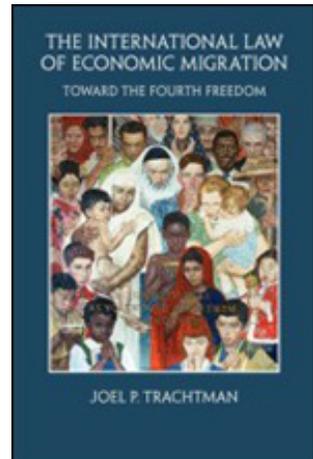

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Introduction: Toward the Fourth Freedom

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Introduction: Toward the Fourth Freedom

It was permissible from the beginning of the world, when everything was in common, for anyone to set forth and travel wheresoever he would.

—Francisco de Vitoria
(quoted in Plender [1988], p. 2)

International migration is the missing link between globalization and development.

—Rubens Ricupero
(quoted in International Organization for Migration [2001])

*Something there is that doesn't love a wall,
That sends the frozen-ground-swell under it,
And spills the upper boulders in the sun,
And makes gaps even two can pass abreast.*

—Robert Frost (1914)

This book explores the economic and political ramifications of liberalization of national rules of migration through international legal agreements, examines the existing international law of economic migration, and develops detailed conjectural proposals for new international legal rules in this field.¹

As I reviewed the prior literature on the law of economic migration, and as I interviewed policymakers and scholars active in this field, it was continually impressed upon me that “people are not commodities.”² When I began my research, I tended to set aside this caveat, thinking that this truism was simply a way to avoid grappling with the hard issues of whether to have, and how to structure, international legal commitments on labor migration. However, as I learned, and thought,

more, I understood that the point is that people are complex, with complex needs and relationships.

Goods are often single purchase events and do not broadly entail a continuing relationship between buyer and seller. Services, while often entailing more complex and durable relationships than a purchase of goods, are relatively unidimensional. Individuals, on the other hand, are multidimensional, and their movement as workers involves long-term relationships of great complexity with governments and with employers.

Throughout my research for this book I was also periodically reminded of the aphorism attributed to the Swiss author Max Frisch: “We imported workers and got men instead.” Men and women come with cultures and skills and grow up in dense familial and social networks. They have spouses and children. They need education, health care, political engagement, and all the other fruits of society. They bear responsibilities to society as well, including taxes and perhaps military service. So, as we discuss migration, we must recognize that it requires breaking and restructuring many relationships: a costly endeavor in the deepest sense.

Despite this complexity, and despite these costs, individuals sometimes determine that migration is their best option. However, there are substantial barriers in place today, which prevent people from achieving their desires to move to seek a better life. These barriers often demean human welfare. So it seems worthwhile to grapple with the complexity in order to evaluate whether and how to unlock substantial welfare gains. But it is important to say that at stake is welfare in the broadest sense: the right and power to move should be seen as an essential liberty, which is today highly constrained.

Individuals will only decide to undertake migration if they perceive that it is worthwhile to them. Throughout history, some have decided to do so while many others have not. But we must also recognize that there are costs and benefits that are external to the individual migrant. The migrant may be permitted to decide whether to accept these costs and benefits for his or her own family, but what about costs and benefits of the migrant’s decision that are felt by the migrant’s former compatriots, or by the migrant’s new hosts? The external effects of migration legitimate the desire to regulate migration to some extent.

MIGRATION, THE STATE, AND INTERNATIONAL LAW

For millennia, human migration was unconstrained, and people and even peoples often moved to seek a better life (Diamond 1999). While migration was a mechanism of social and biological evolution, by which stronger societies overcame weaker ones, and human society expanded its geographic scope and adaptive capacity (Chua 2007), it was also a mechanism of integration, forming multicultural societies which then became new cultures.

One of the main roles, and powers, of the modern state involves citizenship, and the capacity to exclude outsiders. This role of the state stands in opposition to the natural movement of individuals, limiting human freedom. On the other hand, one might argue that the freedom to associate within a state, even exclusively of others, is an important innovation in human freedom and enhances the ability of individuals to develop unique and enhanced cultures. Perhaps freedom is on both sides of the argument. But to the extent that these freedoms are inconsistent with one another—which merits further analysis—what is the best trade-off?

The role of international law in this as in other contexts is to allow states to constrain themselves where their unregulated action would be less desirable than action constrained by international law. International law has not broadly responded to state restraints on immigration. There are a number of reasons why there is little international law addressing state restraints on immigration. One reason is that these restraints are fairly recent.

The United States, which was once a nation of immigrants, only began to restrict immigration at the federal level in 1875, and then restrictions were limited to those who were destitute, engaged in immoral activities, or physically handicapped.³ These restrictions seem to be intended to protect the public fisc, as opposed to jobs. However, the U.S. Chinese Exclusion Act of 1882 responded to concerns about competition from cheap immigrant labor, as well as racism. In fact, throughout the history of immigration restrictions, we see the influence of both protectionism and racism. However, the late nineteenth century was still a period of effectively liberal policies toward migration. “Roughly

60 million Europeans emigrated to the New World between 1820 and 1914” (O’Rourke 2004, p. 2). This liberalism ended in the imposition of country of origin quotas during the early twentieth century (O’Rourke 2004).

During the early twentieth century, many popular destination states began to establish restrictions on immigration. During the past sixty years, global society has made important strides toward free movement of goods, money, and even some types of services. Yet human migration for economic and noneconomic reasons remains broadly constrained.

This book explores the law and policy of international economic migration. It analyzes the economics and politics of migration in order to assess the fit between the legal rules and institutions that presently exist to govern international economic migration, and the goal of maximizing welfare. In fact, there are practically no multilateral international legal rules regulating migration for economic purposes. This work shows that, in order to establish the domestic and international political conditions for welfare-enhancing liberalization of migration, it may be necessary to establish complex and binding international legal agreements regarding liberalization.

