International Law and the Movement of Persons in the Greater Mekong Subregion

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1 Introduction

Individuals, families and communities are more mobile today than at any other period in human history. Globalization and its associated phenomena—transport, technology, economy, media—may have had the practical effect of 'shrinking' the world, but the ability of people to move from place to place to take advantage of global opportunities remains stubbornly unequal.

This paper examines the potential role of international law in shaping patterns of human migration between States in the Greater Mekong Subregion (GMS). The GMS is taken to include the five independent states of Cambodia, Lao People's Democratic Republic, Myanmar, Thailand and Viet Nam, together with the Yunnan Province of China. In total, the GMS has a population that exceeds 270 million people.

To many observers, the most obvious source of rules about migration is not international law but domestic law. This happens through the regulations that States promulgate to control the movement of migrants across their borders and to govern the treatment of migrants within their borders. Domestic rules exist at many levels: constitutional provisions, enacted legislation, subsidiary regulations, government policies, and the practices of state officials as they are applied 'on the ground'. Yet, despite the importance of domestic migration laws, it is international law that establishes the fundamental framework in which domestic laws operate, and it is international law that is therefore critical to understanding and explaining contemporary patterns of international migration in the GMS at the macro level.

1.1 Sources of international law

The rules of international law relevant to migration come from a number of sources. The two most important sources are (a) international conventions and (b) customary international law. A treaty is 'an international agreement concluded between States in written form and governed by international law … whatever its particular designation'. That 'designation' can vary widely according to the context: conventions can also be called charters, treaties, covenants or protocols. The second major source is customary international law, which is the law that has evolved from the practice or custom of States. Such a rule forms when a particular practice is adopted consistently by a widespread and representative group of States in the international community in the belief that the practice is binding on them as law.

These formal sources of law are increasingly supplemented by a myriad of 'soft law' derived from resolutions, recommendations, declarations and accords of international organizations and conferences. While such statements are not legally binding, they can be highly influential in guiding State practice and thus indicating the future direction of new norms of international law. Soft law has been a potent source of development of international migration law and policy (Martin 1989) and has increasingly been the route through which multilateral, regional, sub-regional and bilateral arrangements have sought to address migration issues (IOM 2003).

Rules of international law can have quite different impacts on the size, direction and composition of international migration flows in the GMS. International law may affect the *size* of migratory flows by either restricting or facilitating international migration. Treaties dealing with human smuggling and trafficking are directed towards suppressing these exploitative migrations. The Refugee Convention, by contrast, is intended to facilitate the migration of refugees to countries in which they will not face persecution. International law may also affect the *direction* of migration flows. Thus, the customary rule that every State must admit its own nationals to its territory is aimed at inward flows, while the human right to leave a country is aimed at outward flows. International law may also influence the *composition* of migration flows by affecting the distribution of migrants by age, sex or other attributes.

1.2 Outline of this paper

This paper is arranged as follows.

- Part 2 examines core international principles affecting the movement of persons *across* borders. These include the long-established power of a State to regulate cross-border movements as an attribute of state sovereignty, and limitations on its power to control entry and exit.
- Part 3 discusses the way in which international law regulates the treatment of migrants *within* a State's borders. The development of international human rights law has been a key constraint on state action in the United Nations era.
- Part 4 turns to two contemporary migration issues and international law's response to them. These are, first, the protection of women and children as vulnerable classes of migrants and, second, the suppression of cross-border smuggling and trafficking of people.
- Part 5 offers a brief conclusion that identifies the main trends in regulating international migration through international law.

2 Movement of People across International Borders

This Part examines the way in which international law establishes a framework for regulating the movement of people *across* international borders. The analysis begins with the power of a State to control population movements as an inherent attribute of its sovereignty and continues with an examination of circumstances in which that power has been progressively constrained in relation to entry and exit.

2.1 State sovereignty and the power of exclusion

A central attribute of sovereignty is the power of a State to regulate its territory by controlling the movement of people across its borders. All States do this to a greater or lesser extent. The modern system of states, conceived as a collection of territorial entities, thus poses challenges to migration that were largely unknown in previous periods of human history.

It is sometimes said that a core attribute of state sovereignty is the unfettered right of a State to deny foreign nationals (or 'aliens', as they are sometimes called) access to its territory, either by excluding them at the border or expelling them if they have already been admitted. At the end of the 19th century and the beginning of the 20th century, a number of Anglo-American judicial decisions made bold claims about the exclusion of foreign nationals under international law. For example, in *Nishimuru Ekiu v US* 142 US 651, 659 (1892) the United States Supreme Court stated:

> 'it is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to 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.'

The absolutist view put forward in this decision was a product of its time; a response to the desire to control large waves of Asian migration to the New World (Nafziger 1983). Although this view has been highly influential, international law now plays a greater role in shaping migration policy and practice by limiting each State's freedom of action in regulating access to and egress from its territory. These limitations have emerged from several developments—most importantly the growth of international human rights norms since 1945 and increasing economic integration of a global society (Plender 1988:2).

