Canada*, UN Doc. CPPR/C/96/D/1792/2008, 2009, paras 8.3–8.4; *Byahuranga v. Denmark*, UN Doc. CCPR/C/82/D/1222/2003, 2004, para. 11.7; *Madafferi v. Australia*, UN Doc. CCPR/C/81/D/1011/2001, 2004, paras 9.7–9.8; *Winata v. Australia*, UN Doc. CCPR/C/72/D/930/2000, 2001, paras 7.2–7.3.

[235] Regarding the practice of other treaty bodies, see UN Committee on the Elimination of Discrimination against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, UN Doc. A/49/38, 1994, para. 10; UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations: Portugal*, UN Doc. CERD/C/65/CO/6, 10 Dec. 2004, para. 14; CERD, *Concluding Observations: Liechtenstein*, UN Doc. CERD/C/LIE/CO/3, 2007, para. 20; CESCR, *Concluding Observations: The United Kingdom*, UN Doc. E/C.12/1/add.10, 6 Dec. 1996, paras 26 and 34; CESCR, *Concluding Observations: Norway*, UN Doc. E/C.12/1/Add. 109, 13 May 2005, paras 16 and 35. At the regional level, see also with regard to deportation cases: African Commission on Human and Peoples' Rights

underlying that Article 8 does not impose a general obligation to authorize family reunion, it has ruled that there is a positive obligation to facilitate family reunification where there is an objective obstacle preventing the migrant already within its jurisdiction from realising his/her family life in any other place.[236] Though States enjoy a broad margin of appreciation in controlling family immigration, assessing the existence of such an obstacle requires an *in concreto* examination of the circumstances of each particular case (including the age of children, their situation in the country of origin and the degree of their dependence upon their parents).[237]

Against such a frame, family reunification is thus a positive obligation deriving from the right to respect for family life. The former is a means of implementing the latter. Assuming family reunification as an implicit – albeit integral – component of the right to respect for family life has quite significant impact on the plane of general international law, for the right to respect for family life is conventionally regarded as a customary norm of international law.[238] Hence, the customary character of the right to respect for family life logically presumes that the same conclusion should be drawn with regard to the positive obligations inherent to the effective respect of this fundamental right, including the correlative duty of family reunification when there is no other alternative for exercising the right to family life elsewhere. Although this line of reasoning has rarely been developed in depth by the doctrine, an increasing number of scholars have acknowledged the existence of a customary norm for facilitating reunification of the nuclear family (spouse and minor children) of documented migrants.[239] Other commentators nevertheless considered it as a nascent norm of

(ACommHPR), *Amnesty International v. Zambia* (1999) Comm. No. 12/98, para. 58; Inter-American Court of Human Rights (IACtHR), *Dominican Republic Case. Case of Haitian and Haitian-Origin Dominican Persons in the Dominican Republic* (Provisional Measures Requested by the Inter-American Commission on Human Rights) (2000) Annual Report, 2001, Chapter V, paras 85–97.

[236] ECtHR: *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (Judgment) (1985) Appl. No. 15/1983/71/107-109, paras 67–8; *Gül v. Switzerland* (Judgment) (1996) Appl. No. 53/1995/559/645, paras 38–42; *Ahmut v. the Netherlands* (Judgment) (1996) Appl. No. 73/1995/579/665, para. 63; *Sen v. the Netherlands* (Judgment) (2001) Appl. No. 31465/96, para. 31; *Chandra and Others v. the Netherlands* (Admissibility Decision) (2003) Appl. No. 53102/99, para. 32; *Benamar v. the Netherlands* (Admissibility Decision) (2005) Appl. No. 43786/04, para. 30; *Haydarie and Others v. the Netherlands* (Admissibility Decision) (2005) Appl. No. 8876/04, paras 46 and 48; *Tuquabo-Tekle and Others v. the Netherlands* (Judgment) (2005) Appl. No. 60665/00, para. 42.

[237] See for instance: *Sen v. the Netherlands*, para. 37; *Tuquabo-Tekle and Others v. the Netherlands*, para. 44.

[238] Among other instances, see: *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Reports 1989, 177, 210–211 (separate opinion of Judge Evensen). See also for example: L. Ayoub & S.-M. Wong, 'Separated and Unequal', *William Mitchell Law Review*, 32(2), 2006, 585–6; C.G. Blood, 'The "True" Source of the Immigration Power and Its Power Consideration in Elian Gonzalez Matter', *Boston University International Law Journal*, 18, 2000, 215, 240; J. Dugard, 'The Application of Customary International Law Affecting Human Rights by National Tribunals', *American Society of International Law Proceedings*, 76, 1982, 247.

[239] See in particular: S. Kadidal, 'Federalizing Immigration Law: International Law as a Limitation on Congress's Power to Legislate in the Field of Immigration', *Fordham Law Review*,

customary international law,[240] whereas some acknowledged the widespread acceptance of States but still denied that it has been crystallized into a customary rule.[241]

Besides the variety of doctrinal views, there is strong evidence for considering as a core minimum that reunifying a minor child with his/her family legally established in a foreign country is a duty of customary international law when there is no reasonable alternative for exercising his/her family life elsewhere. This arguably constitutes the lowest common denominator of state practice behind the great diversity of domestic legislation on family reunification.[242] Although States' assertions about the existence of a customary norm are rare compared to the principle of *non-refoulement*, the French *Conseil d'Etat* held that the right of documented migrants to be reunified with their children and spouses constitutes a general principle of law.[243] Furthermore, a federal district court in the US ruled that the best interests of the child must be taken into

7(2), 2008, 515–6; A.C. Helton, 'Applying Human Rights Law to Asylum Cases' in: American Immigration Lawyers Association (ed.), *Immigration and Nationality Law Handbook*, Washington, DC, AILA, 1999–2000, Vol. II, at 490; S.R. Chowdhury, 'Response to the Refugee Problems in Post Cold War Era: Some Existing and Emerging Norms of International Law', *International Journal of Refugee Law*, 7(1), 1995, 114; Fourlanos, *Sovereignty and the Ingress of Aliens*, 108–18; as well as the legal opinions delivered by Brownlie and Shelton referred in: HCJ 13/86 *Adel Ahmed Shahin v. Regional Commander of IDF Forces in the West Bank*, *P.D.* 41(1)197, 202–4 and discussed in: Y. Merin, 'The Right to Family Life and Civil Marriage under International Law and its Implementation in the State of Israel', *Boston College International and Comparative Law Review*, 28(1), 2005, 109–10. See also K. Jastram, 'Family Unity', in Aleinikoff & Chetail (eds), *Migration and International Legal Norms*, 193 and 195–196. For Hathaway, States have 'the customary international legal duty to avoid unlawful or arbitrary interference with a refugee's family': Hathaway, *The Rights of Refugees under International Law*, 559. The right to family reunion has been alternatively considered as a general principle of law by M. Nys, *L'immigration familiale à l'épreuve du droit. Le droit de l'étranger à mener une vie familiale normale*, Brussels, Bruylant, 2002, 585–606.

[240] S. Starr & L. Brilmeyer, 'Family Separation as a Violation of International Law', *Berkeley Journal of International Law*, 21, 2003, 229–31; Sohn & Buergenthal (eds), *The Movement of Persons Across Borders*, 70; Goodwin-Gill, *International Law and the Movement of Persons between States*, 197.

[241] G. Lahav, 'International Versus National Constraints in Family-Reunification Migration Policy', *Global Governance*, 3, 1997, 361; C.S. Anderfuhren-Wayne, 'Family Unity in Immigration and Refugee Matters: United States and European Approaches', *International Journal of Refugee Law*, 8(3), 1996, 350; E.F. Abram, 'The Child's Right to Family Unity in International Immigration Law', *Law and Policy*, 17(4), 1995, 432, footnote 17; Plender, *International Migration Law*, 366.

[242] For an overview of domestic legislation on family reunification, see notably: ILO, International Labour Conference, 87th Session, *Migrant Workers*, Report III (I B), Geneva, Jun. 1999, paras 475–99; Secretariat of the Inter-Governmental Consultations (IGC) on Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Report on Family Reunification: Overview of Policies and Practices in IGC Participating States*, Geneva, IGC, 1997; K. Groenendijk et al., *The Family Reunification Directive in EU Member States – the First Year of Implementation*, Nijmegen, Wolf Legal Publishers, 2007; Plender, *International Migration Law*, 366–82.

[243] Conseil d'Etat, *GISTI et autres, Rec. Lebon*, Appl. Nos. 10097, 10677 and 10979, 8 Dec. 1978, 493. See also with regard to refugees: Conseil d'Etat, *Agyepong*, *Leb.*, Case No. 112842, 2 Dec. 1994, 523.

account in the field of immigration as a principle of customary international law codified in the 1989 CRC.[244] This last acknowledgement is particularly significant given that the US is not a State Party to this Convention.

While restating the cardinal importance of the best interests of the child, the CRC embodies two main principles. First, Article 9(1) enshrines the obligation of not separating a child from his/her parents against their will, except when such separation is necessary for the best interests of the child. Second, as a result of this general duty, Article 10(1) specifies that:

> In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.[245]

It is true that this provision is not a model of legal clarity and accordingly reflects States' concerns in immigration control. Nevertheless Article 10(1) enshrines a mixture of both procedural and substantive obligations. On the one hand, the main procedural requirement is to examine applications submitted by a child or his/her parents 'in a positive, humane and expeditious manner'. In other words, Article 10(1) not only requires a rigorous and independent scrutiny of all the circumstances of each particular case; the examination process should also be done promptly with a particular attention to the best interests of the child and the human dignity of family members. While expressing its concern about the length of the procedure for family reunification,[246] the Committee on the Rights of the Child has notably recommended that States Parties 'pay particular attention to the implementation … of the general principles of the Convention, in particular the best interests of the child and respect for his or her views, in all matters relating to the protection of refugee and immigrant children.'[247]

On the other hand, though the procedural guidance enshrined in Article 10(1) does not prejudice the outcome of the final decision on applications for family reunification,[248] some substantive obligations can be inferred from the text of this provision. The

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[244] *Beharry v. Reno* [2002] 183 F.Supp. 2d 584 (E.D.N.Y). See also *Maria v. McElroy* [1999] 68 F.Supp.2d at 234 (E.D.N.Y.).

[245] See also Art. 22 of the Convention regarding refugee children.

