



2003

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Recommended Citation

Steve Charnovitz, Assessing the ILO's Efforts to Develop Migration Law, 30 *Legal Issues of Econ. Intetration* 193 (2003).

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Assessing the ILO's Efforts to Develop Migration Law

By Steve Charnovitz*

The world community is increasingly recognizing the movement of people as an issue of global policy rather than an exclusive sovereign preserve of individual governments.¹ For example, in 2001, the High-Level Panel on Financing for Development (Zedillo Commission) called for governments 'to start working together to develop forms of international cooperation to optimize collectively the benefit of the movement of labour across national borders.'²

Two senior scholars at the (US) Council on Foreign Relations, Jagdish Bhagwati and Arthur C. Helton, have each recently written about the need for a World Migration Organization (WMO). Bhagwati, the eminent economist, points out that:

'The world badly needs enlightened immigration policies and best practices to be spread and codified. A World Migration Organization would begin to do that by juxtaposing each nation's entry, exit, and residence policies toward migrants, whether legal or illegal, economic or political, skilled or unskilled.'³

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1. Of course, the right to exclude aliens has not always been regarded as an essential attribute of a country's sovereignty. Richard Plender, *International Migration Law* pp. 39–43 (A.W. Sijthoff, 1972). An early international law scholar, Francisco de Vitoria (1557), explained that it was not lawful for the French to prevent the Spanish from traveling to or living in France, or vice versa, provided that the visitors did no injury. Francisci De Victoria (sic), *De Indis et de Ivre Belli Relectiones*, p. 151 (Ernest Nys ed., Oceana Publications, 1964 reprint). It is also interesting to note that as early as 1217, trade agreements provided for openness to aliens. A treaty of that year between England and Norway stated that traders and people would be able to freely enter on a reciprocal basis. Jean Banerth, *Comment*, in *The WTO as an International Organization* p. 271, 274 & n. 1 (Anne O. Krueger ed., University of Chicago Press, 1998).
2. UN General Assembly, Report of the High-Level Panel on Financing for Development, available in A/55/1000 (26 June 2001), p. 28.
3. Jagdish Bhagwati, 'Borders Beyond Control', *Foreign Affairs*, January–February 2003, p. 98. Bhagwati began advocating a WMO in 1992. Jagdish Bhagwati, *A Champion for Migrating Peoples* (1992), reprinted in Bhagwati, *A Stream of Windows* 315–17 (MIT Press, 1998).

Helton, a noted expert on refugee and humanitarian law, explains that:

'Achieving a comprehensive policy relating to the international movement of people would require new international institutional arrangements capable of serious research leading to the generation of norms in this field – a World Migration Organisation (WMO). . . . The ultimate objective for a WMO would be to make and arbitrate global migration policy, which should be more effective, generous and humane than is currently the case. The alternative is to muddle along, failing to appreciate both the threats and benefits.'⁴

This project to catalyze a WMO will be able to build upon an effort organized in the late 1990s by Bimal Ghosh, a longtime international civil servant, who has promoted a 'New International Regime for Orderly Movements of People.'⁵

In considering whether a good case exists for establishing such a World Migration Organization, policymakers and stakeholders should look first at whether existing international organizations can be better used to enhance international cooperation on migration policy.⁶ Several existing organizations have a role in migration policy and could expand their efforts. The main candidate is the International Organization for Migration (IOM), which is a non-UN agency with 101 Member States.⁷ Another is the International Labour Organization (ILO), a UN specialized agency that has worked on migrant issues from its beginning.⁸ A third is the World Trade Organization (WTO), which promotes the movement of goods and services, and, to a lesser

