Part II: Interpreting the Convention

Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention

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Pursuant to the international legal principle of territorial sovereignty, states possess extensive authority to control the ingress of foreigners into their territory, but the presence of tens of millions of irregular migrants around the world reveals that states often fail to exercise such control in practice. As a result, international society is faced with the need to establish standards of appropriate treatment for irregular migrants who are present within the territory of receiving states. In view of the precarious social condition of these individuals, the need for human rights protections in this context is particularly urgent, but the interests of states in territorial sovereignty are also at stake. The International Convention seeks to accommodate these competing concerns by providing human rights protections to undocumented migrants which are substantial but less extensive than those provided to documented migrants, and through ensuring states' continuing authority in the spheres of immigration control and national "membership policy." The article concludes that, despite the unmistakable normative value of many of the Convention's protective provisions, the Convention's ability to substantially ameliorate the human rights situation of irregular migrants is significantly constrained by its overriding commitment to the norms and structures of sovereign statehood.

[W]hile the international legal protection afforded to aliens is on [the] one hand an inchoate expression of human similarities which cannot be denied, it is simultaneously an expression of national differences which are equally beyond question. (Morgan, 1988:142)

Irregular migration has become the subject of urgent policy debate both within many states and at the international level during the past two decades. While international organizations, state governments and analysts have focused much of their concern on the effect of clandestine migration on receiving states, they have also devoted increasing attention to the precarious social condition of the migrants themselves.

The plight of irregular migrant workers was explicitly highlighted in the international arena in 1974, when the International Labour Organization (ILO) adopted a Convention concerning Migrations in Abusive Conditions (No. 143).[1] The Convention emphasized the damaging social consequences of irregular migration, and explicitly included undocumented migrant workers within the scope of certain protective provisions. That same year, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities published a report entitled *Exploitation of Labour Through Illicit and Clandestine Trafficking,* which detailed, among other things, the human rights problems faced by undocumented migrant workers and their family members. The report concluded that the preparation of "one or more new instruments to render explicit certain relevant human rights which are only implicitly recognized in the existing provisions" was desirable (Warzazi, 1986:192).

Spurred by these developments and the growing international perception that a human rights instrument of general applicability was required in the labor migration context, the General Assembly of the United Nations issued a call in 1979 for the drafting of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[2] (Haseneau, 1990:138). A special working group of state representatives was established to draft the instrument, and after a series of meetings which spanned the course of a decade, the final draft was completed in 1990. The General Assembly adopted the Convention that same year.

The Convention includes a broad range of explicit human rights protections for undocumented migrant workers and the members of their families[3] which significantly surpasses any protections afforded to them

[1] Convention No. 143 ("Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers"), Geneva, June 24, 1974, Cmnd.6624.

[2] GA Res. 34/172, UN doc. A/34/46 (1979).

[3] Under Article 5 of the Convention, migrant workers and members of their families "a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a Party; b) Are considered as non-documented or in an irregular situation if they do not comploy with the conditions provided for in subparagraph (a) of this article." Under Article 4 of the Convention, the term "members

previously. Prior to the Convention, undocumented migrants had either been explicitly excluded from coverage or had been ignored as a distinct class under the provisions of virtually all existing human rights instruments, both international and regional.[4] The sole exception was ILO Convention No. 143, which guarantees "equality of treatment for [the undocumented migrant worker] and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits" (Article 9(1)), and also requires the protection of the basic human rights of "all migrant workers" (Article 1). Nevertheless, the ILO Convention does not protect the family members of migrant workers, and the "basic human rights" it guarantees are generally viewed as limited in scope.[5] Moreover, because the employment-related rights the ILO Convention provides to undocumented migrants cover only "past employment," they remain extremely restrictive.

Notably, undocumented migrants were ultimately *not* excluded from the class protected under the UN General Assembly's recent Declaration on the Human Rights of Individuals Who Are Not Citizens of the Countries in which They Live,[6] although factious debates about their inclusion tied up

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of the family" includes spouses of migrant workers, common-law spouses, if recognized by the law of the state of employment, their dependent children, and "other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreement between the states concerned."

[4] The only (indirect) references to irregular immigrants in the major United Nations human rights instruments preclude them from protections afforded to regular migrants. Articles 12(1) and 13 of the International Covenant on Civil and Political Rights, respectively, limit the right of liberty of movement to "[e]veryone lawfully within the territory of a State," and provide procedural rights in the context of expulsion from a state to "alien[s] lawfully in the territory of a State Party." In theory, at least, the treatment of irregular immigrants should be otherwise indistinguishable from all other aliens and non-nationals (the extent of protection afforded to aliens as a group varies among the instruments and their provisions) (*see,* Lillich, 1984:41–48). Regional human rights instruments follow much the same pattern. The European Convention on Human Rights and Fundamental Freedoms, for example, limits coverage of the article on freedom of movement to persons lawfully within the territory of the State Party (Article 2 of the Fourth Protocol), and allows curtailment of the right to liberty and security of the person where an individual is seeking to make an unauthorized entry into the territory of the State Party or "against whom an action is being taken with a view to deportation" (Article 5). Otherwise, in theory, the rights of irregular aliens should not be distinguishable from those of other aliens. *See also,* African Charter On Human Rights, 1981 (Article 12(4)); American Convention on Human Rights, 1969 (Articles 22(1) and (6)).

[5] The Convention fails to specify those rights which are considered "basic," which would make it difficult to apply in specific cases; moreover, it is "out of the question that Article 1 implies an open-ended reference to the entire body of human rights that have been gradually codified in the UN" (Bertinetto, 1983:194).

[6] G.A. Resolution 40/144 (December 13, 1985).

the drafting committee for years. In its final form, the Declaration extends certain human rights protections to "any individual who is not a national of the State in which he or she is present" (Article 1). However, the Declaration is of limited value to most undocumented immigrants since it is a nonbinding instrument, the rights it sets forth are far from comprehensive, and the particular condition and specific needs of undocumented immigrants are not addressed.

The United Nations Convention for the Protection of The Rights of All Migrant Workers and Members of Their Families is, therefore, the most ambitious statement to date of international concern for the problematic condition of undocumented migrants. The Convention recognizes that "workers who are non-documented or in an irregular situation are frequently employed under less favorable conditions of work than other workers," and that "the human problems involved in migration are even more serious in the case of irregular migration" (Preamble). Its provisions make clear that irregular migrant workers and the members of their families—two categories which effectively include most migrants in an irregular situation around the world[7]—are persons affirmatively entitled to substantial legal protection within the international human rights regime.

The Convention extends a broad range of civil rights and employment-related protections to "all migrant workers and members of their families." Thus, under the Convention, states parties are to afford to undocumented as well as documented migrants a range of civil, social and labor rights as against the state of employment, employers, and other individuals within the state. These include, but are not limited to, rights to due process of law in criminal proceedings, free expression and religious observance, domestic privacy, equality with nationals before the courts, emergency medical care, education for children, respect for cultural identity, and process rights in the

[7] Despite the nominal limitation of the Convention to "migrant workers and the members of their families," the Convention would actually protect the vast majority of migrants in an irregular status in the territory of contracting states. First, the Convention defines the term migrant worker" as a "person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national" (Article 2(1)). This definition encompasses not only people who migrated for the purpose of employment, but also those people who entered for reasons entirely unrelated to employment who have worked at any point. Consequently, hundreds of thousands of "de facto refugees" who have entered states without authorization and have subsequently become employed would be covered, as would certain former students, tourists and others (note, however, that Article 3(d) expressly excludes refugees and stateless persons from coverage).

The Convention covers not only irregular migrants who are or have themselves been employed, but also most persons who are closely related to them (*see,* note 3).