2.2 Limitations on a State's power to regulate entry

The admission of people into a State's territory remains one of the most jealously guarded prerogatives of national governments, into which international law has made few real inroads (Martin 1989:572). The practical consequence of this is that nearly all States can, and do, exercise control over entry at their borders. States have thus crafted immigration laws and policies to exclude or disfavor foreign nationals on many grounds, including medical history, projected health care burden, character, criminal history, absence of skills, lack of fluency in the local language, and financial security. This can be seen, for example, in the various kram, kret, anukret, and prakas promulgated in Cambodia on immigration since the mid 1990s. Similarly, the Thai *Immigration Act BE 2522 (1979)*, s 16, allows the Minister to exclude an alien from entering the Kingdom of Thailand to safeguard public peace, culture, morality or welfare, or whenever else the Minister thinks entry is improper.

However, there are two significant legal restrictions on the power of a State to control admission: a State's duty to admit its own nationals and its duty to admit refugees.

Admission of a State's own nationals

The principle that every State must admit its own nationals to its territory is widely accepted. Every individual has a human right to enter his or her own State. This right was proclaimed in the *Universal Declaration of Human Rights 1948* (UDHR), and has been reiterated in different ways in the *International Covenant on Civil and Political Rights 1966I* (ICCPR); in the *Convention on the Elimination of All Forms of Racial Discrimination 1966* (CERD); in regional human rights instruments in America, Europe and Africa; and in the constitutions of many States. For example, Cambodia's Constitution (Art 40) proclaims that 'Khmer citizens shall have the right to travel and settle abroad and return to the country', and similar provision is made in the Thai Constitution 2007 (Art 34) and in the Viet Nam Constitution 1992 (Art 68).

Admission of refugees

Although all people have the right to return to the State of their nationality, not everyone is able or willing to do so. A properly functioning government provides its citizens with a range of civil, political, economic, cultural and social rights and services including, for example, protection from crime and persecution (UNHCR 2007:8). If the system of national protection breaks down, international protection may be required.

The need for such protection became apparent in the tumult of the First and Second World Wars, which led to the displacement of persons on an enormous scale—many fleeing from persecution in the State of their nationality. Despite early hopes, the problem of refugees has never abated: war and civil unrest continue to generate successive waves of people seeking refuge from discrimination and persecution. The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that at the end of 2008 there were 34.4 million people within its mandate, including 9.1 million refugees worldwide. Their composition has changed significantly from the predominance of Europeans in the immediate post-war period.

The number of refugees and other persons of interest in the GMS are shown in Figure 1. Within the region, Thailand is host to the largest number of refugees, most of whom have fled conflict in Myanmar. Many of these are intractable, long-term refugees who have been 'warehoused' in refugee camps along the Thai-Myanmar border (Loescher and Milner 2006). However, the number of refugees is modest in comparison to the total number of persons of concern to the UNHCR, most of whom are stateless.

Figure 1: Refugees and other persons of concern in the GMS, end 2008

Country of origin	Refugees	Total person of concern
Cambodia	164	225
Lao PDR	—	—
Myanmar	—	790,861
Thailand	112,932	3,625,510
Viet Nam	2,357	9,872
Total	**115,453**	**4,426,468**

Source: UNHCR (2009) *2008 Global Trends.*

The *Convention on the Status of Refugees 1951* (as amended in 1967) creates a legal regime for the protection of refugees, and in doing so establishes an important qualification to the discretion of a State to determine who may enter its territory. The Refugee Convention has been ratified by 144 States but within the GMS only Cambodia and China are party to it. The reluctance of States to ratify the Convention is frequently based on their concern about loss of sovereignty, particularly in relation to the process for determining refugee status. This is a misapprehension, nevertheless some of the Convention's central obligations have probably passed into customary international law and thus bind even states that are not party (Goodwin-Gill 1986:901-902).

The beneficiaries of the Convention are those who are defined as refugees under Art IA(2), namely, persons who, owing to a well-founded fear of being persecuted on stated grounds, are outside the country of their nationality and are unable or, owing to such fear, unwilling to avail themselves of the protection of that country. The prohibited grounds of persecution are race, religion, nationality, membership of a particular social group, or political opinion.

Where a claimant arrives at the border of a State seeking refuge, the principal obligation under the Convention is the obligation not to return the refugee to the frontier of a territory where the refugee's life or freedom would be threatened on account of the persecution (Art 33). This obligation is called 'non-refoulement'. Where a claimant has already lawfully entered the territory of a host State, there is a parallel obligation not to expel the refugee, except on grounds of national security or public order (Art 32).

The obligation of a State not to turn back a potential refugee falls short of a more substantial right of asylum, namely, a positive right that inheres in an individual in jeopardy to enter and remain in a host State. The failure of the Refugee Convention to deal with the broader issue of asylum is a significant weakness in the international refugee system. In 1967 the General Assembly adopted a weak Declaration on Territorial Asylum (GA Res 2312(XXII)), which conspicuously failed to impose a duty on countries to grant asylum; and in 1977 an attempt to draft a more progressive convention at the United Nations Conference on Territorial Asylum also faltered. No effort has since been made to resuscitate the asylum convention project (Hathaway 2005:112).