[246] This represents by far the main subject of concern. See the following concluding observations of the Committee: UN Doc. CRC/C/BEL/CO/3-4, 18 Jun. 2010, para. 74(d) (Belgium); UN Doc. CRC/C/FRA/CO/4, 11 Jun. 2009, para. 89 (France); UN Doc. CRC/C/15/Add.272, 20 Oct. 2005, para. 49 (Finland); UN Doc. CRC/C/15/Add. 251, 31 Mar. 2005, para. 35 (Austria); UN Doc. CRC/C/15/Add.248, 28 Jan. 2005, para. 41 (Sweden); UN Doc. CRC/C/15/Add.250, 28 Jan. 2005, para. 53 (Luxembourg); UN Doc. CRC/C/15/Add.226, 26 Feb. 2004, para. 54(d) (Germany); UN Doc. CRC/C/15/Add. 185, 13 Jun. 2002, para. 34 (Spain); and UN Doc. CRC/C/15/Add.170, 2 Apr. 2002, para. 68(b) (Greece).

[247] *Concluding Observations: Canada*, UN Doc. CRC/C/15/Qdd.37, 20 Jun. 1995, para. 24.

[248] This was confirmed by the drafters during the *travaux préparatoires* of the Convention. While acknowledging that 'family unity and reunification were basic rights', the US delegate explained in line with the French representative that the obligation to deal with applications in a 'positive manner' 'only obliged States to act positively and in no way prejudged the outcome of

explicit link to the obligation under Article 9(1) of not separating a child from his/her parents combined with the additional requirement of avoiding any adverse consequences for family members clearly contemplates a presumption of approval.[249] This presumption of approval mainly operates when there is no reasonable alternative for reuniting the child with his/her parents elsewhere. Any other interpretation would contravene the *effet utile* of Article 10(1) in light with the object and purpose of the Convention as a whole and would further be in contradiction with the best interests of the child. As recalled by the Committee on the Rights of the Child, States Parties must 'take all necessary measures for reunification of children with their families when this is in the best interests of the child'.[250]

From the perspective of general international law, the prompt and almost universal ratification of the CRC can be seen as a major step in the customary law process mentioned above. This is further confirmed by the very small number of reservations to Article 10(1): only seven of the 193 States Parties have formulated a reservation on family reunification.[251] The existence of a customary norm finds additional support in international humanitarian law. Indeed, the obligation to facilitate the reunion of

their deliberations on questions of family reunification'. See: Considerations 1987 Working Group, UN Doc. E/CN.4/1987/25, 1987, para. 10 and Considerations 1989 Working Group, UN Doc. E/CN.4 /1989/48, 1989, para. 216, reprinted in: S. Detrick (ed.), *The United Nations Convention on the Rights of the Child. A Guide to the 'Travaux préparatoires'*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1992, 202 and 206. See also the reservation to Art. 10 formulated by Japan. For further comments, see: S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1999, 191–4.

[249] For a similar account, see notably: *Amicus Curiae submitted to the Inter-American Court of Human Rights by the International Organization for Migration (IOM)*, para. 219; Boeles et al., *European Migration Law*, 176; Jastram, 'Family Unity', 195; Abram, 'The Child's Right to Family Unity in International Immigration Law', 423.

[250] *Concluding Observations: Malaysia*, UN Doc. CRC/C/MYS/CO/1, 25 Jun. 2007, para. 96(d). See also: UN Doc. CRC/C/THA/CO/3-4, 17 Feb. 2012, para. 55 (Thailand); UN Doc. CRC/C/IRL/CO/2, 29 Sep. 2006, para. 31(c) (Ireland); UN Doc. CRC/C/15/Add.233, 30 Jun. 2004, para. 36(f) (Panama). The Committee on the Rights of the Child recalled in its General Comment No. 6 that the obligations under Arts 9 and 10 of the Convention come into effect whenever family reunion in the country of origin is not in the best interest of the child. This requires a 'careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.': *General Comment No. 6*, paras 82–3 and 86.

[251] They are China (on behalf of the Hong Kong Special Administrative Region), Cook Islands, the Holy See, Japan, Liechtenstein, Singapore, and Switzerland. Germany and the UK withdrew their general reservation on immigration legislation respectively in 2008 and 2010. The text of the reservations is available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

families dispersed as a result of armed conflicts is enshrined in the two 1977 Additional Protocols[252] and it is currently considered as a norm of general international law.[253]

This customary principle of international humanitarian law is arguably part of a broader norm which applies both in times of war and peace for the purpose of reunifying a child with his/her family when there is no alternative elsewhere. Such a norm is not only an implicit obligation derived from the right to respect for family life, but it has been explicitly codified in several universal and regional treaties. In addition to the treaties mentioned above, these instruments include the ICRMW (Article 44), the African Charter on the Rights and Welfare of the Child (Article 25(2)(b)), the Covenant on the Right of the Child in Islam (Article 8(4)), the European Social Charter (Article 19(6)),[254] the European Convention on the Legal Status of Migrant Workers (Article 12(1)), and several other EU Directives.[255]

Furthermore, an impressive number of soft law instruments have constantly underlined the importance of facilitating family reunification[256] and spelt out guidelines

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[252] See Art. 74 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1125 UNTS 3, 8 Jun. 1977 (entry into force: 7 Dec. 1978)); and Art. 4(3)(b) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1125 UNTS 609, 8 Jun. 1977 (entry into force: 7 Dec. 1978)). Protocol I has been ratified by 172 States and Protocol II by 166 States.

[253] J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law*, Volume I: Rules, Geneva/Cambridge, International Committee of the Red Cross/Cambridge University Press, 2005, 381. Besides the wide ratification of the two Protocols, the study of the International Committee of the Red Cross justifies the customary law nature of this obligation on the following observations. The obligation of facilitating the reunion of families is set forth in a substantial number of agreements and domestic legislation. It has been reaffirmed in official statements from non-States Parties and in resolutions adopted by consensus by International Conferences of the Red Cross and Red Crescent. The study concludes that 'the importance of family reunification in human rights law, in particular in relation to reuniting children with their parents, is reflected in treaties and other international instruments, case-law and resolutions.'

[254] ETS No. 35, 18 Oct. 1961 (entry into force: 26 Feb. 1965); and European Social Charter (Revised), ETS No. 163, 3 May 1996 (entry into force: 1 Jul. 1999).

[255] See in particular the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3 Oct. 2003; Art. 16 of the Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16/44, 23 Jan. 2004 (as amended by the Directive 2011/51/EU of the European Parliament and of the Council to extend its scope to beneficiaries of international protection, OJ L 132/1, 19 May 2011); and Art. 23 of the EU Qualification Directive 2011/95/EU.

[256] See for example: World Population Conference, *Plan of Action*, Bucharest, 19–30 Aug. 1974, para. 56; International Conference on Population, Mexico, 6–14 Aug. 1984, Recommendation 49; International Conference on Population and Development, Cairo, 5–13 Sep. 1994, paras 10.9, 10.12 and 10.13; World Summit for Social Development, Copenhagen, 6–12 Mar. 1995, *Programme of Action* (Annex II) paras 39(e) and 77 (b); Fourth World Conference on Women, Beijing, 4–15 Sep. 1995, *Platform for Action* (Annex II), para. 147(k); Review and Appraisal of the Implementation of the ICPD Programme of Action (ICPD + 5), New York, 1 Jul. 1999, *Key Actions for the Further Implementation of the Programme* (Annex), para. 24(a); Further Initiative for Social Development, Geneva, 26–30 Jun. 2000, paras 22 and 68; World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 Aug.–10 Sep. 2001, *Declaration*, para. 49 and *Programme of Action*, para. 28; Berne

detailing its implementation by States.[257] It is also noteworthy that the great majority of General Assembly resolutions have been adopted by consensus when they refer to family reunification of children.[258] By contrast however, more general statements recalling 'the vital importance of family reunification' without specific reference to children have been adopted by vote within the General Assembly with a substantial number of abstentions (mainly from Western States).[259] This suggests that, besides the particular case of children, there is no general duty of family reunification under customary international law. In other words, the emergence of a customary norm is not sanctioned by a widespread *opinion juris* when the interests of the child are not at stake. The relevant state practice is also much less uniform with regard to other dependent relatives or unmarried partners without children.[260]

Initiative, *International Agenda for Migration Management*, 2005, Part III(4)(b)(2). See also among many other regional resolutions: *Final Act of the Helsinki Conference on Security and Cooperation in Europe*, Basket III, 1; *Resolution (78) 33 on the Reunion of Families of Migrant Workers in Council of Europe Member States*, adopted at the 289th meeting of the Ministers' Deputies and within the Organization of American States, 8 Jun. 1978; *The Human Rights of All Migrant Workers and their Families*, OAS Doc. AG/RES. 2669 (XLI-O/11), 7 Jun. 2011. With regard to family reunification of refugees, see Recommendation B of the *Final Act of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*; Cartagena Declaration on Refugees, para. 13; and the following ExCom conclusions: No. 107 (LVIII), 2007, para. (h); No. 105 (LVII), 2006, para. (n); No. 104 (LVI), 2005, para. (n); No. 103 (LVI), 2005, para. (n); No. 100 (LV), 2004, para. (d); No. 91 (LII), 2001, para. (a); No. 88 (L), 1999, paras (b)(ii) and (c); No. 85 (XLIX), 1998, paras (u) to (x); No. 74 (XLV), 1994, para. (gg); No. 47 (XXXVIII), 1987, para. (i); No. 24 (XXXII), 1981, para. 1; No. 15 (XXX), 1979, para. (e); No. 9 (XXVIII), 1977, paras (a) to (c); No. 7 (XXVIII), 1977, para. (a).

[257] See especially *Migration for Employment Recommendation (Revised)*, No. 86, 1 Jul. 1949, paras 15–71; *Migrant Workers Recommendation*, No. 151, 24 Jun. 1975, paras 13–19; *Recommendation 1686 (2004) on Human Mobility and the Right to Family Reunion*, adopted by the Parliamentary Assembly of the Council of Europe, 23 Nov. 2004; *Recommendation Rec(2002)4 of the Committee of Ministers to Member States on the Legal Status of Persons Admitted for Family Reunification*, adopted by the Committee of Ministers of the Council of Europe, 26 Mar. 2002; *Recommendation R(1999)23 of the Committee of Ministers to Member States on Family Reunion for Refugees and Other Persons in Need of International Protection*, adopted by the Committee of Ministers of the Council of Europe, 15 Dec. 1999.

[258] See for instance: UN Doc. GA/RES/66/172, 19 Dec. 2011, para. 5(e); UN Doc. GA/RES/66/141, 19 Dec. 2011, para. 17; UN Doc. GA/RES/65/212, 21 Dec. 2010, para. 5(e); UN Doc. GA/RES/65/197, 21 Dec. 2010, para. 16; UN Doc. GA/RES/64/166, 18 Dec. 2009, para. 5(c); UN Doc. GA/RES/64/146, 18 Dec. 2009, para. 14; UN Doc. GA/RES/60/169, 16 Dec. 2005, para. 14; UN Doc. GA/RES/59/194, 20 Dec. 2004, para. 18; UN Doc. GA/RES/58/190, 22 Dec. 2003, para. 18; UN Doc. GA/RES/57/128, 18 Dec. 2002, para. 16; UN Doc. GA/RES/56/170, 19 Dec. 2001, para. 13.

