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DE DROIT INTERNATIONAL PRIVÉ

QUELQUES RÉFLEXIONS SUR L'UTILITÉ D'APPLIQUER CERTAINES TECHNIQUES DE COOPÉRATION INTERNATIONALE DÉVELOPPÉES PAR LA CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ AUX QUESTIONS DE MIGRATION INTERNATIONALE (NOTE DE SUIVI)

Note établie par le Bureau Permanent

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SOME REFLECTIONS ON THE UTILITY OF APPLYING CERTAIN TECHNIQUES FOR INTERNATIONAL CO-OPERATION DEVELOPED BY THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW TO ISSUES OF INTERNATIONAL MIGRATION (FOLLOW-UP NOTE)

Note submitted by the Permanent Bureau

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à l'intention du Conseil d'avril 2007
sur les affaires générales et la politique de la Conférence

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for the attention of the Council of April 2007
on General Affairs and Policy of the Conference

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Update on the Note "Some reflections on the utility of applying certain techniques for international co-operation developed by the Hague Conference on Private International Law to issues of international migration"

1. The Note "Some reflections on the utility of applying certain techniques for international co-operation developed by the Hague Conference on Private International Law to issues of international migration"[1] was briefly discussed at the meeting of the Special Commission on General Affairs and Policy of the Conference held from 3-5 April 2006. At the request of some experts, the Chair confirmed that the subject would remain on the Agenda of the Conference. It is worth recalling that the Note sought, above all, to offer a *model* for a new, *incremental* approach to a limited number of *specific* issues concerning the management of international migration – with emphasis on the establishment of an *inter-State* framework for progressive cross-border *co-operation*. The "Hague model" is presented, not necessarily as a topic for the Hague Conference, but as a possible way forward, to be taken up by any appropriate forum, given on the one hand the growing awareness of the need for concrete steps to be taken and of the global dimensions of issues of international migration, and, on the other hand, the absence of a global consensus both on a comprehensive normative framework or on additional attribution of governance power to intergovernmental or supranational organisations.[2]

2. During the past year, the need for international co-operation, at the global, regional, and bilateral levels, has been stressed again and again, in different gatherings. At the same time, these discussions have shown that many States remain reluctant to adhere to any normative schemes over which they would not retain full control. Significantly, in his Summary of the High-level Dialogue on International Migration and Development conducted by the UN General Assembly on 14 and 15 September 2006 at the UN Headquarters[3], the President of the General Assembly noted that, while "*there was widespread support for the proposal of the Secretary General to create a global forum*" for dialogue on international migration, "*[…] many participants stressed that, if established, the forum should foster practical, evidence-based measures to enhance the benefits of international migration and minimize its negative effects. The forum […] would not produce negotiated outcomes or normative decisions, but it would promote closer co-operation among Governments*".[4] The "Hague model" might well meet these concerns, because it would create an inter-State institutional and procedural, rather than a normative framework to enable *practical* steps to be taken; moreover, it would provide for follow-up, including evidence-based monitoring, steered by the States themselves. The model might, therefore, well lend itself to further study at the first meeting of the UN global forum to be held in Belgium in the summer of 2007.

3. As explained in the Note,[5] it is proposed that the focus should be on cross-border issues, where, the need and justification for international co-operation are obvious, and on certain, carefully identified areas, *e.g.*:

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[1] Preliminary Document No 8 of March 2006 for the attention of the Special Commission of April 2006 on General Affairs and Policy of the Conference – hereinafter "the Note".

[2] It was well understood in this sense by the Special Session on the Implementation of the Inter-American Program for the Promotion and Protection of Human Rights of Migrants, including Migrant Workers and Their Families, held in Washington, DC on 13 February 2007, see *Final Report* (in Spanish) prepared by the OAS Secretariat, Chapter V, p. 11, and Chapter VII, Conclusions and Recommendations, pp. 17-18. The Special Session concluded, *inter alia* "that co-operation is necessary at the national, regional and international level, among governments, civil society and international organizations, including co-operation with the UNHCR concerning refugees, the IOM concerning migration, the ILO concerning employment and *the Hague Conference concerning co-operation in civil matters* […]" [translation of the Permanent Bureau – emphasis added].

[3] See para. 22 of the Note, p. 9.

[4] See UN General Assembly, Summary of the High-level Dialogue on International Migration and Development, note by the President of the General Assembly, Doc A/61/515 of 13 October 2006, p. 5.

[5] See, in particular, para. 23 at p. 10.

a) Co-operation in the implementation of temporary labour migration programmes agreed between countries of origin and countries of destination.

b) Co-operation to ensure the orderly return and resettlement of migrants in other cases where this return is agreed between countries of origin and countries of destination.

c) Co-operation in establishing and monitoring a system of licensing and regulation of agents involved in facilitating international migration.

d) Co-operation in facilitating the easy and cheap transfer of remittances sent home by international migrants.