While there are certain to be exceptions (including people who have overstayed their visas but are not employed and undocumented relatives of irregular migrant workers who do not meet the state's definition of "family member"), most undocumented immigrants fall into one or the other category.

detention and deportation context. They also include the rights to enforce employment contracts against employers, to participate in trade unions, and to enjoy the protection of wage, hour and health regulations in the workplace. (Part III of Convention, Articles 8–35).[8]

Yet despite its laudable protective provisions, the Convention's treatment of undocumented immigrants is deeply ambivalent. In the first place, the Convention is as striking for its exclusion of undocumented immigrants from the scope of certain important rights and protections as it is for its explicit coverage of them by others. While contracting states must meet the minimum standard of treatment of irregular migrants prescribed in Part III of the Convention, the rights provided these migrants need not be as extensive as those which must be afforded to migrant workers and members of their families who are in a regular situation in the state of employment. States parties are entitled to discriminate against undocumented migrants with respect to rights to family unity, liberty of movement, participation in the public affairs of the state of employment, equality of treatment with nationals as regards the receipt of various social services, equality of treatment for family members, freedom from double taxation, and further employment protections and trade union rights, among others. (Parts IV and V of Convention, Articles 36–56 and 57–63, and Article 70).

Moreover, and more significantly, the Convention's terms repeatedly stress in a variety of direct and implicit ways that the rights provided in the Convention are not to be construed as an infringement on state power to govern the admission and exclusion of aliens from their territory and on all concomitant state prerogatives. The Convention permits states parties to pursue the immigration control policies that they see fit (Article 79), and requires them to undertake control measures to end the process of clandestine migration and the presence and employment of irregular migrants including, "whenever appropriate," employer sanctions (Articles 68 and 69). Contracting states are explicitly not obliged to regularize the status of irregular migrant workers (Article 35), and undocumented immigrants are pointedly not exempted from "the obligation to comply with the laws and regulations of any State of transit and the State of employment" (Article 34), including, by implication, states' laws against unauthorized entry, employment or residence.

This article will argue that the process of irregular migration poses a set of exceptionally complex dilemmas for the theory and practice of international human rights. The debate which accompanied the Convention's

[8] As provided in most other human rights instruments, states parties may derogate from many of these rights when necessary to maintain *ordre public*, and in other exceptional circumstances (*see*, various provisions of Part III).

drafting revealed a continual tension between the rights of undocumented migrants, as individuals, to treatment in accordance with international human rights standards, and the rights of states to unimpeded exercise of their sovereign power to exclude foreigners from their territory and to shape the composition of national membership. The ultimate result is a hybrid instrument, at once a ringing declaration of individual rights and a staunch manifesto in support of state territorial sovereignty.

The Convention represents an important advance for the rights of undocumented migrants, notwithstanding its two-tiered structure of protections. If ratified and enforced by the individual states parties, the Convention's terms would constrain the abusive exercise of state power against undocumented immigrants under certain circumstances, and would guarantee them a degree of social protection, particularly in the employment context. However, the Convention's net value for these migrants is threatened by its overriding commitment to the principle of national sovereignty. Specifically, the Convention's assiduous reservation of powers to the states in the interests of territorial sovereignty will ultimately circumscribe the reach and effect of many of the protections for undocumented migrants that the Convention seeks to assure.

STATE SOVEREIGNTY AND IRREGULAR MIGRATION

The meaning of "irregularity" of status for migrants is variously defined under different states' legal systems. As a rule, irregular migrants or immigrants are people who have arrived in the state of employment or residence without authorization, who are employed there without permission, or who entered with permission and have remained after the expiration of their visas. The term frequently includes de facto refugees (persons who are not recognized as legal refugees but who are unable or unwilling to return to their countries for political, racial, religious or violence-related reasons), as well as those who have migrated specifically for purposes of employment or family reunion.

Irregular immigrants experience a range of treatment, both legal and social, among different receiving states. Despite these variations, the status of all undocumented immigrants shares one decisive element. By definition, their designation as "irregular" migrants or immigrants presupposes either the breach or the failure of national territorial borders. The concept "irregular migration," in other words, is intelligible only by reference to both the rule of state territorial sovereignty and the limitations of sovereignty in fact.

The rule of territorial sovereignty is a fundamental governing principle of the international legal and political systems. The term refers to a state's power to exercise exclusive control over its physical domain, subject to

limitations imposed by international law (*see e.g.*, Sieghart, 1985:32; Mayall, 1990:19–20). It is usually understood to entail a state's "competence to prescribe and apply law to persons, things and events within its territorial domain to the exclusion of other states" (Chen, 1989:117).

States' power to refuse entry and to expel aliens and their discretion to confer nationality has been treated as an integral part of this territorial sovereign power since the late nineteenth century. As one analyst expressed it, "if a state is not free to decide who will enter its territory according to its own criteria and to regulate the conditions of such ingress, it is severely impeded in its function as the governing authority of the territory in question" (Fourlanos, 1986:50, 57).

Such powers are by no means treated as absolute under current international law—in fact, international law imposes important limitations on their exercise. For example, major human rights instruments place procedural restrictions on the power of states to expel lawfully present aliens.[9] Many states have entered into bilateral, regional and specialized accords regarding migration for employment and other forms of international movement through which they effectively relinquish their discretion to control the entry and expulsion of foreigners. Under the 1951 Refugee Convention, states may not expel or return aliens who qualify as refugees to the frontiers of states of persecution (this is the principle of *nonrefoulement*), and this principle is now generally regarded as supported by customary international law (Plender, 1988:425–431; Goodwin-Gill, 1988:104; *but see,* Hailbronner, 1988:128–132).[10]

Despite these and other limitations, (*see generally,* Plender 1988:159–191; Fourlanos, 1986), conventional international law provides that the ingress of aliens is a field "essentially falling within [the] domestic jurisdiction" of states (Fourlanos, 1986:50; *see also,* Brownlie, 1990:519). The prevailing view is that states may draw limits, and that they may condition the entry of foreigners into their territory upon their consent[11] (*e.g.*, Plender, 1988:460;

[9] *See, e.g.,* International Covenant on Civil and Political Rights (Article 13); American Convention on Human Rights (Articles 22(6) and (9)); African Charter on Human Rights (Articles 12(4) and (5)); and the European Convention on Human Rights (Article 4 of the Fourth Protocol).

[10] Under the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, Article 1, para. 2, and the 1967 Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, Article 1, a refugee is defined as any person who possesses a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, who is outside his or her country of nationality and is unwilling to avail him or herself of the protections of that country due to such fear. Article 33 of the 1951 Convention sets forth the right of *nonrefoulement.*

[11] Such consensus in international law corresponds with view in political thought that states

Martin, 1989:572). While some disagreement remains as to the absoluteness of those limits,[12] there is little question that, at the very least, states may seek to prevent the entry, and may subsequently exclude, migrants who attempt to enter or do enter state territory without formal state authorization for purposes of employment, family reunification or for other "voluntary" purposes.

Despite international recognition of states' powers to control their ingress, foreigners frequently cross states' borders uncontrolled. As a general matter, national borders still function as boundaries which channel and constrain the movement of human beings; states control their borders by formally choosing who (if any) will enter (legal or "regular" migration) and by turning away the rest. Yet hundreds of thousands of people cross national borders each year without the explicit authorization of the states of entry, and millions more remain in those states without express permission. The majority of these migrants are ultimately employed in the receiving state.

Significantly, not all unauthorized cross-border movements are perceived or treated as "irregular" migrations in practice. The legal power that states possess to protect their borders against outsiders is not always exercised, and, perhaps more importantly, unauthorized cross-border population flows have often not been treated, either rhetorically or in fact, as a process which poses a threat to state sovereignty. In France, for instance, undocumented immigration, which constituted up to 80 percent of all immigration until the early 1970s, was described as "spontaneous migration" and was tolerated as such; only later was it described as "illegal" and made the object of concerted legal control (Verbunt, 1985:136). Likewise, until recently, the entry and employment of undocumented immigrants in many developing countries "were not in fact viewed as illegal acts although they were at variance with existing legislation. Irregular migration was tolerated as a normal occurrence and regarded as inconsequential" (Lohrmann, 1987:253).

In the past two decades, however, the rate of unauthorized cross-border movements has increased while the international economy has deteriorated. States have come more frequently to characterize irregular migration as a legal problem of significant proportions (Bertinetto, 1983:189–190; Moulier-Boutang, 1985:580; Lohrmann, 1987) and often describe such migra-

may exercise an "admissions policy" with respect to foreigners for the purpose of protecting the national community (Walzer, 1983:31; see, also, Zolberg, 1989:411–412).