FOUR FREEDOMS

In connection with trade in goods and services, and also in connection with movement of workers, the European Union (EU) is a paradigm of advanced integration. Within the EU, the drive toward free trade and economic integration has been defined in terms of four freedoms: free movement of 1) goods, 2) services, 3) money, and 4) labor. The EU has made important progress in achieving all four freedoms, including the fourth freedom: legally authorized free movement of labor. In the global setting, we have done little to establish, or reestablish, the fourth freedom.

In the United States during the Second World War, Franklin D. Roosevelt declared four other freedoms for each citizen of the globe: 1) freedom of expression, 2) freedom of conscience, 3) freedom from fear, and 4) freedom from want. This fourth freedom—freedom from

want—is directly linked to free movement of labor: free movement of labor enhances the capacity of individuals to be free from want. While throughout history migrants have moved to avoid oppression of all kinds, today many would like to move to obtain better livelihoods. The European fourth freedom is closely related to Roosevelt’s fourth freedom: freedom from want can be enhanced by freedom of movement of labor.

This fourth freedom seems to have intrinsic value, but it also has enormous instrumental value. The dual pressures of globalization and demographic imbalance suggest the utility of greater legal structure to facilitate and regulate economic migration.

Demography and Destiny

One important set of determinants of the quantity of migration is supply of and demand for work abroad.

On the demand side, the World Bank Independent Evaluation Group (2006, p. 28) explains why demographic trends—principally the relative youth of developing country populations—suggest that the number of people who wish to migrate from developing to high-income countries will rise in the period through 2026. While the global workforce is expected to increase substantially in the decade ending in 2010, the vast majority of the increase will take place in developing countries. As developing countries have relatively young populations, and as the returns to migration are greater the earlier in one’s life that one migrates, it is appropriate to anticipate increased numbers of people in developing countries interested in emigration (World Bank Independent Evaluation Group 2006, p. 28).

Demography also operates on the “supply” side in this model: the supply of immigration opportunities would be expected to increase as developed country populations age. The workforces in developed countries are about to begin a decline. The high-income countries will experience a general decline in working-age population during the period 2010–2025 (OECD 2007; World Bank Independent Evaluation Group 2006, p. 29).

Wealthier states such as Germany, Japan, and the United States are anticipating labor shortages that will have substantial adverse conse-

quences for their prosperity, for their ability to provide services to aging populations, and for their ability to fund social welfare programs (McDonald and Kippen 2001). The stock of immigrants to high-income countries increased at about 3 percent per year from 1980 to 2000, up from a 2.4 percent pace in the 1970s (World Bank Independent Evaluation Group 2006, p. 27). About 70 percent of this increase is accounted for by the United States and Germany, which only account for 40 percent of the population of high-income countries. The Pew Research Center has recently stated that, based on current trends, “The population of the United States will rise to 438 million in 2050, from 296 million in 2005, and 82 percent of the increase will be due to immigrants arriving from 2005 to 2050 and their U.S.-born descendants . . .” (Passel and Cohn 2008).

In some advanced states, these shortages arise from fertility rates that are below replacement levels. It is estimated that between 2010 and 2030, the number of employed people in Europe will fall by approximately 20 million, while the number of older people will rise from 71 million to 110 million (Commission of the European Communities 2003a,b).

Thus, there are prospective increases on both the demand and supply side of international migration. Therefore, both wealthy and poor states will find themselves responsible to manage and regularize, even encourage, flows of migrant labor—flows of migrants. While this need will be reflected in part in unilateral policy measures, it will become important, for a variety of reasons addressed in this work, for states to cooperate in managing global migration. In some cases, it will be beneficial to enter into international agreements simply to manage flows of immigrant labor. There are a number of historical examples of international agreements used to regulate economically inevitable flows of workers, and there exist today hundreds of bilateral labor mobility agreements that do so. In other cases, it will be useful for states to make commitments to liberalize their restrictions on immigration.

FORCES BEHIND THE LAW OF MIGRATION

There are great gains in welfare to be made in freeing up international economic migration, just as there have been and continue to be great gains to be made in freeing up international trade in goods, services, and money. The global and sectoral welfare effects of migration will be examined in detail in Chapter 2.

It is estimated that a modest increase in industrial countries' quotas on incoming temporary workers, equal to an aggregate of 3 percent of their current workforces, would result in increased world welfare of more than US\$356 billion a year by 2025 (World Bank Independent Evaluation Group 2006). Scaled to the same reference year, 2001, the gains from a *3 percent increase* in the stock of migrants is \$175 billion, while the gains from *total* trade liberalization are \$155 billion (World Bank Independent Evaluation Group 2006, p. 41). "If international policy makers were really interested in maximizing worldwide efficiency, they would spend little of their energies on a new trade round or on the international financial architecture. They would all be busy at work liberalizing immigration restrictions" (Rodrik 2001).

These gains would be shared by developed and developing countries, although the greatest portion of gains would accrue to the migrants themselves. But perhaps even more important, migration, if it is managed carefully, can help to raise the living standards in poor countries. In order to achieve these gains, it is necessary to overcome obstacles to bargaining, and to assist political processes in realizing the magnitude of the potential gains. With so much welfare improvement to be gained, states will endeavor to overcome these obstacles to bargaining. Chapter 3 addresses the possibilities for doing so through international legal commitments.

So, poverty reduction may be an important goal of liberalization of migration. However, O'Rourke and Sinnott (2003) argue that

compared with the late 19th century . . . early 21st century policies make it far more difficult for developing countries to use migration as a means of convergence on the rich. One hundred years ago mass emigration raised living standards significantly in countries such as Ireland, Italy and Sweden, enabling them to converge on the core countries of the day, Britain and the U.S. Indeed, mass

migration can account for as much as 70 percent of the convergence in living standards worldwide which occurred during the late 19th century . . . Today's rich country immigration policies not only prevent developing economies from raising their average living standards via emigration; by admitting skilled workers rather than unskilled workers, these policies may actually hurt developing economies via the brain drain effect, and also make them less equal (by raising the relative wages of skilled workers).