Various meetings and documents adopted during the past year have confirmed that these areas are among those that need to be urgently addressed through international co-operation. For example, in respect of a), the need *for international co-operation in relation to temporary or circular labour migration* was stressed not only at the UN High Level Dialogue[6], but also at the regional level, *e.g.* in the African Union's "African common position on Migration and Development"[7] and "The migration policy framework for Africa"[8] both adopted at the Banjul Summit in the summer of 2006, the Joint Africa-EU Declaration on Migration and Development adopted at Tripoli, 22-23 November 2006[9] and in the Presidency Conclusions of the Brussels European Council held on 14-15 December 2006.[10] The same applies to d), the need for *co-operation in facilitating the easy and cheap transfer of remittances sent home by international migrants*. Detailed "appropriate measures" were proposed in this regard at the UN High Level Dialogue,[11] and the need for international co-operation was also stressed in the African Union Documents, and in the "Lima Declaration" adopted at the close of the Special International Conference, at Ministerial Level, of Developing Countries with Substantial International Migrant Flows held in Lima, Peru, on 15-16 May 2006.

4. Already a number of *bilateral* agreements on migration deal with aspects of the areas mentioned above. For example, several Latin-American countries recently concluded bilateral agreements with Spain, dealing, in respect of temporary labour migration,[12] with the exchange of information on the characteristics of the employment on the one hand, and on the potentially available circular employees on the other hand,[13] preparation of the migrants prior to their departure from the country of origin,[14] and with co-operation with a view to their return to, and their reintegration into the economy of the country of origin.[15]

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[6] See Summary (note 4 *supra*), para. 14.
[7] See, in particular, Recommendations for Action at the international level j), k) and l), at pp. 12-13.
[8] In particular in the context of trade, see p. 38.
[9] See, in particular, pp. 8 and 9.
[10] Document 16879/1/06 of 12 February 2007, see p. 9.
[11] See Summary (note 4 *supra*), para. 12.
[12] *E.g.* Colombia-Spain, 21 May 2001; Ecuador-Spain, 29 May 2001; Dominican Republic-Spain, 17 December 2001.
[13] See *e.g.* Ecuador-Spain, Art. 3 to 10.
[14] See *e.g.* Colombia-Spain, Art. 5.
[15] See *e.g.* Colombia-Spain, Art. 12, and, with even more practical details Agreement between The Gambia and Spain on co-operation on migration matters, Banjul, 9 October 2006, Art. 4 to 6.

Several bilateral agreements provide for the equivalent of a "Central Authority" in charge of the implementation of the agreement;[16] more common is the institution of a "mixed committee", composed of an equal number of representatives of each State party.[17] In addition to circular labour migration,[18] several agreements deal with the temporary movement of migrants for educational purposes.[19]

Co-operation with a view to facilitating international remittances is also dealt with in a number of bilateral agreements.[20]

These provisions might be a source of inspiration for a flexible general multilateral framework that would establish much-needed basic permanent channels for cross-border communication and co-operation, thus carrying the dialogue beyond a continuing series of expert and high-level meetings – however useful – while leaving States full freedom to decide on the extent of their international engagements in terms of their migration policies, and allowing for a gradual rationalisation, and depolitisation based on progressive international understanding, of at least some aspects of a burning global issue.

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[16] See *e.g.*, The Gambia-Spain, Art. 12 and 13.

[17] See *e.g.*, Colombia-Spain, Art. 17, Agreement between Japan and Brazil concerning migration and settlement, Rio de Janeiro, 14 November 1960, Art. 43; Mali-France, Agreement concerning migration, Bamako, 29 May 1998, Art. 1.

[18] For an analysis of bilateral agreements on employment, and the need for a multilateral approach, see OECD, Migration for Employment – bilateral agreements at a crossroads, Paris, 2004.

[19] See *e.g.*, Agreement between France and Mauritania on the movement and stay of persons, Nouakchott, 1 October 1992, Art. 9; Agreement between France and Niger, *idem*, Niamey, 24 June 1994, Art. 9.

[20] See *e.g.*, Agreement between Argentina and Bolivia on migration, Buenos Aires, 16 February 1998, Art. 11; Australia-Malta, Agreement on Migration and Settlement, Canberra, 14 December 1970, Art. 6; Australia-Italy, Agreement on migration and settlement, Canberra, 26 September 1967, Art. 23.