[259] UN Doc. GA/RES/63/188, 18 Dec. 2008, para. 2, adopted by 121–4 with 60 abstentions; UN Doc. GA/RES/61/162, 19 Dec. 2006, para. 2, adopted by 122–4 with 58 abstentions; UN Doc. GA/RES/59/203, 20 Dec. 2004, para. 2, adopted by 122–3 with 61 abstentions; UN Doc.GA/RES/55/100, 4 Dec. 2000, para. 2, adopted by 106–1 with 67 abstentions; UN Doc. GA/RES/51/89, 12 Dec. 1996, para. 2, adopted by 89–4 with 76 abstentions. See also UN Commission on Human Rights, Res. 1995/62, 7 Mar. 1995, para. 2, adopted by 27–9, with 17 abstentions.

[260] See for instance Art. 4(2) and (3) of the EU Family Reunification Directive 2003/86/EC.

However, family reunification may fall within the ambit of other well-established norms of customary international law. In particular, a refusal of family reunification may constitute in some circumstances a degrading treatment or a violation of the principle of non-discrimination.[261] When there is no applicable rule of customary international law, treaty law still plays a key role in the field of family reunification, whether as an implicit obligation deriving from the right to respect for family life under general human rights instruments or as an explicit obligation subscribed in more specific conventions.

In any event, family reunification is not an absolute duty. Generally speaking, a fair balance has to be struck between the competing interests of the State in controlling immigration and of the individual in exercising his/her family life. Needless to say that States retain a broad margin of appreciation for assessing such a balancing act. This case-by-case examination not only takes into account the particular circumstances of the migrants and his/her family members, but it also includes additional factors, such as potential threats to public order as well as sufficient resources and adequate housing to support incoming family members.

Family reunification is not only about human rights. It is also in the interest of the host States themselves for promoting social cohesion. Family reunification is a powerful tool for facilitating integration and social adaptation of migrants within their host countries. The ILO acknowledged that:

> Uniting migrant workers with their families living in the countries of origin is recognized to be essential for the migrants' well-being and their social adaptation to the receiving country. Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevent them from leading a normal life. The large numbers of migrant workers cut off from social relations and living on the fringe of the receiving community create many well-known social and psychological problems that, in turn, largely determine community attitudes towards migrant workers.[262]

The Executive Committee of the UNHCR Programme similarly observed that, 'Experience has shown that the family unit has a better chance of successfully … integrating in a new country than do individual refugees. In this respect, protection of the family is not only in the best interests of the refugees themselves, but is also in the best interests of States.'[263]

3.3 Immigration Control and Procedural Guarantees under Customary International Law

Public international law does not only impose some substantive obligations on States in deciding whether or not to admit non-citizens. It also provides for several procedural

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[261] On the customary law character of these norms, see infra parts 3.3.2.3 and 4.2.

[262] ILO, International Labour Conference, *Migrant Workers*, Report VI(1), Geneva, Jun. 1974, 27. Among many other similar acknowledgements, see also Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, ILO, Geneva, Apr. 1997, Annex I, para. 6.1.

[263] UNHCR ExCom, Standing Committee, *Family Protection Issues*, UN Doc. EC/49/SC/CRP.14, 4 Jun. 1999, para. 16.

guarantees in implementing immigration control. This primarily concerns the detention of undocumented migrants, their removal and other related measures of enforcement.

3.3.1 Immigration control and the prohibition of arbitrary detention

The prohibition of arbitrary detention is a well-established principle of general international law codified in a broad range of treaties.[264] This basic prohibition applies to all deprivations of liberty (including immigration detention).[265] The General Assembly has constantly called on all States (regardless of their ratification of the relevant instruments) to duly respect this principle with regard to undocumented migrants and 'where necessary, to review detention periods in order to avoid excessive detention of irregular migrants, and to adopt, where applicable, alternative measures to detention'.[266]

However, detaining undocumented migrants for the purpose of enforcing migration control is not considered arbitrary per se. Such a possibility is even explicitly permitted by Article 5(1)(f) of the ECHR 'to prevent [a person] effecting an unauthorised entry into the country'. The ECtHR held in line with the UK House of Lords[267] that detention of undocumented immigrants is 'a necessary adjunct' to the 'undeniable

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[264] Art. 9 ICCPR; Art. 37(d) CRC; Art. 16 ICRMW; Art. 5 ECHR; Art. 6 of the Charter of Fundamental Rights of the European Union; Art. 7 ACHR; Art. 6 ACHPR; Art. 20 of the Arab Charter on Human Rights; Art. 5 of the CIS Convention on Human Rights. Among many other restatements of its customary law nature, see notably: HRC, *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 Nov. 1994, para. 8; HRC, *General Comment No. 29: Article 4: Derogations during a State of Emergency*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 Aug. 2001, para.11; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 2002, para. 38; US Court of Appeal, *Alvarez Machain v. United States* [2003] Nos. 99-56762 et 99-56880 (9th Cir.); US Court of Appeal, *MA v. Ashcroft* [2001] 257 F.3d 1095 (9th Cir.), para. 65; UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/22/44, 24 Dec. 2012, para. 75.

[265] See for instance Art. 5(a) of the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live; HRC, *General Comment No. 8: Right to Liberty and Security of Persons (Art. 9)*, in UN Doc. A/37/40, 1982, Annex V, para. 4; ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, ICJ Reports 2010, 31, para. 77.

[266] General Assembly: *Protection of Migrants*, UN Doc. A/RES/67/172, 3 Apr. 2013, para. 4(a); *Protection of Migrants*, UN Doc. A/RES/66/172, 29 Mar. 2012, para. 4(a); *Protection of Migrants*, UN Doc. A/RES/65/212, 1 Apr. 2011, para. 4(a); *Protection of Migrants*, UN Doc. A/RES/64/166, 19 Mar. 2010, para. 4(a); *Protection of Migrants*, UN Doc. A/RES/63/184, 17 Mar. 2009, para. 9. For further and more general restatements of the States' duty to respect the prohibition of arbitrary detention with regard to migrants, see also: UN Doc. A/RES/62/156, 7 Mar. 2008, para. 9; UN Doc. A/RES/61/165, 23 Feb. 2007, para. 8; UN Doc. A/RES/60/169, 7 Mar. 2006, paras 19 and 21; UN Doc. A/RES/59/194, 18 Mar. 2005, paras 12 and 14; UN Doc. A/RES/58/190, 22 Mar. 2004, paras 12 and 19.

[267] *R v. Secretary of State for the Home Department, ex parte Saadi and Others* [2002] 4 All ER 785 (HL), 794–795 (per Lord Slynn of Hadley).

sovereign right to control aliens' entry'.[268] The HRC considered in the same vein that there is no basis under either treaty law or customary law for concluding that it is per se arbitrary to detain individuals requesting asylum.[269]

In fact, the increasing use of detention by States has become the most patent manifestation of immigration control for the twofold purpose of deterring future immigrants and of removing those already on their territory.[270] This represents the saddest irony of contemporary movement of persons: for States, the only means of preventing individuals from migrating is to deprive them of the most precious freedom, the right to liberty. The widespread practice of detaining undocumented migrants does not however mean that the prohibition of arbitrary detention has no role to play in channelling the power of States in the field of immigration control. While preserving States' margin of appreciation, this norm of general international law embodies three main limitations regarding the legal basis of detention, its grounds and other related procedural guarantees.

First, any detention must be in accordance with and authorized by law. This reflects the general principle of legal certainty which is inherent to the rule of law and codified in all human rights instruments. Such fundamental principle notably includes two basic components: detention of undocumented migrants must not only be in accordance with domestic law and procedures, but national legislation must also be sufficiently accessible and precise in order to avoid all risks of arbitrariness.[271]

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[268] ECtHR, *Saadi v. The United Kingdom* (Judgment; Grand Chamber) (2008) Appl. No. 13229/03, para. 64. One should add nevertheless that this judgment constitutes with the *Bankovic* case one of the most disputable and controversial judgments of its whole jurisprudence.

[269] HRC, *A v. Australia*, UN Doc. CCPR/C/59/D/560/1993, 3 Apr. 1997, para. 9.3. See by contrast: UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/7/4, 10 Jan. 2008, para. 53 ('criminalizing an irregular entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention.').

[270] For further discussions, see among a plethoric literature: C. Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law', *Indiana Journal of Global Legal Studies*, 19(1), 2012, 257–303; A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, Division of International Protection, PPLA/2011/01.Rev.1, Apr. 2011; C. Galina, *Immigration, Detention and Human Rights. Rethinking Territorial Sovereignty*, Leiden, Martinus Nijhoff Publishers, 2010; E. Acer & J. Goodman, 'Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention', *Georgetown Immigration Law Journal*, 24, 2010, 507; S. Vohra, 'Detention of Irregular Migrants and Asylum Seekers', in Cholewinski, Perruchoud & MacDonald (eds), *International Migration Law*, 49; C. Teitgen-Colly, 'La détention des étrangers et les droits de l'homme', in Chetail (ed.), *Mondialisation, migration et droits de l'homme*, 571.

[271] See for instance the following restatements of this twofold principle: ECtHR, *Amuur v. France* (Judgment) (1996) Reports 1996-III, para. 50; IACtHR, *Servellón-García et al. v. Honduras* (2006) Series C No. 152, paras 88–9; UN Working Group on Arbitrary Detention (WGAD), *Annual Report 1998*, UN Doc. E/CN.4/1999/63, 18 Dec. 1998, para. 69, Guarantee 2;

Second, the prohibition of arbitrary detention is generally understood as requiring deprivation of liberty to be reasonable, necessary and proportionate.[272] In most cases, this presupposes an individual assessment (taking into consideration the likelihood of absconding and lack of cooperation). The general principle of proportionality further requires two key guarantees. On the one hand, States must examine whether there are less invasive means for achieving their objective of migration control without interfering with the right to liberty and security (such as reporting obligations and sureties).[273] On the other hand, when detention is inevitable, its length must not exceed that reasonably required for the purpose pursued.[274]

Third, the right to challenge the lawfulness of detention before a court is another well-established principle of customary international law.[275] As restated by human rights treaties, this fundamental right includes the following four key procedural guarantees: the review must be prompt; it must be exercised by an independent and impartial judicial body; the procedure must respect the minimum standards of due process (including the equality of arms and the adversarial principle); the judicial review must be effective and include the possibility of ordering release. In particular, the court review of the lawfulness of detention is not limited to mere compliance with

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Shum Kwok-sher v. Hong Kong SAR [2002] 5 HKCFAR 318 and *A v. Director of Immigration* [2008] HKCU 1109.