[12] The disagreement is evidenced, for example, by the ongoing debate regarding states' powers to expel asylum seekers who fail to qualify for refugee status, even if they have entered such states without authorization (*see*, debate in Martin, 1988; *see, also,* Plender, 1988:426–427).

tion as a threat to national sovereignty (*e.g.*, United States policy-makers repeatedly warned in the 1980s that the country had "lost control of its borders"). Many states have enacted restrictive immigration legislation in the past decade in an effort to reassert control.[13]

The incidence of irregular migration is unlikely to diminish anytime soon, despite renewed control efforts in many states of employment. Undocumented immigrant labor is relied upon increasingly in both advanced and developing states (*e.g.*, Sassen, 1989:811–832; UN General Secretary, 1984:8, 25), including states, like Japan, which formerly experienced extremely low rates of immigration (Selby, 1989:327–330). Countries which formerly "exported" migrants, including Italy, Spain and Greece, are increasingly net "importers," and many of their new immigrants are undocumented (Murray, 1989:180; Widgren, 1989:52). The number of asylum seekers is rising annually worldwide, and while states will continue to deny asylum to most applicants, large numbers will remain in those states without authorization as they do today (*e.g.*, Martin and Honekopp, 1990:601; Lohrmann, 1987:255–256). Economic and political conditions in many of the principal sending countries have further deteriorated in recent years with no sign of relief in sight, and new pools of migrants, including millions from Eastern Europe, have recently joined the flow. The ILO predicts that in the next two decades there will be 25 million migrants in irregular situations throughout world, not including refugees (*Migration News Sheet*, Feb. 1991:3).

In light of these recent developments, the prevailing legal norm of territorial sovereignty appears increasingly at odds with the current dynamics of transnational migration. Like other transnational processes, the process of irregular migration reveals a "discrepancy between the terms of reference and explanatory reach of the theory [of the sovereign state] and the actual practices and structures of the state and economic system at the global level" (Held, 1989:229). Evidently, states' internationally recognized powers to police their frontiers and to control admission to and exclusion from their territory do not necessarily guarantee state insularity. In short, while states possess the legal authority to keep these migrants out, they often fail to do so in fact.[14]

[13] The United States, Canada, France, Australia, Japan, Germany, Argentina and Italy among other countries, have all introduced laws in the last several years which are aimed, at least in part, at controlling the process of irregular immigration within each of those countries. For a summary of some such legislation (*see*, Plender, 1986). Increasing restrictionism on the part of the states is both paralleled and partially spurred by the surge in nationalist and explicitly anti-immigrant political movements within the societies of many of these states, those in Europe in particular (*see e.g.*, Riding, 1990; Cross, 1989:171; Widgren, 1989:52–53).

[14] As Duchacek (1986:208) has observed in a different context, "[t]he concept of territorial

This failure of sovereignty-in-fact gives rise to various knotty questions for the international legal system. While states possess acknowledged authority to prevent the entry of these migrants in the first instance and to deport them from their territory, their authority in relation to these migrants in spheres other than immigration regulation is much less certain. What international legal norms govern states' relationships with undocumented migrants once they are present within their territory? How can states' interests in immigration control and undocumented migrants' interests in fair treatment be accommodated? What is the actual relationship between states' immigration-regulatory powers and their general human rights obligations to undocumented aliens, and what should it be? In short, how do we understand and work with the interplay between "questions of entry" and "questions of membership" (Brubaker, 1989:14) in the treatment of irregular migrants under international law?

HUMAN RIGHTS FOR UNDOCUMENTED MIGRANTS: COMPETING PERSPECTIVES

The extension of substantial human rights protections to undocumented immigrants appears both particularly necessary and especially problematic under international law. As already noted, completion of the UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live was delayed for years due to heated conflict within the working group over whether undocumented immigrants would be included within the protected class of non-nationals. While, in contrast, inclusion of undocumented migrants within at least some of the protections of the International Migrant Workers Convention was contemplated by most states from the beginning, the scope and extent of such coverage were among the most fiercely contested issues that the working group faced. The full complexity of this debate was not developed during the Convention's lengthy drafting process since working group participants were seeking compromise rather than a detailed exposition of differences. Nevertheless, conflicting views are discernable in the record of the group's proceedings and are embodied in the final draft of the Convention itself.

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impermeability has combined with the facts of permeability to produce what may be called international relations among perforated sovereignties" (cf., Held:228–229). Analysts have debated the source and nature of state territorial permeability in the migration context. Many emphasize the incapacity or infectiveness of states in keeping the migrants out, while others stress the states' toleration of the phenomenon in order to benefit from the labor the migrants provide. Evidently, the emphasis will change depending on the conditions involved in different countries at different historical moments.

The debate between proponents and opponents of human rights protections for undocumented migrants is actually conducted at two different levels of argument and analysis (although they are never entirely separate), each of which is structured around the tension between the rights of the migrants as individuals and the interests or prerogatives of states. At the first level, the arguments concern the best or most appropriate course of conduct in the treatment of undocumented aliens as measured against both policy objectives and normative standards. At this level, the positions closely resemble those which have been elaborated (often more extensively) in policy debates about clandestine migration within states and in the general migration literature.

At a second level, the debate involves structural questions about the manner in which two sometimes-conflicting principles of international law should be accommodated in the context of an international human rights instrument which protects undocumented aliens. The question here concerns the effect of states' sovereign powers to exclude foreigners on the rights of undocumented migrants as individuals, and reciprocally, the effect of human rights protections for undocumented migrants on states' sovereign exclusionary powers.

The Policy Debate

Contrasting models of fairness and divergent approaches to deterrence shape the debate at the level of policy. On one side, analysts, human rights advocates and some states contend that the legal and social status of irregular migrant workers and their families in the countries in which they live and work makes extension of substantial human rights protections to them especially urgent. By virtue of the illegality of their entry, presence and/or employment, the undocumented are particularly powerless within the receiving states.[15] Their unauthorized status, however defined, makes them subject to removal and possible prosecution for immigration violations at all times. They usually lack access to many, if not most, civil and labor rights and social benefits, and they are afraid to avail themselves of the rights they may enjoy for fear of exposure to immigration authorities. As a consequence, undocumented migrants are often among the lowest paid and hardest worked employees in the work force; they are susceptible to avari-

[15] Despite sometimes very significant variations, the social and economic conditions of irregular immigrants share certain characteristics in different receiving states. The social problems often associated with the irregular and legal status of undocumented immigrants within the receiving countries have been extensively documented for many of the major states of employment and residence. Recent studies include Selby, 1989 (Japan); Wihtol de Wenden, 1990 (Western Europe); Bosniak, 1988 (United States); Hawkins, 1990:195–213 (Australia and Canada). *See also,* Warzazi, 1986.

cious practices on the part of landlords and merchants; and they fear state authority, including authority that might provide them with assistance.[16] These effects of illegal status not only shape the migrants' own experience, but also have disruptive social consequences for the societies in which they live and work.

The particular need to protect the human rights of this group of migrants is argued both as a matter of universal values and as an issue of instrumental expediency. Stressing the extreme condition of social vulnerability to which the undocumented are often subjected, advocates of the normative human rights position invoke the universality of the human rights mandate,[17] and also emphasize the particular concern that the international community has shown for especially unprotected social groups.[18] Instrumentalists, on the other hand, argue that guaranteeing human rights for undocumented migrants serves the interests not only of the migrants but of the state and

[16] Illegal status is not the only factor which shapes the experience of undocumented immigrants in the receiving countries, and their experience does not always differ fundamentally from the experience of legally present migrants. Studies in the United States, for instance, have demonstrated that the undocumented are not always paid less than domestic workers and that when they are, this may often be as much a function of their foreign status, length of residence and education level as their legal situation (Massey, 1988). Furthermore, one cannot necessarily presume that employers (or landlords) specifically seek out undocumented migrant workers for their vulnerability, or even that they are always aware of the legal status of their employees (or tenants) (*e.g.*, Bailey, 1985).