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I. Introduction

1. International migration has become a burning global issue that affects all sixty-five Member States of the Hague Conference, and indeed practically all States and their citizens on this planet. It is estimated that the number of international migrants[1] has doubled in the past 25 years to reach the number of almost 200 million people.[2] It is more than likely that the numbers will only further increase as nations become more interdependent and regions more integrated. Cross-border migration takes place both within the large regions of the world and between those regions, with a clear trend from economically developing towards developed regions. With the increase in scale, the issue has grown in complexity, and has become increasingly linked with other important global issues, such as security, trade, development, environment, and human rights. The range of stakeholders involved is huge, and their interests vary and sometimes conflict.

2. As the issue has grown in scale and complexity, States, international organisations and other stakeholders are looking for forms of governance to manage cross-border migration. Instinctively, many governments tend to favour unilateral procedures, but it is increasingly realised that international migration is driven by global forces, and there is growing awareness that international co-operation is essential to effectively control the movement of persons, eliminate abuses such as trafficking and smuggling, combat other undesirable forms of international migration, and promote the benefits it may also bring.

A. The work of the Hague Conference and its relation to international migration

3. Although the work of the Hague Conference on Private International Law – in so far as it deals with private international law aspects of the cross-border movement of people – is not central to the policy-making in the field of international migration, there are nevertheless important links. On the one hand, policies and perceptions of international migration have an impact on the willingness of governments to engage in negotiations on private international law issues that may affect those policies and perceptions, and to embrace the results of such negotiations. One may presume, for example, that one reason why a potentially very useful instrument such as the 1978 Hague Marriage Convention[3] has not yet been more widely ratified has to do with concerns about its impact on the control of the international movement of people.

4. On the other hand, several successful Hague Conventions provide effective solutions to problems raised by various aspects of international migration. They extend from regulating the cross-border movement of children to dealing with certain specific cross-border consequences of international migration. An example of an instrument aimed at effectively controlling the international movement of a specific category of children – by

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[1] Following the example of the *Report of the Global Commission on International Migration*, published in October 2005 (see < www.gcim.org >), this Note does not attempt to give a definition of "international migration" or "international migrants" and will focus on people who have been living outside their country for more than a year, as well as on temporary migrants.

[2] Most of the data referred to in this Note are derived from the Report cited in footnote 1.

[3] The *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, in force (only) for Australia, Luxembourg and the Netherlands (and signed only by Egypt, Finland and Portugal). On the potential of this Convention, see P. Nygh, "The Hague Marriage Convention – A Sleeping Beauty?", in A. Borrás c.s. *E Pluribus Umum*, *Liber Amicorum* Georges A.L. Droz (1996), pp. 253-269, and, in a wider context, P. Lagarde, "*Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures*", in *RabelsZ.* (2004), pp. 225-243.

promoting their migration where it is in their best interest and no suitable arrangements can be made in the country of origin, and combating it when it is not – is the widely ratified 1993 Hague Intercountry Adoption Convention.[4] According to one of its main provisions, no child may be entrusted to prospective adoptive parents for purposes of international adoption unless the Central Authorities of both the State of origin and the State of destination ("receiving State") have agreed that the adoption may proceed.[5] They must take the necessary steps so that the child may leave the State of origin and enter and reside permanently in the State of destination.[6] The Convention also establishes an accreditation system for (private) intermediaries as a major means to reduce abuses and to enhance the prospects of successful adoptions.[7] Within the next few years, the Intercountry Adoption Convention will cover the largest part of the estimated at least 40,000 children that are adopted every year, mainly from economically developing to economically more developed countries.

5. Examples of Hague Conventions that deal with certain incidents of international migration include the 1956, 1958 and 1973 Conventions on the law applicable, and on the recognition and enforcement of decisions relating to maintenance obligations. As one knows, the Hague Conference is presently negotiating a new global instrument in this field which, in consultation with the United Nations, will also include a new system for international administrative and judicial co-operation for the cross-border recovery of maintenance, as a modern alternative to the 1956 UN Convention.[8] The new Convention should, within the area it covers, help to resolve issues, such as the lack of effective systems for, and high costs relating to the cross-border remittance of money, which are, on a more general scale, core issues of international migration and development.[9] The 1996 Hague Convention on International Protection of Children[10] is another instrument with huge potential to assist countries worldwide in protecting the rights – both under private and under public law – of children on the move, including migrant children.

6. The work of the Hague Conference is, therefore, in more than one respect linked to the current search for governance in respect of international migration. On the one hand, the Conference, in order to reach its objective of progressively bridging differences between legal systems, has a clear interest in the establishment of more commonality of visions, objectives and practices in respect of international migration. This would strengthen the resolve of the international community to deal effectively with the many private international law aspects of international migration: international marriage and divorce, legal protection of children (including child abduction) and vulnerable adults (including migrating elderly people), marital property relations and inheritance, recovery of maintenance, etc. The wider ratification of the various Hague Conventions in those fields[11] would, in turn, bring order and legal certainty to international migration and its consequences.