[272] Among many other similar acknowledgments, see: HRC, *A v. Australia*, para. 9.2; HRC, *Madafferi et al. v. Australia*, UN Doc. CCPR/C/81/D/1011/2001, 2004, para. 9.2; IACtHR, *Yvon Neptune v. Haiti* (2008) Series C No. 180, para. 98; IACtHR, *Vélez Loor v. Panama* (2010) Series C No. 218, para. 118.

[273] See notably HRC, *C. v. Australia*, UN Doc. CCPR/C/76/d/900/1999, 2002, para. 8.2; HRC, *D. and E. v. Australia*, UN Doc. CCPR/C/87/D/1050/2002, 2006, para. 7.2; UNHCR, *UNHCR Revised Guidelines Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Geneva, UNHCR, Feb. 1999, Guidelines 2, 3 & 4; Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2000/21: Detention of Asylum-Seekers*, para. 6; UN Commission on Human Rights, Civil and Political Rights, Including Questions of Torture and Detention, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, 18 Dec. 1998, para. 69, Guarantee 13. See also at the regional level: Art. 15(1) of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 Dec. 2008; Council of Europe, Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, Guideline 6; IACtHR, *Vélez Loor v. Panama*, para. 171.

[274] For instance, the detention of an asylum-seeker for a period of more than four years without justifying any grounds particular to the applicant's case is clearly arbitrary, whereas detaining an applicant for seven days to enable his claim to asylum to be processed speedily has been held compatible with the right to liberty and security. See respectively: HRC, *A v. Australia*, para. 9.4; and ECtHR, *Saadi v. United Kingdom*, paras 79–80. Among other restatements, see also: IACtHR, *Vélez Loor v. Panama*, para. 171; WGAD, *Mission to Angola*, UN Doc. A/HRC/7/4/Add.4, 29 Feb. 2008, para. 97; *Kanyo Aruforse v. Minister of Home Affairs and Two Others* (2010/1189) [2010] SGHC (South Gauteng High Court (Johannesburg)), para. 18.

[275] Besides the material already mentioned in footnotes 263 and 265, see for instance: UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/7/4, 10 Jan. 2008, para. 67.

domestic law, but it should include whether the detention is necessary, proportionate and reasonable in due accordance with international law.[276]

Besides the fundamental guarantees inherent to the prohibition of arbitrary detention, two other guarantees remain particularly important. On the one hand, the right of non-national detainees to consular access is a well-established norm of general international law as notably codified in Article 36 of the 1963 Vienna Convention on Consular Relations.[277] On the other hand, the conditions of detention must respect human dignity in conformity with the absolute prohibition of torture and inhuman or degrading treatment.[278] As restated by the ICJ in the *Diallo* case, '[t]here is no doubt … that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments.'[279]

Although no violation has been observed in this particular case, the detention of an ever-larger number of migrants in often overcrowded facilities has been frequently found by the ECtHR to violate the right to be free from inhuman and degrading treatment.[280] Among other similar cases, it holds that detaining an unaccompanied five-year-old child in a transit centre for adults 'demonstrated a lack of humanity to

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[276] HRC, *A. v. Australia*, para. 9.5; HRC, *Shafiq v. Australia*, UN Doc. CCPR/C/88/D/1324/2004, 2006, at para. 7.4; ECtHR, *Chahal v. The United Kingdom* (Judgment) (1996) Reports 1996-V, Appl. No. 22414/93, para. 127; ECtHR, *Dougoz v. Greece* (Judgment) (2001) Appl. No. 40907/98, para. 61; IACtHR, *Vélez Loor v. Panama*, paras 142–3.

[277] Among other restatements of its customary law nature, see: US Department of State, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, 3rd edn, Sep. 2010, 46; IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 Oct. 1999, 19 (requested by the United Mexican States).

[278] Besides the prohibition of torture, inhumane and degrading treatment, all general human rights treaties with the exception of the ECHR recall that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. See Art. 10 ICCPR, Art. 5(2) ACHR, Art. 5 ACHPR and Art. 20 of the Arab Charter on Human Rights.

[279] ICJ, *Ahmadou Sadio Diallo*, para. 87. On the peremptory nature of the prohibition of torture, see: International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija* (Judgment) (1998) Case No. IT-95-17/1-T, para. 144; HRC, *General Comment No. 24*, para. 10; ECtHR, *Al-Adsani v. United Kingdom* (Judgment) (2001) Appl. No. 35763/97, para. 61.

[280] Among its abundant case-law devoted to the conditions of detention in Greece, the European Court has held that 'a period of detention of six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet is unacceptable with respect to Article 3': *S.D. v. Greece* (Judgment) (2009) Appl. No. 53541/07, para. 51, as quoted in *M.S.S. v. Belgium and Greece* (Judgment) (2011) Appl. No. 30696/09, para. 222. For a similar conclusion of violation, see also *Riad and Idiab v. Belgium* (Judgment) (2008) Appl. Nos. 29787/03 and 29810/03, at paras 106–10; and *Abdolkhani and Karimnia v. Turkey (n°2)* (Judgment) (2010) Appl. No. 50213/08, at para. 31.

such a degree that it amounted to inhuman treatment'.[281] In any event, detention of children must remain an exceptional measure in line with the best interests of the child.[282]

3.3.2 Due process guarantees and the removal of undocumented migrants

Besides the detention of immigrants, international law provides specific due process guarantees governing expulsion. These procedural guarantees are notably enshrined in Article 13 of the ICCPR:

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

These procedural guarantees have been restated in various instruments[283] and are arguably part of general international law.[284] Their benefit is however circumscribed to 'aliens lawfully in the territory'[285] of the host State and has thus no impact for governing the removal process of undocumented migrants.

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[281] ECtHR, *Mayeka and Mitunga v. Belgium* (Judgment) (2006) Appl. No.13178/03, para. 58. The Court came to the same conclusion with regard to the detention of four children with their mother during more than one month despite serious signs of psychological distress: *Muskhadzhiyeva and others v. Belgium* (Judgment) (2010) Appl. No. 41442/07, paras 60–63.

[282] Committee on the Rights of the Child, *General Comment No. 6*, para. 61; HRC, *Bakhtiyari v. Australia*, Comm. No. 1069/2002, 6 Nov. 2003, para. 9.3; UN Human Rights Council, *Report of Working Group on Arbitrary Detention*, UN Doc. A/HRC/13/30, 15 Jan. 2010, para. 60; UNHCR, *UNHCR Revised Guidelines*, Guideline 6; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, Geneva, UNHCR, 1997, paras 7.6–7.8; *Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures*, adopted by the Committee of Ministers of the Council of Europe, 1 Jul. 2009, Principle XI.2.

[283] Art. 32 of the Geneva Convention Relating to the Status of Refugees; Art. 31 of the Convention Relating to the Status of Stateless Persons (360 UNTS 117, 28 Sep. 1954 (entry into force: 6 Jun. 1960)); Art. 22 ICRMW; Art. 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (ETS No. 155, 22 Nov. 1984 (entry into force: 1 Nov. 1998)); Art. 22(6) ACHR; Art. 12(5) ACHPR; Art. 26(2) of the Arab Charter on Human Rights; Art. 25(3) of the CIS Convention on Human Rights and Fundamental Freedoms. See also among non-binding instruments, Art. 7 of the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live.

[284] Plender, *International Migration Law*, 472.

[285] The only treaty which does not explicitly require a lawful presence within the territory is the ICRMW. With regard to the ICCPR, the HRC has confirmed that 'illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions'. It has considered however that 'if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13': HRC, *General Comment No. 15*, para. 9.

3.3.2.1 The prohibition of collective expulsion A more relevant norm for undocumented immigrants may be found in the absolute prohibition of collective expulsion. This prohibition has been endorsed in several instruments regardless of the lawful presence of aliens.[286] Furthermore, this well-established principle is generally understood as requiring an individual examination of the circumstances of each case.[287] It thus provides a non-negligible guarantee for undocumented immigrants who are subjected to forced removals.

The prohibition of collective expulsion is all the more significant since it arguably binds all States regardless of their ratification of the relevant treaties. There are indeed strong reasons for considering that collective expulsions violate customary international law.[288] In particular, States' participation to the relevant treaties is broad and representative: in September 2012, 139 States had ratified at least one of the conventions explicitly prohibiting collective expulsion.

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[286] Art. 22(1) ICRMW; Art. 22(9) ACHR; Art. 12(5) ACHPR; Art. 4 of Protocol No. 4 to the ECHR; Art. 26(2) of the Arab Charter on Human Rights; Art. 25(4) of the CIS Convention on Human Rights and Fundamental Freedoms; Art. 19(1) of the EU Charter of Fundamental Rights. See also Art. 49 of the Fourth Convention relative to the Protection of Civilian Persons in Time of War. Furthermore, though not explicitly mentioned in the ICCPR, the HRC considers that such prohibition is implicit to Art. 13, because 'it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions.': HRC, *General Comment No. 15*., para. 10. Among other soft law restatements, see also: CERD, *General Recommendation 30: Discrimination against Non-Citizens*, 1 Oct. 2002, in UN Doc. CRED/C/64/Misc.11/rev.3, 2004, para. 26; International Law Association, *Declaration of Principles of International Law on Mass Expulsion*, Seoul, 23–30 Aug. 1986; Council of Europe, Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 3.

[287] '[C]ollective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. Moreover, the fact that a number of aliens receive similar decisions does not lead to the conclusion that there is a collective expulsion when each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis.': ECtHR, *Andric v. Sweden* (1999), Appl. No. 45917/99, para. 1. See also: Art. 22(1) ICRMW ('Each case of expulsion shall be examined and decided individually'); Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, para. 404 ('[a]n expulsion becomes collective when the decision to expel is not based on individual cases but on group considerations, even if the group in question is not large'). For similar reaffirmations by States, see notably the declarations of the Czech Republic, in UN Doc. A/CN.4/628, 26 Apr. 2010, 13; of Switzerland, in UN Doc. A/CN.4/604, 26 Aug. 2008, 6; and of the Netherlands, in UN Doc. A/C.6/60/SR.12, 23 Nov. 2005, para. 20.