The point is that the unauthorized legal status of these individuals provides a background set of rules which structure the relationships that they have inside the country of employment and delimit the scope of action that they are likely to take. For instance, an employer may not pay an undocumented worker less than the minimum wage or require him to work longer hours, but if he does—and this occurs with great frequency in many countries (*see*, note 15)—the worker 1) is unlikely to complain about it to the authorities for fear of exposure to punishment or expulsion, 2) is less likely to quit and risk unemployment since he or she is ineligible for state unemployment and other welfare benefits, and 3) is less likely to participate in any labor organization process for fear of exposure to immigration authorities (*see generally*, Bosniak, 1988:987–998; Wihtol de Wenden, 1990).

[17] For example, during a meeting of the working group which was preparing the draft Convention, the representative of Denmark stressed that the Convention should protect "the rights of all migrant workers and their family members in any conceivable situation. The main principle behind the work should be the humanitarian aspect in any situation, and that aspect should be strengthened to the widest possible extent in the text of the Convention" (*Report of the Open-ended Working Group* (hereinafter, *"Report"*), (June 1985): UN doc.A/C.3/40/1, para. 30). Similarly, the representative of Finland stated that the Convention's "guiding principle should be the humanitarian interest of each individual rather than the interest of the State" (*Id.*, para. 17).

[18] The representative of Mexico emphasized that the Convention "was a further step in United Nations efforts to define the fundamental rights of certain specially vulnerable population groups" (*Report*, June 1985), UN doc.A/C.3/40/1, para 48). Additionally, as already noted, the Convention's Preamble bases the need for further protections for undocumented immigrants on the fact that "the human problems involved in migration are even more serious in the case of irregular migration."

its citizens as well: to the extent the rights of irregular migrants are not protected, they are more desirable to certain employers who seek their vulnerability. Further rights for and empowerment of these workers *vis à vis* both state and employers will limit the demand for the particular character of labor which they provide; thus, conditions for domestic workers will improve, and the interests of border control as well as the human rights of migrants will be served (*e.g.*, Peletier, 1983:182; Böhning and Werquin, 1990:14–16).[19]

In sharp contrast, many analysts, and certainly many governments, view the prospect of extending substantial human rights to irregular migrants as extremely problematic. In their view, more rights would encourage and even reward further violations of state territorial borders (*e.g.*, Bertinetto, 1983:199).[20] Furthermore, while recognizing that undocumented immigrants suffer human rights abuses, they stress that the only acceptable policy response is a renewed commitment to enforce state borders and to prosecute employers who hire undocumented immigrants and persons who traffic in clandestine migration. Some emphasize that more punitive immigration control measures will serve as a deterrent to further irregular migration, thereby eliminating the situation of exploitation altogether.

Notably, support for enhanced restriction and enforcement is also expressed by some proponents of rights for undocumented immigrants, who view stringent border control measures as an indispensable part of any human rights program. The theory is that to the extent undocumented migrants are prevented from illegal entry or employment, they are protected from the forms of exploitation which characterize their status (*e.g.*, Böhning and Werquin, 1990:14–16; Peletier, 1983).[21]

[19] The representative of Norway, for example, "stressed the importance of ensuring basic rights to all migrant workers, irrespective of their being in a regular or irregular situation, which would discourage the use and exploitation of undocumented foreign workers" (*Report* (June 1985), para. 29). The representative of Sweden stated that "contrary to what has been advocated, the protection of the basic human rights of undocumented migrant workers would tend to discourage illicit or clandestine migration" (*Id.*, para. 14). *See also,* Preamble to Convention: "*Considering also* that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized. . . ."

[20] *See e.g., Draft Report of the Open-ended Working Group,* UN doc. A36/378, Annex XIII (May 1981), para. 10 ("certain delegations felt the [draft] text would tend to encourage illegal trafficking in labor, or, at least, to make it very difficult for States to take effective measures against such trafficking"); *Report of the Open-ended Working Group* (June 20, 1985), UN doc. A/C.3/40/1, para. 25 (the representative of Australia expressed concern that the protections for undocumented migrants included in the draft Convention might "affect Australia as regards illegal migration").

[21] The representative of Sweden, for example, asserted that a human rights policy for undocumented migrants "must be combined with legislative measures to make illegal and

In addition to the legal and pragmatic arguments for and against rights for undocumented migrants, the Working Group's record of proceedings contains a subtext of contrasting normative views on questions of national community, social obligation and policy toward immigrants.[22] On one side, supporters of rights for the undocumented suggest that states and employers should not be permitted to benefit from the labor of irregular migrant workers without being required to accord them, or to comply with, fundamental rights and protections. Rather than treating irregular migrants as voluntary transgressors of state immigration laws, many analysts shift at least part of the responsibility for irregular migration to the receiving states by emphasizing, among other things, states' persistent demand for migrants' labor and their history of economic and political penetration into many of the societies from which the migrants originate (*e.g.,* Portes and Rumbaut, 1990:233; Sassen, 1989:828–829). Rights supporters argue that irregular migrant workers are in certain respects de facto members of the national community by virtue of their economic and cultural contributions and that the community should keep its end of the unwritten compact by extending the undocumented legal recognition and certain basic rights.[23]

Opponents assert, on the other side, that states should not be obliged to provide undocumented aliens anything more than minimal human rights protections because they are not party to the social contract which binds the national community (*see e.g.,* Henkin, 1990:47–50; Martin, 1983:231; Schuck and Smith, 1985:131–140). In this view, the migrants entered the state's territory without state consent and in direct violation of the state's expressed intention to condition entry upon consent, and are therefore not entitled to the benefits of community membership, including most rights.[24]

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punishable the unauthorized employment of foreign workers in accordance with Part I of ILO Convention No. 143 on migrations in abusive conditions" (*Report,* (June 20, 1985), para 14).

[22] These themes have been more explicitly developed in the immigration debates within individual states and within the migration literature more generally.

[23] "Membership is a social fact, not something that can simply be determined by political authorities . . . [Aliens'] moral claims . . . derive from their social ties to these countries, from the fact that they live and work there" (Carens, 1989:32–33, 43–44). *See e.g.,* Selby, 1989:356–358; GISTI, 1990:4- 37; Layton-Henry, 1990:189; Lopez, 1981. *See also, Report,* UN doc. A/36/378 (May 1981), para. 42 (various delegations "stressed that undocumented migrant workers frequently paid taxes or contributions in the state where they were employed and that their corresponding entitlements must be guaranteed"); *Report,* UN doc. A/C.3/40/1 (June 1985), para. 47 (the delegation of Mexico stressed "the positive contribution of migrant workers to the economic development of the receiving States").

[24] For a recent critique of the use of national community membership theories "to defend immigration law exceptionalism," *see,* Aleinikoff, 1990:27–34.

Moreover, they emphasize, no national community can afford to continually remake its boundaries in response to the economic and political hardships which afflict other parts of the world (*see e.g.*, Freeman, 1986). Finally, some opponents argue that national communities are constituted on the basis of shared histories, values, culture and language, and that the social fabric will quickly unravel if an uncontrolled number of people, often from radically different backgrounds, are even partially incorporated into the membership community.

All of these contrasting positions on rights for undocumented migrants reflect competing emphases on individual rights and community interests, on the centrality of the nation-state and on the salience of transnational processes. Undocumented migrants themselves are alternately viewed as subjects of rights and objects of regulation, as in need of protection and as threats to the rights and fulfillment of others. The Convention responds by fashioning a series of compromises between rights and control, incorporation and exclusion, individuals and states, and by characterizing the whole as serving both the interests of state territorial integrity and the human rights of irregular migrants.

The Structural Debate

The international debate on the treatment of undocumented migrants is also embroiled in a boundary dispute between the concerns of international human rights, on the one hand, and state territorial sovereignty, on the other. Parties to the debate contest the point at which states' sovereign rights to exclude foreigners, and more generally their authority over matters of national membership, gives way to international obligations to protect undocumented migrants as individuals, or, framed in the alternative, the point at which undocumented aliens' rights as individuals properly yield to states' sovereign exclusionary powers.

Before examining the elements of the debate, it must be emphasized that the conflict between the international norms of human rights and state sovereignty is not unique to the migration context. International efforts to impose human rights obligations on states, entirely apart from the rights of aliens, have frequently met with resistance from states on grounds of state sovereignty. In fact, the international human rights regime as a whole is afflicted by a deep and persistent tension between the two principles (Caportorti, 1983; Henkin, 1990:43–64; Vincent, 1986:129–132). While the nature of this tension has changed over time,[25] it is currently often ex-

[25] In the past, the human rights/sovereignty tension was articulated as one which counterposed the inherent sovereign power of states over their inhabitants, on one side, and individuals'

pressed as a debate about jurisdiction or the proper locus of authority: at issue is when human rights concerns are within the exclusive jurisdiction of states and when they are legitimately subject to international scrutiny.