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[4] The *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* is now in force for 68 States.
[5] Art. 17 *c)*.
[6] Art. 5 *c)* and 18.
[7] Art. 10-13.
[8] The *United Nations Convention of 20 June 1956 on the Recovery Abroad of Maintenance*.
[9] See "Progress report on the development of a new international instrument on the International Recovery of Child Support and other forms of Family Maintenance", Prel. Doc. No 7 of March 2006 for the attention of the Special Commission of April 2006 on General Affairs and Policy of the Conference, with the attached "Tentative draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance", Art. 6: "Central Authorities shall provide assistance (…) In particular, they shall (…) facilitate [collection and] expeditious transfer of maintenance payments".
[10] The *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*.
[11] See, in particular, in addition to the Hague Conventions already mentioned: the *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, the *Convention of 13 January 2000 on the International Protection of Adults*, the *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, the *Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions* and the *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*.

B. Possible use of certain techniques developed by the Hague Conference to certain aspects of international migration

7. On the other hand, the current debate on international migration might benefit from the fact that the Hague Conference has been a pioneer in creating innovative multilateral treaties, or Conventions, for the promotion of international co-operation in private international law matters relevant to international migration. These Conventions are based on a division of responsibilities between States, as well as on shared responsibilities, and aim at achieving practical results. Moreover, they have laid the groundwork for original "post-Convention"[12] procedures and services, for assistance, monitoring and review, enabling the sharing of experiences and expertise among States parties, and their further development, made possible by progressive co-operation and growing confidence among treaty partners, other co-operating international organisations and the secretariat.

8. These treaties and the co-operative techniques based on them have proven their usefulness empirically, they have been a source of inspiration for other organisations, and some, including United Nations bodies,[13] have recommended their use, most notably in the context of the international protection of children involved in cross-border movements, including migration. Their original features include: a careful negotiation procedure prepared by solid scientific research with the participation of a core group of States, international organisations and non-governmental experts from the field; an agreed set of principles and rules on the co-ordination of the interplay of different legal systems; the requirement by the Convention of designation of a specific government body (Central Authority) with overall responsibility both internally and internationally – in relation to its foreign counterparts – for the implementation of the Conventions, and as a result, the establishment of a form of institutionalised direct international communication, sharing of information and co-operation coupled with internal co-ordination; and progressive confidence building by regular meetings of these government bodies, again in the presence of experts from the field.

9. It may be worth examining whether some of these techniques developed by the Hague Conference might be applied to certain specific policy issues in the field of international migration, as a useful complement to some of the approaches that are presently being offered or considered. It would seem that current thinking on ways to provide more governance to the issue of international migration tends to focus either on a comprehensive and detailed regulation of the rights and obligations of migrants or on the reinforcement of the responsibilities of international organisations. There may be room to reflect more on ways to assist States in progressively better co-ordinating, at the internal level, some aspects of their policies regarding international migration, while at the same time developing, at the international level, forms of institutionalised direct co-operation among them, in respect of certain practical issues along the lines of the Hague approach. It might well be that such a course, which need not conflict at all with the two models currently most advocated, would be relatively easy to accept, would be not too difficult to realise, and would then have useful spin-off effects on other aspects of international migration.

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[12] See "Post-Convention work, regional developments and the need for a systematic programme of training", Prel. Doc. No 6 of March 2006 for the attention of the Special Commission of April 2006 on General Affairs and Policy of the Conference.

[13] Most notably the UN Committee on the Rights of the Child has on many occasions recommended to States Parties to the *United Nations Convention of 20 November 1989 on the Rights of the Child* to join the Hague Conventions on protection of children.

II. Some of the dilemmas of international migration facing the countries involved as well as migrants and their families[14]

A. A changing reality

10. It was not so long ago that industrialised countries generally pursued an active policy of attracting workers from less affluent parts of the world. While some of these countries did so on the basis of temporary labour contracts, avoiding creating any expectation of permanent establishment or even integration, many other countries attracting foreign workers did not set time limits, and allowed the workers' families from overseas to join them under certain conditions, which led to permanent establishment, to family reunification, and to larger or lesser degrees of integration of these persons in those countries. Although irregular forms of international migration also occurred, they were not generally perceived as posing a major problem to these countries, because the influx of foreigners was generally welcomed. Refugee and asylum questions were seen as distinct issues, and dealt with under the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol.

