International Migration Law

Section 1.6

Topics:
International Law
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Essentials of Migration Management
Volume One: Migration Management Foundations
Section 1.6

This Section provides an understanding of the current state of international migration law and its relationship to national policy and legislation in the field of migration. The focus in Topic One is on the sources of international law and the obligations placed on States by international treaties and instruments. International law related to movement-related rights, labour migration, human trafficking, and migrant smuggling are addressed in Topic Two.

Learning Objectives

• increase your knowledge of the main elements of international migration law

• better understand the implications and relevance of international migration law

• enhance your capacity to identify where national migration law needs to be modified or strengthened in your setting

Background

International law governs legal relations between States. In the last 50 years, the concept of international law has slowly expanded to include relations between States and international organizations, and between States and individuals. Historically, migration was, for the most part, only regulated at the national level. National legislation was the only relevant law in the migration field. With the increase in global mobility, States have begun to realize that migration is no longer something that they can manage alone. They have recognized the need for regional and international cooperation on
the issue. International norms have been increasing, as States work together in an effort to manage migration.

International migration law is a branch of law that has developed over time, and continues to develop as the need for international cooperation continues. In basic terms, international migration law deals with international responsibilities and commitments that States have undertaken. These commitments and responsibilities place limits on the traditional authority that States have over migration issues.

A fundamental principle is that international law prevails over national law. This means that a State cannot rely on a provision of national legislation to avoid a responsibility under international law.

The main elements of international migration law occupy several areas:

- human rights
- the duty of States to accept returning residents
- the obligation to provide consular access to non-residents
- human trafficking and migrant smuggling
- specific areas that are the subject of specific international agreements, for example, labour migration

**Guiding Questions**

1. To what extent are migration-related policies and legislation in your State governed by the international commitments made by your State?

2. To what extent do migration related policies and legislation in your State reflect the international commitments made by your State?

3. What are the implications of these commitments for future migration policy development and implementation?

4. To what extent would your State benefit from accession to existing international conventions or other instruments that are currently not binding on your State?

5. What policy trade-offs would be required in order to achieve benefits resulting from accession to existing international conventions and other instruments?
Key Message

States now have a number of international responsibilities that limit or restrict their authority over migration. International migration law refers to these international responsibilities.

A State’s authority to regulate entry, stay, and removal on its territory is not absolute. States are increasingly realizing that migration must be managed, and that cooperation with other States is necessary. International obligations based on international norms that limit State authority over migration issues provide a means for protecting human rights and balancing the interests of migrants with the interests of States.

Terms and Concepts

**Customary international law**
International laws that derive their authority from the constant and consistent practice of States, rather than from formal expression in a treaty or legal text. Customary international law changes as a result of contributions made by individual States. When a State acts from what it determines are its legal obligations in the international community, its practice can contribute to the formation of customary international law. This occurs when other States adopt and consistently follow the contributing State’s example.

**International law**
A framework of principles agreed to by States that governs how States will function together and order their relations with each other. The term “international law” is synonymous with the term “public international law.”

**Law**
The framework of prescriptive principles by which a society or a group of nations functions

**National law**
A framework of principles that govern how a specific State will order the relations between the State and individuals
Topic One

International Law

Laws spell out what is permitted, what is forbidden, and how behaviour is to be regulated in a society. In the broadest sense, the term “law” refers to a framework of principles that determines how a society functions. Every community has established its own system of law, and this is also true of the international community. The community of States has determined how it will function, cooperate, and decide what is permitted in world affairs and what is not.

“International law” always means public international law, not private international law. Public international law is a separate system of law, and must not be confused with private international law. There are a number of branches of public international law that correspond to areas where States have decided regulation is required. For example, international concern over use and exploitation of the environment has led to a branch of international law called “international environmental law” that regulates the conduct of States regarding pollution and the use of natural resources. Other branches of international law regulate areas such as trade, air and space, warfare, intellectual property, and the oceans.

Private international law refers to conflicts between different legal systems. It deals with cases within particular legal systems when foreign elements intrude and raise questions about the application of foreign law or the role of foreign courts. Private international law is often concerned with multinational or international business. For example, if two English business partners make a contract in Italy to sell Italian products, an English court would apply Italian law regarding the validity of that contract.