There are important barriers to realizing increased welfare and increased economic equality. But the critical point is that these are policy barriers rather than natural barriers. The goal of this work is to explore these barriers, and to suggest international legal responses.

In economic terms, migration is a result of demand and supply. To think of this relationship in economic terms from the standpoint of the potential migrant deciding whether to migrate, we might understand the present value of life opportunities at home, plus the cost of migration, as the total cost to the potential migrant, while the present value of life opportunities in the destination state is the benefit to the potential migrant. Whenever the benefit exceeds the cost, the potential migrant will wish to migrate. Of course, each individual will have different opportunities at home and in the destination state, and different ways of valuing various components of their opportunities.

Of critical importance, now and in the future, will be demographic supply and demand, as discussed above. Pressure to emigrate from poor countries is increasing (Ghosh 2000, pp. 6, 10). Differences in wages, largely due to differences in productivity, drive the demand. "For example, in 1975 per capita GDPs in the high-income countries were on average 41 times higher than those in low-income countries, and 8 times higher than in middle-income countries. By 2000, high-income countries had per capita GDPs that were 66 times those in low-income countries and 14 times those in middle-income countries" (Martin 2004, p. 4). "Despite the public announcements by policy-makers in numerous regional and international fora for a concerted use of aid, trade, and foreign investment to reduce emigration pressure in labour-abundant countries, there is little evidence that the strategy is being consistently applied or that it is making a real impact at the global level" (Ghosh 2000, p. 17).

Source countries are sometimes ambivalent, and would at least be expected to vary in their policy responses to emigration. First, emigration can reduce pressure on domestic employment markets, and can produce remittances, which can be an important source of foreign exchange. So, important countries such as the Philippines and India have sought to promote emigration. However, the risk of brain drain might raise concerns in particular circumstances.

Demand to migrate is not exclusively dependent on demography and economic circumstances. Reduction of transportation costs due to new transportation technologies has reduced the costs of migration to a point within reach of the very poor. This change has increased the number of potential migrants (Hatton and Williamson 2005, p. 1). Costs imposed by the destination country's immigration system also affect the decision to migrate. For poor people, these costs have been a significant barrier.

Demand to migrate is also affected by conditions in departure countries, compared to conditions in destination countries. So, in addition to the critical factors of wages and productivity, human rights abuses, insecurity, disease, and other negative factors in the departure countries, combined with their opposites in the destination countries, would be expected to affect demand for migration. Famines, revolutions, government crises, and ethnic cleansing and other action have contributed to the timing and source of migration (Hatton and Williamson 2005, p. 213). There are important links between economic migration and forced migration, and the border between these phenomena is not always clear. In fact, any regime for management of either voluntary or forced migration must deal with the problem of definition and enforcement of categories.

The cost of migration is also dependent on the costs of travel and information, and on the ease of obtaining legal permission for migration to the destination country, or on the ease of evading enforcement of legal restrictions. It is important to note that migration is facilitated by reduced costs of transportation and communication. Perhaps less obvious as a causal factor is greater information and education, increasing awareness of better conditions abroad. Migration can also build upon itself, as emigrants supply information and support to future emigrants.

Earlier migration has resulted in “diasporas” in developed countries that can promote and facilitate future migration.

Restrictions on immigration reduce the supply of immigration opportunities. They can also be understood as increases to the price of migration, as the restrictions themselves would have effects on the cost of migration. Supply and demand will adjust toward equilibrium. Occasionally, shocks will occur, changing some of these parameters and thereby changing the relevant prices.

As these demand and supply factors change, there is no particular reason for the relevant law to remain static. “With respect to migration, national regulatory regimes and municipal law in general simply must accommodate the development of international markets for skilled and unskilled workers” (Hollifield 2000, pp. 75, 87; Sassen 1996). The same perspective applies to the applicable international law. In fact, all law is to some extent dynamic, as it responds to changed conditions and aspirations. In addition to being molded to fit social conditions, law can also play a leading role, driving social change.

Migration, Globalization, and Law

Migration is a parameter of globalization, and it also has complex relationships of substitutability and complementarity with other parameters of globalization: movement of goods, services, information, money, and investment. Rubens Ricupero states that “migration is the missing link between globalization and development” (International Organization for Migration 2001).

Freeman (2006) examines the degree of international economic integration in labor, evaluating both quantities of movement of labor compared to movement of other factors, and price differentials in labor compared to price differentials in other factors. He finds that the labor market “is the least developed part of globalization.”

Harris (2002, p. 93) describes a globalization sequence between freeing trade (1950–1980 and beyond), freeing capital (1980 onward), and freeing movement of people. If Harris is correct regarding this sequencing, it might help us to understand why trade has been liberalized while migration has not. Harris sees xenophobic resistance to liberalization of immigration as nothing short of a survival of “the old

order of states and the reality of warfare between them” (Harris 2002, p. 94). Indeed, xenophobia, as well as a tendency to value the welfare of compatriots over that of foreign persons, is an important reason for antipathy to globalization. For Harris, the resistance to liberalization of migration is ideational, rather than necessarily economic. Law can play a leading role in changing ideas.

It seems true that free migration would challenge the nation-state-based world order, insofar as under a regime of free migration the composition of states would no longer be formally based on “nations,” and would be fluid. The ruler-subject relationship would be broken, and citizens would have greater freedom to “vote with their feet.” Furthermore, as some degree of a global society is formed through globalization, it seems increasingly reasonable to see the freedom to move within this global society—global movement—as a basic liberty comparable to the fundamental freedom to move within a national state.

International Law of Economic Migration

States have found it useful to exchange authority with others in particular contexts: this is the role of international law.⁴ What are the changing social elements that would lead states to agree to reduce their authority further in the field of migration? First, demographic change will result in increasing demand for certain types of labor in the developed world.⁵ Second, individuals in poor countries will continue to seek better standards of living in wealthier countries. Finally, there are large economic surpluses to be captured from mobility. These surpluses arise from rather large wage differentials between developing and developed countries; labor mobility will allow individual workers, their employers, and eventually consumers to share these surpluses.