Conflict of this sort arises in the context of virtually all international human rights endeavors, and the International Migrant Workers' Convention is no exception. State representatives to the UN working group, for example, argued on more than one occasion about whether the Migrant Worker's Convention would represent a codification of customary international law or whether it would only bind the signing parties.[26] These exchanges reflected, among other things, differing views on the relative supremacy of international and national law and on the need for state consent to international jurisdiction in matters of human rights.[27]

But while the entire human rights field suffers from a perennial tension arising from international commitments to the protection of state sovereignty as well as to universal individual rights, the conflict assumes an additional and distinct dimension in the area of international migration. Here, human rights interests contend not merely with states' relative jurisdictional independence from international authority, but also with a central substantive aspect of sovereignty: states' plenary territorial powers, one attribute of which is their virtually uncontested authority to control the admission and exclusion of aliens and to confer nationality—to, in effect, prescribe the composition of the national community.

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natural rights as human beings to a minimum standard of treatment by states, on the other. Since international law now unequivocally recognizes that individuals are bearers of rights independent of states, and that constraints may be placed on states' relationships with their inhabitants (Sieghart, 1983:15), the conflict currently tends to be expressed in less absolute terms, and instead concerns issues—in addition to the jurisdictional conflicts described in the text—such as the extent of protection states are required to afford and the occasions on which restrictions on or derogations of rights are permissible.

[26] *See e.g., Report of the Open-ended Working Group,* A/C.3/42/1, (June 22, 1987), paras. 205:326–331. The representative of the United States took the position that the convention should not be construed as a codification of customary international law. The chairman of the committee agreed, as did the representative of the Federal Republic of Germany. The representatives of Senegal and Morocco expressed the view that those provisions of the Convention which concerned "fundamental human rights" would constitute a codification of customary international law. Representatives of the Soviet Union, Algeria and India concurred.

[27] Another example was the debate about the Convention's state complaint procedure. Some delegations wanted to empower the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (established under Article 72) to receive any and all communications from states parties regarding alleged or possible violations of the Convention by any other state party. Others wanted a provision which would make states parties subject to the jurisdiction of the Committee optional rather than compulsory. *See,* debate in *Report,* UN doc. A/C.3/44/1 (June 1989), paras. 81–109. Ultimately, the optional procedure prevailed. *See,* Article 76.

To understand the unique manner in which human rights and territorial sovereignty principles meet and compete in the international migration context, it is necessary to distinguish between two legal and political domains which together comprise the field of international migration. The first domain governs matters involving the admission and expulsion of aliens into and from a national territory—governing, in other words, questions of border or entry. In this domain, the tension between human rights principles and states' immigration powers have largely been resolved in favor of the state. There is little question that, in the absence of some treaty obligation, states' territorial powers prevail over aliens' claims to entry or residence, or their claims against expulsion from states, even if such entry or such expulsion have obvious and compelling human rights ramifications. On the other hand, states do not enjoy unfettered discretion over aliens in the exercise of their sovereign exclusionary powers. As we have seen, international law requires that states provide aliens who are present in their territory with basic process rights in the immigration regulatory sphere.[28] The Migrant Workers' Convention codifies this accommodation of principles by requiring states to provide all migrant workers and their family members with a variety of procedural protections prior to expulsion (Articles 22 and 23), while at the same time emphasizing states' undisturbed power to establish and enforce their substantive policies of admission and exclusion (Article 79).

The second domain concerns states' general, *i.e.*, nonimmigration-related, treatment of aliens who are present within their territory. Here the interplay between the principles of states' territorial powers and their human rights obligations is more complex. The Migrant Workers Convention may be viewed, in large measure, as an effort to come to terms with this complexity.[29]

[28] *See,* note 9, *supra.*

[29] It should be recalled that prior to the era of modern human rights law, the matter of state treatment of aliens was "subsumed" into the structure of state-state relations, so that "[i]f a State committed a wrong against an individual who was an alien, then that wrong, if unredressed, was translated into a wrong against the alien's state of nationality. Once two States were involved, traditional international law handled the issue through its normal mechanisms . . . [T]he alien himself had no right which was cognizable by traditional international law against his host State" (Lillich, 1984:1). Within this context, customary international legal norms developed regarding minimum standards of treatment which states were required to accord to aliens.

The development of these norms initially "produced the curious result that [states] were obliged, in international law, to respect at least some of what are today called human rights in the case of aliens, at a time when they were under no such obligation to respect any for their own citizens" (Sieghart, 1985:33). However, these norms later provided the foundation for the protection of individuals as subjects *vis à vis* their own governments under modern human rights law.

Ironically, despite the fact that contemporary international human rights law has its origins

Generally speaking, in this second "membership" domain, the interplay is structured as follows: As human beings, all aliens are theoretically entitled to internationally-guaranteed standards of treatment with respect to "fundamental rights."[30] Yet states plainly are not required to treat aliens, including legal resident aliens, identically with citizens. Restrictions for aliens, usually involving political and economic rights, are written into various human rights instruments.[31] Moreover, even in the absence of such explicit restrictions, states regularly limit a variety of rights to nationals, and such action is generally treated as legitimate under international law.[32]

To the extent that such differential treatment, even of legal permanent residents, is permissible, its permissibility derives from states' sovereign power to admit and exclude aliens and to confer nationality. Since states

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in the traditional law governing the treatment of aliens, the application of modern international human rights norms to aliens as individual subjects in their own right is currently "one of the most heatedly controversial [topics] in all of contemporary international law" (Lillich, 1984:3).

[30] According to Goodwin-Gill (1989:536–537), "[t]he major human rights treaties acknowledge the inherent dignity and equal and inalienable rights of all, and in respect of fundamental rights, recognize no distinction between the national and the non-national." Indeed, some commentators view the major international human rights instruments as fully applicable to aliens as well as citizens, with the exception of a handful of provisions which specifically exclude aliens. The International Covenant on Civil and Political Rights, for example, requires States Parties to protect persons "within [their] territory and subject to [their] jurisdiction," and in general would appear to contain a general norm of nondiscrimination against aliens (*see generally,* Lillich, 1984:44–47, 84–98; McDougal, *et al.,* 1976:456–464).

[31] For example, Article 2(3) of the International Covenant on Economic, Social and Cultural Rights provides: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." Similarly, Article 1(2) of the International Convention on the Elimination of Racial Discrimination provides that the Convention "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." Article 16 of the European Convention For the Protection of Human Rights and Fundamental Freedoms provides that contracting states may impose restrictions on the political activity of aliens. Article 25 of the International Covenant on Civil and Political Rights guarantees a variety of political rights to "[e]very citizen," although all other articles expressed in the affirmative provide rights to "everyone." Finally, Article 21(2) of the Universal Declaration of Human Rights states that "[e]veryone has the right of equal access to public service in *his country*" (emphasis added).

[32] Customary international law does appear to place limits on the type and degree of differential treatment permitted. While "[i]t is seldom seriously asserted that states cannot differentiate between nationals and aliens," such differentiation must "bear a reasonable relation to the differences in their obligations and loyalties" (McDougal, *et al.,* 1976:444). *See also,* Brownlie, 1990:528 (unreasonable discrimination against aliens must be distinguished from "the different treatment of non-comparable situations"); Goodwin-Gill, 1978:87 (proper inquiry is "whether alienage is, in the circumstances, a 'relevant difference' justifying differential treatment . . . objective justification and proportionality" must be demonstrated).

may decline to admit aliens altogether, they may provide them less than full admission to the privileges of national membership, or may grant them admission pursuant to a set of limiting conditions. In other words, states' gatekeeping powers, which entail powers to determine the composition of the community to which state obligations are owed, are viewed as legitimately justifying a principle of discrimination,[33] subject to some limitations, in the application of human rights protections to aliens.