Beyond the Refugee Convention, three GMS states (China, Myanmar and Thailand) are members of the Asian-African Legal Consultative Organization (AALCO), and thus subscribe to the Bangkok Principles on the status and treatment of refugees, which were adopted in 1966 and affirmed in

1987. These principles uphold the central principle of non-refoulement, but they are only a guide to national action and do not create binding obligations for its members.

2.3 Limitations on a State's power to regulate exit

The counterpart of the power of a State to regulate who comes into its territory is its power to determine who can exit, and in what circumstances. The question can arise in different contexts. A State may wish to a *expel* person whom it regards as undesirable, for example, because he or she has engaged in serious criminal conduct or poses a threat to national security. Conversely, a State may wish to *prevent* persons from leaving its territory because they are regarded as 'valuable commodities to be kept rather than permitted to increase the prosperity of other states' (Hannum 1987:4). Sometimes an individual's departure may be thought to pose a risk to the State, as where the person holds vital state secrets or poses a public health risk.

International law imposes wider restrictions on a State's power to regulate the exit of persons than it does on its power to regulate entry. Legal restrictions on a State's power to regulate the exit of persons, which are discussed below, apply both to state attempts to forbid exit and to state attempts to demand it. Despite the constraints of international law, States continue to impose a wide variety of controls on exit, not all of which are supportable on legal grounds (Ingles 1963, Plender 1988:95-131).

The right to leave any country

The right to leave any country, including one's own country, has been widely proclaimed in international law. It is embodied in the UDHR 1948, the ICCPR 1966 and CERD 1966; in regional human rights instruments in Europe, America and Africa; and in constitutions around the world. It is a right that attaches both to nationals and foreign nationals, and is thus broader than the 'right to return' discussed above, which applies to nationals alone.

However, like most human rights, the right to leave is not absolute. The ICCPR (Art 12(3)) permits the right to be limited if the restriction is (a) provided by law, (b) necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and (c) consistent with other rights recognized in the Covenant. International law thus recognizes that a balance must be struck between the individual's interest and the State's interest; between treating freedom to leave as a right and treating it as a privilege.

Against the background of these provisions, States appear to accept that restrictions on departure will not draw protest from other States if they are imposed for the following purposes (Plender 1988:120-121): (1) to prevent a national from engaging in actions abroad contrary to the security of his or her own State; (2) to prevent a national from evading an obligation to perform military or civilian service; (3) to allow a person to face trial for a serious crime, or to be punished after conviction; (4) to compel a person to reimburse the State for the cost of his or her repatriation; (5) to aid the collection of taxes or duties owed to the State; (6) to protect the interests of the family of a person (eg the payment of maintenance); and (7) to protect court processes (such as compelling appearance as a witness or defendant) or to prevent evasion of a civil liability.

Expulsion of foreign nationals

The power of a State to expel individuals from its territory is traditionally regarded as a natural incident of sovereignty. It is a power that may be exercised only over foreign nationals ('aliens') because nationals enjoy a right of return to their own State under international law and thus cannot generally be expelled in the first place. Although all States retain discretion to 'denationalize' individuals and then expel them, international law imposes limits on the exercise of that discretion (Donner 1994:150-159). The UDHR 1948, for example, states that 'no one shall be *arbitrarily* deprived of his nationality' (Art 15), but international jurisprudence does not provide

clear rules about when denationalization is arbitrary. Every case has to be considered in light of its facts and the reasons for the decision (Goodwin-Gill 1978:7–8). This uncertainty is reflected in some constitutions in the GMS. The Cambodian Constitution (Art 33), for example, provides that 'Khmer citizens shall not be deprived of their nationality', but also says that 'Khmer nationality shall be determined by law'.

Throughout history the power over foreign nationals has been frequently used 'to relieve the soil of an obnoxious guest' (Rolin-Jacquemyns 1888) and to support the mass expulsion of minorities. The motivations of States have been diverse, with appeals variously made to national security, economic competition, religious uniformity, ideological rigidity, cultural distinctiveness and racial purity (Cohen 1997:372).

The power of a State to expel a foreign national is constrained by the rules and standards of international law. The power of expulsion must be used in good faith, and not for some ulterior motive. Every State is given a 'margin of appreciation' in deciding what its essential interests are and whether a particular foreign national threatens them. In practice, domestic laws frequently limit the power of expulsion to cases where a foreign national has entered in breach of immigration laws, engaged in criminal activities, become involved in undesirable political activities, or otherwise threatens national security. Even then the State must carry out the expulsion in an appropriate manner—in accordance with law, and with due regard to the dignity of the individual and his or her basic rights as a human being (Goodwin-Gill 1978:307-310).

3 Human Rights of Migrants within Borders

Part 2 focused on the regulation of cross-border movement of people under international law. However, a substantial body of international law is directed to a different question, namely, how migrants should be treated *within* the borders of a State by virtue of their status as migrants or foreign nationals. The subject is of vital importance because many migrants are exposed to specific vulnerabilities and risks, which vary with their immigration status, gender, age, nationality, ethnicity, and occupation (Global Migration Group 2008:98).