11. More recently, many developed countries have become more reticent, and in some cases unfavourably disposed, to admitting foreigners to their labour market. There are several reasons for this. In the wake of diminishing employment opportunities the admittance of foreigners to the labour market may be seen as a threat to local workers. Governments may be concerned about additional security risks, or negative attitudes of the electorate. At the same time, paradoxically, the private sector may be demanding more flexibility to recruit foreign workers, and if this demand is not met, for example due to political resistance, decide to move an industry, or part of it, abroad, or resort to the services of subcontractors employing migrants with irregular status.

12. Even in times of diminishing employment, however, there are sectors of the economy, both at the low-income and at the high-income knowledge-based side (health, education, IT), which can only function with the help of foreign labour. That is why many developed countries are facing the dilemma of either making certain exceptions to a restrictive admission policy, or tolerate, out of sheer economic necessity, a certain quantum of migrants with irregular status, and perhaps, after some time, regularise their status. The situation has been further complicated by the influx into many developed countries, for example in Europe, of persons seeking asylum, most of whom however do not qualify for refugee status, and many of whom are in reality economic migrants. This in turn, has an adverse effect on the way countries implement their obligations under the UN Refugee Convention, to the detriment of those who do qualify for protection as persons fearing persecution.

13. If one looks at the issue from the perspective of the international migrants – women and men – and the countries from which they migrate, the current situation is no less complex. The main forces that are driving international migration are differences in development, demography and democracy. As the divide in living standards between affluent and poor regions continues to grow, and a migrant can easily earn many times more in the industrialised part of the world than at home, the incentive for migration towards the industrialised regions increases. Demographic differences reinforce this trend: while fertility rates in the industrialised countries tend to fall below the

[14] For a more complete analysis, see the Report cited in footnote 1, especially Chapters I-III. This Note largely draws upon this Report, but focuses on cross-border aspects.

replacement rate (2.12 per woman) and their populations are getting older, the population growth in the developing regions continues, with the result that an increasing percentage of the global labour force will come from those regions. The democratic deficit in certain developing countries, in the face of rising but unfulfilled expectations with the younger generation, is an additional factor causing many young people to migrate to countries where they can exercise their rights as free citizens.

14. It is often entrepreneurial people, those who have some education, bright and capable women and men, who set out to migrate. Some are in a position to exercise the skills they have also in their country of origin but choose to improve their living standards or level of knowledge or skills by moving abroad. Most, however, migrate essentially out of necessity rather than free choice. Many might have stayed in their country where they have their roots and where they would have preferred to develop their full human potential including their socio-cultural identity, if the economic, social and political climate in their homeland were not so hopeless. Moreover, when they leave their country they do so often under very difficult circumstances and at great personal cost, even risking their lives.

B. Temporary or "circular" migration

15. For countries of origin, the departure of migrants may have both adverse and positive effects. Clearly, migration may mean a relief to countries that have an excess of labour supply. Losing bright and skilled people forever may, however, weaken the country's prospects for development. It is well known, for example, that the loss of professional personnel in the health sector as a result of migration to wealthier countries has had a very serious negative impact on the delivery of health services in some parts of Africa. A similar trend may be noted in the field of education. The result is a downward spiral with an adverse impact on the development of the countries of origin concerned. In contrast, these countries will draw great benefits from those migrants who return, if only temporarily, and bring the knowledge, skills and contacts they have gained abroad. Measures to promote temporary, "circular" migration are therefore of great importance, and they will be most effective when based on common understanding and co-operation between countries of origin and countries of destination. Several Asian countries, for example, have recognised the developmental opportunities of this form of migration and it is estimated that each year some two million Asian people leave their countries to work abroad under short-term contracts.

C. Remittances[15]

16. To many countries of origin, remittances sent home by international migrants are an increasingly important source of income. In 2004, Mexico received 16,000 $ million, India almost 10,000 $ million, and the Philippines 8,500 $ million worth of such remittances. To some smaller countries remittances represent a share of 20% or even 30% of their GDP. It is estimated that they almost triple the official development assistance to low-income countries, and come second as a source of external funding

[15] See B. Ghosh, "Myths, rhetoric and realities: migrants' remittances and development", paper prepared at the request of the Hague Process on Refugees and Migration and the International Organisation for Migration (2006), and D. Sriskandarajah, "Migration and development", a paper prepared for the Global Commission on International Migration (< www.gcim.org/en/ir_experts.html >).

after foreign direct investment. They also come at a price, however. They involve social costs when family and community structures fall apart as a result of international migration. They may discourage economic reform in the countries of origin and may reinforce inequalities between households that do and those that may not count on remittances. Temporary labour migration, although not free from problems, may assist in avoiding some of the drawbacks of remittances by permanent emigrants.