This study assesses the existing international law of economic migration, both descriptively and analytically. While the world has found it useful to establish rules regarding the entry of foreign goods, services, and investment, there is a remarkable scarcity of international law establishing commitments of states to admit foreigners to work in their markets (Aleinikoff 2003, p. 2). In 1992, Sohn and Buergethal (1992) wrote, “The preoccupation of many governments with international trade in goods and services across national borders has resulted

in an elaborate set of international rules on that commercially important subject. Less attention has been paid to the development of the rules governing the movement of human beings across national borders.”

On the other hand, there are significant rights accorded to migrants upon their arrival. Authorized migrants are entitled to a full panoply of human rights—but while it is clear that migrants have rights, few people outside of a few regional arrangements generally have the right to *be* a migrant—to immigrate.⁶ The fourth freedom still seems neglected. This work seeks to explain the dog that did not bark: the failure, thus far, to establish international law regarding labor market access (Hollifield 2000, pp. 75, 87). This work is intended to contribute to a small but growing literature on this topic, commenced in the late 1990s with Bimal Ghosh’s project (2000) for a “new international regime for the orderly movements of people” and continuing recently with Lant Pritchett’s *Let Their People Come* (2006).

It is worthwhile here to observe that, as we will see in Chapters 6 and 7, the states of virtually all of Europe, most of Latin America, the Caribbean, much of Africa, and Australia and New Zealand are party to fairly comprehensive regional labor movement liberalization agreements. These agreements demonstrate that, at least outside of Asia and North America, states have been willing at some level to engage in liberalization of labor migration. There are additional initiatives in Asia, including an Association of South East Asian Nations (ASEAN) effort to liberalize movement of highly skilled and professional workers, and the North American Free Trade Agreement (NAFTA) provides for a very modest degree of liberalization of North American migration. However, most of the liberalization commitments that have been undertaken in Africa and Latin America have not been fully implemented. Furthermore, while many states have engaged in some liberalization with some states, few have engaged in liberalization with many other states.

Thus, one question that arises in connection with liberalization of migration is the conflict (or competition or synergy) between regional or plurilateral liberalization on the one hand and multilateral liberalization on the other. Are regional or plurilateral efforts in this area building blocks or stumbling blocks toward multilateral liberalization? A different but related question is whether they increase or reduce welfare. Any

multilateral agreement in this area will have to address whether most-favored nation (MFN) type prohibitions of discrimination will apply to prevent states from treating specified other states better than others, and whether regional or other plurilateral arrangements will benefit from an exception to an MFN rule.

Legalizing Migration

The focus of this work will be on international legal commitments regarding legal immigration. Legal immigration has a complex relationship with illegal immigration. First, legal immigration serves as a substitute for illegal immigration, and thus can suppress illegal immigration. Second, legal immigration (like illegal immigration) produces remittances which increase wealth in sending states, also possibly suppressing illegal immigration. Third, legal immigration, to the extent that it is limited, may induce increased illegal immigration through information or other support provided by legal migrants to potential illegal migrants.

There is an ongoing competition between illegal immigration (Ghosh 2000, p. 12) and legal immigration, both in the decision making of individual migrants and in the policy of the receiving countries. A substantial percentage of global migrants are illegal immigrants.⁷ An important research question asks to what extent the demand to migrate is elastic in relation to increased costs based on legal restrictions, or based on increased enforcement of legal restrictions.

In any event, poverty-induced migration, like the poor, will always be with us. Since half the world's workers live on less than US\$2 per day, there will be strong incentives for them to migrate, and for those seeking inexpensive labor to employ them. Experience along the United States–Mexico border shows that it is difficult for immigration law and enforcement to stop behavior required by the “laws” of economics (Pritchett 2006). However, illegal migration can have a number of adverse consequences, for the migrants themselves, for citizens of the host country, and for the political fortunes of liberalization of market access.

Of course, no system of border controls will be impermeable. Each destination state must make a policy choice regarding its investment in

controls, both in terms of financial cost and social cost. In addition, at some level, immigration controls become too expensive financially, or are inconsistent with an open society and open economy (Harris 2002). If there are otherwise gains to the destination state from excluding illegal aliens, these gains may be overcome by the costs of exclusion. Making immigration illegal increases the costs, including the dangers, experienced by migrants.

In examining national policy, it is important to examine not just the law on the books but also the law in practice. Many destination states purport to limit legal immigration, but their lax enforcement policy with respect to illegal immigration can be understood instead as evidence of a liberal policy.

For example, the United States has an ambivalent relationship with illegal immigration: it declines to legalize certain unskilled flows, but declines also to devote sufficient resources to enforce the exclusion. The then commissioner of the U.S. Immigration and Naturalization Service, Lionel Castillo, said in 1989 testimony to the U.S. Congress that “The actual policy of the U.S. government is quite different from its stated policy . . . the de facto policy is to keep the door half open” (Harris 2002, p. 80). While interior enforcement can be more effective than border control, especially if it focuses on imposing penalties on employers who hire illegal immigrants, some destination states, such as the United States, have declined to implement it. This ambivalence may represent an attempt to placate two opposing political forces: 1) employers who seek immigrant labor, and 2) general public opinion which is opposed to increased immigration.

To the extent that a state implicitly permits illegal immigration, with the presumed result (see Chapter 2) that labor prices are artificially suppressed compared to legal immigration, it may have the effect of subsidizing the domestic production of goods or services. Even in the 1940s, during the formation of the original General Agreement on Tariffs and Trade (GATT), states were concerned about the trade effects of prison labor, with some of the same trade-distorting characteristics.