4. Arthur C. Helton, 'People Movement: The Need for a World Migration Organization', May 2003, available at <http://www.cfr.org/publication.php?id=5950>.
5. Bimal Ghosh, 'New International Regime for Orderly Movements of People: What Will It Look Like?', in *Managing Migration. Time for a New International Regime* 220 (Bimal Ghosh ed., Oxford University Press, 2000). (Calling for a new regime that would supplement, but not supplant, the existing arrangements.) This volume contains several thoughtful articles on a prospective migration regime.
6. For a basic application of comparative institutional analysis on this topic, see Glenn Withers, 'Migration', in *Managing the World Economy* 311, 332–36 (Peter B. Kenen ed., Institute for International Economics, 1994), discussing the need for an international migration regime and reviewing the roles of the various multilateral agencies. For an interesting analysis that analogizes a migration regime based on the WTO, see Thomas Straubhaar, 'Why Do We Need A General Agreement on Movements of People (GAMP)?', in *Managing Migration. Time for a New International Regime* 110 (Bimal Ghosh ed., Oxford University Press, 2000), proposing a new regime combining free movement with a tax on the 'externality' of exiting or entering a country.
7. See www.iom.int. Brunson McKinley, the distinguished former U.S. diplomat, serves as the Director-General.
8. See Virginia Leary, 'Labor Migration', in *Migration and International Law Norms* 227 (T. Alexander Aleinikoff & Vincent Chetail eds., Asser Instituut Press, 2003) (discussing the ILO).

extent, the transborder movement of natural persons supplying services.⁹ Other key agencies are the Office of the UN High Commissioner for Refugees, the UN Commission on Population and Development, the Organization for Economic Co-operation and Development (which has recently boosted its research on International Migration), the UN Conference on Trade and Development (UNCTAD), and the UN Commission on Human Rights Special Rapporteur on Human Rights of Migrants.

The purpose of this article is to analyze the work of the ILO in international migration as prolegomena to assessing whether its role could be expanded, or could serve as a model for a new agency. How has the ILO sought to develop migration law over the years? Has it promoted the free movement of people analogously to the way that the WTO promotes the free movement of goods and services?

This article has two parts. Part one provides a brief survey of what the ILO has done on the issue of migration since 1919. Part two discusses the implications of the ILO experience for the idea of promoting transborder migration through an international organization.

1. Overview of ILO norms on migration

The ILO was established in 1919, and began immediately to formulate international Conventions. Building on pre-war transborder labor cooperation, the ILO approved six labor Conventions at its first Conference in 1919. Unique among international organizations, the ILO is tripartite, meaning that each country is represented by its government, organized workers, and organized employers.

Migrant labor was seen as being within the ILO competence at the beginning. In 1919, the inaugural Washington Conference approved the Reciprocity of Treatment Recommendation (No. 2) urging that governments agree on reciprocal terms to grant to foreign workers employed in their territory the same benefit of protective labor laws and right of lawful organization that are enjoyed by domestic workers.¹⁰

The ILO returned to the issue of migrant labor many times over the following years. In 1925, it approved the Convention on Equality of Treat-

9. For the WTO role on the movement of natural persons, see UNCTAD, *Increasing the Participation of Developing Countries through Liberalization of Market Access in GATS Mode 4, for Movement of Natural Persons Supplying Services*, Note by the Secretariat, TD/B/COM.1/EM.22/2 (18 June 2003); 'Trade Law Norms on International Migration', in *Migration and International Law Norms* 241 (T. Alexander Aleinikoff & Vincent Chetail eds., Asser Instituut Press, 2003).

10. Recommendation concerning Reciprocity of Treatment, No. 2, 28 November 1919, available on ILO website.

ment (Accident Compensation) (No. 19) which provides that alien workers resident in the host country are to get the same worker's compensation as domestic workers, so long as the alien worker is from a country that is a party to the treaty.¹¹ In 1926, the ILO enacted the Convention on Inspection of Emigrants (No. 21).¹² This Convention provided that the official inspector on board a ship was to ensure observance of the rights of the emigrants under the law of the ship's flag, other national law, international agreements, or the emigrant's contract. (These provisions provide a good example of transnational law in operation.) In 1935, the ILO passed the Convention on Maintenance of Migrants' Pension Rights (No. 48).¹³ This thinly ratified Convention established an International Scheme to totalize compulsory social security credits split between participating governments, subject to numerous conditions and rules.