[288] For a similar account, see notably: Iran-US Claims Tribunal, *Short v. Iran*, Award No. 312-11135-3, 14 Jul. 1987, Dissenting Opinion of Judge Brower, in Iran-US Claims Tribunal Reports, 16, 1987, Vol. III, Grotius Publication Limited, 1988, 88; Plender, *International Migration Law*, 476; J.-M. Henckaerts, *Mass Expulsion in Modern International Law and Practice*, The Hague, Martinus Nijhoff Publishers, 1995, 45; D.E. Arzt, *Existing and Emerging International Human Rights and Humanitarian Law Standards Outlawing Forcible Population Transfer and Settler Implantation, Expert Seminar on the Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers and Settlements*, HR/SEM.1/PT/1997/WP.5, 14 Feb. 1997, 11; A. Cassese, *International Law*, Oxford, Oxford University Press, 2005,

More decisively, even States which have not ratified one of these treaties have endorsed the prohibition of collective expulsion. For instance, both China and Iran declared that 'collective expulsion was prohibited under international law, since in most cases such action was discriminatory'.[289] This line of argument is probably the most convincing: a collective expulsion will rarely be – if not never – in conformity with the customary law principle of non-discrimination.[290] As restated by the CERD, States must ensure that 'non-citizens are not subject to collective expulsion, in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account.'[291]

3.3.2.2 The right to judicial review Besides the specific prohibition of collective expulsion, a more controversial issue concerns the right to judicial review against an expulsion order. G.S. Goodwin-Gill argues that such a right is required under general international law even for expulsion proceedings against undocumented immigrants[292] while, for the Special Rapporteur of the International Law Commission, the right to an individual appeal against an expulsion order only exists under customary law for aliens who are lawfully within the territory of States.[293] By contrast, Plender considers in categorical terms that 'there is no general obligation in international law to afford a judicial review of the merits of a decision to expel an alien'.[294]

121; UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante*, UN Doc. A/HRC/7/12, 25 Feb. 2008, para. 36; R. Cholewinski, 'The Human and Labor Rights of Migrants: Visions of Equality', *Georgetown Immigration Law Journal*, 22, 2007–2008, 195; Cornelisse, *Immigration Detention and Human Rights*, 178; International Commission of Jurists, *Migration and International Human Rights Law, Practitioners Guide No. 6*, Geneva, International Commission of Jurists, 2011, 138. The Special Rapporteur of the International Law Commission has advanced instead that the prohibition of collective expulsion is a general principle of law: International Law Commission, *Third Report on the Expulsion of Aliens, M. Kamto, Special Rapporteur*, UN Doc. A/CN.4/581, 19 Apr. 2007, 37. Among the rare authors denying the existence of a customary norm prohibiting collective expulsion, see: R. Perruchoud, 'L'expulsion en masse d'étrangers', *Annuaire français de droit international*, XXXIV, 1988, 682.

[289] *Summary Record of the 11th Meeting: Report of the International Law Commission on the Work of its Fifty-Seventh Session*, UN Doc. A/C.6/60/SR.11, 23 Nov. 2005, paras 54 (China) and 84 (Iran). See however: *Summary Record of the 19th Meeting: Report of the International Law Commission on the Work of its Fifty-Ninth Session*, UN Doc. A/C.6/62/SR.19, 28 Nov. 2007, para. 69 (Malaysia).

[290] See also in this sense: A. de Zayas, 'Collective Expulsion in the Light of International Law', *AWR Bulletin*, 24, 1977, 268; and Henckaerts, *Mass Expulsion in Modern International Law and Practice*, 45–7.

[291] CERD, *General Recommendation 30*, para. 26.

[292] Goodwin-Gill, *International Law and the Movement of Persons between States*, 262 and 280.

[293] *Sixth Report on the Expulsion of Aliens Submitted by Mr. Maurice Kamto Special Rapporteur*, UN Doc. A/CN.4/625/Add.2, 9 Jul. 2010, 22 and UN Doc. A/CN.4/625/Add.1, 28 May 2010, 7 and 15–16.

[294] Plender, *International Migration Law*, 472. He nevertheless adds that 'there is, however, some support for the proposition that a decision to deport an alien from a territory in which he

The contradictory views of scholars fairly reflect the absence of any clear cut norm of customary international law in this field. Furthermore, treaty-law related practice does not provide a uniform pattern for substantiating the existence of a customary right to judicial review against an expulsion order. In particular, the applicability of the right to fair trial to the expulsion process has raised diverging interpretations and its impact accordingly varies from one treaty to another. Under both the ACHR and the ACHPR, the right to fair trial has been construed by their respective treaty bodies as being applicable to the deportation process of undocumented immigrants.[295] This does not only require the right to challenge the expulsion order before a court, but also the right to a public hearing and the right to be given an adequate opportunity to exercise the right of defence. Unlike the Inter-American Court and the African Commission, the HRC[296] and the ECtHR[297] consider that the right to fair trial does not apply to decisions on entry, stay and expulsion of aliens on the disputable ground that they do not concern the determination of civil rights or criminal obligations under the meaning of their respective provisions.

Whatever the controversies are surrounding the applicability of the right to fair trial to expulsion, the right to an effective review offers a firmer avenue for ensuring procedural guarantees to undocumented immigrants. The right to an effective review is acknowledged by all human rights treaties, including the ICCPR and the ECHR.[298] According to the prevailing interpretation of these last instruments, immigrants are entitled to challenge refusal of admission and/or removal when there is an arguable claim of violation of their rights under the relevant treaties (including the right to

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is lawfully present is arbitrary, save where there are overwhelming considerations of national security to the contrary, unless he is informed of the allegations against him and is afforded an opportunity to advance reasons against his deportation, before some competent authority independent of those proposing to deport him': ibid.

[295] IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, 17 Sep. 2003, paras 124–7; IACtHR, *Vélez Loor v. Panama*, para. 146; IACtHR, *Riebe Star and Others v. Mexico* (1999) Case No. 11.160, Report No. 49/99, para. 71. With regard to the interpretation of the African Commission, see in particular: *Rencontre africaine pour la défense des droits de l'homme (RADDH) v. Zambia* (1996) Comm. No. 71/92, 60, para. 29; *Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Angola* (2008) Comm. No. 292/2004, para. 59.

[296] HRC, *General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, UN Doc. CCPR/C/GC/32, 2007, at para. 17. See also: HRC, *Ernst Zundel v. Canada*, UN Doc. CCPR/C/89/D/1341/2005, 2007, at paras 6.7. and 6.8.; and HRC *Mario Esposito v. Spain*, UN Doc. CCPR/C/89/D/1359/2005, 2007, at para. 7.6.

[297] ECtHR, *Maaouia v. France* (2000) Reports 2000-X, para. 40.

[298] Although the right to an effective remedy can only be invoked in conjunction with other protected rights and freedom under the relevant treaty, it is sometimes alleged as being part of customary international law: R. Pisillo Mazzeschi, 'The Relationship between Human Rights and the Rights of Aliens and Immigrants', in U. Fastenrath *et al*. (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford, Oxford University Press, 2011, 562.

family and private life, as well as the prohibition of torture, inhuman and degrading treatment and the correlative duty of *non-refoulement*).[299]

Although the right to an effective remedy does not automatically require a judicial review, the powers and guarantees of the competent authority must be similar to those offered by a domestic court. As notably restated by the European Court, the domestic organ must have two essential characteristics to be considered an effective remedy.[300] It must be empowered to take a binding decision and grant appropriate relief, excluding thus any form of consultative procedure. Moreover, the domestic authority must offer sufficient procedural safeguards for ensuring its independence and the basic rights of the claimant, including equality of arms and legal representation. In sum, although the right to judicial review against an expulsion order is currently not part of customary international law, treaty law largely offers similar guarantees under general human rights instruments.[301]

3.3.2.3 Enforcement of immigration control and the right to human dignity In parallel to the rules governing detention and removal of undocumented migrants, general international law retains a residual role for channelling the enforcement of immigration control. Clearly, the most important norm in this field is the prohibition of torture, inhuman or degrading treatment. States' obligation to carry out refusals of admission and forced removals with due regard to the human dignity of migrants has been further reiterated in a substantial number of international instruments and case-law.[302] In some exceptional circumstances, forced removal and refusal of entry may also constitute per se degrading treatment. This might notably happen because of the poor health conditions of the immigrants.[303] Similarly,

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[299] See for instance: HRC, *Maksudov and others v. Kyrgyzstan*, UN Docs. CCPR/C/93/D/1461, 1462, 1476 & 1477/2006, 2008, para. 12.7; HRC, *Al Zery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005, 2006, para. 11.8; and ECtHR, *G.H.H. and others v. Turkey* (2000) Reports 2000-VIII, paras 34 and 36.

[300] ECtHR, *Chahal v. The United Kingdom*, paras 145 and 154.

[301] One should further add that the right to an effective remedy is also guaranteed by EU law. See in particular: Art. 4 of the Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ L 149/34, 2 Jun. 2001; Art. 12(4) of the Long-Term Residents Directive 2003/109/EC; and Art. 13 of the Return Directive 2008/115/EC.

[302] See for instance: Annex 9 to the Convention on International Civil Aviation, 'International Standards and Recommended Practices', International Civil Aviation Organization, 12th edn, 2005, para. 5.2.1; Council of Europe, Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 17; Art. 8(4) of the EU Return Directive 2008/115/EC; Art. 6(1) of the Regulation No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1, 13 Apr. 2004. With regard to the numerous arbitral cases, see also: *Bofolo* case, Mixed Claims Commission Netherlands-Venezuela, 1903, United Nations, *Reports of International Arbitral Awards*, X, 528; *Maal* case, ibid., 732.

[303] See in particular: Committee against Torture, *G.R.B. v. Sweden*, UN Doc. CAT/C/20/D/83/1997, 15 May 1998, para. 6.7; ECtHR, *D. v. The United Kingdom* (1997) 1997-III, 805, para. 54.

> [T]he repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3 of the [European] Convention … Such an issue may arise, a fortiori, if an alien is, over a long period of time, deported repeatedly from one country to another without any country taking measures to regularise his situation.[304]

The refusal of entry based on racial grounds also constitutes a degrading treatment in violation of international law.[305] One should further recall in this regard that the prohibition of racial discrimination constitutes a peremptory norm of general international law.[306] As a result of this fundamental norm, immigration control cannot be carried out in such a way as to solely target persons with specific physical or ethnic characteristics.[307]

The prohibition of arbitrary deprivation of life constitutes another norm of *jus cogens*[308] which sadly retains its relevance in the enforcement of immigration control. The excessive use of force in the execution of deportation orders has been regularly condemned by treaty bodies.[309] An independent report even counted nearly 300 cases of alleged abuses of the use of force on asylum-seekers during detention and removal in the UK between January 2004 and June 2008.[310]

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[304] European Commission on Human Rights, *Harabi v. The Netherlands* (1986) Appl. No. 10798/84, DR 46, 112. See also in this sense: ACommHPR, *Modise v. Bostwana* (2000) Comm. No. 97/93, para. 91.