The human rights of migrants are a vast field and many scholarly works have explored specialized aspects of the topic. Historically, there have been three important strains of legal development: (a) the long-established rules governing the manner in which States must treat foreign nationals present within their territory; (b) newer human rights norms regulating the way in which States must treat all persons by virtue of their common humanity; and (c) specific standards of treatment applicable to the sub-category of migrant workers, which have been developed under the auspices of organizations such as the International Labour Organization (ILO) and the United Nations General Assembly. There are areas of convergence between these three strains, which are discussed below.

3.1 Treatment of foreign nationals

All States are under an obligation, under customary international law, not to ill-treat foreign nationals present in their territory. Mistreatment may take many forms. One review of state practice identified four categories of claims against States for 'non-wealth' injuries to foreign nationals: personal injury and death; denial of justice; failure to protect; and expulsion (Yates 1983). In addition to this, there are a great many claims for 'wealth' injuries, namely, expropriation of the property of foreign nationals.

The obligation not to ill-treat foreign nationals is owed by one State to another, rather than by a State to the foreign nationals themselves. A breach of the obligation may give rise to a claim by State A that it has been injured by State B because of the manner in which State B has treated a

national of State A. In exercising this right, which is called the right of diplomatic protection, State A is asserting its own right to ensure respect for the rules of international law.

Despite the longevity of the rule, there has been longstanding disagreement about the standard of treatment that a State must afford to foreign nationals. Many developed States claim that foreign nationals must be treated according to an 'international minimum standard', regardless of how a State treats its own nationals. By contrast, many developing States claim that foreign nationals need only be treated according to the 'national standard', and that foreigners cannot claim rights more extensive than those offered locally.

The difference of approach becomes important where the national standard is lower than the international minimum, but this is not always easy to determine because the content of the international minimum is often not articulated. In practice, the development of international human rights law has brought about some convergence between these viewpoints. This is because it both defines a standard of treatment and makes that standard binding on developed and developing States alike (Tiburcio 2001:64–73).

International law on the treatment of foreign nationals is an important but imperfect tool for protecting the interests of migrants abroad. There are stringent preconditions to the exercise of diplomatic protection. These include: (a) the existence of a wrong imputable to the defendant State; (b) establishment of a genuine link of nationality between the aggrieved person and the claimant State; and (c) exhaustion of all local remedies in the defendant State. It should also be emphasized that the rules benefit only foreign nationals: they do not protect the significant class of migrants who become nationals of the receiving State and thus lose their alienage.

A State is not obliged to exercise its right to protect nationals who suffer injury abroad. This is a matter for the State's discretion and can be influenced by political considerations unrelated to the merits of the claim. Nevertheless there is an expectation that States will look after their nationals aboard. The Cambodian Constitution (Art 33) supports this view by stating that 'Khmer citizens residing abroad enjoy the protection of the State', while the Kram on Nationality 1996 (Art 3) goes further by stating that 'Khmer citizens who are living in foreign countries shall be protected by the State *through all diplomatic means*'.

3.2 International human rights norms

Since the creation of the United Nations in 1945 there has been a shift in international law from its traditional focus on the rights and duties of States to encompass the rights of individuals as legitimate subjects of international law (Scaperlanda 1993). This change has come about largely through the evolution of human rights norms in international and regional treaties, customary law, and the recommendations and declarations of international organizations.

The core human rights instruments are known as the International Bill of Rights, which comprises five documents: the *Universal Declaration of Human Rights 1948* (UDHR), the *International Covenant on Economic Social and Cultural Rights 1966* (ICESCR), the *International Covenant on Civil and Political Rights 1966* (ICCPR), and its two Optional Protocols. These Protocols deal, respectively, with individual complaints mechanisms and abolition of the death penalty. The International Bill of Rights is supplemented by a range of human rights treaties on specific topics, including the protection of particular classes of vulnerable persons (e.g. women, children) and the prohibition of particular types of conduct (e.g. race discrimination, torture).

The record of ratification of human rights instruments in the GMS is modest but improving. Five of the six GMS states are now party to the ICESCR (Myanmar excepted); and four of the six are now party to the ICCPR (Myanmar is again the exception, while China has signed but not yet ratified the Covenant). Twenty years ago, in 1990, no GMS country other than Viet Nam had adhered to either Covenant. It is still the case that no GMS country is party to the Optional Protocol to the ICCPR,

which allows individual complaints of human rights violations to be brought to the United Nations Human Rights Committee, although Cambodia has signaled its intention to be bound in the future by signing the Protocol.

The International Bill of Rights aims to promote respect for rights and freedoms of 'all peoples and all nations' (UDHR Preamble). For this reason, the instruments proclaim the rights of 'everyone' within the territory of a State and not merely individuals with a particular legal status as nationals or aliens. Generally speaking, migrants are thus included in the class of persons protected by the Covenants once they are lawfully within a State's territory. Two rights of particular relevance to migrants are the right to equality and the right to be free from discrimination on grounds that include race, national origin, or other status (ICCPR Art 2, 26; ICESCR Art 2).