Just how much protection states must minimally provide to aliens is a matter of ongoing controversy, as evidenced by the debates in preparation for the International Migrant Workers Convention, as well as the UN Declaration on the Human Rights of Non-Citizens. The degree of protection states are required to provide, however, depends significantly on the class of aliens at issue. The discrimination permitted and practiced against undocumented aliens exceeds, by far, the discrimination permitted against most other classes of aliens.

States view the very presence of irregular migrants both as a violation of their sovereign exclusionary powers and as a rupture of the social contract which binds the nation. In theory, receiving states never had the opportunity to refuse them admission or to impose conditions on that admission. As a consequence, international law treats the power of states to discriminate as both greater and more vital with respect to irregular immigrants. The "character of the relationship" between undocumented aliens and the state in the immigration arena, which is by definition a "prohibited one,"[34] is transposed to the domain of states' internal human rights treatment of these aliens and significantly affects the nature of this treatment. In other words, discrimination against the undocumented as to human rights is effectively

[33] In international human rights parlance, the term "discrimination" is often used to denote the drawing of impermissible distinctions between members of a protected class and is contrasted with permissible differentiation between protected and unprotected members (*e.g.*, Brownlie, 1990:528). Under this usage, aliens would often not be characterized as subject to discrimination, but rather to differential treatment based on their lack of membership in the protected class. However, as used here (and as employed by some international legal scholars), the term "discrimination" is understood in its broader sense to include state decisions to exclude aliens from the ambit of protections in the first instance.

[34] *Plyler* v. *Doe,* 457 U.S. 202, 246 (1982) (Burger dissenting). According to the dissent, "[t]his Court has recognized that in allocating governmental benefits to a given class of aliens, one 'may take into account the character of the relationship between the alien and this country' (*Mathews* v. *Diaz,* 426 U.S. 67, 80 (1976)). When that 'relationship' is a federally-prohibited one, there can, of course, be no presumption that a State has a constitutional duty to include illegal aliens among the recipients of government benefits." *See, also,* majority opinion in *Plyler,* in which the Court protects the rights of undocumented children to state-provided education but nevertheless advises, with regard to adult undocumented immigrants, that "those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, *but not limited to,* deportation" (457 U.S. at 220) (emphasis added).

treated as both an extension of states' exclusionary powers and a substitute for actual exclusion at the border.

Of course, some states and international advocates urge increased protections for undocumented migrants by stressing the rights of individuals as such and the human rights needs of especially vulnerable groups. Many acknowledge states' enhanced powers to discriminate against undocumented immigrants, but question the extent of the permissible discrimination and the degree to which the sovereignty principle may be treated as determinative in their treatment. The Convention accommodates these competing approaches by providing substantial human rights protections to the undocumented, but by emphasizing that their unlawful status makes these migrants less entitled to international protection than other migrants.

Although the principles of rights and sovereignty compete within the conceptually separate state domains of entry and of membership, in reality the two domains are inextricably linked. As indicated above, states may discriminate against aliens in matters unrelated to immigration regulation precisely by virtue of their powers in the immigration regulatory sphere; likewise, states' human rights responsibilities to persons within their national communities serve to constrain, to some degree, draconian exercise of their border powers.

During elaboration of the migrant workers Convention, the close and complex linkage between the domains of entry and membership gave rise to substantial debate among working group members. Several members expressed tremendous concern that the rights the Convention provides to undocumented migrants could somehow be read to undermine states' formal legal authority to eliminate these same migrants from their territory or to exercise other immigration control functions. Others—though far less vocally—pointed out that states' powers of exclusion could well serve to limit the application and/or the efficacy of the Convention's human rights provisions. Debate in the working group about what is now Article 79 reflected both sets of concerns. That Article states:

> Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.

Participants engaged in extensive discussion about the scope and meaning of the term "admission." The representative of the United States "wished to make it absolutely clear that it was his delegation's understanding that

the article as adopted reaffirmed the well-recognized principle that all States have the sovereign right to adopt and enforce their own immigration policies. In this regard, his delegation understood the word 'admission' in this article in its broadest concept, to encompass all terms and conditions pursuant to which migrant workers and members of their families may enter and remain in the United States, as well as those conditions which would result in their expulsion." In contrast, the representative of Sweden opposed the inclusion of the provision altogether since it "could undermine the other provisions of the Convention and this gave particular concern as the Convention lays down fundamental human rights, which always have to be respected by all States."[35]

In other words, the U.S. representative (supported by France and Canada) went on record to emphasize that the reserved domain of state power, expressed in Article 79 by the word "admission," must not be treated as diminished in any way by the rights provided in the Convention. The representative of Sweden (joined by Cape Verde and Algeria) asserted that the very invocation of states' reserved domain of territorial sovereignty, via reference to their powers relating to the admission of aliens, runs the risk of jeopardizing the full application of rights which the Convention seeks to ensure. Sweden's concern (notwithstanding the second sentence of Article 79, which on its face would appear to protect against this eventuality) attests to the enormous, almost talismanic power that assertions of state sovereignty have had often in the area of human rights for aliens.

While concern was voiced on both sides, there was far more anxiety expressed in the working group about the effect that human rights for migrants might have on states' sovereign powers to regulate admission and exclusion than vice-versa. The record of proceedings is replete with statements by delegations which sought to hold the line against what they viewed as the encroaching agenda of rights for aliens, leading sometimes to unwarranted sensitivity about Convention language. As an example, Article 18 states in part:

> Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals.

Representatives of the United States and the Netherlands both expressed reservation about the formulation of this provision, "since, in their view, the text could imply a legal recognition or regularization of the status of migrant

[35] *Report*, A/C.3/43/1 (June 20, 1988), paras. 11, 20.

workers."[36] The representative of the Netherlands went on to emphasize that "no provision of [what is now Part III] of the Convention should seek to regularize the status of illegal migrant workers or of illegal members of their families."[37] (This sentiment was ultimately codified in Article 35).

In the end, the Convention accommodates the competing concerns about sovereignty and human rights by substantially incorporating them both. It counterposes rights narrowed by state immigration interests against state immigration interests curtailed—though only minimally—by rights. This scrupulous balancing is an effort to provide full assurance to states that their sovereign powers are not in jeopardy without frustrating the ultimate objective of the instrument, which is human rights for migrants. The full significance of some of the Convention's provisions, such as Article 79, is left to future interpretation. However, the Convention's probable effectiveness as a human rights instrument for undocumented migrants can already be assessed.

THE PROTECTION OF UNDOCUMENTED MIGRANTS UNDER THE CONVENTION

The draft Convention's provisions regarding the treatment of irregular migrants represent a political and jurisprudential achievement: the often-competing interests of the migrants and states, of human rights and immigration control, are all in evidence and are all apparently accommodated. Yet when evaluated from the perspective of the human rights of undocumented migrants, the accommodation is only a partial success.

Under the strict terms of the document, the undocumented fare reasonably well. States are required to extend significant rights to undocumented migrant workers and family members, including due process, equal protection, access to the courts, protection from employers, rights to free expression, and so forth. If properly enforced, some of the substantial protections extended to undocumented migrants under Part III could improve their status and situation immeasurably. This is especially true in countries in which the most basic rights of these immigrants are ignored.

The Convention does permit states to afford lesser protections to irregular migrant workers than to documented migrants. Under the terms of the Convention, the undocumented do not have guaranteed rights to family

[36] Note that the legal system of the United States itself has long recognized the right of undocumented aliens to legal equality, meaning full legal personhood, before the courts (*see generally, Plyler* v. *Doe,* 457 U.S. 202 (1982), without, however, treating such equality and legal personhood as entailing legalization of immigration status.

[37] *Report,* A/C.3/36/10 (November 23, 1981), para. 57.

unity, certain trade union freedoms, liberty of movement, participation in public affairs in the state of employment, equality of treatment with nationals with regard to certain government benefit programs including housing, educational and health-related services, and further employment protections, among other things (*see,* generally, Convention, Part IV). In other words, under the terms of the Convention, the undocumented continue to enjoy institutionally-sanctioned second- (or third-) class status.