In 1939, the ILO approved the Convention on Migration for Employment (No. 66).¹⁴ This Convention contained a strong set of rules for national regulation on issues such as misleading propaganda, the availability of information to emigrants and immigrants from non-profit making institutions, the regulation of recruitment, the regulation of worker contracts, and national treatment for conditions of work, the right to join a union, and employment taxes. Convention No. 66 was quite progressive for its time. Perhaps that was why no government acted to ratify it.¹⁵

Most of the disciplines of this still-born Convention were placed in a somewhat diluted form in the Revised Convention on Migration for Employment (No. 97), which was enacted in 1949, and currently has 42 parties.¹⁶ This Convention contains a broad national treatment provision, though one limited to lawful immigrants and to the federal level.¹⁷ Given the contemporary debate about the respective mandates of the ILO and the WTO, it is interesting to note that ILO Convention No. 97 includes a trade liberalization provision.¹⁸ Specifically, it mandates an exemption from customs duties on the

11. Convention concerning Equality of Treatment for National and Foreign Workers as Regards Workmen's Compensation for Accidents, No. 19, 5 June 1925, 134 BFSP 393, art. 1.
12. Convention concerning the Simplification of the Inspection of Emigrants on Board Ship, No. 21, 5 June 1926, 130 BFSP 868 (now shelved).
13. Convention concerning the Establishment of an International Scheme for the Maintenance of Rights under Invalidity, Old-Age and Widows' and Orphans' Insurance, No. 48, 22 June 1935, 7 Hudson 144 (now shelved).
14. Convention concerning the Recruitment, Placing, and Conditions of Labour of Migrants for Employment, No. 66, 28 June 1939, 8 Hudson 382 (now withdrawn).
15. Two earlier Conventions had the same ignominious ending. They were: Reduction of Hours of Work in Public Works (No. 51) and Reduction of Hours of Work in Textiles (No. 61). No Conventions have suffered the same fate since then.
16. Convention concerning Migration for Employment, No. 97, 1 July 1949, 120 UNTS 71.
17. *Id.* art. 6.
18. *Id.* Annex 3, Importation of the personal effects, tools and equipment of migrants for employment. All of the Annexes are subject to national opt out, and some governments did opt out of

personal effects and tools belonging to recruited migrants and their families.¹⁹ The exemption also applies upon the return of a national to her country of origin. This episode marks the only time that a ratified ILO convention sought to dismantle import restrictions. The existence of the treaty provision demonstrates the ILO's competence to author trade law.

In drafting a Convention on 'Migration for Employment', the ILO showed that its jurisdiction includes the planned movement of workers from one country to another with a view to being employed. This perspective is made clearer in an ILO Recommendation (No. 86) enacted the same year, which states that:

'It should be the general policy of Members to develop and utilise all possibilities of employment and for this purpose to facilitate the international distribution of manpower and in particular the movement of manpower from countries which have a surplus of manpower to those countries that have a deficiency'.²⁰

Recommendation No. 86 proposes some progressive standards on transparency, and also includes in the annex a bilateral Model Agreement on Temporary and Permanent Migration for Employment.²¹ No study of the impact of this Convention and Recommendation on transborder worker relocation has come to my attention.

The ILO did not draft another convention on migration until 1975, when it approved the Convention on Migrant Workers (No. 143).²² Reflecting the new influence of the human rights movement on international labor law, this Convention commits parties to undertake to respect the 'basic human rights' of all migrant workers.²³ Such rights are to include equality of treatment with

some or all of the Annexes. The trade provision was based on the trade provision in the unratified Convention No. 66.