At any rate, the main point is that controls on immigration—illegality—seek to stem a natural phenomenon, one that is likely to enhance global welfare and is unlikely to diminish local welfare in the destination state. Where wage or welfare differentials are sufficiently large,

individuals will find a way to overcome barriers: they will make great expenditures and incur fearsome risks in order to migrate. The barriers are simply part of the price. Yet this expenditure and risk may be a source of deadweight loss: it may be a cost incurred in order to frustrate efficient transactions. The efficiency of any particular act of migration is not assured, as there will be external costs that the migrant will not take into account, but the data presented in Chapter 2 showing the welfare gains from liberalized migration suggests that it is safe to assume that much migration is efficient.

Recent Initiatives

There have been a number of recent initiatives that have sought to stimulate interest and action relating to international migration. Of course, there were earlier initiatives. For example, the League of Nations explored in the 1920s an international convention to “facilitate and regulate international exchange of labour.” In 1939, the ILO adopted a Migration for Employment Convention, which was never ratified by any state.

The purpose of this section is to introduce the current initiatives, with a focus on their perspectives and goals.⁸ But the main point is that these are talking initiatives and have not yet resulted in significant changes in law. The formation of new international legal commitments, or protections for migrants, does not appear to be on today’s formal radar screen. However, this book examines the possibility that new international legal commitments might be worthy of greater consideration.

GLOBAL COMMISSION ON INTERNATIONAL MIGRATION REPORT: MIGRATION IN AN INTERCONNECTED WORLD

The Global Commission on International Migration (GCIM) was established in 2003 by a self-appointed core group of states, with the encouragement of then UN secretary-general Kofi Annan.⁹ The mandate of the GCIM was to formulate a coherent global response to international migration. The commission was established as an independent

body consisting of 19 experts, including Mike Moore, former director general of the World Trade Organization (WTO), and Mary Robinson, former president of Ireland and former UN High Commissioner for Human Rights.

The GCIM issued an important report in October 2005. This report states that migration has risen to the top of the global policy agenda, and that “In every part of the world, there is now an understanding that the economic, social and cultural benefits of international migration must be more effectively realized, and that the negative consequences of cross-border movement could be better addressed” (GCIM 2005).

The report establishes six principles that it recommends be followed in formulating global migration policy (GCIM 2005). First, individuals should migrate out of choice, not necessity. It is worth pointing out here that choice and necessity may be difficult to separate, especially when the choice arises from poverty. Second, migration should be part of development policy. Third, states should cooperate to regulate illegal immigration. Fourth, efforts should be made to integrate immigrants into host country society. Fifth, the rights of immigrants should be respected and strengthened. Sixth, governance of international migration should be improved, with greater attention to coherence.

Importantly, while these principles otherwise provide a reasonable starting point, they do not explicitly include liberalization of market access for migrants.

The report wisely recommends that policymakers pay attention to the relationship between supply and demand for workers (GCIM 2005). So long as developed country demand is subject to political constraint, it is useful to seek to reduce developing country supply through continued focus on poverty alleviation at home.

The report concludes that “a well regulated liberalization of the global labour market would also be preferable to the current situation, in which labour market gaps are filled in part by means of irregular migration and unauthorized employment” (GCIM 2005).

BERNE INITIATIVE

In recognition that there is no comprehensive and harmonized system regulating international migration through which the movement of people can be managed in an orderly and cooperative way, the Swiss Federal Office for Refugees launched the Berne Initiative in 2001 to establish a dialogue between countries of origin, transit, and destination on the full range of migration issues with the objective of identifying common understandings and enhancing migration management at the global level (Klein, Solomon, and Bartsch 2003).

At the International Symposium on Migration (“Berne I”) in June 2001, some 80 government officials and experts from international agencies, nongovernmental organizations (NGOs), and academia comprehensively reviewed current migration dynamics and trends. The participants considered the diverging interests and perspectives of origin, transit, and destination countries, but also identified interests common to all states (Klein, Solomon, and Bartsch 2003).

The “undermining of state sovereignty and security by uncontrolled and irregular migration” was identified as a major concern for many countries, both in developing and industrialized regions, with important financial, economic, social, and legal implications. It was concluded that there is a need for a balanced approach to facilitate regular migration and prevent irregular migration, and that mutual benefits could derive from enhanced interstate cooperation. The participants decided to pursue the development of a framework of guiding principles for the management of migration, through an ongoing and broadened process of consultations, rather than through efforts to create new international law in this area (Klein, Solomon, and Bartsch 2003). This was obviously a decision to avoid formal obligations, but to pursue greater communication and informal cooperation.

However, as a first step, the Swiss authorities, in coordination with the International Organization for Migration ([IOM], an intergovernmental organization that deals with international issues of migration management), undertook the preparation and publication of an expert stocktaking on existing international law norms relevant to migration. The study, *International Legal Norms and Migration*, seeks to clar-

ify the existing legal framework and identify gaps and grey areas not adequately covered by international law, but where the elaboration of effective practices might be useful. To complement the expert study, IOM's Migration Policy and Research Programme prepared a *Compilation of Significant International Statements on Migration*. This compilation focuses on nonbinding common understandings emanating from regional consultative processes on migration and selected international migration-related conferences (Berne Initiative 2002, 2003).

The most important outcome of the Berne Initiative process is the International Agenda for Migration Management (IAMM) (Berne Initiative 2004a), a reference system and nonbinding policy framework aimed at facilitating cooperation between states in planning and managing the movement of people in a humane and orderly way. It gathers states' common perspectives and understandings on migration in a comprehensive framework in the form of a nonbinding agenda, mapping out in a comprehensive manner all major aspects of migration at the international level (Organization for Security and Cooperation in Europe 2006, p. 23). The IAMM has two components: 1) a set of common understandings underlying migration management and summarizing the values and perceptions that governments bring to migration, and 2) a set of "effective practices" for a national approach to migration. It addresses the following issues: migration and development, human rights of migrants, labor migration, integration, irregular migration, trafficking and migrant smuggling, trade and health, and return (Nielsen 2007).