However, the position of migrants is more nuanced in practice because many rights and freedoms are subject to permissible limitations which allow migrants to be treated less favorably than nationals (Fitzpatrick 2003). Under the ICCPR, these limitations may arise by express derogation in times of public emergency (Art 4), or more commonly because specific rights must be balanced with a democratic society's interests in national security, public safety, public order, and the protection of public health or morals (e.g. Art 14, 21, 22). Under the ICESCR, the equal treatment of migrants may be even less secure because economic, social and cultural rights can be balanced against the wider state interest of 'promoting the general welfare in a democratic society' (Art 4).

In summary, there is a matrix of circumstances in which States can, and do, make lawful distinctions between migrants and other people based on their status as foreign nationals ('alienage'). Typical examples concern the right to vote or stand for election to the legislature. Under the Cambodian Constitution (Art 34) and the Kram on Election Law 1997 (Art 33), only those who have Khmer nationality from birth are eligible to stand for election to the National Assembly, thereby excluding foreign nationals, even if they have longstanding ties with the country.

International law therefore permits a number of discriminatory practices affecting migrants. However, conformity with international law still requires any differential treatment of migrants to be in pursuit of a legitimate aim, objectively justifiable, and reasonably proportionate (Goodwin-Gill 1978:78). These are important constraints on state action because they require state-sanctioned discrimination to be carefully tailored to achieve legitimate objectives, and thus to reach a fair balance between migrant rights and compelling state interests.

3.3 Protection of migrant workers

One category of migrants that has drawn the special attention of international law is migrant workers. In part this is because of the existence of an international agency whose mission has been to champion the cause of these workers. The International Labour Organization (ILO), established in 1919 as part of the Treaty of Versailles, recognizes in its constitution the need to protect the interests of 'workers employed when in countries other than their own' (Preamble). International attention is also a product of the practical significance of the issue. It has been estimated that of the 174.9 million migrants in the world in 2000, 86.3 million (49 per cent) were migrant workers, and many millions more were their family members (ILO 2004:7).

The protection of migrant workers has particular significance for the GMS because of complex labour migration flows between countries within the GMS, and from the GMS to areas beyond. There is substantial labour migration to Thailand from Myanmar, Cambodia and Lao PDR; and there are even greater labour flows from the GMS region northward to Taiwan, Korea and Japan; southward to Malaysia; and even westward to India and Bangladesh.

International Labour Organization Conventions

The ILO has drafted two treaties dealing with migrant labour. These are the *Convention Concerning Migration for Employment* (ILO No. 97), adopted in 1949, and the *Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (ILO No. 143), adopted in 1975. The conventions have been largely ignored by the international community (Cholewinski 1997:135). ILO No. 97 has been ratified by 48 States, ILO No. 143 has been ratified by only 23 States, and no GMS state is party to either convention. Different reasons have been given for the apparent lack of interest, including the generality of the conventions; preference for a State's own nationals in economic matters; and concern that treaty obligations may impede the regulation of illegal migration (Fitzpatrick 2003:177). A review by the ILO itself concluded that the conventions lacked relevance to contemporary migration issues such as regional integration, commercialization of recruitment, and the rise of female labour migration (Leary 2003:233).

International Convention on Migrant Workers

The importance of the ILO conventions has been eclipsed by the conclusion of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990* (CMW). This comprehensive convention was drafted under the auspices of the United Nations General Assembly and adopts a new approach to migrant labour. In contrast to the ILO's methodology of minimum standards, the CMW focuses on the human rights of migrant workers, and thus promotes a degree of convergence with the human rights norms discussed above. Many of the convention's provisions reiterate the civil and political rights of the ICCPR and the economic, social and cultural rights of the ICESCR, but the convention goes further than this in extending existing rights and creating new ones (Nafziger and Bartel 1991). It seeks to prevent and eliminate the exploitation of all migrant workers and members of their families throughout the entire migration process, including preparation to migrate, adjustment in the receiving country, and access to social and medical services.

The CMW came into force in 2003, some 13 years after it was opened for signature. Currently, 42 States are party to the CMW but once again no GMS state is party to it. The States that have ratified the CMW to date are predominantly States that *send* migrant labour abroad. This attempt to protect nationals working overseas can only be successful, however, if receiving States also accept the Convention's obligations. To date, only about 10 per cent of state parties are net receivers of migrants, and it is their support that will ultimately hold the key to the success.

Some commentators remain pessimistic about the prospect of any real progress on this front in the near future (Taran 2000:92–93). Many reasons have been given for the low ratification record of the CMW. These include: incompatibility with existing national legislation; technical and financial challenges of implementation; coordination problems between government departments because of shared responsibility for migrant workers; lack of awareness of the CMW; failure of the CMW to differentiate sufficiently between regular and irregular migrant workers; and general lack of political will (Pècoud and de Guchteneire 2004; Cholewinski 2007:266–267).