However, the extent of the discrimination considered acceptable for undocumented aliens is significantly curtailed under this Convention. This narrowing of the discrimination gap is largely the result of the Convention's establishment of fairly rigorous standards of minimum treatment for irregular migrants. Thus, despite the discrimination, the terms of the Convention clearly represent an advance for undocumented migrant workers and members of their families.[38] The real problem with the Convention, and one which seriously limits its efficacy as a human rights instrument for undocumented migrants, is that its provisions protecting states' sovereign prerogatives to control immigration will often effectively undermine or defeat the rights it provides to those migrants. Efforts to exercise rights prescribed in the Convention may well expose the migrants to expulsion and punishment for immigration-related violations. At the very least, the continued vulnerability of these migrants to prosecution for immigration violations will limit their ability and willingness to exercise the rights guaranteed to them under Part III of the agreement.

Such a result may be predicted not only as a matter of common sense, but also based on the experience of undocumented immigrants in states which formally extend a range of basic rights to the undocumented. In those countries, the aliens invariably fail to avail themselves of the full range of civil and social rights for fear of prosecution and punishment, including

[38] Nevertheless, the nonapplication of the right to family unity to undocumented migrant workers deserves a few words. Lack of protection in this area is troubling from a human rights perspective precisely because the right to family unity is generally considered among those rights which are fundamental (Foulanos, 1985:87–118; Plender, 1988:365–392; Secretary General of the United Nations, 1985). Of course, to have included family unity in Part III of the Convention would have meant requiring states to permit the entry and residence of hundreds of thousands, if not millions, of persons in their territory, something that the principle of state sovereignty precludes. It is also very difficult to conceptualize exactly how family reunification would work in the absence of some legal status for the undocumented migrant workers (an issue which is addressed below). But in light of the seriousness with which this right is approached internationally, and the attention paid to the question of family unity in the various reports generated by the United Nations on labor migration, its omission is unfortunate. Note that during working group meetings, the government of Greece registered its support for the right of family reunification for all migrant workers, including those in an irregular status (*Report* (June 1985), para. 38).

expulsion, under the state's immigration regulatory laws (*e.g.*, Wihtol de Wenden, 1990:42–44; Bosniak, 1988:986–987, 1003–1004).[39]

Likewise, efforts by irregular migrant workers and members of their families to avail themselves of protections under the terms of the Convention could easily expose them to expulsion. Upon presenting themselves for emergency medical care or upon applying for social security benefits (Articles 28 and 29), for instance, they would almost certainly be required to display identification, or in some other way reveal the particulars of their status, which could lead to questions and to unwanted contact with immigration officials.

There is nothing in the Convention that would preclude such a result; there is no provision that provides that undocumented migrants may not be prosecuted for immigration violations based on information obtained in the course of the migrants' exercise of their rights under the Convention. On the contrary, there is Article 79, which, as we have seen, states that "[n]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families."[40] In light of the broad interpretation which will undoubtedly be applied to this provision, states retain a broad reservoir of power which permits them to execute the country's immigration regulations notwithstanding any (nonimmigration-related) human rights that the Convention provides.[41]

[39] As an example of this dynamic, a recent study on undocumented immigrant women in the San Francisco Bay Area found that well over half the 400 women studied avoid using public services for which they are eligible such as state medical services and welfare (for citizen children), because they fear exposing themselves to potential deportation (the study also found that many fear leaving their homes to buy groceries for the same reason) (Hogeland and Rosen, 1991).

[40] Adding belts to the braces, Article 34 provides: "Nothing in this Part [Part III] of the Convention shall have the effect of relieving migrant workers and members of their families from . . . the obligation to comply with the laws and regulations of any State of transit and the State of employment."

[41] In light of the persistent determination of working group participants to reserve complete discretion in the immigration regulatory sphere to states, it is extremely unlikely that a provision could be included in the Convention that would prohibit states parties from deporting or otherwise punishing undocumented migrants whose unauthorized status becomes apparent in the process of their efforts to exercise Convention rights. It should be noted, however, that language of this sort is not unprecedented in legislation providing protection or benefits to undocumented immigrants. The legalization provisions in the United States' 1986 Immigration Reform and Control Act (IRCA), for instance, include a "confidentiality" section which provides, on pain of *criminal* penalty, that the information provided in the legalization application may not be used for any purpose other than to make a determination on that application; that prohibition clearly precludes use of that information by immigration authorities for deportation or other law enforcement purposes (Pub. L. 99-603, Sec. 245A(c)(5).

Moreover, even if this scenario were to occur infrequently, the threat that it might would operate as an enormous disincentive. In an effort to avoid the possibility of expulsion, the rights often would not be exercised—and would therefore not be effectively available.

Despite the best efforts of the Convention's drafters, the state's exclusion powers might easily defeat the migrants' human rights in the employment context as well. One of the most significant features of the Convention is its assurance that irregular migrants' rights are enforceable against the employer. The Convention contains a provision, Article 25(3), which explicitly protects migrants' legal and contractual rights with respect to employers notwithstanding their irregular status; in other words, employers are prohibited from evading their obligations to migrant workers "by reason of any such irregularity."

However, even if an employer arguably violated this provision by contacting the state's immigration officials in response, for instance, to an undocumented employees' efforts to participate in a labor union, or to invoke some other employment-related protection provided under the Convention, a state is unlikely to forego prosecuting an immigrant for violations of its immigration laws simply because his or her employer may also be subject to prosecution; as provided in Article 34, "[n]othing in [Part III] of the present Convention shall have the effect of relieving migrant workers and the members of their families from . . . the obligation to comply with the laws and regulations of . . . the State of employment." Moreover, a migrant worker who is in detention or has been expelled is not well-situated to vindicate his or her employment rights, other than those pertaining to remuneration for work already completed (if even those).[42] Finally, and once again, the mere threat that an employer might notify immigration officials would often be enough to convince the migrant to relinquish the exercise of his or her rights.[43]

[42] Article 22(6) provides that "[i]n case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities." Article 22(9) states that "[e]xpulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance of the law of that State, including the right to receive wages and other entitlements due to him or her."

[43] In the event that the state has a policy of sanctioning employers who hire undocumented immigrants, the Convention provides that "[t]he rights of migrant workers *vis-à-vis* their employer arising from employment shall not be impaired by these measures" (Article 68(2)). Thus, an employer cannot cite the sanctions law to relieve himself of any contractual obligation he may have with an undocumented employee (*i.e.*, since your employment was unlawful in the first place, we had no binding contract; *see e.g.*, GISTI, 1990:11-13).

Nevertheless, the Convention is silent about what to do if employer sanctions and Convention rights conflict. For instance, an employer might fire a particular migrant worker who had begun to participate in a trade union (an activity protected by the Convention under Article 26(1)),

The Convention's failure to require any regularization of, or amnesty for, irregular migrant workers or members of their families simply underlines this dilemma.[44] Of course, inclusion of provisions on amnesty would have constituted interference with states' decisions regarding the composition of their own national membership—decisions which, as we have seen, are considered part of the state's domain of territorial sovereignty. Moreover, mandating extensive legalization might arguably have served to engender further irregular migration by providing migrants with the hope that they would be included the next time, thereby undercutting one of the central objectives of the Convention.[45]

However, from a human rights standpoint, the Convention's failure to require some sort of progressive legalization or eventual amnesty effectively threatens to take away with one hand what has been offered by the other. In the absence of protections against both prosecution and removal for

claiming that he wished to comply with the sanctions laws. If, under that state's law, discharge of nationals is prohibited on grounds of trade union participation, then the employer's discharge of the undocumented employee could constitute *both* a violation of Article 25(1)(a) of the Convention, (which mandates equality of treatment with nationals for all migrant workers with respect to laws regarding "termination of the employment relationship") *and* a compliance with state sanctions laws. Under the circumstances, it might be difficult to ensure that sanctions do not "impair" undocumented migrant workers' rights with respect to their employer. Even if the employer was found to have violated the undocumented worker's rights by "pretextual" use of sanctions against the employee, sanctions against hiring irregular migrants would insulate the employer from ever having to reinstate that worker (since the 1986 implementation of employer sanctions in the United States, the position of the National Labor Relations Board has been that undocumented immigrants must demonstrate their authorization to work before reinstatement will be ordered; *see,* Office of the General Counsel, NLRB Memorandum 88-9 (September 1, 1988)). And, once again, the undocumented worker would be unlikely to press his or her claim against the employer in the first place for fear of exposure to immigration officials.