19. These requirements would seem to apply to workers from any country regardless of whether that country is a signatory to the Convention. Thus, such liberalization would seem to be consistent with the most-favoured-nation principle.
20. Recommendation concerning Migration for Employment, No. 86, 1 July 1949, para. 4(1), available on ILO website.
21. *Id.*, paras. 7, 8, 21, Annex. The 1949 Recommendation does not include an interesting provision in the 1939 Recommendation on Migration for Employment which calls for inter-governmental cooperation in the practical solution of migrant problems. In particular, the 1939 Recommendation suggests periodic meetings of a Joint Committee of the country of emigration and the country of immigration. Recommendation on Migration for Employment (Co-operation between States) No. 62, 28 June 1939, para. 2, available on ILO website.
22. Convention concerning Migrations in Abusive Conditions, and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, No. 143, 24 June 1975, 1120 UNTS 323.
23. *Id.* art. 1.

respect to individual and collective freedom of lawful migrants, but the Convention notes that a government may make the free choice of employment subject to a two-year contractual work requirement.²⁴ Unlike previous ILO migrant worker conventions, which sought to improve conditions for migrants and may therefore have *promoted* migration, this Convention commits parties to *suppress* illegal migration and clandestine trafficking, and to detect and punish illegal employment of migrant workers.²⁵ For whatever reason, this Convention has been ratified by only 18 states.

The low rates of ratification for Conventions No. 97 and 143 are even worse when it is recognized that the ratifications are largely in the traditional source states, not the receiving states. Furthermore, both Conventions have failed to receive significant ratifications in the past 20 years. Perhaps this inaction implies a retreat in state acceptance of the ILO role in migration. In 1990, following ten years of negotiation, the UN General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.²⁶ That Convention entered into force in July 2003.

In addition to administering its Conventions, the ILO also focuses on migration through other efforts, such as policy declarations, technical assistance, and research. 'International manpower movements' was one of the major topics at the World Employment Conference in 1976.²⁷ The Conference offered two types of proposals: (1) measures designed to avoid the need for workers to emigrate, and (2) measures to counter abusive conditions.²⁸ Reflecting the prevailing concern about 'brain drain' at the time, the Conference also recommended measures in the country of origin to forestall the departure of skilled workers.²⁹

Beginning with a tripartite meeting of experts in 1997, the ILO has increased its attention to migration. In that year, the ILO set up a mechanism to investigate allegations of persistent exploitation of migrant workers. In 1999, the ILO Committee of Experts on the Application of Conventions and Recommendations issued a comprehensive report on migration.³⁰ In 2001, the International Labour Office worked with the IOM and the (UN) Office of the High Commissioner for Human Rights to present a joint paper to the World

24. *Id.* arts. 10, 14.

25. *Id.* arts. 3, 6.

26. 18 December 1990, available at http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm.

27. See ILO, *Employment, Growth, and Basic Needs: A One-World Problem: The International 'Basic-Needs Strategy' Against Chronic Poverty and the Decisions of the 1976 World Employment Conference* 125–39 (Praeger Publishers, 1977).

28. Declaration of Principles and Programme of Action adopted by the Tripartite World Conference on Employment, Income Distribution and Social Progress, and the International Division of Labour, June 1976 (available in Praeger volume), paras. 35–39.

29. *Id.* para. 40(f).

30. Migrant Workers, International Labour Conference, 87th Session, Report III (Part 1B), 1999.

Conference Against Racism (Durban Conference). The paper presented 'Core Principles for Action against Racism and Xenophobia Faced by Migrants.'³¹ Under the leadership of Juan Somavía, the ILO Director-General, the ILO has expanded its International Migration Program, which supports efforts to combat trafficking and provides other technical assistance.

In 2004, migration will be a main topic for general discussion at the annual ILO Conference.³² The proposed themes are: migration and globalization, policies for more orderly migration for employment, and standard setting. The Conference is expected to consider the continued relevance of Conventions 97 and 143, and assess whether new or additional standards are advisable.

2. Lessons from the ILO in considering a WMO

Although migration has been an ILO issue for 84 years, the Organization so far has focused more on conditions of employment than on employment itself. None of the ILO Conventions discussed above obligate governments to permit either immigration of aliens or emigration of nationals. One might say that the Conventions are about the treatment of migrants, rather than about facilitating migration.