At the 2004 Berne II Conference, participants engaged in a substantive exchange on three selected sets of issues addressed in the IAMM: 1) migration, development, and interstate cooperation; 2) labor, regular, and irregular migration and interstate cooperation; and 3) rights, responsibilities, integration, and interstate cooperation (Berne Initiative 2004a, p. 5). Preparatory work for the Berne II Conference included four regional consultations for each of Africa, Europe, Asia, and the Americas, where government officials and migration experts discussed the further development of the IAMM (Berne Initiative 2004a, p. 3). The Berne II Conference culminated in the following recommendations and suggestions being made. First, the IAMM should be widely disseminated amongst governments to assist them in the management of migration. Second, international organizations should be invited to

assist governments upon their request to put the IAMM to use at the national, regional, and global levels (Berne Initiative 2004a, p. 7).

UN GENERAL ASSEMBLY'S HIGH-LEVEL DIALOGUE

The UN High-Level Dialogue on International Migration and Development took place on September 14–15, 2006, at the UN headquarters in New York. The first high-level UN event devoted entirely to the topic of migration and development, the High-Level Dialogue brought together ministers from UN member states and representatives from UN agencies, intergovernmental organizations, NGOs, civil society, and the private sector (UN General Assembly [UNGA] 2006, p. 1).

The purpose of the High-Level Dialogue was to discuss the multidimensional aspects of international migration and development in order to identify appropriate ways and means to maximize its development benefits and minimize its negative impacts. Additionally, the High-Level Dialogue had a strong focus on policy issues, emphasizing the challenge of achieving internationally agreed development goals, including the Millennium Development Goals (UNGA 2006, p. 2).

The two-day dialogue included four thematic roundtables covering the following topics:

- the effects of international migration on economic and social development;
- measures to ensure respect for and protection of the human rights of all migrants, and to prevent and combat smuggling of migrants and trafficking in persons;
- the multidimensional aspects of international migration and development, including remittances;
- promoting the building of partnerships and capacity building and the sharing of best practices at all levels, including the bilateral and regional levels, for the benefit of countries and migrants alike (UNGA 2006, p. 1).

The High-Level Dialogue produced a number of proposals for future action; in recognition of the fact that the IOM has consider-

able experience in the field, proposals were made for the IOM to take greater measures to make migration work for development, to enhance interagency coordination, and to enhance global intergovernmental cooperation (IOM 2006).

It was also at the High-Level Dialogue that the idea of a global forum on migration and development was first proposed. The first global forum on migration and development was held July 9–11, 2007, where more than 800 representatives from 156 UN member states and more than 20 international organizations participated in two plenary sessions and 12 roundtable sessions (UNGA 2007, p. 3).

INTERNATIONAL ORGANIZATION FOR MIGRATION

The IOM is concerned with management of migration, and assists governments by providing expert support and facilitation of regulated labor migration, as well as direct assistance to migrants. The IOM facilitates the development of policies and programs that can individually and mutually benefit the concerned governments, migrants and societies in connection with migration (IOM 2008b).¹⁰

The Commission on Global Governance, meeting in 1993–1994, considered a paper on “Movements of People: The Search for a New Regime.” This was followed by the launch of a global project, financed by the United Nations and to be executed through the IOM, toward a “new international regime for the orderly movement of people” (NIROMP). An intergovernmental meeting in 1997 endorsed the concept of a global arrangement for regulated openness of international migration. A second meeting was held in 1999, and this project was debated until 2001, when it was decided not to pursue it through IOM.¹¹

Since 2001, the IOM Council has conducted an International Dialogue on Migration (IDM). The IDM is an informal consultation mechanism intended to contribute to a better understanding of migration and to strengthen cooperative mechanisms between governments (Nielsen 2007).

The IOM assists in harnessing migration to achieve economic development objectives in countries of origin and destination by two specific

types of initiatives. The first type of initiative focuses on building the capacity of governments and other stakeholders in countries of origin to communicate with and engage their expatriate communities in initiatives related to home country development, and on contributing to the increase of more development-oriented migration policies. The second type of initiative contributes to addressing root causes of economically motivated migration by enhancing the ability of governments and other key actors to focus development actions more strategically on home country migration dynamics. Projects focus on expanding economic opportunities and improving social services and community infrastructure in specific geographic areas prone to economically induced outward migration, or in need of development to absorb and sustain the return of migrants to that region.¹²

According to the IOM, the return and socioeconomic reinsertion of skilled and qualified nationals can benefit the national development or rehabilitation and reconstruction processes of developing countries, countries with economies in transition, or countries recovering from conflict situations. The IOM runs several programs that facilitate Return and Reintegration of Qualified Nationals and other projects that can help shape the economic and social environment in countries of origin in a manner conducive to further returns.¹³

The IOM's Technical Cooperation on Migration Division helps governments equip themselves with the necessary policy, legislation, administrative structures, operational systems, and human resource base needed to tackle diverse migration problems, to help lessen the root causes of economically forced migration.¹⁴

In June 2006, IOM Brussels hosted a roundtable on labor migration gathering 20 representatives of think tanks and the European Commission. This roundtable aimed to further the public debate, launched with the adoption in January 2005 of the European Commission Green Paper on "An EU approach to managing economic migration" and the "Policy Plan on Legal Migration," adopted by the European Commission in December 2005 as a follow-up to the Green Paper.¹⁵ In 2007, as part of its initiative of capacity building in countries of origin, the IOM and the Republic of Korea have agreed to create a migration research and training center in Korea which aims to help governments in the region facilitate the movement of human resources.¹⁶

INTERNATIONAL LABOR ORGANIZATION

The ILO, the UN specialized agency concerned with labor issues, is the leading international organization dealing with labor. The preamble of the constitution of the ILO assigns to it the task of protecting “the interests of workers when employed in countries other than their own” (ILO 1974).