17. International remittances may find hurdles on their way: unavailability of accessible formal financial channels, high banking fees, and unfair exchange rates, among others. To the extent that the money is being transferred through formal financial channels remittances, in addition to benefiting the direct recipients, also provide foreign exchange to countries of origin, and reinforce the financial sector (both in countries of destination and in countries of origin). But this assumes that migrants and recipients alike have access to these channels at acceptable costs. If not, they may resort to informal and clandestine channels, which may be intertwined with money laundering activities, involve more risks for the individuals concerned, and yield less indirect benefits to the economies, in particular of the countries of origin. Better regulation and co-ordination at the internal level combined with international co-operation and monitoring at the international plane could raise the micro as well as the macro benefits of international remittances.

D. Trafficking and smuggling

18. Due to the dynamic and changing nature of international migration, the distinction between countries of origin and of destination is not clear-cut. There are countries that fall in both categories, or have become transit countries (there number is growing), and, as migration patterns change, a country of immigration may become a country of emigration, a country of emigration may become a transit country, etc. All three types of countries, however, and, above all the individual victims themselves, are currently faced with appalling abuses as a result of the involvement of traffickers and unscrupulous agents in the movement of people across international borders. Trafficking involves the coercive or deceptive transfer of people independent of their will for purposes of exploitation, whereas smuggling is a consensual transaction for the purpose of circumventing immigration controls. But in practice the two may be combined, or may be difficult to distinguish. While the criminal fight against these abuses, within and between the countries involved, will continue to require great efforts, these efforts could be assisted by the further development of legal machinery for the regulation and licensing of intermediaries involved in the recruitment of migrant workers, in particular in the context of temporary labour programmes. International co-operation at the administrative level and monitoring of the licensing system could serve this development.

III. Current international initiatives to bring governance to the issue of international migration

19. International migration is a major issue at the global, the regional, the national and often even at the local level. Because it is such an all-pervasive issue, it is important to study and discuss it in its full dimensions in order to be well understood. The recent Report (October 2005) of the Global Commission on International Migration (CGIM) commissioned by a core group of States and presented to the Secretary General of the United Nations is an excellent example of such a comprehensive and thorough study and discussion. This Report has the additional merit of looking forward and suggesting directions for possible solutions. While study, research and discussion need to include all

ramifications of the issue, the search for effective solutions need not be all encompassing from the start. Indeed, this search may be more promising if it focuses on specific aspects in respect of which progress could realistically be made, provided one does not loose sight of the overall picture and takes into account the general directions which should guide the search for solutions generally.

20. The CGIM notes several recent initiatives of States to co-operate internationally – at the bilateral, regional and global level – on international migration. It also notes, however, the connection that exists between national policies on international migration and efforts to respond at the multilateral institutional level. If national policies are not adequate, international policies risk being inadequate. At the national level, lack of coherence – between migration policies and other fields, in particular economy and development; lack of co-ordination of policy-making and implementation – for example between too many ministries; lack of capacity – in particular in the poorest countries; and lack of co-operation with other States, notwithstanding that "[t]he very nature of trans-national migration demands international co-operation and shared responsibility"[16] are still widespread. If the promotion of co-ordination at the national level, involving various stakeholders can be institutionally linked with sustained direct international co-operation between States – as is done by the treaty techniques developed by the Hague Conference – then these two major objectives will reinforce each other.

21. There is no lack, at the global level, of treaties providing normative frameworks that affect or are specially designed to protect international migrants. They include the UN universal human rights instruments, various ILO Conventions, the *1993 Vienna Convention on Consular Relations,* the two Protocols on trafficking in persons and on migrant smuggling to the 2000 *UN Convention against Transnational Organised Crime*, and, in particular, the *UN International Convention of 18 December 1990 on the Protection of the Rights of All Migrant Workers and Members of Their Families*, which includes many of the provisions found in the other treaties mentioned. Although the 1990 Convention came into force on 1 July 2003, after ratification by 30 States, and is presently in force among 34 States,[17] States from the industrialised world in particular have been hesitant to join this Convention, one important reason being that the Convention contains detailed rules applying to all migrants, and does not allow differentiation between migrants who move in a regular and those who move in an irregular manner, nor between migrants who settle permanently and temporary workers. Pending further developments with regard to the 1990 Convention, complementary initiatives are called for.