There are two main sources of International Law to consider in this Section:

- international treaties
- international custom

Important Points

1. International treaties are contracts at the international level. Treaties are known by a variety of names, including “conventions”, “international agreements”, “pacts”, “charters”, “statutes”, and
“covenants”. These terms refer to a written agreement entered into by States that legally binds them to act in a certain manner or perform certain obligations.

2 International customs are general practices of States that are accepted as law by all States. There are two elements of customary law: 1) actual State practice, and 2) the belief by a State that it must act a certain way because it is law. When States act in a certain way over time, that way of acting is accepted as practice and other States will act in that way. A new norm is then developed. Customary laws may be written in treaties and agreements, but sometimes they are not written down. For example, the prohibition against genocide is a rule accepted as customary law. Genocide is not practiced by States (the few exceptions are known as violations), and all States know that genocide is against international law. The prohibition against genocide is written in the Geneva Conventions. However, because it is also customary law, all States are bound, whether or not they have signed the Geneva Conventions.

What You Need To Know About...

The Relationship Between International Law and National Law

There are two approaches to the question of whether individuals can use international law before a national court:

• In some countries, international law will have direct effect if a State ratifies an international treaty, because no further steps are needed to make the treaty provisions applicable to the national population.

• In other countries the provisions of an international treaty have to become part of the national legislation before they will have direct effect on the population. This is accomplished, for example, through an Act of Parliament.

Apply What You Have Learned

1 What international treaties have been signed by your State to regulate areas of international concern?
State sovereignty is the traditional starting point when considering international migration law. States have authority over their territory and population. They can decide who can and who cannot enter their territory. States can secure their borders and decide on conditions of entry and stay, as well as removal.

States no longer have an unlimited or unfettered authority over migration issues. International law, including treaties entered into on a bilateral, regional or international level, sometimes limits State authority over the issues of entry, stay, and removal. States now have a number of international responsibilities that limit or restrict their authority over migration. International migration law refers to the sum of these international responsibilities. International migration law is the branch of law where States have sought to manage some aspects of migration at the international level. International migration law has a scope that is difficult to specify accurately. It covers a web of legal relationships, which may be State-to-State or State-to-individual. It is found at the bilateral level (where a State enters into arrangements with one other State), the regional level, and the multilateral level.

There is no single international legislature that has developed the laws of international migration. It is a branch of law that has developed over time and continues to develop as the need for international cooperation continues.

There are a number of norms and areas of concern that limit the authority of States in migration matters. These are described in the important points below.

- Human Rights
  - Non-discrimination
  - Freedom of movement
  - Asylum
  - Non-refoulement
  - Family unity
  - Procedural guarantees in areas such as detention or expulsion
  - The duty of States to accept their returning citizens
• Consular Access
• Human Trafficking and Migrant Smuggling
• Other areas regulated by international agreements, for example, labour migration or irregular migration

States have also entered into a vast number of bilateral, regional, or multilateral agreements that focus or touch on migration issues and that have become part of international migration law. They are too numerous to address here. One area to note is labour migration. This has been addressed at the multilateral level through International Labour Organization (ILO) standards and conventions, as well as the UN Convention on the Rights of All Migrant Workers and Members of their Families. There are also a large number of bilateral instruments between sending and receiving countries that regulate this area.

Issues relating to labour migration are dealt with in greater detail in Section 2.6, Migration and Labour.

Important Points

1 Internationally accepted human rights impose limits on what a State can and cannot do to persons within its territory. Human rights generally, and the movement-related rights in particular, are elements of international migration law. National laws must be in conformity with these international norms wherever they apply.

2 There are a number of human rights known as “movement-related rights” that are particularly relevant to migrants:
   • Freedom of Movement is a fundamental principle in the international migration context, which is found in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
     - Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his or her residence.
     - Everyone shall be free to leave any country, including his or her own.
     - The abovementioned rights shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and that are consistent with the other rights recognized in the Covenant.
     - No one shall be arbitrarily deprived of the right to enter his or her own country.
International human rights treaties generally include a non-discrimination clause, which provides that States must ensure human rights to all people within its territory without making distinctions of any kind, including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other indicators of status. Non-discrimination rights require that States’ laws and policies must not discriminate against migrants. This principle of non-discrimination limits the distinctions that States can make between its citizens and migrants. Although some differences in treatment may be allowed, they cannot be based on any of the criteria noted in the preceding point.