[305] See especially the well-known case European Commission on Human Rights, *East African Asians v. United Kingdom* (1973) DR 78-B, 62. See also with regard to discrimination based on sex: HRC, *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* (1981) Comm. No. 35/1978.

[306] ICJ, *Barcelona Traction Light and Power Company (Belgium v. Spain)*, Judgment, ICJ Reports 1970, 32.

[307] See notably the condemnation of Spain for racial discrimination in: HRC, *Williams Lecraft* v. *Spain*, UN Doc. CCPR/C/96/D/1493/2006, 2009, para. 7.2 ('The Committee must decide whether being subjected to an identity check by the police means that the author suffered racial discrimination. The Committee considers that identity checks carried out … to control illegal immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.')

[308] On the peremptory nature of the right to life, see for instance: HRC, *General Comment No. 24*, para. 10.

[309] See for instance: HRC, *Concluding Observations*: *The United Kingdom*, UN Doc. CCPR/C/79/Add.55, 27 Jul. 1995, para. 15; HRC, *Concluding Observations*: *Switzerland*, UN Doc. CCPR/CO/73/CH, 12 Nov. 2001, para. 13; HRC, *Concluding Observations*: *Belgium*, UN Doc. CCPR/CO/81/BEL, 12 Aug. 2004, para. 14; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 13th General Report, Doc. CPT/Inf(2003)35, 10 Sep. 2003, paras 31–43.

[310] Birnberg Peirce & Partners, Medical Justice & the National Coalition of Anti-Deportation Campaigns, *Outsourcing Abuse, The Use and Misuse of State-Sanctioned Force During the Detention and Removal of Asylum Seekers*, Jul. 2008, 2.

Under public international law, due respect for the right to life requires that coercive measures to carry out forced removals of undocumented migrants must be used as a last resort and be strictly proportionate to the resistance of the returnees.[311] States are further bound to open an independent and impartial inquiry on any excessive use of force, as well as to prosecute and punish the perpetrators and offer compensation to the victim's family.[312]

4. THE SOJOURN OF MIGRANTS UNDER GENERAL INTERNATIONAL LAW: FROM MINIMUM STANDARDS TO HUMAN RIGHTS

Though general international law is far from being indifferent to the limits imposed on States in carrying out immigration control, its most substantial impact concerns the sojourn of migrants in their host States. This key component of international migration law has been traditionally equated with the law of state responsibility for injuries committed to aliens. This represents a typical question of classical international law which has been crystallized through the notion of minimum standards at the end of the nineteenth century and the beginning of the twentieth century (4.1). Since then this notion has been progressively encapsulated within international human rights law which currently represents the primary source of protection (4.2).

4.1 The Origins of the International Minimum Standard and the Law of State Responsibility

For a long time, the responsibility of States for injuries to aliens was a branch of international law on its own and, even more, one of its most important branches.[313] In

[311] These well-established obligations deriving from the right to life have been restated in the specific context of forced return by several instruments. See for instance: Council of Europe, Committee of Ministers, *Twenty Guidelines on Forced Return*, Guideline 19; Art. 8(4) of the EU Return Directive 2008/115/EC; International Air Transport Association & Control Authorities Working Group, 'Guidelines on Deportation and Escort', in *ECAC Policy Statement in the field of Civil Aviation Facilitation*, ECAC.CEAC Doc. No. 30, 2003, Part I, Annex D, para. 8.

[312] For a restatement of these basic obligations in link with the death of a Nigerian citizen, when he was being forcibly repatriated by air from Switzerland, see: Committee against Torture, *Concluding Observations: Switzerland*, UN Doc. CAT/C/CHE/CO/6, 25 May 2010, para. 16.

[313] Among a rich literature see: R.B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, Charlottesville, University Press of Virginia, 1983; F. Garcia-Amador, L. Sohn & R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries of Aliens*, New York & Leiden, Oceana Publications Inc., Dobbs Ferry & Sijthoff, 1974; C.F. Amerasinghe, *State Responsibility for Injuries to Aliens*, Oxford, Clarendon Press, 1967; F. Garcia-Amador, 'State Responsibility: Some New Problems', *Recueil des cours de l'Académie de droit international*, 1958–II, T. 94, 365–491; F.S. Dunn, *The Protection of Nationals*, Baltimore, The Johns Hopkins Press, 1932; J. Dumas, 'La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers', *Recueil des cours de l'Académie de droit international*, 1931–II, T. 36, 183–261; A. Decencière-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers*, Paris, Rousseau & Co.,

the century after 1840, some 60 mixed claims commissions were set up to deal with disputes arising from this specific field.[314] Jessup observed in 1948 that 'the international law governing the responsibility of states for injuries to aliens is one of the most highly developed branches of that law'.[315] Its primary rationale was based on the well-known fiction of Vattel: 'whoever uses a citizen ill, indirectly offend the State, which is bound to protect this citizen.'[316]

According to this traditional stance, aliens are worthy of protection as nationals because they personify their own State. The legal status of aliens under classical international law is the result of a purely inter-state relationship. Both in practice and principle, aliens are under the dual dependency of the territorial State (where they sojourn) and of the personal State (of which they have the nationality). This traditional position is well synthesized by the arbitral award delivered in 1928 in the famous *Island of Palma* case: 'Territorial sovereignty … involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights … each State may claim for its nationals in foreign territory'.[317]

This overlapping between the territorial and personal jurisdictions is inherent to alienage. It further explains the longstanding interest of international law towards aliens. By contrast, classical international law has long been indifferent to the treatment of nationals within their own country who were left at the discretion of their sovereign State. As Lauterpacht observed, 'the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as the citizen of his own State.'[318]

This paradox corresponds to a specific stage in the evolution of international law when the individual was literally considered as an object of international law and not a subject in his own right.[319] The treatment reserved to aliens was not an exception but, on the contrary, a confirmation of this purely inter-state legal system. They can be protected only because they incarnate the State of their nationality. This is epitomized

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1925; E.M. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, The Banks Law Publishing Co., 1915; and D. Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par les étrangers', *Revue générale de droit international public*, 1906, 5–29 et 110–30.

[314] Brownlie, *Principles of Public International Law*, 500; M.O. Hudson, *International Tribunals: Past and Future*, Carnegie Endowment for International Peace and Brookings Institution, 1944, 196.

[315] P. Jessup, *A Modern Law of Nations – An Introduction*, New York, Macmillan, 1948, 94.

[316] Vattel, *The Law of Nations or the Principle of Natural Law (1758)*, Book II, Chap. VI, para. 71.

[317] Permanent Court of Arbitration, *Island of Palma (United States of America v. Netherlands)*, RSA, Vol. II, 4 Apr. 1928, 839.

[318] H. Lauterpacht, *International Law and Human Rights*, London, Stevens, 1950, 121.

[319] See, for example: W.G.F. Philimore, 'Droits et devoirs fondamentaux des Etats', *Recueil des cours de l'Académie de droit international*, 1923, T. 1, 63. For further discussions and bibliographical references, see notably, V. Chetail, 'Le droit d'avoir des droits en droit international public: réflexions sur la subjectivité internationale de l'individu', in M.-C. Caloz-Tschopp (ed.), *Lire Hannah Arendt aujourd'hui: Pouvoir, guerre, pensée, jugement politique*, Paris, L'Harmattan, 2008, 217–32.

by the *Mavrommatis* Judgment delivered in 1924 by the Permanent Court of International Justice:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law.[320]

This inter-state monologue is further exacerbated by the discretionary nature of diplomatic protection. As restated by the ICJ, '[t]he State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease.'[321]

Thus, one should not be surprised that diplomatic protection has been a persistent source of tension among States – especially between Western States and newly independent ones (notably in Latin America). At the time, the aliens in question were generally entrepreneurs from industrialized countries in search of new markets. Furthermore, diplomatic protection was used as a common pretext for intervention in disregard of the principles of sovereign equality and non-interference in the domestic affairs of developing States. As a result, '[t]he history of the development of the international law on the responsibility of states for injuries to aliens is thus an aspect of the history of "imperialism", or "dollar diplomacy".'[322]

The conflicting interests at stake have been reflected by two opposite conceptions of the standard of treatment granted to aliens. On the one hand, developing States have advanced the doctrine of national treatment: aliens must be treated on an equal footing with nationals (with the obvious exception of political rights).[323] As a result, aliens cannot claim more rights than those granted to nationals and only a difference of treatment can trigger the responsibility of the State. The doctrine of national treatment was endorsed at the First International Conference of American States held in

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[320] *Mavrommatis Palestine Concessions Case (jurisdiction) (Greece v. United Kingdom)*, 1924 PCIJ Series A, No. 2, 12. See also *Panevezys Saldutiskis Railway Case (Estonia v. Lithuania)*, 1939 PCIJ Series A/B, No. 76, 16.

[321] ICJ, *Barcelona Traction Light and Power Company*, 45, para. 79.

[322] Jessup, *A Modern Law of Nations*, 96. See also: Separate opinion of Judge Padilla-Nervo in ICJ, *Barcelona Traction Light and Power Company*, 246. Among other well-known instances, the Boer War (1899–1902) was officially justified by the UK in order to protect the British mine owners of Witwatersrand.

[323] C. Calvo, *Le droit international*, 5th edn, Vol. VI, Paris, Marcel Rivière, 1885, 231, para. 256. For further discussions see also: J.M. Yepes, 'Les problèmes fondamentaux du droit des gens en Amérique', *Recueil des cours de l'Académie de droit international*, 1934–I, T. 47, 106; Nys, *Le droit international*, 266; A. Guani, 'La solidarité internationale dans l'Amérique latine', *Recueil des cours de l'Académie de droit international*, 1925, T. VIII, 287; J. De Louter, *Le droit international positif*, Vol. I, Oxford, Oxford University Press, 1920, 296–8; H. Arias, 'The Non Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War', *American Journal of International Law*, 1913, 265.

Washington in 1889–90.[324] It has been reinforced at the regional level in several treaties, including the 1902 Convention relative to the Rights of Aliens,[325] the 1928 Convention on the Status of Aliens,[326] as well as the famous Montevideo Convention on the Rights and Duties of States adopted in 1933.[327]

Nonetheless, international initiatives carried out by Latin American States have been primarily confined within their own region. At the universal level, the first Conference for the Codification of International Law, held in 1930 under the auspices of the League of Nations, demonstrated the absence of a broader consensus. The Conference was unable to adopt the draft 'Convention on Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners' mainly because of the two different conceptions of the applicable standard: 17 States supported the doctrine of national treatment, whereas 31 other States were opposed to it.[328]

By contrast to the national treatment, Western States have promoted the notion of a minimum international standard, traditionally defined in the following terms:

> Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.
>
> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world … If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.[329]

Thus, according to such a notion, aliens shall not be treated below a minimum standard which is required by general international law regardless of how a State treats its own nationals. This doctrine has been endorsed in a large amount of treaties and jurisprudence.[330] The very content of the international minimum standard is however particularly vague. It has raised many controversies among States, some of them considering

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[324] J. Scott (ed.), *The International Conferences of American States 1889–1928*, Oxford, Oxford University Press, 1931, 45.