22. At the global level important informal initiatives are under way. The Commission on International Migration built on pioneering work done in the context of the Berne Initiative's International Agenda for Migration Management, and the Hague Process on Refugees and Migration which is a follow-up to the Declaration of The Hague on the Future of Refugee and Migration Policy.[18] At the global institutional level, a UN Special *Rapporteur* on the Human Rights of Migrants has been appointed. The ILO, the International Organisation for Migration (IOM), UNHCR, among others, have initiated important programmes and dialogues. The UN General Assembly will hold a High-Level Dialogue on Migration and Development later in 2006. Co-ordination of all these initiatives is clearly of utmost importance, and the debate continues on the possibility to bring, in the longer term, these various activities under the umbrella of one organisation, be it a new agency, merging UNHCR and IOM, bringing IOM into the UN system, etc. At the regional level, the European Council agreed in November 2004 on the Hague

[16] Report (footnote 1), Ch. Six, No 6, p. 66.
[17] See < www.ohchr.org/english/countries/ratification/13.htm >.
[18] See < www.thehagueprocess.org/activities/declaration/samenvatting.htm >.

Programme for Strengthening Freedom, Security and Justice in the European Union, with important orientations concerning partnerships with third countries and regions of origin and transit.[19] At this point, however, it would seem that there is not at the global level consensus on the introduction of an effective governance system for international migration.

IV. Possible application of some "Hague" co-operation techniques to specific issues of international migration

23. The phenomenon of international migration is of such scale and complexity that progress in terms of international governance at the global level may well be best achieved incrementally. This would suggest that efforts should be made to identify certain areas, where there may be a sufficient commonality of interest and support among a core group of countries of origin, transit and destination, to establish, for those areas, a multilateral legal framework, that would define certain responsibilities of the States parties, create a mechanism for regular mutual information and co-operation to implement those responsibilities, provide for regular review meetings, and permit further development on that basis. The focus should be on cross-border aspects, where the need and justification for international co-operation are obvious.

Subject to further study, research and discussion, the following might be some of these areas:

a. Co-operation in the implementation of temporary labour migration programmes agreed between countries of origin and countries of destination.
b. Co-operation to ensure the orderly return and resettlement of migrants in other cases where this return is agreed between countries of origin and countries of destination.
c. Co-operation in establishing and monitoring a system of licensing and regulation of intermediaries involved in facilitating international migration.
d. Co-operation with regard to facilitating the easy and low-cost transfer of remittances sent home by international migrants.

A. Co-operation on temporary labour migration programmes

24. As we have seen,[20] temporary and circular labour migration programmes are widely used among some countries in particular in Asia. While traditional immigration countries may continue to prefer permanent arrangements, temporary programmes are likely to appeal increasingly to countries of destination faced with public opposition against increased permanent immigration, but also to countries of origin which may gain more from migrants who return sharing their know how and resources acquired abroad than when they stay abroad.[21] In order to implement such programmes, and to protect the

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[19] See also "Towards a common European Union immigration policy":
< www.europa.eu.int/comm/justice_home/fsj/immigration/fsj_immigration_intro_en.htm >, and Green paper on "An EU approach to managing economic migration":
< www.europa.eu.int/comm/justice_home/doc_centre/immigration/work/doc/com_2004_811_en.pdf >.
[20] Supra, No 15.
[21] The Report of the Global Commission on International Migration makes a strong case for the design of effective temporary migration programmes. It argues that "the old paradigm of permanent migrant settlement is progressively giving away to temporary and circular migration" and underlines the "developmental opportunities this provides for countries of origin" (Ch. II, No 42, p. 31).

interests of the migrants concerned, both countries of origin and receiving countries must assume certain responsibilities, and consult and co-operate on a regular basis. For example, countries of origin should ensure that such migrants will be well documented, will be free to leave the country, be assisted in keeping contact with their families, and have the right to return and re-integrate there. Countries of destination should provide full information to the migrants, prior to their departure from the country of origin, about their rights and duties and employment conditions, provide the necessary visas, provide work permits, monitor the implementation of work and residence permits, etc. A responsible designated governmental body (in "Hague Conference" terms: a Central Authority) in each country would co-ordinate the implementation of the programme internally, and communicate and co-operate with its counterparts in the other treaty countries in order to ensure the implementation of the programme internationally. Regular consultations and review meetings among these governmental bodies, with the participation of representatives of international organisations, employers' organisations, trade unions, migrant organisations, etc. would promote the exchange of practical experience, lead to better understanding, allow good practices to be developed.

B. Co-operation on orderly return and resettlement

25. Outside temporary labour migration programmes, there may be other instances where a multilateral legal framework, based on mutually agreed principles could bring benefits. Where migrants have an irregular status and their return is appropriate, their orderly return should be facilitated where possible on a voluntary basis. This will be easier when countries of origin and of destination agree on return schemes, and co-operate in implementing them. They may also agree to co-operate in certain cases where compulsory return is the only appropriate option. Countries of destination need to ensure that returns of migrants are arranged with full respect for their human rights. Countries of origin should make consular services available to their nationals who are subject to removal, and on their return should re-admit them to their territory. The designated responsible government body could provide the internal co-ordination and international exchange of information and co-operation. Regular review meetings of these governmental bodies, with the participation of international organisations, migrant associations and other stakeholders, would gradually improve international understanding and practical co-operation in this area. Such meetings could also be useful to exchange experiences with development assistance programmes that are increasingly used to support the resettlement and durable re-integration of returning migrants.