All persons have a right to seek asylum, but a State does not have a corresponding legal duty to grant asylum or allow asylum-seekers entry to its territory. However, once a State does recognize a refugee, the principle of non-refoulement comes into play. This is a fundamental norm of international migration law, and strictly limits the authority of States to remove people from its territory. It means that a State cannot send anyone back to a country where he or she may be persecuted. The UN Convention Against Torture extends this principle to prohibiting a person from being returned to a country where he or she may face torture.

The authority of States to use national law to regulate who may enter, stay in, or must leave its territory is limited by international law relating to family unity and to the “best interests of the child”. Human rights instruments protect the family unit by recognizing it as the fundamental unit of society. For example, international law relating to the family clearly affects national authority to expel or deport a person from its territory, as the family’s interest in staying intact must be taken into account and balanced against the State’s interests. In cases involving children, the “best interests of the child” is also a paramount factor, limiting a State’s right to remove an alien from its territory. Further, family unity includes family reunification in cases where a family has been separated. This can place a positive obligation on a State to allow entry to a person.

States are not free to detain or expel aliens at will. An expulsion cannot be arbitrary, nor can it be discriminatory. There are certain international human rights guarantees or standards that must be respected. For example, a State would be in violation of its international responsibilities if it decided to expel all persons of a certain race. Expulsions and detentions must not be carried out with ill-treatment or torture. Due process must be respected. Under international law, an alien has the right to have the expulsion decision reviewed and to have proper representation.

The duty of States to accept returning nationals is generally accepted to be a norm of customary international law. This duty is not explicitly mentioned in an international treaty but follows from the right of States to expel unwanted aliens. For that right to be effective, another State has to allow the individual to enter. Most logically, it is the State of origin who must allow the individual
to return. The duty is seen in some documentation at the international level, for example, the 1994 *Cairo Programme of Action* states that “Governments of countries of origin of undocumented migrants and persons whose asylum claims have been rejected have the responsibility to accept the return and reintegration of those persons, and should not penalize such persons on their return”. The *Programme of Action* is, however, a non-binding instrument. In order to clarify the duty therefore, returning States and States of origin are increasingly entering into bilateral agreements known as “readmission agreements”. In practice, the duty to readmit is often hampered by lack of travel or identification documents.

The operational implications of this issue are dealt with in greater detail in Section 3.9, *Return Migration*.

7 A State that detains an alien must inform the individual of his or her right to contact the consular authorities of his or her country of origin. The right to consular access is well accepted under international law and is explicitly laid down in the 1963 *Convention on Consular Relations*. It is another example of how international law limits the authority of States over persons in their territory.

### What You Need To Know About...

**Freedom of Movement**

The freedom of movement and residence within the border of a State applies only to persons lawfully within a territory of a State, not to undocumented migrants or migrants in an irregular situation.

The right to leave any country including one’s own implies a right to travel and have access to appropriate travel documents.

Under international law, there is no corresponding right to enter the territory of another country. This creates a major limitation on the right to freedom of movement and is an example of a gap in international migration law.

The right to freedom of movement and residence, and freedom to leave any country, can be restricted in certain circumstances if restrictions:

- are provided by law and are in the national legislation - a mere administrative provision is not sufficient
- are consistent with the other rights recognized in the Covenant. For example, if a person is barred from leaving a country solely on account of his or her religious beliefs, this would not be compatible with the right to freedom of religion unless it served one of the purposes
listed in Article 12 (3) of the Covenant that justify interference with freedom of movement on grounds of national security, public order, public health or morals, and protection of the rights and freedoms of others.

The right to enter one’s own country has been the subject of lengthy debate because “own country” raises issues as to whether citizenship is a requirement. Arguably, this right includes aliens and stateless persons who have a strong attachment to a State such that they view it as their home country, for example, long-term residents.

What You Need To Know About...

*International Law, Human Trafficking, and Migrant Smuggling*

With the rise of irregular migration, there has been a corresponding increase in the level of human trafficking and smuggling of migrants across borders. States have realized that this aspect of migration needs to be addressed at an international level, and cooperation efforts are under way.