The limited state action on the ILO Conventions and the CMW has stimulated additional measures to secure protection for migrant workers through the development of soft law (Betts 2008). In 2005 the ILO adopted a *Multilateral Framework on Labour Migration* as a means of providing guidance to migration policy makers through a collection of principles, guidelines and best practices. The Framework adopts a rights-based approach to labour migration, but does so within a non-binding framework that recognizes the sovereign right of all States to determine their own migration policies. By way of example, Principle 9 states that national laws and regulations should be 'guided by the underlying principles' of ILO 97, ILO 143 and the CMW, and that these conventions should be fully implemented if they have been ratified.

This softer language is more accommodating of both inherent differences between States and the need for gradual implementation. Cambodian law—for example the Kram on Labour Law 1997 and the Anukret on the Export of Khmer Labour Overseas 1995—reflect dual concerns about the rights of foreign workers in Cambodia and the rights of Cambodian workers overseas. In both cases, Cambodian laws and regulations show a concern for human rights issues that are also identified in international conventions, even though Cambodia is not party to those conventions.

4 Special Migration Issues

The preceding Parts have addressed the primary rules of international law that affect the movement of migrants *across* state borders and the treatment of migrants *within* state borders. In addition to these rules, international law addresses a number of specialized issues of great significance to contemporary migration. This Part discusses two emerging areas of international regulation: the position of migrant women and children, and measures to prevent human smuggling and trafficking.

4.1 Vulnerable migrant groups

Women and children are especially vulnerable migrant groups. In their capacity as 'foreign nationals', 'human beings' or 'workers', they are the beneficiaries of the general legal protections discussed above. But international law also affords them additional protections.

Migrant children

The special needs of child migrants have been recognized for many decades because of their vulnerability as refugees and their susceptibility to exploitation through smuggling and trafficking. The League of Nations acknowledged these concerns in its *1924 Declaration of the Rights of the Child*, and several treaties concluded in the first half of the 20th century were designed to suppress the trafficking of children and the exploitation of their labour (Bhabha 2003). In the present day, it is the *Convention on the Rights of the Child 1989* (CRC) that goes furthest in protecting the interests of children generally, including in the context of migration. The CRC has been ratified by 193 States, including all the GMS countries, and is the most widely subscribed human rights treaty in history.

Many of the CRC provisions echo the human rights articulated in the ICCPR. In the context of migration, these include the right to be free from discrimination; to leave any country and to enter one's own country; and to acquire nationality (Art 2, 10, 7). These rights are finessed by the overarching requirement that in all actions concerning children, including actions taken by the State, 'the best interests of the child shall be a primary consideration' (Art 3). For example, the CRC imposes an additional requirement that applications by a child to enter or leave a State for the purpose of family reunification are to be dealt with 'in a positive, humane and expeditious manner' (Art 10).

Several rights enumerated in the CRC have special importance for migrant children (IOM 2008). These include the right to an education, which shall be 'compulsory and available free to all' at the primary level (Art 28); the right not to be deprived of liberty (e.g. by immigration detention) except as 'a measure of last resort and for the shortest appropriate period of time' (Art 37); the right not to be separated from one's parents against one's will unless it is in the best interests of the child (Art 9); and the right to family reunification following separation (Art 10). The latter two rights are expressions of a value that has been widely accepted since the *Universal Declaration of Human Rights 1948*: the family is the fundamental unit of society and the natural environment for the growth and well-being of all its members, particularly children (Jastram 2003). This is expressly reaffirmed in the Preamble of the CRC.

The IOM recently noted that international law on children's rights has developed with considerable speed over the past two decades. Under the CRC, migrant children have gained a position as bearers of rights rather than mere objects of adult charity. Yet, in practice, discrimination often prevents migrant children from enjoying their rights, and there is ample room for development of the notion that children should be not only protected, but respected, as human agents (IOM 2008:73).

Migrant women

The position of migrant women has been more controversial. Historically, concerns about the rights of migrants have been focused on male workers, with the impact on women reduced to a subsidiary role as accompanying family members. However, the demography of international migration has changed. The increasing 'feminization of migration' is reflected in the fact that half of all international migrants are now women and that, in increasing numbers, women migrate independently in search of jobs rather than as dependants of male workers (UN-INSTRAW 2007).

The patterns of international female migration differ fundamentally from those of men. A sizeable portion of female migrants are employed in the informal domestic sphere in receiving States—for example as household workers—reinforcing their cultural association with the home. These jobs are often poorly remunerated, socially marginalized, ineffectively regulated, and potentially abusive. The frequency of adverse experiences, despite years of regulation, has led some commentators to describe the international legal framework as a 'pious but ineffectual' response, which exacerbates the social and cultural inequalities of migrant women (Fitzpatrick and Kelly 1998:48, 50).