The ILO provides advisory services and technical assistance to member states and provides a tripartite (government, worker, and employer) forum for consultations (ILO 2004a, p. 7). It has established international conventions on migration policy and protection of migrant workers, as well as a multilateral framework on labor migration in order to guide its constituents. The ILO distinguishes among three leading forms of labor migration: 1) temporary migration of professional, technical, managerial, and business workers, as well as people providing cross-border services; 2) contract migration for ordinary employment, but for a limited period of time, guest workers; and 3) migration to settle for ordinary employment purposes (Abella 2000, pp. 113–114).

In 2004, the 92nd Session of the International Labour Conference included a discussion of the challenges of labor migration under globalization. The conference concluded with a resolution for a comprehensive plan for migrant workers, including a nonbinding multilateral framework for a rights-based approach to labor migration (ILO 2004b).

WORLD TRADE ORGANIZATION

In terms of specific formal commitments, the World Trade Organization (WTO) has avoided addressing immigration per se. Nevertheless, it is clear that because immigration is importantly related to trade in goods and trade in services, immigration will increasingly be linked to negotiations on goods and services. The WTO General Agreement on Trade in Services (GATS) specifically includes commitments on trade in services by a service supplier of one member, through presence of natural persons of a WTO member in the territory of any other WTO

member. However, the GATS Annex on Movement of Natural Persons stipulates that the GATS “shall not apply to measures affecting natural persons seeking access to the employment market of a member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.” Furthermore, the scope of coverage of Mode 4 is limited to the category of “service suppliers.” This is a limited category, although most developed country gross domestic product is derived from services.

THE GLOBAL MIGRATION GROUP

The Global Migration Group (formerly the Geneva Migration Group) was originally comprised of the heads of the IOM, ILO, UN Office of the High Commissioner for Refugees, UN Office of the High Commissioner for Human Rights, the UN Office on Drugs and Crime, and the UN Conference on Trade and Development, and now includes the UN Development Program, the UN Department of Economic and Social Affairs, the UN Population Fund, and the World Bank. The aim of the Global Migration Group is to provide policy coherence in migration. The Global Migration Group seeks to “promote the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration” (Global Migration Group 2006, p. 1).

PLAN OF THE BOOK

The purpose of this book is first to review the economic, ethical, and political rationales for greater international legal rules in the field of economic migration (Chapters 2, 3, and 4). Second, the book describes the existing international law of economic migration (Chapters 5–8). By analyzing the existing international law of economic migration, this book will facilitate discussion and analysis of new proposals. Third,

this book attempts to show how the economic, political, and ethical rationales that it describes may be aligned with particular international legal rules and institutions. Chapters 2–8 form a basis for Chapters 9–11, which seek to suggest the dynamics of negotiation of new legal rules for labor market access, the types of new rules that may be negotiated, and the institutional structures that may be useful to assist in the implementation of these rules.

Chapter 2 reviews the existing theoretical and empirical work on the welfare economics of migration. Under a trade-based model of welfare, given wide disparities in wage rates across borders, global welfare would be increased by permitting greater trade in labor. The chapter reviews the various parameters that seem important to the welfare analysis, including distinguishing between global welfare, national welfare, welfare of migrants, and welfare of other groups. It addresses the distinction between permanent and temporary migration, as well as the distinction between migration of skilled and unskilled workers. The purpose of Chapter 2 is to describe the welfare considerations that will be important to negotiations regarding international legal rules for economic migration.

Chapter 3 examines the arguments from ethics for free movement of people. These arguments may have an effect on the preferences and voting patterns of individuals, or on the behavior of government officials. This chapter shows the weaknesses in some arguments to the effect that there is no ethical obligation, or a severely limited ethical obligation, to act to improve the circumstances of poor people in foreign states.

Political economy, reviewed in Chapter 4, adds two important dimensions to the analysis. First, how are the dictates of welfare economics mediated by domestic politics? Second, how do states fail to achieve welfare-enhancing agreements or transactions due to strategic problems or other market failures? These two dimensions combine to present a cooperation problem in connection with international migration. How is this cooperation problem different from that experienced in other areas, such as international trade in goods and services? What are the implications of these differences for legal structures? This chapter develops a political economy schematic of the possible utility of legal rules relating to economic migration. International legal rules may

induce the formation of domestic political coalitions that support liberalized immigration in destination states.

In order to evaluate possible reforms of the international law of migration, it is necessary to describe the existing international law. Chapter 5 addresses existing customary international law and treaty law relating to human rights, as they pertain to economic migration. The core point of this chapter is that states generally have no obligation to accept economic migration by citizens of other states. However, it is important to establish the general absence of rules in this area, and to explain the modest rules that do exist. This chapter plays an additional role. It points out some of the possible human rights law requirements that may apply in connection with the formation of international legal rules to govern economic migration.

The EU has reached a very high degree of formal labor market integration, although important barriers remain and the level of actual integration is modest. The EU has developed a set of disciplines designed to permit a very high degree of labor market integration, while respecting national regulatory and public policy prerogatives. Under these disciplines, individual nationals of EU member states have the formal right to enter the labor market of any other member state, without explicit discrimination, without implicit discrimination, and without losing rights that they would otherwise have, such as social security rights. The history of the development of labor market integration in the EU is salient to a study of broader international labor market integration, insofar as it represents a kind of maximal menu of labor market integration devices. The issues that have arisen, and the way that these issues have been addressed, both substantively and institutionally, can provide, if not a roadmap, a checklist for anticipating issues that will arise as other efforts at international legalization of migration are undertaken. Chapter 6 attempts to provide this history and description.

There are several bilateral, regional, and plurilateral arrangements for labor mobility beyond the EU. Some of these are based on historically rooted arrangements, such as the British Commonwealth. Others are more recent adjuncts to bilateral or regional free trade agreements or customs unions. Examples include the recent free trade area agreements that the United States has entered into with Australia, Chile, and Singapore. The goal of Chapter 7 is not to provide a comprehensive

survey of all arrangements, but rather to describe a set of examples and develop a basic taxonomy to assess the variety of bilateral, regional, and plurilateral arrangements for migration.