A number of international treaties address the issue, particularly the trafficking of women and children. The most recent treaties specifically dealing with trafficking and smuggling are two of the Protocols of the *UN Convention Against Transnational Organized Crime*. The Trafficking protocol, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, calls on States to prevent and combat trafficking and to protect and assist victims, and aims to promote cooperation between States.

An increase in ratifications will mean that States take a uniform approach to preventing trafficking and supporting victims of trafficking.

The Smuggling Protocol, the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, aims to prevent and combat migrant smuggling and promote cooperation between States while protecting the rights of smuggled migrants.

These measures and their implications for States are dealt with in more detail in Section 3.12, *Irregular Migration*. 
## Apply What You Have Learned

1. Identify a law in your State that is in conformity with international norms.

2. What issues surrounding the right to movement are of concern in your setting?

3. What readmission agreements has your State entered into? How effective are they?

4. How have international treaties that deal with migrant smuggling and trafficking affected your State and region?

5. How is the right to family unity interpreted in your State’s migration legislation?
Concluding Remarks

International migration law is complex and is evolving as cooperation between States becomes increasingly necessary. The principle that international law prevails over national law has important implications for State authority and migrant rights. Migration managers need to take note of existing treaties and instruments and the principles that they are based on. The future of migration management is closely linked to the development of increasingly effective international instruments.

Resources

Resource items, treaties, and instruments will be identified in other Sections where the issues touched on in this Section are examined in more detail.

Annex

International and Regional Legal Instruments

International Legal Instruments (in chronological order):

- Special Protocol concerning Statelessness (1930)
- Universal Declaration of Human Rights (1948)
- ILO Convention No. 97 concerning Migration for Employment (revised 1949)
- Convention relating to the Status of Refugees (1951) and its Protocol (1967)
- Convention on the Political Rights of Women (1953)
- Convention relating to the Status of Stateless Persons (1954)
- Agreement relating to the Refugee Seamen (1957) and its Protocol (1973)
- ILO Convention concerning Discrimination in Respect of Employment and Occupation (1958)
- UNESCO Convention against Discrimination in Education (1960)
- Convention on the Reduction of Statelessness (1961)
- ILO Convention (No. 118) concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (1962)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Civil and Political Rights Optional Protocol (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
• Convention for the Reduction of Cases of Statelessness (1973)
• ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975)
• Convention on the Elimination of All Forms of Discrimination against Women (1979)
• Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
• Convention concerning International Cooperation regarding Administrative Assistance to Refugees (1985)
• International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)

Regional Legal Instruments (in chronological order):
• American States Convention on Political Asylum (1935)
• American States Treaty on Political Asylum and Refuge (1939)
• American Declaration of the Rights and Duties of Man (1948)
• European Convention on the Protection of Human Rights and Fundamental Freedoms (1950)
• Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention (1952)
• OAS Convention on Territorial Asylum (1954)
• OAS Convention on Diplomatic Asylum (1954)
• Treaty establishing the European Community (1957) as amended by the Treaty of Amsterdam (1999) and Treaty of Nice (2001) and relevant Council regulations
• European Agreement on Regulations Governing the Movement of Persons between Member States of the Council of Europe (1957)
• European Agreement on the Abolition of Visas for Refugees (1959)
• European Social Charter (1961, revised 1996)
Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto (1963)

European Convention on Consular Functions (1967) and its Protocol

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969)


European Convention on Social Security (1972)

European Convention on the Legal Status of Migrant Workers (1977)

European Agreement on Transfer of Responsibility for Refugees (1980)

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981)


European Agreement on the gradual abolition of controls at the common frontiers (Schengen Agreement) (1985)

Inter-American Convention to Prevent and Punish Torture (1985)

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) and its Protocols No. 1 and No. 2


Convention determining the State responsible for examining application for asylum lodged in one of the member states of the European Community (1990)

Schengen Implementation Convention (1990)


European Convention on the Participation of Foreigners in Public Life at Local Level (1992)


Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belen do Para” (1994)


Endnotes

1 See for example, Article 2 of Universal Declaration of Human Rights, and Article 2 of the International Covenant of Civil and Political Rights.