Notwithstanding this huge lacunae in international labor law, the ILO would have the legal competence to draft conventions promoting greater opportunity for workers to migrate across borders to new jobs. Yet the fact that the ILO has never done so is indicative of the disinclination of governments to act jointly on that purpose. The ILO characterizes its work on migration as being related to migrant 'rights,' and yet the basic right to relocate in order to work is not part of the ILO's current agenda.

Obviously, this gap has been noticed by thoughtful International Labour Office experts over the years. One recent staff paper states that fully addressing the dynamics of labor migration requires 'policies for labour mobility – freedom for labour to move – in regional integration areas'.³³ This paper further notes that it is 'manifestly contradictory' when the logic of the international community in managing the movement of capital, goods, technology, services, etc. is not also applied to migration.

If the ILO were to seek to promote international worker mobility, the stakeholders in the ILO would be challenged to agree upon a normative prin-

31. ILO, *Time for Equality at Work, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* 97–98 (2003).

32. ILO, *Date, Place and Agenda of the 92nd Session (2004) of the International Labour Conference*, GB.283/2/1 (March 2002), at 27–34.

33. Patrick A. Taran and Eduardo Geronimi, 'Globalization, Labour and Migration: Protection is Paramount, ILO Perspective on Labour Migration', Paper 3E, 2003, pp. 18–19, available at <http://www.ilo.org/public/english/protection/migrant/download/pom/pom3e.pdf>.

ciple to guide such efforts.³⁴ The most radical principle would be the deontological one that individuals should have the right to live and seek work where they want. Another possible principle would be community-based utilitarianism that would permit as many migrants to enter as would be economically beneficial for the existing national community. Both of these principles would probably allow in more migrants to high-income countries than public opinion in those countries would tolerate.

In one important way, the ILO would be suited for pursuing an expanded mandate. The strength of the ILO is its tripartite structure that roots in society in a much deeper way than a traditional international organization which merely assembles national government officials. If any international organization could be successful in catalyzing new international norms on worker mobility, it would be an organization that brings together, in transnational social dialogue, the private sector, civic society, and governments.³⁵ One political benefit of such transnational dialogue would be to help enable the formation of stronger constituencies for lessening barriers to migration. As a recent editorial in the journal *Economiquity* observed:

‘Whereas the advocates of the liberalisation of trade and investment form a powerful group of multinationals and export-oriented firms, the beneficiaries of the removal of restrictions on the international movement of workers consist of a disparate group of employers and consumers with not so well-organised representation’.³⁶

Although the ILO will probably never transform itself into the world’s migration organization, the participatory opportunities available in the ILO are important institutional features to insist upon in any project to establish a WMO. Contrary to what some analysts assume, the true contribution of the ILO to global governance is *not* giving NGOs influence in international law-making. NGOs have always had that.³⁷ The original contribution of the ILO was in showing the way to bring the private actors into the assembly hall, rather than relegate them to the corridors or to the street.

34. See James F. Hollifield, ‘Migration and the “New” International Order: The Missing Regime’, in *Managing Migration. Time for a New International Regime* 75, 105 (Bimal Ghosh ed., Oxford University Press, 2000) (noting the need for an organizing principle of a new international migration regime).

35. See Henk Overbeek, ‘Globalization, Sovereignty, and Transnational Regulation: Reshaping the Governance of International Migration’, in *Managing Migration. Time for a New International Regime* 48, 69 (Bimal Ghosh ed., Oxford University Press, 2000) (calling for involvement of nongovernmental organizations in the work of the International Organization for Migration).

36. ‘Mobilising Labour – The Key to Gains from Globalisation’, in *Economiquity*, No. 21, January–March 2002, p. 2.

37. See Steve Charnovitz, ‘Two Centuries of Participation: NGOs and International Governance’, reprinted in Charnovitz, *Trade Law and Global Governance* (Cameron May, 2003).