The WTO does not deal with labor or immigration per se, just as it does not deal with finance or investment per se. However, labor has entered the WTO in several ways, including, as relevant here, through the subject of trade in services. In fact, there is an important overlap between trade concerns and immigration concerns. One motivation for this book is to bring a trade perspective to the field of immigration. From a trade perspective, limits on immigration are analogous to tariffs or quantitative restrictions. These limits include quotas or other quantitative restrictions on immigration, bureaucratic formalities involved with obtaining a visa, visa fees, discrimination against foreign workers, and limits on recognition of professional qualifications.

The Doha Development Agenda negotiations included efforts by developing countries to increase developed country liberalization commitments with respect to the movement of individuals to supply low-skilled or semiskilled services. Chapter 8 describes the structure of commitments, and the applicable rules, within the WTO. Chapter 8 also provides information that will be relevant to the discussion in Chapter 11 of the extent to which the WTO provides an appropriate institutional structure for negotiation and administration of possible international legal rules on labor migration.

Chapter 9 catalogs the potential goals that states might pursue in connection with negotiations on global rules regarding labor market liberalization. Would states negotiate on a multilateral basis, and would they accept a rule of most favored nation nondiscrimination? Would negotiations over liberalization be structured around a “positive list” in which only those areas that are specifically listed are liberalized, and then only to the extent specified, or around a “negative list” in which all areas are liberalized except as stated?

Chapter 10 builds on Chapter 9, by considering what types of specific disciplines would align with the negotiation goals developed in Chapter 9. Issues considered in this chapter include

- rules relating to restrictions on national limits on emigration,
- the application of an MFN (nondiscrimination across foreign states) principle,

- the application and scope of a national treatment principle,
- taxation of migrants,
- professional regulation and licensing of migrants,
- access of migrants to public services and transfer payments, and
- rights to have family members accompany migrants.

A number of subsidiary disciplines will be required in order to guard against defection from primary disciplines. Examples of these specific disciplines are articulated in sample treaty language form in Appendix A.

Chapter 11, building on Chapters 9 and 10, describes the possible role of an organization, and structures within an organization, to manage international economic migration. An international organization may assist in resolving a number of strategic problems. This organization could provide secretariat services of various kinds, including negotiation initiatives, research, surveillance, dispute settlement, and even possibly enforcement. The types of services would depend on an analysis of the strategic utility of these services provided by an international organization in the context of the types of rules that are likely to be negotiated.

Chapter 12 provides some concluding remarks, and suggests a number of areas for further inquiry and discussion.

Appendix A provides an illustrative draft treaty. This illustrative draft is intended simply to show the types of specific provisions that could be included in an international agreement on international economic migration. Indeed, this draft is a framework agreement, which would be designed to serve as a facility for states to make the kinds of agreements that make sense to them, individually and collectively. It is only once these agreements are made that we would truly know whether states believed that reciprocal legal commitments were useful.

Notes

1. Throughout this book, I follow the conventional practice of referring to “emigration” as the act of leaving one’s home state, “immigration” as the act of entering the destination state, and “migration” as the combination of the two.
2. Indeed, Polanyi (1944) decried the commodification of labor.
3. As Neuman (1993, p. 1883) points out,

there existed state qualitative regulation of immigration before 1875, and this qualitative regulation was an antecedent for federal regulation: Thus, state immigration law in the century preceding 1875 included five major categories: regulation of the migration of convicts; regulation of persons likely to become or actually becoming a public charge; prevention of the spread of contagious diseases, including maritime quarantine and suspension of communication by land; and regionally varying policies relating to slavery, including prohibition of the slave trade, bans on the migration of free blacks, and the seamen's acts. Federal statutes backed up the state quarantine laws and state laws barring importation of slaves or free black aliens.
4. For a broad statement of this argument, see Trachtman (2008).
5. Fehr, Jokisch, and Kotlikoff (2004) argue that immigration growth can only solve demographic problems in the developed world if it is concentrated in high-skilled workers from the developing world. See also Gordon’s (2003) argument regarding the importance of population growth for economic growth in the United States during the near future.
6. Unauthorized migrants retain their humanity, but they may enjoy fewer rights (Lyon 2005).
7. Ghosh estimates that one-fifth of all migrants are unauthorized (Ghosh 2000, p. 18).
8. In order to do so as accurately as possible, while focusing on the issues of interest here, this section liberally adapts from the relevant organizations’ Web sites and other published materials.
9. As of August 2005, these states included Algeria, Australia, Bangladesh, Belgium, Brazil, Canada, Egypt, Finland, France, Germany, Holy See, Hungary, India, Indonesia, Islamic Republic of Iran, Japan, Mexico, Morocco, Netherlands, Nigeria, Norway, Pakistan, Peru, the Philippines, Russian Federation, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, and the EC/EU.
10. A list of the projects being undertaken by the IOM to facilitate labor migration can be found at <http://www.iom.int/jahia/Jahia/pid/706> (IOM 2008a).
11. This discussion is based on personal communication with Bimal Ghosh.
12. A fuller discussion of the two initiatives can be found at <http://www.iom.int/jahia/Jahia/pid/542> (IOM 2008b).
13. A list of such ongoing projects can be found at <http://www.iom.int/jahia/Jahia/op/edit/pid/742> (IOM 2008c).
14. The full activities of the TCM Division of IOM are described at <http://www.iom.int/jahia/Jahia/op/edit/pid/749> (IOM 2008e).

15. A full discussion on the proceedings of the IOM Brussels Roundtable on Economic Migration is available at http://www.belgium.iom.int/index.asp?Selected=2&News_ID=483&sm=71 (IOM Brussels 2008).
16. The establishing of the IOM-Korea migration research and training center may even be seen as a move to improve migration management between Asia and Europe. See <http://www.iom.int/jahia/Jahia/pbnAS/cache/offonce?entryId=15964> (IOM 2008d).