[325] Ibid., 415–6.

[326] Ibid.

[327] 1936 LNTS 34. As for the previous conventions, the US, along with other States, made a reservation to Art. 9.

[328] League of Nations, *Actes de la Conférence pour la codification du droit international*, Doc. C. 351 (c.). M. 145 (c.). 1930 V., Vol. 4, 188.

[329] E. Root, 'The Basis of Protection to Citizens Residing Abroad', *American Society of International Law Proceedings*, 1910, 20–21.

[330] Among numerous arbitral awards, see most notably the *British Claims in the Spanish Zone of Morocco* case, (1925) RSA Vol. II, 644; *Hopkins* case (1926) ibid., Vol. IV, 411; *Neer* case (1926) ibid., Vol. IV, 60; and *Roberts* case (1926) ibid., Vol. IV, 77. See also among many other similar treaties: Convention Respecting Conditions of Residence and Business and Jurisdiction, annexed to the Treaty of Peace with Turkey signed at Lausanne on 24 Jul. 1923 by the British Empire, France, Italy, Japan, Greece, Romania, Yugoslavia, and Turkey (31 LNTS 166) or the Egypt-Persia Treaty of Friendship between Egypt and Persia of 28 Nov. 1928 (93 LNTS 381).

the ambiguity of the notion as the perfect excuse for justifying arbitrary interferences in host States. Nevertheless, as a result of these inter-state disputes, a considerable body of arbitral awards has progressively identified and refined the international minimum standard on a case-by-case basis. This incremental process has been crystallized in a core content of fundamental guarantees, including the right to life and respect for physical integrity, the right to recognition as a person before the law, freedom of conscience, prohibition of arbitrary detention, the right to a fair trial in civil and criminal matters, and the right to property (save for public expropriation with fair compensation).[331]

As is apparent from this enumeration, the minimum standard of treatment has been the forerunner of human rights law at the international level. It has been critical for infusing the rule of law in the field of migration. Nowadays, while it still retains some residual value, the international minimum standard is to a large extent absorbed by human rights treaties and customary law.

4.2 International Human Rights Law as the Ultimate Benchmark of Protection

The old law of aliens inherited from the traditional notion of state responsibility has been progressively marginalized and arguably replaced by the new law of human rights.[332] This reflects a more general and systemic evolution whereby human rights law is profoundly reshaping general international law. Even the ICJ acknowledged in the *Diallo* Judgment of 2007 that:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[333]

At a closer look, human rights law constitutes a normative synthesis between the two traditional conceptions of the treatment granted to aliens by international law. On the

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[331] See especially: A.H. Roth, *The Minimum Standard of International Law Applied to Aliens*, Leiden, A.W. Sijthoff's Uitgeversmaatschappij N.V., 1949, 185–6; A.V. Freeman, *The International Responsibility of States for Denial of Justice*, London/New York/Toronto, Longmans, 1938, 507–30; A. Verdross, 'Les règles internationales concernant le traitement des étrangers', *Recueil des cours de l'Académie de droit international*, 1931-III, T. 37, 353–406; S. Basdevant, 'Théorie générale de la condition de l'étranger', in A. De Lapradelle & J.-P Niboyet (eds), *Répertoire de droit international*, T. VIII, Paris, Sirey, 1930, 31–61.

[332] For further discussions about the impact of international human rights law on the law of state responsibility see Lillich, *The Human Rights of Aliens in Contemporary International Law*; T. Carbonneau, 'The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement', *Virginia Journal of International Law*, 25, 1984, 99–141; M.S. McDougal, H.D. Lasswell & L.-C. Chen, 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights', *American Journal of International Law*, 1976, 432–69; A.-C. Kiss, 'La condition des étrangers en droit international et les droits de l'homme', in *Mélanges en l'honneur de M. Ganshof van der Meersch*, T. 1, Brussels, Bruylant, 1972, 509.

[333] ICJ, *Ahmadou Sadio Diallo*, para. 39.

one hand, this branch of law ensures a core content of basic rights to be guaranteed by international law in line with the very notion of minimum standard. On the other hand, human rights law asserts equality of treatment between citizens and non-citizens in accordance with the national standard.

Following this last stance, one can no longer contest that human rights law has substantially eroded the traditional *summa divisio* based on the distinction between citizens and non-citizens. This is all but surprising for human rights are by definition inherent to human dignity without regard to nationality. The Universal Declaration of Human Rights and the two UN Covenants proclaim in the first recital of their preambles that human rights derive from the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'. Similarly, the preamble of the ACHR recalls in more explicit terms that, 'the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality.'[334]

This philosophical and normative underpinning is reinforced by the principle of non-discrimination which has been endorsed in all human rights treaties, including Article 2(2) of the ICCPR:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[335]

The principle of non-discrimination is a well-recognized norm of general international law[336] and its impact on the legal position of non-citizens is quite straightforward. Interpreting Article 2(1) of the ICCPR, the HRC underlined:

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[334] Preambular para. 2 of the ACHR.

[335] Though nationality is not mentioned *expressis verbis* in this non-exhaustive list of prohibited grounds of discrimination, it is clearly covered by the one referring to 'national origin'. For further developments on the principle of non-discrimination see: A.X. Fellmeth, 'Non-Discrimination as a Universal Human Right', *Yale Journal of International Law*, 34, 2009, 588; M. Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?', *Journal of Social Security Law*, 16(3), 2009, 120–138; D. Moekli, *Human Rights and Non-Discrimination in the 'War on Terror'*, Oxford, Oxford University Press, 2008; C.F.J. Doebbler, *The Principle of Non-Discrimination in International Law*, Washington, D.C./Mumbai/Nablus, CD Publishing, 2007; W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Antwerpen/Oxford, Intersentia, 2005; L. Weiwei, *Equality and Non-Discrimination under International Human Rights Law*, Research Notes 03/2004, Oslo, Norwegian Centre for Human Rights, 2004; O.M. Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, Leiden/Boston, Martinus Nijhoff Publishers, 2003; A. Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law', *Human Rights Law Journal*, 11(1–2), 1990, 1; W. McKean, *Equality and Non-Discrimination under International Law*, Oxford, Oxford University Press, 1983; M. Bossuyt, *L'interdiction de la discrimination dans le droit international des droits de l'homme*, Brussels, Bruylant, 1976; E.W. Vierdag, *The Concept of Discrimination in International Law*, The Hague, Martinus Nijhoff Publishers, 1973.

[336] According to the IACtHR, this is even a norm of *jus cogens*: IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, 99, para. 101.

> In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. … Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. … Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens.[337]

The HRC further delineated the basic rights of aliens deriving from the ICCPR. The list enumerated in its General Comment No. 15 on *The Position of Aliens under the Covenant* proves to be extensive:

> Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of Article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.[338]

The fundamental rights listed therein are not only applicable to non-citizens; most of them are generally considered as being grounded on customary international law.[339] Hence, the general applicability of human rights to non-citizens combined with the customary law nature of these fundamental rights has the side effect of anchoring

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[337] HRC, *General Comment No. 15*, para. 1.

[338] Ibid., para. 7.

[339] There is no room here for a detailed analysis of the customary law nature of the human rights referred therein. Among a plethoric literature see notably: R.B. Lillich, 'The Growing Importance of Customary International Human Rights Law', *Georgia Journal of International and Comparative Law*, 25, 1995–1996, 25; H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law*, 6, 1995, 287–397; T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, esp. 79–135.

migrants' rights within general international law. Thus, migrants' rights are universal and must be respected because migrants' rights are human rights.[340]

However, the position of migrants' rights under general international law is qualified by two main considerations. First, some of the rights listed above are conditioned by the legal status of their beneficiaries. It is true that such rights are not numerous for only two rights proclaimed in the Covenant require a legal presence within the territory. Nevertheless their impact is both significant and representative as the two rights in question specifically refers to the movements of persons: a regular presence is required for the right to liberty of movement and freedom to choose his residence within the territory (Article 12(1)), as well as for due process guarantees governing expulsion from the territory (Article 13).

Second, the legal position of migrants under general international law is much more contrasted when it comes to economic, social and cultural rights. On the one hand, the well-established principle of non-discrimination remains plainly applicable to these rights as notably confirmed by the ICESCR.[341] Furthermore, by contrast to civil and political rights, none of the rights endorsed in the ICESCR are conditioned by the nationality or legal status of their beneficiaries. As recalled by its supervisory body, '[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.'[342]

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[340] On the human rights of migrants see generally: G.S. Goodwin-Gill, 'Migration: International Law and Human Rights', in Ghosh (ed.), *Managing Migration*, 160–89; Weissbrodt, *The Human Rights of Non-Citizens*; G. Battistella, 'Migration and Human Rights: The Uneasy but Essential Relationship', in Cholewinsky & Pécoud (eds), *Migration and Human Rights*, 47; R. Cholewinski, 'The Human and Labor Rights of Migrants: Visions of Equality', *Georgetown Immigration Law Journal*, 22, 2007–2008, 177; P. Taran, 'Clashing Worlds: Imperative for a Rights-Based Approach to Labour Migration in the Age of Globalization', in Chetail (ed.), *Mondialisation, migration et droits de l'homme*, 403–33; Chetail, 'Migration, droits de l'homme et souveraineté', esp. 47–105; S. Saroléa, *Droits de l'homme et migrations. De la protection du migrant aux droits de la personne migrante*, Brussels, Bruylant, 2006; J. Fitzpatrick, 'The Human Rights of Migrants', in Aleinikoff & Chetail (eds), *Migration and International Legal Norms*, 169–84; Tiburcio, *The Human Rights of Aliens under International and Comparative Law*.

[341] Art. 2(2) ICESCR. Non-discrimination is an immediate obligation which is neither subject to progressive implementation nor dependent on available resources: *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, UN Doc. E/C.12/GC/20, 2009, paras 2 and 7.