International treaties contain many protections for migrant women, at least in a formal sense. The *Convention on Migrant Workers* (CMW) includes many provisions that speak to the concerns of migrant women: the prohibition of cruel, inhuman or degrading treatment (Art 10); the prohibition of forced labour (Art 11); an entitlement to effective protection by the State against violence, threats or intimidation (Art 16); and a guarantee of working conditions in keeping with principles of human dignity (Art 70). Criticisms of the international framework are thus, in part, claims about the ineffectiveness of international legal norms in fostering real improvements in the day-to-day experience of migrant women. The absence of robust enforcement mechanisms for human rights at the international level compels the system to rely on the power of international organizations and NGOs to expose abuses and bring about incremental change by 'naming and shaming'.

The legal protections for migrant women set out in the comprehensive framework of the CMW should not be taken to diminish the importance of other instruments for articulating the human rights of this vulnerable class of migrants. Other major human rights instruments—ICCPR, ICESCR, CERD and CEDAW—also embody core principles of equality and non-discrimination, and establish mechanisms for reporting, monitoring and promoting compliance (Satterthwaite 2005:3–4). Added to this is the more vigorous role now taken by a variety of United Nations bodies whose functions include gathering and analyzing data, raising awareness, and setting enlightened standards for the treatment of migrant women. These bodies include the Secretary-General; the General Assembly; the Human Rights Council (and its predecessor, the Commission on Human Rights); the Office of the High Commissioner for Human Rights; and the thematic mandates given under the auspices of the Human Rights Council, such as the Special Rapporteurs on the human rights of migrants, violence against women, and trafficking in persons.

4.2 Human smuggling and trafficking

Human smuggling and human trafficking are related but different activities. Smuggling is the illegal movement of persons across international borders for profit: the smuggler and the smuggled are 'partners, however unequal, in a commercial transaction' (Gallagher 2002:25). Trafficking is the

illegal movement of persons across international borders by coercion or deception. The trafficker typically exploits the trafficked person by selling the latter's labour or sexual services in the receiving State. The differences between the activities explain why most smuggled migrants are men, while most trafficked migrants are women and children. The latter are often coerced into prostitution, pornography, forced labour, child adoption, and even the sale of human organs. A global analysis of 21,400 trafficking victims in 2006 revealed that 66 per cent were adult women and a further 25 per cent were children—girls and boys in equal proportion (UNODC 2009:11).

The full extent of global smuggling and trafficking is impossible to quantify but by many accounts these practices are widespread and have grown exponentially in recent years. Many reasons have been given for this increase, including the spread of war, persecution and violence; the decline in opportunities for legal migration; and the inadequacy of enforcement mechanisms. In addition, the involvement of organized crime has spawned a multibillion dollar global industry that justifies its description as 'the fastest growing criminal market in the world' (Kyle and Koslowski 2001; Castles and Miller 2003: 115–116).

Widespread international concern about these burgeoning practices has led to concerted international action, including the acceptance of new international laws under the 'Vienna process'. In 2000, the United Nations adopted a *Convention against Transnational Organized Crime*, which included two Protocols to address human smuggling and trafficking. The *Protocol against the Smuggling of Migrants by Land, Sea and Air* came into force in 2004 and currently has 123 parties. Three GMS countries (Cambodia, Lao PDR and Myanmar) are party to the Protocol, and Thailand has signed but not yet ratified it. The Smuggling Protocol contains some protections for smuggled migrants but—perhaps because they are assumed to be voluntary actors in an illegal enterprise—this is not its focal point. Rather, the Protocol seeks to criminalize smuggling and strengthen border controls to suppress smuggling.

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* came into force in 2003 and currently has 137 parties. Four GMS countries (Cambodia, China, Lao PDR and Myanmar) are party to the Protocol, and Thailand has signed but not yet ratified it. The Trafficking Protocol also seeks to criminalize trafficking and strengthen border controls. However, it goes further than the Smuggling Protocol in promoting cooperation between countries to eradicate exploitative practices, and in protecting the human rights of the victims of trafficking. It has been said that the Protocol's human rights protections are weak, mostly optional, and fall short of the norms articulated in other international instruments (Gallagher 2001; Muntarbhorn 2003:156). The reason lies in the genesis of the Protocols in the Vienna process, which sought to further the interests of developed States in suppressing organized crime and facilitating orderly migration rather than advancing the human rights of individuals unwittingly involved in irregular migration (IOM 2008:62).

The Smuggling and Trafficking Protocols did not arrive in a legal vacuum. There are age-old treaties dealing with these topics. They include several instruments from the first half of the 20th century aimed at crime prevention and the suppression of trafficking in women and children. These include the *International Convention for the Suppression of the White Slave Traffic 1910*; the *International Convention for the Suppression of the Traffic in Women and Children 1921*, and the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1950*. These have been supplemented more recently by treaties that adopt a sectoral approach and give greater emphasis to human rights and the protection of victims. For example, both CEDAW (Art 6) and the CRC (Art 35) contain express provisions dealing with the trafficking of women and children, respectively. Layered upon these instruments are innumerable calls in international declarations for governments and others to take concerted action, internationally and regionally, against human smuggling and trafficking. Accordingly, there is no shortage of international legal principles—hard and soft—articulating the necessity for prompt and effective action.