C. Co-operation on licensing and regulation of intermediaries

26. Trafficking (without the consent of the victim) and smuggling (with the migrant's consent) – as noted above,[22] the two cannot always be neatly distinguished in practice – can only be effectively combated through multilateral co-operation between countries of origin, countries of destination, and transit countries. While criminal prosecution is an essential component in the fight to reduce these crimes and negative practices,[23] in an incremental approach as envisaged here, a multilateral framework might start at the other end, and develop a system of licensing and regulating the activities of agents

[22] *Supra*, No 18.
[23] See, for example, *R.* v. *Wacker* [2002] EWCA Crim 1944 (31 July 2002).

involved in the recruiting of foreign workers. A parallel may be drawn here with the Hague Intercountry Adoption Convention, which, among other objectives, seeks "to establish a system of co-operation amongst Contracting States to ensure that [the] safeguards [established by the Convention] are respected and thereby prevent the abduction, the sale of, or traffic of children", and to that end provides basic rules on the conditions under which adoption agents ("bodies") may be accredited by each Contracting State, on the criteria they should meet, the authorisation they need in order to act in other Contracting States, as well as for the notification of their names and addresses to the Permanent Bureau of the Hague Conference.[24] In a similar manner, countries of origin and of destination of international migrants might agree on certain minimum requirements as to expertise, experience, financial structure and objectives, and supervision to which any agencies involved in the recruitment of international migrants should be subject, and establish a system of licensing on that basis. Licensing and supervising the agents might be the responsibility of the government bodies designated under the treaty framework.[25] Regular review meetings, with the participation of other international organisations, migrant associations, etc, would accumulate experiences with the licensing and regulation system, contribute to regularising international migration and, by clarifying positive standards, facilitate the co-ordinated fight through criminal law against breaches of these standards.

D. Co-operation with regard to facilitating international remittances

27. As we have seen,[26] remittances sent home by international migrants are critical as a major source of income for many countries of origin, and their importance continues to grow fast. Of course, they are private money, and are not to be appropriated by States. However, there is a role for States to see to it that these money transfers are not unduly regulated, or made difficult or expensive by the formal banking channels. If easy access is provided to these channels, their fees are fair and the exchange rates they are offering reasonable, then their use will be promoted. As an additional benefit, the risk that migrants and their dependents will resort to clandestine, money laundering networks will be reduced. The designated responsible government bodies in countries of destination should take steps to facilitate access to and ensure transparency of the financial market, and those in countries of origin should make sure that families, in particular in remote areas, have access to financial services and receive their money. Assistance may be given to counsel migrants, recipients and communities in countries of origin to make effective use of remittances. Some bilateral agreements (for example, between the Netherlands and Morocco) already provide for such arrangements. Regular review meetings of these governmental bodies with the participation of international organisations, representatives of the financial sector, micro-finance organisations, migrant associations, etc. would yield valuable information on current practices, promote better procedures, stimulate new initiatives, etc. They might also promote collective remittances that may benefit whole communities rather than individual households, and stimulate matching funds from public sources. If successful, this form of international co-operation might be extended to other critical financial issues of international migration, including the problem of the transferability (portability) of social security and pensions rights in case migrants return home.

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[24] Art. 1(b) and 10-13.
[25] See Report (footnote 1), Ch. One, No 34, p. 18, "careful consideration [must be given *inter alia* to] licensing and regulating the activities of agents involved in the recruitment of temporary migrants".
[26] *Supra*, Nos 16 and 17.

V. Conclusion

28. It may be that further study and discussion will show that dealing with the four areas mentioned above in one multilateral treaty is too ambitious, or, on the contrary, that other areas might conveniently be added. Indeed, other areas than the four mentioned above might turn out to be promising, or more promising, as the focus of a multilateral co-operative system. The purpose of this Note is to invite reflection on whether the Hague experience might be usefully applied to some issues at the heart of international migration, a phenomenon that conditions so much of the work of the Hague Conference.

29. It should be stressed that the Note does neither attempt to deal specifically with refugee issues, nor to revise or replace the 1951 Refugee Convention or its 1967 Protocol. On the contrary, the idea would be to create a separate, freestanding framework that will address problems of international economic migrants for which the Refugee instruments were not designed. Indeed, if successful, such a framework could contribute to restoring the refugee instruments to their original purpose of taking care of refugees fleeing persecution.