[342] *General Comment No. 20*, para. 30. See also among other similar restatements: Committee on the Rights of the Child, *General Comment No. 6*, paras 12 and 18. One should add however that Art. 2(3) ICESCR provides a non-negligible – albeit circumstantiated – exception to the principle of non-discrimination. According to this provision, 'developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.' This exception is however circumscribed to the 'economic rights recognized in the present Covenant', excluding thus social and cultural rights. Furthermore, it can only be invoked by developing countries. As underlined by the delegate of Indonesia who proposed its insertion during the drafting of the Covenant, the only purpose of the provision was to protect the rights of nationals of former colonies against the abuses deriving from 'the dominant

On the other hand, one cannot deny that equal access of non-citizens to economic and social rights remains a highly contentious issue.[343] Overall, there is nonetheless a growing consensus for acknowledging the customary law nature of a core content of economic and social rights which equally apply to both citizens and non-citizens. Such evolution can be notably observed with respect to some of the core labour rights reaffirmed in several widely ratified ILO treaties.[344]

Besides the widespread and representative participation to these treaties, the customary nature of the basic norms enshrined therein can be inferred from the ILO Declaration on Fundamental Principles and Rights at Work:

> All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.[345]

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economic position enjoyed by [mostly Western] foreigners as a result of the colonial system.': UN Doc. A/C.3/SR.1185, 1962, para. 37. In practice, no developing State has invoked the exception contained in Art. 2(3): M. Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerpen, Intersentia, 2003, 415.

[343] See generally: V. Chetail & G. Giacca, 'Who Cares? The Right to Health of Migrants', in A. Clapham & M. Robinson (eds), *Realizing the Right to Health*, Zurich, Rüffer & Rub, Swiss Human Rights Book Vol. 3, 2009, 224-34; H. Lu, 'The Personal Application of the Right to Work in the Age of Migration', *Netherlands Quarterly of Human Rights*, 26, 2008, 43–77; O. Dupper, 'Migrant Workers and Social Security: An International Perspective', *Stellenbosch Law Review*, 18, 2007, 219–54; R. Cholewinski, 'Economic and Social Rights of Refugees and Asylum Seekers in Europe', *Georgetown Immigration Law Journal*, 14, 2000, 709–55.

[344] Forced Labour Convention (No. 29) (39 UNTS 55, 28 Jun. 1930 (entry into force: 1 May 1932)): 177 contracting States; Freedom of Association and Protection of the Right to Organise Convention (No. 87) (68 UNTS 17, 9 Jul. 1948 (entry into force: 4 Jul. 1950)): 152 contracting States; Right to Organise and Collective Bargaining Convention (No. 98) (96 UNTS 257, 1 Jul. 1949 (entry into force: 18 Jul. 1951)): 163 contracting States; Equal Remuneration Convention (No. 100) (165 UNTS 303, 29 Jun. 1951 (entry into force: 23 May 1953)): 171 contracting States; Abolition of Forced Labour Convention (No. 105) (320 UNTS 291, 25 Jun. 1957 (entry into force: 17 Jan. 1959)): 172 contracting States; Discrimination (Employment and Occupation) Convention (No. 111) (362 UNTS 31, 25 Jun. 1958 (entry into force: 15 Jun. 1960)): 172 contracting States; Minimum Age Convention (No. 138) (115 UNTS 298, 26 Jun. 1973 (entry into force: 19 Jun. 1976)): 166 contracting States; Worst Forms of Child Labour Convention (No. 182) (233 UNTS 161, 17 Jun. 1999 (entry into force: 19 Nov. 2000)): 177 contracting States.

[345] ILO, *Declaration on Fundamental Principles and Rights at Work*, adopted by the International Labour Conference at its Eighty-sixth Session, Jun. 1998. For further discussions about the customary law nature of the core rights reaffirmed in the ILO Declaration see notably: F. Maupain, 'Revitalization not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights', *European Journal of International Law*, 16(3), 2005, 458; P. Alston, 'Core Labour Standards and the Transformation of International Labour Rights

The plain applicability of these basic rights to migrants has been further confirmed in 2004 at the 92nd International Labour Conference:

> The fundamental principles and rights at work are universal and applicable to all people in all States, regardless of the level of economic development. They thus apply to all migrant workers without distinction, whether they are temporary or permanent migrant workers, or whether they are regular migrants or migrants in an irregular situation.[346]

At the regional level, the Inter-American Court of Human Rights has come to a similar conclusion in its Advisory Opinion OC-18/03 of 17 September 2003 on *Juridical Condition and Rights of the Undocumented Migrants*. It has deduced from the principle of non-discrimination and equality before the law some far-reaching assertions regarding labour rights of migrant workers:

> A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination. In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment.[347]

Regime', *European Journal of International Law*, 15(3), 2004, 493; J. Wouters & B. de Meester, *The Role of International Law in Protecting Public Goods. Regional and Global Challenges*, Leuven Interdisciplinary Research Group on International Agreements and Development, Working Paper No. 1, Dec. 2003, 21; Y. Daudet, 'Preface', in L. Dubin, *La protection des normes sociales dans les échanges internationaux*, Aix, Presses universitaires d'Aix-Marseilles, 2003, 3; J. Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work', *International Journal of Comparative Labour Law and Industrial Relations*, 17(3), 2001, 272–3; F. Lenzerini, 'International Trade and Child Labour Standards', in F. Francioni (ed.), *Environment, Human Rights and International Trade*, Oxford/Portland/Oregon, Hart Publishing, 2001, 308; J.F. Hellwig, 'The Retreat of the State? The Massachusetts Burma Law and Local Empowerment in the Context of Globalization(s)', *Wisconsin International Law Journal*, 18, 2000, 477, 505; Gross, 'Workers' Rights as Human Rights', 123. One should add that discrimination in employment is defined by Art. 1(1) of Convention No. 111 as comprising 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. However the prohibited ground of 'national origin' that is traditionally retained in this kind of non-discrimination clause was substituted for the more ambiguous term 'national extraction'.

[346] ILO, *Toward a Fair Deal for Migrant Workers in the Global Economy*, Report VI, International Labour Conference, 92nd session, 2004, 82, para. 229.

[347] IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, 99, para. 101. The rights in question notably include the prohibition of forced labour and child labour, freedom of association and to organize and join a trade union, fair wages and social security. For other regional restatements of non-discrimination in relation to economic and social rights of migrants, see: European Committee of Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France* (2004) Complaint No. 14/2003, paras 30–32; ACommHPR, *Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Angola* (2008) Comm. No. 292/2004, para. 80.

However, one should more generally observe that the principle of non-discrimination does not prohibit all differences in treatment. A differential treatment is still permissible provided that the criteria for such differentiation are 'reasonable and objective'.[348] The differentiation between citizens and non-citizens must thus be proportionate to the aims pursued by States.[349] This requires a subtle case-by-case assessment which confers on States a relatively broad margin of appreciation.

In sum, while the fundamental principle of non-discrimination is not contested as such, its exact implication for non-citizens is still difficult to grasp with certainty. This highlights in turn the schizophrenic nature of an international legal system which is grounded on two contradictory driving forces. On the one hand, due respect of non-discrimination is primarily ensured by a decentralized scheme entrusted to Nation-States. On the other hand, the 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction' is acknowledged as one of the founding principles of the international legal order instituted by the UN Charter (Article 55). But much more remains to be done to draw all the normative and practical consequences of such principle with regard to the distinction between citizens and non-citizens.

5. CONCLUSION

The movement of persons between States is framed by general international law. This has always been the case even if nowadays the trivialization of immigration control has contributed to obscure the role of international norms to such an extent that this field is frequently confused with domestic jurisdiction. The present inquiry into the customary law foundations of international migration law reveals a much more subtle picture. This overview makes clear that migration is regulated by a fairly substantial set of customary norms.

Besides the great diversity of issues associated with migration, customary international law is instrumental in identifying and highlighting the key concepts at stake and their applicable norms. This foundational source of public international law frames and structures international migration law and, by so doing, unveils the internal logic of this discipline. International migration law is grounded on three pillars: departure, admission and sojourn. Each of its core components is governed by several norms of general international law which interact and overlap alongside the migration cycle. The following table of the main applicable norms captures in schematic terms the customary law foundations of international migration law.

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[348] CESCR, *General Comment No. 20*, para. 13; CERD, *General Recommendation No. 30*, para. 4; ECtHR, *Gaygusuz v. Austria* (1996) 1996-IV, para. 42.

[349] Ibid.

Table 1 The pillars of international migration law

Departure	Admission	Sojourn
Right to leave any country, except when restrictions are provided by law, necessary to protect public order and consistent with other fundamental rights	Right to return to one's own country *Non-refoulement* Family reunion of children Prohibition of arbitrary detention Access to consular protection Prohibition of collective expulsion	Non-discrimination Prohibition of forced labour and child labour Right to a fair trial in civil and criminal matters Freedom of conscience and of association, except when restrictions are provided by law, necessary to protect public order and consistent with other fundamental rights

From a systemic perspective, the main interest of customary international law is twofold: it provides the global picture of international migration law and it anchors this discipline at the heart of general international law. Nonetheless, one should not overestimate the role of this source of international law. It is strong on the principles but rather weak for providing a detailed account of the field. In practice, customary international law cannot be dissociated from its broader legal environment in which treaty law and domestic legislation are still influential.

More generally, international migration law is facing two major difficulties. Its first challenge remains its implementation at the state level. This is arguably not so different from many other branches of international law which are at the crossroads between state sovereignty and individuals' rights (such as the law of armed conflicts to mention one well-known instance). Nevertheless it has become commonplace to observe the 'gulf between proclaimed standards and their application to migrants'[350] as regularly denounced by non-governmental organizations and the UN. Migrants are structurally vulnerable to abuses as non-citizens and their undocumented status can aggravate such vulnerability. Other external factors, such as recurrent economic crises, the spectre of terrorist violence and political manipulations and electioneering, have led to highly irrational fantasies that create an environment fertile to violations of migrants' rights.

The other key challenge of international migration law operates at the inter-state level. The last decade has witnessed a growing awareness of the need for inter-state cooperation. This is graphically illustrated by the wave of enthusiasm surrounding the discussions about the migration-development nexus. The credibility test of this new area of dialogue is its ability to promote a balanced and comprehensive approach with due regard to the interests of all stakeholders, thereby including not only immigration States but also emigration States, as well as the migrants themselves. States are more

[350] Cholewinski, 'The Human and Labor Rights of Migrants', 180.

aware than ever that migration is a matter of common interest which cannot be managed on a unilateral basis. But they still have to learn to collaborate on an issue that has been traditionally regarded as a core component of their sovereignty. This is perhaps the key issue at stake. In this field as well as in many others, 'the difficulty lies, not in the new ideas, but in escaping from the old ones, which ramify, for those brought up as most of us have been, into every corner of our minds'.[351]

[351] J.M. Keynes, *The Collected Writings of John Maynard Keynes. The General Theory of Employment, Interest and Money*, Vol. 7, London, Basingstoke, Macmillan; New York, St Martin's Press; Cambridge, Cambridge University Press, 1973, xxiii.