[44] Professor Haseneau (1990:151) states that Article 69 "encourages the regularization of an irregular situation not only by expelling migrant workers and members of their families, but above all by legalizing their stay." However, this interpretation may be subject to sharp debate since several working group participants expressly opposed any requirement for legalization of undocumented migration (*see e.g., Report,* A/C.3/36/10 (November 23, 1981), para. 57; A/C.3/40/1 (June 20, 1985), para. 29).

[45] *See e.g.,* Conclusions and Recommendations of The Intergovernmental Committee For Migration's (ICM) 1983 seminar on "Undocumented Migrants or Migrants In An Irregular Situation" (while regularization of status could serve as a short term solution to the problem of undocumented migration in particular contexts, "constant repetition of this process will be self-defeating, in that it will encourage further illegal entry and stay in the country, in expectation of yet further regularization." (*International Migration,* 1983:103). But *see also,* Wihtol de Wenden, 1990:45 ("European countries should consider the principle of regularization for illegal workers and their families after a specific period of work and residence. This would recognize that they have contributed economically and culturally to society, that they have shown a positive commitment, despite the hardship and exploitation, and that, in spite of the fact they have broken the immigration rules, they are not criminals deserving of the exemplary punishment that deportation often involves").

illegal entry, residence or employment, the willingness and ability of undocumented immigrants to avail themselves of the rights which are provided will inevitably be constrained.

The Convention's protections for undocumented workers and members of their families may be limited in another respect. Throughout the drafting process, some state representatives voiced general disagreement with the decision to protect undocumented migrant workers and members of their families under the Convention.[46] In an effort to ensure against ratifications with attached blanket reservations as to protections for undocumented migrants (which would mean that the ratifying state was not bound as to those protections), the working committee included Article 88, which provides that "[a] state ratifying or acceding to the present Convention may not exclude the application of any Part of it, or . . . exclude any particular category of migrant workers from its application."[47] Thus, no state may ratify while at the same time excluding Part III of the Convention or undocumented migrants as a group. While Article 88 may result in a lesser number of ratifications, it goes a long way toward protecting the purpose and integrity of the instrument.

However, Article 88 does not preclude states from ratifying with reservations as to specific Articles. Based on the extensive objections and reservations expressed about particular protective provisions during the course of the debate, it is likely that many states will ratify, if at all,[48] with a variety of reservations as to specific Articles which benefit undocumented migrant workers. Based on objections raised during the course of the debate, these reservations might well be attached to provisions granting rights to free expression to undocumented migrants, provisions governing equality of

[46] The representative of the Federal Republic of Germany expressed particularly strong opposition to coverage of undocumented migrants by the Convention over the years. *See e.g., Report of the Open-ended Working Group* (June 20, 1985); UN doc.A/C.3/40/1, para. 20–22;178; *Report,* UN doc.A/C.3/42/1 (June 1987), paras. 177, 196, 211. Germany, the United States and other countries repeatedly expressed the view that if the undocumented were to be protected under the Convention, the protections provided should be "considerably limited," *Report,* (June 1985) para. 22, or confined to "basic rights." *Id.,* para. 61.

[47] The representative of Germany opposed the inclusion of Article 88, stating that "the draft Convention went into too many details and, if his Government was considering whether to ratify the Convention, it would not wish to be bound to recognize all of the extensive rights covered therein in respect of the many categories of migrant workers it sought to cover. . . . [I]t was regrettable that the proposal [for Article 88 included] a provision which would forbid States parties from excluding certain categories of migrant workers from the application of the Convention" (*Report,* A/C.3/45/1 (June 21, 1990), paras. 54, 68).

[48] It must be recalled that this Convention has been elaborated during a period when many states have introduced restrictive immigration legislation, much of it addressed specifically to the problem of irregular migration (*see,* note 15, *supra*). The likelihood of ratification by many states under these circumstances is clearly limited.

treatment for undocumented migrants with nationals in the workplace, trade union freedoms, social security benefits and rights to contact consular authorities, among others.[49] Assuming such reservations do not fall afoul of Article 91(2)'s admonition that "[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted,"[50] they will serve to impair the reach and effect of the Convention for migrants in an irregular situation in many countries.

This analysis, of course, assumes that the control measures both prescribed and permitted in the Convention will not, despite the Convention's stated objectives, eliminate the process of irregular migration or the presence of millions of undocumented immigrants already working and living in countries throughout the world. While more serious immigration controls and border enforcement efforts might certainly curtail the size of the irregular migrant population in some countries, analysts have shown, and the facts demonstrate, that there are real limits to restriction (*e.g.*, Widgren, 1990; Portes and Rumbaut, 1990:234–235).

CONCLUSION

As it is currently written, the draft Convention will have only limited effect in improving the social condition of undocumented migrants. But the Convention's limitations do not result so much from a failure of design or concept as from a set of constraints in the international arena, both legal and social, which inevitably bind the hands of states and international organizations in their efforts to respond to the problem of irregular migration.

In the first place, as we have seen, the core idea of universal human rights which originally motivated the drafting of the Convention is constrained by the still vital doctrines and powers of national sovereignty. While states' immigration powers and their general human rights policies are analytically distinct, they uniquely converge in the context of irregular migration. As it turns out, the relationship between undocumented aliens and the state established in the domain of immigration regulation profoundly affects, both formally and in practice, the relationship between them in the domain of internal membership policy as well.[51]

[49] *See e.g., Report of the Open-ended Working Group* (June 1987): UN doc.A/C.3/42/1, paras. 196, 208, 211, 266; *Report* (October 10, 1986): UN doc.A/C.3/41/3, para. 161.

[50] Pursuant to Article 20(3) of the Vienna Convention on the Law of Treaties, Cmnd. 7964 (January 27, 1980), determinations as to the incompatibility or compatibility of reservations would be made by the "competent organ" of the United Nations.

[51] As the United States Supreme Court has concluded, the state's "decision to share [certain

In the second place, the Convention is promulgated under the auspices of the United Nations, an institution which, while constituting the main forum for the development and administration of the international system of human rights, is also comprised of individual states which are committed to advancing the principles and structures of state sovereignty, including those of territorial integrity and noninterference. (Falk, 1981:43–47, 157; Jackson, 1987:545–547, Vincent, 1986:100). As Richard Falk (1981:157) observes, "the state system imposes drastic limits on what can be done at the international level to improve respect for human rights." Not surprisingly, these limits are more drastic still when the human rights involved are meant for undocumented immigrants, whose very presence evokes the erosion of yet another facet of states' sovereign powers.

Finally, irregular migration is a massive global process which, despite the best efforts of states, is certain to increase in the years ahead. Many migrant-receiving states are already feeling besieged, and are hardly inclined, under the circumstances, to agree to enhance the rights and social power of these individuals.

Notwithstanding its limitations, the draft Convention makes tremendous headway in advancing new normative standards of entitlement and protection for undocumented migrant workers and members of their families. Although the provisions of the Convention are unlikely to be treated as customary international law within the foreseeable future, they may well contribute to a change in the "criteria of international legitimacy" (Vincent, 1986:131) associated with the treatment of these migrants.

The inclusion of undocumented migrants within the protective framework of the international human rights regime is also significant for what it reveals about the development of human rights law more generally. In an international society in which state sovereignty remains the paramount ordering principle, undocumented migrants present human rights law with an especially hard case. By promulgating this Convention, and by including the breadth of protections for undocumented immigrants that it has, the United Nations has demonstrated a notable, albeit partial, willingness to rise to the challenge of universality which the international law of human rights has posed.

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benefits] with our guests may take into account the character of the relationship between the alien and this country" (Mathews v. Diaz, 426 U.S. 67, 80 (1976)), by which the Court means the "character of the relationship" in the immigration sphere.

Of course, it is also true that the alien/state relationship on the membership axis partially shapes the relationship on the entry axis as well: process requirements in the expulsion context provide just one example. However, this article is concerned with the human rights of undocumented migrants internal to states and largely separate from the immigration regulatory sphere, and thus the emphasis is the effect of states' immigration regulatory powers on undocumented aliens' membership rights rather than vice-versa.

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