What remains to be done is to move beyond the promulgation of new international laws to the comprehensive implementation and effective enforcement of existing norms at a national level. In this regard, a survey of legislative and institutional responses to human trafficking, conducted by the United Nations Office on Drugs and Crime in 2007–08, is instructive (UNODC 2009). Of the 155 States surveyed, approximately 80 per cent had introduced legislation incorporating a specific offence of trafficking in persons, which was more than double the response in 2003. In addition, 54 per cent of States had introduced a special anti-human trafficking police unit, 91 countries reported at least one human trafficking prosecution, and 73 countries reported at least one conviction. Countries in the GMS have been active in this field, with a sizeable number of criminal investigations, prosecutions and convictions for trafficking—although results vary considerably from country to country.

While this general trend has been hailed by UNODC as 'tremendous progress' in a short period of time, there is still a large gulf between criminalizing certain types of conduct and eradicating that conduct. Closing the gap between what States promise and what they deliver is a substantial challenge. Successful action needs to address both the demand and supply sides of the problem, with the object of converting irregular flows into orderly migration streams. Suggestions for action have included: robust national monitoring programs; better resourcing of national law enforcement; educational and awareness programs; and bolstering in-country and inter-country cooperation to counter trafficking and smuggling (Muntarbhorn 2003:165–166).

5 Conclusion

International law is an imperfect framework for regulating international human migration. It has developed in a piecemeal fashion over a very long period to deal with issues of concern at particular points in human history. While there are many gaps and overlaps, it is a system in evolution and there have been many important advances in recent decades. These are significant for all countries in the GMS.

There has been a gradual shift in the relative importance of different sources of international law in the field of migration. Treaties have become progressively more important in shaping developments over an ever larger number of specialized migration topics. Nevertheless, customary law remains a significant source of binding legal norms in areas that have never been codified by treaty, and for States that lie outside a particular treaty regime.

While the number of concluded treaties on migration continues to grow, ratification of those treaties remains poor in some subject areas, and in some geographic regions. There is evidence of this in the GMS where there are no ratifications of the major conventions dealing with migrant workers, and significant gaps in international refugee protection.

A further challenge to the effectiveness of international migration law is non-compliance with treaty obligations, even among those States that have accepted them. Legal regimes can only be truly effective if States comply both with the letter and spirit of the law. Compliance with international legal obligations is often encouraged by 'naming and shaming' in international forums—a process whose effectiveness has been improved immeasurably by actors in the non-government sector. International law has been forever changed by the empowerment of NGOs (Alvarez 2005:611), but there is a continuing need for these informal compliance mechanisms to be complemented by effective legal measures.

Since the Second World War there has also been an important shift in the language of international migration law, away from a state-centric view of the relevant rules towards one that recognizes individuals as legitimate subjects of international law. An example of this phenomenon is the way in which international human rights norms have gradually supplanted customary law principles

regarding the standard of treatment that a State must afford to foreign nationals within its territory. This shift has been of great benefit to migrants, who are now generally entitled to the protection of international norms (such as non-discrimination) wherever they sojourn.

Despite the shortfalls in existing arrangements, international institutions, in all their variety, are instrumental in shaping international migration law and policy. Not only do they cast a watchful eye on compliance with existing norms, but they mold the debate on migration by setting agendas that move states incrementally towards more enlightened policies (Martin 1989:551). For example, there are multiple regional consultative processes on migration in the Asia-Pacific region, which extend to some or all GMS states. These include the Colombo Process and Abu Dhabi Dialogue on migrant workers, the Bali Process on smuggling and trafficking, and the Asia-Pacific Consultation on refugees and displaced persons. While falling short of creating binding legal obligations, these processes provide an institutional framework for cooperation, and sometimes generate 'soft law' norms that may later crystallize into 'hard law'.

States are unlikely anytime soon to renounce their treasured power to influence the size and composition of their populations by regulating the flow of people across their borders. Yet international law has an unquestionable role to play in shaping those movements in the GMS. It empowers States by giving legal legitimacy to their role in controlling the flow of people across borders. It constrains States by articulating generally accepted norms of behavior, which reflect the often opposing interests of other stakeholders. It sets aspirational standards for international society and drives an agenda for enlightened change in the treatment of different classes of migrants. Over time, goals set in a spirit of optimism may come to operate as real constraints on state behavior (Martin 1989). And it provides an institutional framework for promoting compliance with international norms and facilitating their progressive development.

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Abbreviations

AALCO	Asian-African Legal Consultative Organization
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women 1979
CERD	Convention on the Elimination of All Forms of Racial Discrimination 1966
CMW	Convention on Migrant Workers 1990
CRC	Convention on the Rights of the Child 1989
GMS	Greater Mekong Subregion
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic Social and Cultural Rights 1966
ILO	International Labour Organization
IOM	International Organization for Migration
NGO	Non-government organization
PDR	Peoples' Democratic Republic (Lao)
UDHR	Universal Declaration of Human Rights 1948
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime