

AT THE BORDER AND BETWEEN THE CRACKS: THE PRECARIOUS POSITION OF IRREGULAR MIGRANT WORKERS UNDER INTERNATIONAL HUMAN RIGHTS LAW

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[This article aims to identify jurisprudence which advances the standards of treatment of unauthorised migrants in the context of often hostile domestic laws and political rhetoric. Due to its universalist and humanist underpinnings, many would consider international human rights law to be a natural source of rights protecting migrant workers. However, human rights doctrine takes a chequered approach to the protection of those living or working in a foreign state without visa authorisation. Even the Migrant Workers Convention recognises states' sovereign prerogative over immigration control, and thereby fails to cater to the especially precarious position of irregular migrants who decline to assert their rights for fear of facing sanctions under immigration laws. It is argued that we need to look to regional judicial forums to find international legal doctrine which articulates a progressive legal framework robustly protective of irregular migrants' rights. This article canvasses jurisprudence in the regional Human Rights Courts in Europe and the Americas which succeeds, in different ways, at decoupling the absolute discretion of states to regulate border control from the substantive rights of irregular migrants once present in a host state.]

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I INTRODUCTION

International migration featured high on the United Nations' agenda in 2006, when, on 14 and 15 September, government delegations from around the world met for the UN General Assembly's High-Level Dialogue on International Migration and Development.¹ This same year saw hundreds of thousands of people lining the streets of Los Angeles with placards proclaiming 'no human is illegal'.² Clearly, international migration has become the subject of urgent policy debate within many countries and at the international level. It is equally evident that no single issue is more contentious than that of the movement of people without state authorisation, described in international parlance as 'irregular migration'.³

As the Australian Government attempts to guard against the entry of asylum seekers arriving by boat,⁴ even 'fortress Australia'⁵ is not insulated from irregular (or 'undocumented') migrants. In December 2005, there were approximately 46 400 visa overstayers in Australia,⁶ together with an unknown number of non-citizens present in Australia with valid visas who were working in breach of their visa conditions.⁷ In current Australian public debate, as in most Western countries, irregular migrants are maligned as 'economic migrants'⁸ — less deserving even than refugees because the circumstances precipitating their arrival in Australia are not considered to found a legitimate claim to stay on

¹ See *Summary of the High-Level Dialogue on International Migration and Development, Note by the President of the General Assembly*, UN GAOR, 61st sess, Agenda Item 55(b), UN Doc A/61/515 (13 October 2006).

² Not in Our Name Steering Committee, *No Human is Illegal!* (2006) <<http://www.notinourname.net/archive/immigrant-justice-10apr06.htm>> at 18 May 2007.

³ See, eg, Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action* (October 2005) 32, available from <<http://www.gcim.org>> at 18 May 2007; *Summary of the High-Level Dialogue on International Migration and Development, Note by the President of the General Assembly*, UN GAOR, 61st sess, Agenda Item 55(b), UN Doc A/61/515 (13 October 2006).

⁴ See, eg, Jewel Topsfield, 'Nauru Sets Six-Month Limit on Asylum Seekers', *The Age* (Melbourne, Australia) 20 March 2007, 6.

⁵ See Margo Kingston, 'Fortress Australia — The Implications', *The Sydney Morning Herald* (Sydney, Australia) 3 September 2001 <<http://www.smh.com.au/articles/2003/11/26/1069522644875.html>> at 18 May 2007.

⁶ Department of Immigration and Citizenship, Commonwealth of Australia, *Fact Sheet 86: Overstayers and People in Breach of Visa Conditions* (2007), available from <<http://www.immi.gov.au>> at 18 May 2007. In 1999, the Department of Immigration and Multicultural Affairs estimated that half of all 'unlawful non-citizens' were engaged in paid employment: Department of Immigration and Multicultural Affairs, Commonwealth of Australia, *Review of Illegal Workers in Australia: Improving Immigration Compliance in the Workplace* (1999) 18.

⁷ Auditor-General, Australian National Audit Office, *Onshore Compliance — Visa Overstayers and Non-Citizens Working Illegally* (Audit Report No 2, 2004–05) [4].

⁸ See, eg, Paul Kelly, 'Australia Beyond 2001 — Towards a New National Project' (Speech delivered at the American Australian Association, New York City, US, 26 April 2002) [14] <http://www.americanaustralian.org/Corporate/pdf/speech_paul_kelly.pdf> at 18 May 2007; Rosie Goldsmith, 'Australia's Great Immigration Debate', *BBC News* (UK) 24 October 2001 <http://news.bbc.co.uk/1/hi/programmes/crossing_continents/asia/1613538.stm> at 18 May 2007. See also Wendi Adelson, 'Economic Migrants and Political Asylum Seekers in the United Kingdom: Crafting the Difference' (2004) 1 *Michigan Journal of Public Affairs* <http://www.mjpa.umich.edu/uploads/Volume_1_Migrants_Article_Final.pdf> at 18 May 2007.

Australian soil.⁹ As irregular migrants have not been extended the privilege of entry into Australian territory, enforcement plays a dominant role in political discourse.¹⁰ Those who advocate for the rights of undocumented migrant workers are often blocked by the hold that the mantra of border control has on the popular psyche.

This article has the practical goal of identifying jurisprudence which advances the standards of treatment of unauthorised migrants in the context of often hostile domestic laws and political rhetoric. It is hoped that this article will fuel a more sophisticated public debate about the conceptual frameworks necessary to protect the rights of undocumented migrant workers. It is also envisaged that this research will contribute to the arsenal of advocates' tools as they challenge the prevailing view that decent treatment of migrants must always be sublimated to states' wide-ranging powers over their borders and immigrant admissions. Additionally, examples of laws insisting on decent treatment of irregular migrants may form the basis for a positive framework of rights protection of this vulnerable population by courts and law-makers.

Many would consider international law to be a natural source of rights protecting migrant workers, including those living or working without authorisation. This is because undocumented migrant workers have no access to domestic electoral processes in their states of employment, and often resist reporting exploitative living and working conditions to domestic authorities (or seeking judicial redress) for fear of attracting the attention of immigration enforcement authorities. International law, somewhat insulated from domestic debates over immigration policies, might therefore be better placed to provide positive guidance on the treatment of individuals who form part of the global movement of labourers, and who have no access to their own states for protection.

However, when one examines international human rights legal principles, the result is not progressive doctrine, but rather a deep uncertainty about the legal protections afforded to irregular migrants. As states parties jealously guard control of their territory and national membership, they have adopted UN Conventions which emphasise states' sovereign control over their borders, and their absolute prerogative to control admission and deportation of unauthorised migrants.¹¹ By and large, comprehensive human rights instruments do not explicitly include the protection of irregular migrants; moreover, they explicitly exclude this group from certain rights afforded to authorised immigrants or nationals of the state of residence.¹² When the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

⁹ See Adelson, above n 8, 1.

¹⁰ See, eg, the second reading speeches accompanying the passage of the *Migration Amendment (Employer Sanctions) Act 2007* (Cth): Commonwealth of Australia, *Parliamentary Debates*, Senate, 29 March 2006, 2–3 (Nick Minchin, Minister for Finance and Administration); Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 29 November 2006, 135–7 (Andrew Robb, Minister for Vocational and Further Education). See also *Review of Illegal Workers in Australia*, above n 6.

¹¹ See below Part III(A).

¹² Linda Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International *Migrant Workers Convention*' (1991) 25 *International Migration Review* 737, 739.

(‘*Migrant Workers Convention*’)¹³ entered into force, the inclusion of *all* migrant workers in the human rights corpus was acclaimed as an unprecedented affirmation of the dignity of undocumented migrants.¹⁴ However, as will be explored in some detail below, the *Migrant Workers Convention* continues to allow states the absolute prerogative to pursue any immigration control policies they see fit. Linda Bosniak has argued that this deference to state interests means that the substantive rights afforded to irregular migrants may be unenforceable in practice.¹⁵

It seems that, in order to find international legal doctrine which mediates state sovereignty and migrants’ rights with more regard to the needs of migrant workers, we need to look to regional judicial forums. Perhaps this is because these are still more distant from the influence of states and the overriding goal of preserving territorial sovereignty. Jurisprudence is emerging in regional human rights courts in Europe and the Americas which affirms the right of states to prohibit the entry of foreigners onto their sovereign territory, but also succeeds, in different ways, at decoupling the absolute discretion of states to regulate entry at the border from the substantive rights of irregular migrant workers once present in their countries of employment.¹⁶

I explore this argument in three stages. Part II begins with a brief outline of some of the bases upon which it has been asserted that undocumented workers are entitled to protection in their states of employment and redress for the exploitation they experience. I then discuss why international human rights law might appear at first to be a natural repository of checks on states’ discretion when it comes to the treatment of irregular migrants.

Nevertheless, in Part III, I will proceed to demonstrate that a review of treaty standards — in both the comprehensive human rights instruments and the dedicated migrant-oriented *Migrant Workers Convention* — disclose a deep ambivalence towards the ability of undocumented migrants to enforce their rights. This ambivalence often allows sovereign discretion over immigration control policies to trump any of the few rights which irregular migrants do hold under these treaties. I suggest that states have intentionally drafted and endorsed treaties which accord a great deal of deference to the plenary power of governments to resist unauthorised entries.

Part IV then proposes that international or regional judicial tribunals may be better placed to articulate protective measures for irregular migrants, since they are further removed from the sovereign control of states. This contention is supported by an exploration of recent case law emanating from the European Court of Human Rights (‘ECHR’) and the Inter-American Court of Human Rights (‘IACHR’). This case law recognises that irregular migrants hold substantive rights opposable against their host state and require states to sequester migrants’ unlawful immigration status from their ability to claim these rights. This judicially mediated doctrine suggests different ways in which a uniquely vulnerable class of claimants may be empowered without totally abdicating states’ traditional prerogative over immigration enforcement.

¹³ Opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

¹⁴ Bosniak, above n 12, 740, 758.

¹⁵ *Ibid* 742.

¹⁶ See below Part IV.

II THE RIGHTS OF IRREGULAR MIGRANTS AND THE PROMISE OF HUMAN RIGHTS LAW

Irregular or undocumented migrants are people who work in a state of employment without authorisation.¹⁷ To borrow from the internationally enshrined definition, irregular migrants may have entered without authorisation, be employed contrary to their visa stipulations, or have entered with permission but remained after their visas expired.¹⁸ However, treaty definitions aside, it is difficult to address this topic without becoming mired in inflammatory and politically-charged terminology.¹⁹ Individuals working in a foreign state without authorisation have been variously described as illegals,²⁰ criminal aliens²¹ and unlawful non-citizens.²² It has been observed that the ‘collection of pejorative terms, racial slurs and denigrating epithets appear to have no end’.²³

As an alternative, in 1994, the International Conference on Population and Development recommended the use of the term ‘undocumented’.²⁴ However, this word does not ‘cover migrants who enter the host country legally with tourist documents but later violate their conditions of entry by taking a job’.²⁵ In light of this, the International Symposium on Migration in Bangkok in April 1999 recommended use of the term ‘irregular’.²⁶ This is intended to capture the fact that ‘[i]rregularities in migration can arise at various points — departure, transit, entry and return — and they may be committed against the migrant or by

¹⁷ *Migration in an Interconnected World*, above n 3, 32.

¹⁸ Article 5 of the *Migrant Workers Convention*, above n 13, states that 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 comply with the conditions provided for in subparagraph (a) of the present article.

¹⁹ See, eg, Kevin R Johnson, ‘“Aliens” and the US Immigration Laws: The Social and Legal Construction of Nonpersons’ (1996–97) 28 *University of Miami Inter-American Law Review* 263, 279; Elspeth Guild, ‘Who is an Irregular Migrant?’ in Barbara Bogusz et al (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004) 3.

²⁰ See, eg, Edward Barnes, ‘Slaves of New York: How Crime and Mismanaged Laws Have Made the City the Biggest Magnet for Chinese Illegals’, *Time* (New York City, US) 2 November 1998, 72 (discussing the situation of Chinese ‘illegals’ in New York); ‘“Illegals” to be Deported’, *ABC News Online* (Australia) 29 June 2004, available from <<http://www.abc.net.au>> at 18 May 2007.

²¹ See, eg, Jerry Seper, ‘Illegal Criminal Aliens abound in US’, *The Washington Times* (Washington DC, US) 26 January 2004, A01.

²² See, eg, ‘Suicidal Boy Didn’t Need Psychiatrist, Court Told’, *The Sydney Morning Herald* (Sydney, Australia) 28 July 2003 <<http://www.smh.com.au/articles/2003/07/28/1059244548741.html>> at 18 May 2007 (referring to a suicidal child as an ‘unlawful non-citizen’).

²³ Jorge A Vargas, ‘US Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights’ (2001) 2 *San Diego International Law Journal* 1, 29.

²⁴ International Labour Office, ‘Towards a Fair Deal for Migrant Workers in the Global Economy’ (Report VI presented at the International Labour Conference, 92nd sess, Report VI, Agenda Item 6, Geneva, 1–17 June 2004) 11.

²⁵ *Ibid.*

²⁶ *Ibid.*

the migrant'.²⁷ I adopt the descriptors 'undocumented', 'unauthorised' or 'irregular' migrant worker in an effort to avoid dehumanising language. Irregular migrants have committed mere administrative violations by breaking immigration laws in their country of employment. In the words of Judge Ramírez of the IACHR, '[w]hat should be an administrative description with well-defined effects becomes a "label" that results in many disadvantages and exposes the bearer to innumerable abuses'.²⁸ Catherine Dauvergne has remarked that the nomenclature of 'illegal' 'names the other not only as an outsider to a particular nation, but as an outsider to any nation. As such, the other is outside the law itself, and, in a word, illegal'.²⁹ In sum, it is imperative to avoid labels that suggest a lack of legal existence which is both discriminatory and counterfactual.

A Arguments for the Need to Protect Irregular Migrants

Living on the fringes of society, undocumented migrants assume an extremely precarious life within their states of employment. In many parts of the world, they are among the lowest paid and hardest worked employees in the workforce.³⁰ Due to their unlawful status, irregular migrants live in constant fear of removal, and are thus especially vulnerable to exploitation. The Special Rapporteur on the Human Rights of Migrants has reported abusive working conditions, such as extremely long hours without breaks, refusal to pay wages due, ill-treatment and confinement, which amount, in some cases, to forced labour.³¹ States around the world tend to explicitly exclude irregular migrants from access to civil and labour rights and social benefits, adopting rhetoric which conflates immigrants and asylum seekers with criminals and terrorists. For example, shortly after the attacks of 11 September 2001, the former US Attorney-General John Ashcroft was heard to declare, '[I]et the terrorists among us be warned ... If you overstay your visas even by one day, we will arrest you'.³² It is, therefore, unsurprising that undocumented migrants often resist asserting the rights they are entitled to for fear of exposure to immigration authorities.

However, while their living and working conditions are marginal, the size of the irregular migrant worker population worldwide is certainly not. In 2005, an

²⁷ Ibid.

²⁸ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003) [11] (Concurring Opinion of Judge Ramírez).

²⁹ Catherine Dauvergne, 'Making People Illegal' in Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (2003) 83, 84.

³⁰ Bosniak, above n 12, 737.

³¹ Jorge Bustamante, Special Rapporteur on the Rights of Migrants, *Report of the Special Rapporteur on the Human Rights of Migrants*, UN Doc E/CN.4/2006/73 (30 December 2005) [47].

³² Dan Eggen, 'Tough Anti-Terror Campaign Pledged; Ashcroft Tells Mayors He Will Use New Law to Fullest Extent', *The Washington Post* (Washington DC, US) 26 October 2001, A01.

estimated 191 million people were international migrants.³³ The International Labour Organization has calculated the number of ‘economically active migrants’ around the world at over 86 million.³⁴ Although precise data relating to clandestine activities is impossible to ascertain, current knowledge puts irregular migration for Europe at about 10–15 per cent of all cross-border movement.³⁵

Clearly, some academics and many governments consider the prospect of extending substantial rights to irregular migrants extremely problematic.³⁶ It is outside the scope of this article to provide a fully-fledged argument for the robust protection of the rights of undocumented migrants. Nevertheless, a range of rationales for advancing the rights and dignity of irregular migrants shape the legal standards of protection that do exist in both domestic and international legal regimes. Just as influential are the tensions or presuppositions implicit in these rationales. For this reason, it is necessary, briefly, to canvass the grounds anchoring the promotion of the rights of undocumented migrants. These include normative arguments as well as those based on pragmatic expediency.

Human rights advocates predictably invoke the universal values underpinning the human rights regime.³⁷ Some point to the extreme social vulnerability of the undocumented migrant population, who undertake work ubiquitously described as the ‘three Ds’ — dirty, degrading and dangerous³⁸ — work that nationals and legal migrants avoid. The sectors which employ migrant workers are usually those where little or no regulatory activity upholds minimum safety, health and

³³ UN Secretary-General, *International Migration and Development: Report of the Secretary-General*, UN GAOR, 60th sess, Agenda Item 54c, UN Doc A/60/871 (19 May 2005) [43]. The Commission on Human Security put the figure at 175 million, comprising 3 per cent of the world’s population in 2000: Commission on Human Security, *Human Security Now* (2003) 41, available from <<http://humansecurity-chs.org>> at 18 May 2007. According to the International Organization for Migration, the total number of migrants in the world more than doubled between the years 1965 to 2000, from 75 to 175 million people. The projections for the future are that this total will continue to increase: International Organization for Migration, *World Migration 2003: Managing Migration — Challenges and Responses for People on the Move* (IOM World Migration Report Series, vol 2, 2003) 4–5.

³⁴ International Labour Office, ‘Towards a Fair Deal for Migrant Workers in the Global Economy’, above n 24, [19].

³⁵ *Ibid* [37]. See also Timothy Hatton and Jeffrey Williamson, ‘What Fundamentals Drive World Migration?’ (NBER Working Paper No 9159, National Bureau of Economic Research, Cambridge, Massachusetts, 2002) 3 <<http://www.economics.harvard.edu/faculty/jwilliam/papers/w9159.pdf>> at 18 May 2007.

³⁶ In the view of Schuck and Smith, undocumented aliens entering a state’s territory without consent are strangers to the social contract that binds the national community: Peter Schuck and Rogers Smith, *Citizenship without Consent: Illegal Aliens in the American Polity* (1985) 130–40. The Prime Minister of Australia, John Howard, evoked similar sentiments in his 2001 election slogan: ‘We will decide who comes to this country and the circumstances in which they come’: John Howard (Address delivered at the Federal Liberal Party Campaign Launch, Sydney, Australia, 28 October 2001).

³⁷ See, eg, Gabriela Rodríguez Pizarro, Special Rapporteur on the Rights of Migrants, *Specific Groups and Individuals: Migrant Workers*, UN Doc E/CN.4/2004/76 (12 January 2004) [17].

³⁸ Antoine Pécoud and Paul de Guchteneire, *Migration, Human Rights and the United Nations: An Investigation into the Low Ratification Record of the UN Migrant Workers Convention* (Global Migration Perspectives Series No 3, UN Educational, Scientific, and Cultural Organization, October 2004) 3.

working conditions that should ensure ‘decent work’.³⁹ Those who articulate claims for migrants’ rights on the basis of universal values tend to recall the particular concern that the international community has shown for groups experiencing extreme social vulnerability, including the undocumented.⁴⁰

Other arguments in favour of promoting the rights of undocumented migrants rest on structural analyses of irregular migration flows. According to one such argument, many receiving countries welcome the physical labour of foreigners, but rigidly restrict the number of legally issued visas for blue-collar workers to migrate legally, making the existence of undocumented workers inevitable.⁴¹ According to another, even while countries overtly combat clandestine immigration, irregular migration ‘is often tacitly permitted or even encouraged [by governments and employers], just because illegals lack rights and are easy to exploit’.⁴² Such encouragement may result from geopolitical and transnational economic dynamics based on older colonial patterns.⁴³ Alternatively, encouragement may take the form of permeable borders. Although states wield extensive authority under international law to control the entry of foreigners into their territory, in practice, states often fail to exercise this control.⁴⁴ Such failures to prevent the presence of tens of millions of irregular migrants around the world could be understood as tacit invitations to enter. Analytically, these contributions reject portrayals of irregular migrants as voluntary transgressors of state immigration laws,⁴⁵ and emphasise the complicity of receiving states and local employers in the entrance and continued presence of irregular migrants.

Others argue that irregular migrant workers are, in certain respects, *de facto* members of the national community by virtue of their social and cultural contributions.⁴⁶ Generally, the thrust of these arguments is that states and employers should not be entitled to benefit from the labour of irregular migrant workers without according them some degree of entitlement to participate in the political and social community, including access to fundamental rights and protections. Correspondingly, ‘the community should keep its end of the unwritten compact by extending the undocumented legal recognition and certain basic rights’.⁴⁷

Consequentialist arguments, on the other hand, seek to demonstrate that guaranteeing undocumented migrants’ rights serves the interests of not only the

³⁹ *Ibid* 3–4.

⁴⁰ *Migrant Workers Convention*, above n 13, preamble.

⁴¹ Beth Lyon, ‘New International Human Rights Standards on Unauthorised Immigrant Worker Rights: Seizing an Opportunity to Pull Governments Out of the Shadows’ in Anne Bayefsky (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (2005) 551, 552.

⁴² Stephen Castles and Alastair Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (2000) 73.

⁴³ Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1996) 76–8.

⁴⁴ Bosniak, above n 12, 737.

⁴⁵ Sarah Paoletti, ‘Human Rights for All Workers: The Emergence of Protection for Unauthorized Workers in the Inter-American Human Rights System’ (2004) 12(1) *Human Rights Brief* 5, 5.

⁴⁶ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003) [6] (Concurring Opinion of Judge Ramírez).

⁴⁷ Bosniak, above n 12, 750. See Joseph Carens, ‘Membership and Morality: Admission to Citizenship in Liberal Democratic States’ in William Rogers Brubaker (ed), *Immigration and the Politics of Citizenship in Europe and North America* (1989) 31, 32–3, 43–4.

migrants, but those of the state and its citizens as well.⁴⁸ Enforcing minimum standards of working conditions, for example, wage rates, is thought to remove employers' incentives to seek out irregular migrant labour.⁴⁹ In the words of one long-time community advocate, refusing legal redress for abuses experienced by irregular migrant workers simply serves to

embolden lawbreakers who prey on immigrants, frustrate civil and criminal law enforcement generally, undermine public safety and health, entrench undocumented immigrants in a caste hierarchy, and foster an underground economy that depresses the terms and conditions of employment for all workers.⁵⁰

Naturally, there are policy-makers, politicians and community representatives who contest the suggestion that irregular migrants receive anything other than summary deportation. Normatively, some legal theorists and political philosophers have expressed the belief that national communities are constituted on the basis of shared values and culture, and that protecting this unique character requires communities to have absolute discretion over the admission of foreigners and the terms on which they are to be welcomed.⁵¹ Others reject the notion of rights of membership, including protection of laws and access to forums to assert those rights, without the prior consent of the polity (whether manifested as an entry visa, a licence to permanently reside, or full citizenship).⁵² In instrumental terms, many public opinion-shapers — from government policy-makers to tabloids — see rights as improper rewards for irregular migrants' violations of a state's territorial borders. Punitive immigration control measures, on the other hand, are believed to deter further irregular migration, thereby eliminating the potential for exploitation of irregular migrants.

⁴⁸ See, eg, Owen Fiss 'The Immigrant as Pariah' (1998) 23 (October/November) *Boston Review* <<http://bostonreview.net/BR23.5/Fiss.html>> at 18 May 2007.

⁴⁹ Secretary of State for the Home Department, *Human Trafficking* (Command Paper 6996, Government Reply to the Twenty-Sixth Report From the Joint Committee on Human Rights, session 2005–06, HL Paper 245, HC 1127, 19 December 2006) [13], available from <<http://www.official-documents.gov.uk>> at 18 May 2007.

⁵⁰ Michael J Wishnie, 'Immigrants and the Right to Petition' (2003) 78 *New York University Law Review* 667, 670 (citation omitted).

⁵¹ Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (1983) 32. Peter Schuck argues that:

Since the ideal of nationhood first fired the human imagination, a country's power to decide unilaterally who may enter its domain, under what conditions, and with what legal consequences has been regarded as an essential precondition of its independence and sovereignty.

Peter Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (1998), 19.

⁵² Schuck and Smith, above n 36, 131–40.

B *The Promise of Human Rights Law*

As mentioned above, the aim of this article is to furnish migrants' rights advocates with positive examples of jurisprudential practice in order to challenge the crude utilitarian premises of arguments opposing immigrants' rights. In this vein, Beth Lyon recently issued a call in the US for comparative work on the ways in which legal regimes affect unauthorised immigrant workers — the aim of such a comparison being the proposal of conceptual frameworks for transnational and regional bodies, and to directly influence national policy pertaining to the legal treatment of undocumented immigrant workforces.⁵³ In the face of inadequate domestic safeguards protecting individuals' rights, international human rights law holds much promise as a source of progressive standards. As will be explained, however, the ambivalence of the actual standards provided by human rights law belies this promise.

General principles of human rights law occupy an important place in legal strategies to constrain government abuse and the promulgation of unjust domestic laws. Among other ways in which sovereignty is being steadily eroded, many point out that nations are increasingly called to account for their actions politically and are occasionally also held to account legally. For example, Harold Koh has discerned a trend towards a transnational legal justice system in which the national and the international increasingly merge.⁵⁴ Those who share his vision point to the proliferation of human rights treaties since the end of the Second World War, and the evolution of international enforcement mechanisms as vital developments in this trend.

Faith in international human rights standards might seem even more natural in the context of an inherently transnational phenomenon such as immigration. Yasemin Soysal has expressed a strong belief in the growing impact of international human rights law on immigration policy. Soysal argues that there has been a reconfiguration of citizenship from a more particularistic notion based on nationhood to a more universalistic one based on personhood.⁵⁵ As a result, according to Soysal, immigrants are increasingly granted rights that used to belong solely to nationals, thereby heralding a new post-national model of membership short of citizenship, which 'derive[s] from transnational discourse and structures celebrating human rights as a world-level organizing principle'.⁵⁶ David Jacobson also links the failure of the state to control migration with the rise of an international human rights regime. In his view, 'the basis of state legitimacy is shifting from principles of sovereignty and national self-determination to international human rights'.⁵⁷

Others are more cautious about the potential of international human rights law. Saskia Sassen argues that while external economic pressures and human

⁵³ Lyon, 'New International Human Rights Standards on Unauthorised Immigrant Worker Rights', above n 41, 571.

⁵⁴ Harold Hongju Koh, 'The United States Constitution and International Law: International Law as Part of Our Law' (2004) 98 *American Journal of International Law* 43, 56.

⁵⁵ Yasemin Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, (1994) 1.

⁵⁶ *Ibid* 3.

⁵⁷ David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (1996) 2.

rights may constrain some elements of restrictive executive control policies, such constraints do not limit states' discretion when dealing with undocumented migrants.⁵⁸ Others, like Christian Joppke, consider that excessive reliance on international standards downplays the complexity and diversity of domestic legal norms on the basis of which immigrants have been accorded rights.⁵⁹ Catherine Dauvergne adds that the enforcement of international human rights still depends upon a venue in which to lay claim to them,⁶⁰ displacing authority back to the domestic legal field. In relation to domestic litigation, it has been argued that the enforcement difficulties which plague international law meant that '[i]nternational human rights arguments are often seen as the advocates' last refuge, pulled out only when there is no other authority to cite'.⁶¹ This observation seems equally astute in relation to the political arena of public domestic advocacy.

However, it is my contention that international law remains a crucial site for migrants' rights advocacy and should not lightly be discarded. First and most obviously, migrants are systematically sidelined from traditional domestic political channels. As a class of individuals, migrant workers almost invariably lack access to electoral processes. While many migrant workers are not prevented from participating in public aspects of democratic engagement (such as the news media, lobbying or protests), the degree of political pressure which migrants can exert is, nonetheless, greatly diminished by the very premise of popular sovereignty, which insists that democratic representatives must be accountable to an electorate comprised of citizens and excluding immigrants. Human rights law, on the other hand, does not depend on the same degree of political mobilisation of those who seek its protection.

Second, it is widely acknowledged that international human rights standards can have a persuasive influence on domestic laws and policies.⁶² In particular, immigration policy may be especially conducive to this influence because it necessarily implicates a state's relationships with other states. The interests of foreign states in domestic immigration admissions can be seen in the recent lobbying of the Australian government by Pacific Island officials seeking an Australian temporary labour scheme allowing Islander workers to meet seasonal skills shortages in Australian agricultural sectors.⁶³ While the World Bank has drawn attention to the need to enhance regional development,⁶⁴ international human rights law has not yet been deployed to bolster this argument. Framing a

⁵⁸ Sassen, above n 43, 56.

⁵⁹ Christian Joppke, 'The Legal-Domestic Sources of Immigrant Rights: The United States, Germany, and the European Union' (2001) 34 *Comparative Political Studies* 339, 342.

⁶⁰ Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 *Modern Law Review* 588, 611.

⁶¹ David Cole, 'The Idea of Humanity: Human Rights and Immigrants' Rights' (2005-06) 37 *Columbia Human Rights Law Review* 627, 628.

⁶² Beth Lyon, 'The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18' (2004) 28 *New York University Review of Law and Social Change* 547, 553.

⁶³ Senate Employment, Workplace Relations and Education Committee, Commonwealth of Australia, *Perspectives on the Future of the Harvest Labour Force* (2006) [3.37].

⁶⁴ World Bank, *At Home and Away: Expanding Job Opportunities for Pacific Islanders through Labour Mobility* (Report of the Poverty Reduction and Economic Policy Unit, 2006), available from <<http://www.worldbank.org>> at 18 May 2007.

denunciation of a state in terms of an international human rights violation may immediately capture the attention of foreign lawyers, foreign civil society and, possibly, also foreign governments. Such governments may have an interest in promoting the rights of their citizens abroad in a way that is not accomplished by reference to domestic law violations alone. It is therefore understandable that some who have witnessed abuses committed against undocumented migrant workers have urged lawyers to ‘understand and make use of international human rights law to avoid further deprivation of migrant worker rights’.⁶⁵

However, my argument is not that international human rights law *guarantees* a transformation of domestic laws and policies, and the lives of unauthorised migrants. This is because I support the scepticism of Critical Legal scholars that ‘there are no safe havens, no areas of law — not jurisprudence, not moral philosophy, not constitutional law, not international law — where one will be embraced, where one will find wholehearted allies’.⁶⁶ Instead, my contention is that progressive formulations of international human rights principles can be a useful source of legal precedent for advocates seeking to secure social change and law reform. It is widely acknowledged that human rights doctrine holds great ‘discursive power’⁶⁷ and ‘symbolic impact’.⁶⁸ However, such doctrine will not hold any promise as a tool to improve the lives of irregular migrants, unless it is formulated in such a way as to prove itself equal to its aspirational origins and universalist framework.

III THE HESITANT APPROACH OF HUMAN RIGHTS LAW TO THE PROTECTION OF IRREGULAR MIGRANTS

The coverage of migrants and irregular migrants under the principal human rights treaties has been the subject of much debate. The UN Special Rapporteur for the Subcommission on Prevention of Discrimination and Protection of Minorities recently noted that the architecture of international human rights is built on the premise that all persons, by virtue of their essential humanity, enjoy certain rights.⁶⁹ Furthermore, a number of commentators argue that a strong body of norms already exists to protect the rights of all individuals, including

⁶⁵ Connie de la Vega and Conchita Lozano-Bastista, ‘Advocates Should Use Applicable International Standards to Address Violations of Undocumented Workers’ Rights in the United States’ in Anne Bayefsky (ed), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers: Essays in Memory of Joan Fitzpatrick and Arthur Helton* (2005) 517, 549.

⁶⁶ Richard Delgado and Jean Stefancic, ‘Cosmopolitanism Inside Out: International Norms and the Struggle for Civil Rights and Local Justice’ (1995) 27 *Connecticut Law Review* 773, 787.

⁶⁷ T Alexander Aleinikoff, ‘Between National and Post-National: Membership in the United States’ (1999) 4 *Michigan Journal of Race and Law* 241, 254.

⁶⁸ Kevin R Johnson, ‘The Moral High Ground? The Relevance of International Law to Remediating Racial Discrimination in US Immigration Laws’ in Berta Esperanza Hernández-Truyol (ed), *Moral Imperialism: A Critical Anthology* (2002) 285, 296.

⁶⁹ David Weissbrodt, Special Rapporteur on the Rights of Non-Citizens, Committee on the Elimination of Racial Discrimination, *Progress Report on the Rights of Non-Citizens*, UN ESCOR, 54th sess, Provisional Agenda Item 5, UN Doc E/CN.4/Sub.2/2002/25 (5 June 2002) [11].

non-citizens.⁷⁰ However, recognition of the inalienable rights of all individuals in the immigration context seems to be systematically undermined by deference to states' control over immigration policy. This has produced a chequered approach to the treatment of migrants. Wide-ranging analyses of the treatment of migrants under the core international human rights treaties have been provided elsewhere⁷¹ and are beyond the scope of this article. Nonetheless, the pervasive ambivalence toward the treatment of undocumented migrants under international human rights law is apparent in the *International Covenant on Civil and Political Rights* ('*ICCPR*').⁷²

A *Irregular Migrants and the International Covenant on Civil and Political Rights*

The *ICCPR* is premised on the universality of human rights, making at times no distinction between the rights of citizens and non-citizens, nor distinctions based on immigration status.⁷³ For instance, art 2(1) states:

Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷⁴

However, at the heart of the *ICCPR* lies a contradiction between territorial sovereignty and migrants' rights, evident for example in art 12, which provides:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.

The privilege accorded to territorial sovereignty in this article operates on two levels. First, art 12(2) epitomises the asymmetric character of the right of movement under international human rights law. At the same time as the provision recognises one aspect of a right to freedom of movement across boundaries (at least insofar as there is a right to leave a country) and the right of freedom of movement within a country, the Convention is silent on states' obligations to grant entry to foreigners. Similarly, art 12(4) of the *ICCPR* provides that '[n]o one shall be arbitrarily deprived of the right to enter his own country'. The UN Human Rights Committee ('HRC') — the body established under the *ICCPR* to monitor states parties' compliance with the Covenant — has issued an opinion that this implied prohibition on the right of a non-national to enter a country other than that of their nationality is subject to an exception for

⁷⁰ Margaret L Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) 8 *Yale Human Rights and Development Law Journal* 1, 4.

⁷¹ See *ibid*; Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (1997).

⁷² Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁷³ *Ibid* preamble.

⁷⁴ *Ibid* art 2(1) (emphasis added).

immigrants who hold long-term or permanent residence status.⁷⁵ The HRC thus accords the right to ‘return to his country’ to alien residents who have established ‘close and enduring connections’ to the relevant country,⁷⁶ although the exclusion of other non-nationals apparently remains.

Second, by explicitly linking the general right of freedom of movement to lawful immigration status, art 12(1) establishes the basis for a hierarchy of entitlements accorded to individuals on the basis of their immigration status, which extends to other rights related to presence in a foreign country. For instance, unlike lawful migrants, irregular migrants have no legal right to challenge their expulsion on any ground whatsoever. Article 13 of the *ICCPR* provides that aliens lawfully present in a state are entitled to procedural protections prior to being expelled, including review by a competent authority and the opportunity to submit reasons against the expulsion.⁷⁷ Unlike asylum seekers, irregular migrants are not immune from penalties for being present on foreign territory without authorisation on account of their illegal presence.⁷⁸ It has been remarked that this hierarchy of protection, which accords privilege solely on the basis of legal status, runs counter to a number of progressive national policies which accord rights not on the basis of an individual’s immigration status, but according to the equities gained by virtue of being present on a state’s territory.⁷⁹

The logic of differential entitlements pervades even some of the most basic provisions of the *ICCPR*, such as its prohibition of discrimination. Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

On its face, this non-discrimination provision is ambiguous in its extension to migrants as a class, since it prohibits discrimination on the basis of national and social origin or ‘other status’ without specifically addressing citizenship, alienage or immigration status. In an effort to address this uncertainty, the HRC, charged also with interpreting the *ICCPR*, has concluded that most of the provisions of the *ICCPR* generally apply to all persons in a state’s territory,

⁷⁵ HRC, ‘General Comment No 27: Article 12 (Freedom of Movement)’ in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 213, 217.

⁷⁶ *Ibid.*

⁷⁷ However, these procedural rights may be denied to regular migrants if national security interests so require: *ICCPR*, above n 72, art 13.

⁷⁸ See *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 2545, art 31 (entered into force 22 April 1954). This protection is tied to the primary right of refugees, under art 33(1) of the Convention, not to be forcibly returned to a country ‘where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.

⁷⁹ Susan Martin, ‘The Legal and Normative Framework of International Migration’ (Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005) 9.

including aliens who are not legally present.⁸⁰ However, elsewhere, the HRC has concluded that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’.⁸¹ Further, national labour market regulation, national security, public order and public health and safety have been considered legitimate reasons to restrict the rights of foreigners.⁸² As a result, some state practices that disproportionately impact upon non-citizens may not amount to discrimination if immigration status proves to be a relevant consideration. According to the same rationale, certain state practices will not be deemed ‘arbitrary’, and therefore contrary to law, as long as they are directed solely against migrants. For example, the prohibition in art 9(1) of ‘arbitrary arrest and detention’ cannot be read as prohibiting all detentions of irregular migrants. It is clear that states’ border control powers alone provide a reasonable basis upon which to discriminate against irregular migrants.

It can be seen, therefore, that the international protection of undocumented migrants depends on a tension between the concerns of international human rights and states’ territorial sovereignty. The doctrine of territorial sovereignty permits states to exercise exclusive control over their physical domain.⁸³ Certainly, this power is said to be subject to limitations imposed by international law, and human rights might be thought to operate here, as in other contexts, as a check on state sovereignty. However, when it comes to the treatment of non-citizens, human rights norms appear to give way to another incident of territorial sovereignty — the long-established principle of international law that gives states discretion over the reception and exclusion of aliens.⁸⁴ As Linda Bosniak has noted, when dealing with undocumented migrants, human rights interests contend not just with states’ arguments about their jurisdictional authority over domestic affairs but also with this substantive aspect of sovereignty — states’ expansive territorial powers, including their virtually uncontested authority to control the admission and exclusion of aliens and grant nationality — in effect, to prescribe the composition of the national community.⁸⁵

⁸⁰ HRC, ‘General Comment No 15: The Position of Aliens under the Covenant’ in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 179, 179–80.

⁸¹ HRC, ‘General Comment No 18: Non-Discrimination’ in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 185, 188.

⁸² Virginie Guiraudon and Gallya Lahav, ‘A Reappraisal of the State Sovereignty Debate: The Case of Migration Control’ (2000) 33 *Comparative Political Studies* 163, 168.

⁸³ Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht, 8th revised ed, 1955) vol 1, 286.

⁸⁴ *Ibid* 675–6; Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 498.

⁸⁵ Bosniak, above n 12, 752.

B *The Innovation Presented by the Migrant Workers Convention*

When the *Migrant Workers Convention* entered into force on 1 July 2003,⁸⁶ it was acclaimed as ‘the most ambitious statement to date of international concern for the problematic condition of undocumented migrants’.⁸⁷ It covers both lawful and irregular migrants and provides the first international definition of ‘irregular migrant workers’.⁸⁸ Furthermore, the *Migrant Workers Convention* expressly recognises that

workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of competition.⁸⁹

The *Migrant Workers Convention* explicitly articulates a broad range of human rights for undocumented migrant workers and members of their families, far surpassing any protections afforded to them previously. Rights in Part III of the *Migrant Workers Convention* apply to all migrant workers, irregular as well as regular, and include: the right to enjoy treatment that is at least equal to nationals of the state of employment in respect of remuneration;⁹⁰ the right to enforce employment contracts against employers;⁹¹ the right to join trade unions;⁹² the right to emergency medical care;⁹³ and the right to basic education, regardless of a child’s or parents’ irregular status.⁹⁴ The *Migrant Workers Convention* emphasises that these rights apply to all migrant workers, irregular as well as regular and, further, that states parties are obliged to ensure that ‘migrant workers are not deprived of any [of these] rights ... by reason of any irregularity in their stay or employment’.⁹⁵

However, lest it be thought that the *Migrant Workers Convention* rejects the doctrine of national sovereignty, the Convention does differentiate the rights accorded to undocumented and documented migrants. The protections due to all migrants (contained in Part III of the *Migrant Workers Convention*) fall short of broader protections owed to lawful migrants, which are separately enumerated in

⁸⁶ *Migrant Workers Convention*, above n 13, art 87(1) (pursuant to the 20th ratification by Guatemala on 14 March 2003).

⁸⁷ Bosniak, above n 12, 740.

⁸⁸ Prior to the *Migrant Workers Convention*, a definition of ‘migrant for employment’ could be found in the *Convention (No 97) concerning Migration for Employment (Revised 1949)* opened for signature 1 July 1949, 120 UNTS 71, art 11 (entered into force 22 January 1952). The term ‘migrant worker’ was defined in the *Convention (No 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, opened for signature 24 June 1975, 1120 UNTS 323, art 11 (entered into force 9 December 1978). At the regional level, there is a definition of migrant workers in the Council of Europe’s *European Convention on the Legal Status of Migrant Workers*, opened for signature 24 November 1977, ETS 93, art 1 (entered into force 1 May 1983).

⁸⁹ *Migrant Workers Convention*, above n 13, preamble.

⁹⁰ *Ibid* art 25.

⁹¹ *Ibid* art 25(3).

⁹² *Ibid* art 26.

⁹³ *Ibid* art 28.

⁹⁴ *Ibid* art 30.

⁹⁵ *Ibid* art 25(3).

Part IV. Unlike regular migrants, the undocumented have no rights to: liberty of movement;⁹⁶ family unity;⁹⁷ to form associations and trade unions;⁹⁸ or protection from abusive expulsions.⁹⁹ Strikingly, there is no general prohibition on discrimination on the basis of immigration status.¹⁰⁰

States' concern to police their borders featured prominently in debates during the drafting of the *Migrant Workers Convention*,¹⁰¹ making these concessions unsurprising. Indeed, even with the compromise to border protection offered by this tiered structure, the ratification record of the *Migrant Workers Convention* is extremely low in comparison with other UN human rights instruments.¹⁰² This low ratification record has been identified as a major weakness of the *Migrant Workers Convention*.¹⁰³ Consequently, a great deal of attention has been directed to illuminating the obstacles to ratification of the *Migrant Workers Convention*.¹⁰⁴ Sending states are driven to protect their nationals living abroad and signing onto this convention forms part of that strategy. However, thus far, no major receiving state, including the US, Australia, or any European state, has ratified the *Migrant Workers Convention*, asserting that it is too ambitious.¹⁰⁵ Presumably, receiving states have balked at the significant protections accorded to irregular migrant workers. However, it bears reflection that the distinction between sending states and receiving states can be quite fluid. Indeed, certain states parties to the *Migrant Workers Convention* were primarily sending countries at the time of ratification but increasingly have become points of

⁹⁶ Ibid art 39.

⁹⁷ Ibid art 44.

⁹⁸ Ibid art 40.

⁹⁹ Ibid art 56.

¹⁰⁰ Ibid art 7.

¹⁰¹ Bosniak, above n 12, 756.

¹⁰² For example, the *International on Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) has, to date, 156 states parties; the *ICCPR*, above n 72, has 160 parties; and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) has 193 parties. See Pécoud and de Guchteneire, above n 38, 6. It took 13 years for the *Migrant Workers Convention* to obtain the 20 ratifications necessary to enter into force. As of 18 May 2007, there were 36 state parties to the convention: Algeria, Argentina, Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Honduras, Kyrgyzstan, Lesotho, Libyan Arab Jamahiriya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Peru, Philippines, Senegal, Seychelles, Sri Lanka, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Uganda and Uruguay.

¹⁰³ Nicola Piper and Robyn Iredale, UN Educational, Scientific and Cultural Organization, *Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers — The Asia-Pacific Perspective* (UNESCO Series of Country Reports on the Ratification of the UN *Convention on Migrants*, SHS/2003/MC/1 REV, October 2003) <<http://unesdoc.unesco.org/images/0013/001395/139528E.pdf>> at 18 May 2007.

¹⁰⁴ See, eg, Pécoud and de Guchteneire, above n 38; Piper and Iredale, above n 103; Martin, above n 79.

¹⁰⁵ Pécoud and de Guchteneire, above n 38, 8; Cholewinski, *Migrant Workers in International Human Rights Law*, above n 71, 201–2. As observed in 2000, ‘no developed country has signed it, not even the most progressive countries in the area of international human rights legislation’: IACHR, Special Rapporteurship on Migrant Workers and Members of their Families, *Second Progress Report of the Second Rapporteurship on Migrant Workers and Their Families in the Hemisphere*, OEA/Ser.L/V/II.111, Doc. 20 rev (16 April 2001) [69] <<http://www.cidh.org/annualrep/2000eng/chap.6.htm>> at 18 May 2007.

reception for migrants.¹⁰⁶ Morocco, for example, has become a major transit country for population flows from West Africa to Europe, which has resulted in the presence of a significant number of undocumented migrants within its borders.¹⁰⁷ Nevertheless, this is not the only barrier to the *Migrant Workers Convention*'s coverage of irregular migrant workers.

The apparent privileging of lawful migrant workers over unauthorised workers is not the only concession to states' traditional prerogative over border control. The *Migrant Workers Convention* repeatedly affirms the immigration-specific aspects of territorial sovereignty. It permits states parties to pursue immigration control policies that they see fit,¹⁰⁸ and requires them to take measures 'with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation'.¹⁰⁹ Contracting states are explicitly not obliged to regularise the status of irregular migrant workers,¹¹⁰ and it is made clear that undocumented immigrants are not exempted from 'the obligation to comply with the laws and regulations of any State of transit and State of employment',¹¹¹ which naturally include domestic laws against unauthorised entry, employment or residence.

From these provisions, Linda Bosniak has extrapolated that the *Migrant Workers Convention* navigates the conflict between human rights and state sovereignty by distinguishing between two different domains: state immigration power over admission and exclusion, and state treatment of migrants under other areas of the law.¹¹² When it comes to the admission and expulsion of aliens — the domain of the border — Bosniak argues that the conflict has been resolved in favour of states, as their interests in curbing irregular migration are affirmed, along with their sovereign prerogative over migrants' entry and exclusion.¹¹³ Yet when it comes to migrants' rights in areas other than immigration, the *Migrant Workers Convention* requires states to protect the basic rights of undocumented migrants, even if the rights are not identical to those accorded to its citizens or lawful residents. Article 79 reflects this bifurcated approach:

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.

During the drafting of the *Migrant Workers Convention*, delegates in a working group riven by divisions in this controversial area broadly agreed that it should not effectively force states parties to regularise the status of illegal migrant workers or grant an amnesty.¹¹⁴ The delegates held that sovereign

¹⁰⁶ Pécoud and de Guchteneire, above n 38, 6.

¹⁰⁷ Ibid.

¹⁰⁸ *Migrant Workers Convention*, above n 13, art 79.

¹⁰⁹ Ibid art 68.

¹¹⁰ Ibid art 35.

¹¹¹ Ibid art 34.

¹¹² Bosniak, above n 12, 751–8.

¹¹³ Ibid 753.

¹¹⁴ Cholewinski, *Migrant Workers in International Human Rights Law*, above n 71, 191.

prerogative over immigration must remain intact.¹¹⁵ The resulting *Migrant Workers Convention* attempts to strike this balance. It seeks to provide full assurance to states that their sovereign powers are not in jeopardy without frustrating the ultimate objective to guarantee human rights for migrants.

The trouble is that these two domains — regulation of entry, on the one hand, and substantive protections in other areas of law, on the other — are inextricably linked. The way in which the *Migrant Workers Convention* mediates this connection seriously limits its ability to provide effective protection to irregular migrants. Essentially, the problem is this: the provisions which protect states' sovereign prerogatives to control immigration are so wide-ranging that they end up infiltrating the domain of undocumented migrants' substantive protections in other areas of domestic law, thus effectively defeating their enforceability.

The way in which states' border control powers ultimately trump the rights provisions can be seen through the prism of the protection afforded by art 25(3) of undocumented migrants' legal and contractual rights with respect to employers. This provision purports to assure enforceable employment rights to irregular migrants, notwithstanding their irregular status, by prohibiting employers from evading their obligations to migrant workers 'by reason of any such irregularity'.¹¹⁶ But if, in response to an undocumented employee's efforts to assert her rights an employer decides to notify the state's immigration officials, the state is free to prosecute the immigrant for violations of its immigration laws.¹¹⁷ There is nothing in the *Migrant Workers Convention* which protects undocumented migrants from prosecution for immigration violations based on information obtained in the course of the migrants' exercise of their rights under the same Convention. As provided in art 34:

Nothing 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.

Similarly, when an irregular migrant worker asserts a right under the *Migrant Workers Convention* against a state party, the state is obliged under the Convention to facilitate the enjoyment of this right.¹¹⁸ However, the state is simultaneously free under the *Migrant Workers Convention* to demand to know a migrant worker's immigration status which could lead to expulsion or punishment for immigration-related violations.¹¹⁹

In the Western world, the dictates of stringent border control seem so natural that we are accustomed to conceiving of migrants' rights as inevitably yielding to this state interest. Against this backdrop, the balance struck by the *Migrant Workers Convention* may appear fair. However, the *Migrant Workers Convention* handles this tension much more delicately when it comes to the rights of *authorised* migrant workers. Article 56 stipulates that 'expulsion shall not be resorted to for the purpose of depriving' authorised migrant workers of rights arising from their residence and employment. In so doing, it quarantines a

¹¹⁵ Ibid 192–3.

¹¹⁶ *Migrant Workers Convention*, above n 13, art 25(3).

¹¹⁷ Ibid art 34. See also Bosniak, above n 12, 761.

¹¹⁸ *Migrant Workers Convention*, above n 13, art 23.

¹¹⁹ Bosniak, above n 12, 760.

state's discretion over migrant entry from the substantive obligations owed to migrants once they have entered the state. This approach is precisely what is needed to give effective protection to undocumented workers, but it is reserved for documented migrant workers only.

According to the doctrine of the *Migrant Workers Convention*, the relationship between undocumented migrants and the state at the border, in regulating entry and exclusion, infiltrates the relationship between them in the domain of substantive protections in other areas of domestic law. This barrier to enforcement seriously impairs the *Migrant Workers Convention's* capacity to improve the social condition of undocumented migrants.

IV SEEKING OUT MORE PROGRESSIVE DOCTRINE: THE REGIONAL HUMAN RIGHTS COURTS

To be of practical benefit to irregular migrants, international human rights standards must quarantine a migrant's immigration status from his or her ability to seek effective protection under other areas of the law once in a state of employment. In a sense, this limitation is bound up in the strength of the doctrine of state sovereignty in the international arena. However, this outcome is not unique to international law. A great many domestic laws also allow the absolute discretion of states to regulate entry at the border to infect their treatment of irregular migrant workers once present in a country of employment. For instance, s 76 of the *German Foreigners Law* requires 'all public offices' to notify immigration officials of irregular migration status¹²⁰ — with the result that this lack of confidentiality discourages unauthorised immigrant workers from making wage claims to industrial tribunals.

The question remains whether any such separation is possible. It is significant that the *Migrant Workers Convention* was 'promulgated under the auspices of the UN', an institution which is comprised of individual states stridently committed to state sovereignty.¹²¹ As we will see, the rights of undocumented migrants *have* been elaborated much more progressively in forums at a distance from the influence of states and the overriding goal of preserving sovereignty. In regional human rights courts, in Europe and the Americas, the absolute discretion of states to regulate entry at the border is being decoupled from the substantive rights of irregular migrant workers once present in their countries of employment.

Structurally, international or regional courts seem better placed than international treaty law to articulate standards that are responsive to the protection needs of migrants. An analogy may be drawn with domestic courts, which are often attributed a key role in the expansion of migrant rights due to

¹²⁰ *Gesetz über die Einreise und den Aufenthalt von Ausländern im Bundesgebiet (Ausländergesetz — AuslG)*, vol 9, July 1990 (BGB1. I S. 1354) as amended by *Gesetz zur Änderung ausländischer — und asylverfahrensrechtlicher Vorschriften*, vol 29, October 1997 (BGB1. I S. 2584) (*Aliens Act*).

¹²¹ Bosniak, above n 12, 765.

their insulation from democratic majority pressures.¹²² Lacking citizenship, migrants are almost always excluded from direct access to parliamentary law reform through the traditional democratic route of voting.¹²³ While migrants may be free to assert rights through other forms of civic participation and political mobilisation, in any contest with the rights claims of citizens, elected representatives will almost invariably accord priority to their constituents.¹²⁴ After all, the very principle of popular sovereignty requires that the law respond to the will of citizens, as expressed through electoral processes and voiced through conflict between mobilised interest groups.¹²⁵ Democratically accountable governments are therefore susceptible to populist pressures that readily absorb racist and xenophobic sentiments.¹²⁶ Courts, on the other hand, to some extent, are 'less determined and more insulated both from concrete social interests and from political struggle taking place in other state institutions'.¹²⁷

Judicially mediated doctrine can be seen to recognise the unique vulnerability of undocumented migrants and restrain states' immigration power. Both the ECHR and the IACHR have not only recognised that irregular migrants hold substantive rights vis-à-vis their host state but have also enjoined states to sequester migrants' unlawful immigration status from their ability to claim these rights. These two courts accomplish this in very different ways in the context of the relevant provisions of the regional human rights convention. Nevertheless, the bodies of jurisprudence are similar in that they both suggest ways to avoid the shortcoming of the *Migrant Workers Convention*, whereby the substantive protections offered to irregular migrants are apparently compromised by an inability to claim them.

A *European Jurisprudence on the Right to Family Life*

The Council of Europe was established in 1949 in response to the atrocities of the Second World War to promote unity, social and economic progress and

¹²² See Christian Joppke and Elia Marzal, 'Courts, the New Constitutionalism and Immigrant Rights: The Case of the French *Conseil Constitutionnel*' (2004) 43 *European Journal of Political Research* 823, 825; Joppke, 'The Legal-Domestic Sources of Immigrant Rights', above n 59, 340. See generally Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (1998).

¹²³ However, it is true that permanent residents, in certain states, have electoral rights and other political participatory rights traditionally reserved for citizens: see generally, Lisa García Bedolla, 'Rethinking Citizenship: Noncitizen Voting and Immigrant Political Engagement in the United States' (Paper presented at the Nation of Immigrants Conference, Berkeley Institute for Governmental Studies, University of California, May 2-3 2003); Virginia Harper-Ho, 'Noncitizen Voting Rights: The History, the Law and Current Prospects for Change' (2000) 18 *Law and Inequality* 271; Gerald L Neuman, 'We are the People: Alien Suffrage in German and American Perspective' (1992) 13 *Michigan Journal of International Law* 259; Jamin Raskin, 'Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage' (1992-93) 141 *University of Pennsylvania Law Review* 1391.

¹²⁴ Harper-Ho, above n 123, 295.

¹²⁵ Raskin, above n 123, 1393.

¹²⁶ *Ibid* 1464.

¹²⁷ Alec Stone, as quoted in Virginie Guiraudon, 'Citizenship Rights for Non-Citizens: France, Germany, and the Netherlands' in Christian Joppke (ed), *Challenge to the Nation-State* (1998) 272, 301. See generally David Jacobson and Galya Benarieh Ruffer, 'Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy' (2003) 25 *Human Rights Quarterly* 74, 75.

human rights in Europe.¹²⁸ The Council promptly created the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention*'), which was adopted in 1950.¹²⁹ The addition of Protocol 11 to the *European Convention* in 1998 dramatically changed the ECHR's structural system of enforcement.¹³⁰ Protocol 11 created an absolute right for individuals or non-governmental organisations to petition the ECHR¹³¹ which has the power to issue decisions regarding *European Convention* violations and to order the offending state to pay compensation and costs to the applicant.¹³² The ECHR may receive applications from 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation' committed by one of the contracting states.¹³³

Notwithstanding this broad jurisdiction, the European human rights regime does not necessarily protect people regardless of the passport they hold. Under the *European Convention*, like the *ICCPR*, political rights are explicitly reserved for citizens.¹³⁴ From 1959, when the ECHR started functioning, until December 1993, fewer than a dozen decisions involved the civil rights of foreigners.¹³⁵ Nor has Europe promulgated any specialised protective standards for unauthorised migrant workers. The *European Social Charter*¹³⁶ protections for migrants and the *European Convention on the Legal Status of Migrant Workers*¹³⁷ in their terms apply only to the nationals of other contracting parties, who are, by definition, legally working as a matter of regional immigration law.¹³⁸ Ryszard Cholewinski has observed that the *Migrant Workers Convention* contains the 'minimum standard of treatment for illegal migrants in Europe, who are presently ignored by analogous European standards'.¹³⁹

Yet, even though the ECHR has no express mandate to protect unauthorised immigrant workers, a body of jurisprudence bolstering the rights of migrants has

¹²⁸ See *Statute of the Council of Europe*, opened for signature 5 May 1949, 87 UNTS 103, preamble, art 1 (entered into force 3 August 1949).

¹²⁹ Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 December 1953).

¹³⁰ *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, opened for signature 11 May 1994, 2061 UNTS 12 (entered into force 1 November 1998).

¹³¹ *European Convention*, above n 129, art 34 places an obligation on the contracting states to allow individuals to bring complaints and obliges those states not to hinder applicants in seeking this right.

¹³² *Ibid* art 41.

¹³³ *Ibid* art 34.

¹³⁴ *Ibid* art 16.

¹³⁵ Virginie Guiraudon, 'European Courts and Foreigners' Rights: A Comparative Study of Norms Diffusion' (2000) 34 *International Migration Review* 1088, 1096.

¹³⁶ Opened for signature 18 October 1961, 529 UNTS 89 (entered into force 26 February 1965).

¹³⁷ Opened for signature 24 November 1977, 1496 UNTS 3 (entered into force 1 May 1983).

¹³⁸ Jan Niessen, 'Migrant Workers' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed, 2001) 389, 395–7, describing the *European Social Charter*, above n 136 and the *European Convention on the Legal Status of Migrant Workers*, above n 137. However, the European Committee of Social Rights has concluded that regardless of its apparent limited personal scope, the *European Social Charter* does apply to protect particularly vulnerable groups, including children of irregular migrants whose access to health care in France was restricted: European Committee on Social Rights, *Complaint No 14/2003: International Federation of Human Rights Leagues v France (Merits)* (8 September 2004).

¹³⁹ Cholewinski, *Migrant Workers in International Human Rights Law*, above n 71, 200.

emerged. Among other areas, significant case law has developed around the application of art 8 of the *European Convention*, which protects the right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Clearly, art 8 does not guarantee foreigners the right to a family home in their country of choice. As a recent International Labour Organisation report observes, states 'are not bound by any provision of international law to guarantee family reunification'.¹⁴⁰ In all of its decisions, the ECHR reaffirms that it does not forbid states from regulating immigration and details a number of legitimate reasons for states to restrict immigration, including the economic well-being of a country and threats to public order. These restrictions are applicable if 'necessary in a democratic society'.¹⁴¹

However, the ECHR *does* recognise that any exercise of immigration control must be compatible with art 8,¹⁴² and has repeatedly found that the decision to expel a non-citizen may prima facie constitute an 'interference' with the right to respect for family life.¹⁴³ The Court then assesses the proportionality between the legitimate goal of a measure or a law, the means used to achieve this goal and the damage done to the individual as measured by the violation of *European Convention* rights.¹⁴⁴ In doing so, the Court considers both the individual's interest in 'respect for his private or family life' and the government's need to control disorder and crime.¹⁴⁵

In balancing these interests, a number of considerations are taken into account. These include: the amount of time a non-national has lived in the deporting state; whether his or her family resides there; whether he or she has any ties to another state; and the effect of deportation on his or her family in the

¹⁴⁰ International Labour Office, *Migrant Workers* (Report presented at the International Labour Conference, 87th sess, Report III(1B), Agenda Item 3, Geneva, June 1999) [473].

¹⁴¹ *European Convention*, above n 129, art 8(2).

¹⁴² See *Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985) 94 Eur Court HR (ser A) 4. See also Ryszard Cholewinski, 'Family Reunification and Conditions Placed on Family Members: Dismantling a Fundamental Human Right' (2002) 4 *European Journal of Migration and Law* 271; P Van Dijk, 'Protection of "Integrated" Aliens against Expulsion under the *European Convention on Human Rights*' (1999) 1 *European Journal of Migration and Law* 293; Rut Rubio Marin and Rory O'Connell, 'The *European Convention* and the Relative Rights of Resident Aliens' (1999) 5 *European Law Journal* 4.

¹⁴³ *Mehemi v France* (1997) VI Eur Court HR 1962, 1970; *Beldjoudi v France* (1992) 234 Eur Court HR (ser A) 6, 25–8; *Moustaquim v Belgium* (1991) 193 Eur Court HR (ser A) 4, 16–19.

¹⁴⁴ *Djeroud v France* (1992) 194 Eur Court HR (ser A) 27, 35; *Lamguindaz v UK* (1993) 258 Eur Court HR (ser A) 95, 100–3; *Beldjoudi v France* (1992) 234 Eur Court HR (ser A) 6, 25–8. See also, *C v Belgium* (1996) III Eur Court HR 917, 922–5; *Nasri v France* (1996) 320 Eur Court HR (ser A) 14, 22–6.

¹⁴⁵ See, eg, *Beldjoudi v France* (1992) 234 Eur Court HR (ser A) 6, 25–8.

deporting state.¹⁴⁶ The ECHR also considers the seriousness of any criminal offence committed by the applicant and the applicant's police record since the crime.¹⁴⁷ One line of authority also requires the Court to investigate whether the disruption or threat of disruption to family life is caused by an action or situation for which the persons concerned, and not the state, carry the primary responsibility.¹⁴⁸

Due to these considerations, the case law developed in relation to art 8 has been developed most prominently in the context of long-term or permanent resident aliens. One of the first successful attempts to invoke art 8 in a deportation case was the challenge to expulsion brought by Mr Berrehab after his marriage dissolved and his residence permit was revoked.¹⁴⁹ The ECHR found that his expulsion would violate art 8(1) because it would interrupt settled access between father and child.¹⁵⁰ Although immigration control was an interference that was in accordance with the law and had the legitimate aim of preserving the country's economic well-being within the meaning of art 8(2), the Netherlands had failed to justify this expulsion as necessary in a democratic society.¹⁵¹ As a result, it did not represent a fair balance between the public interest and the rights of the family concerned.¹⁵²

Shortly thereafter, the European Commission of Human Rights issued a pronouncement on the application of art 8 to aliens, which was striking in its characterisation of the relationship between a non-citizen and his country of residence. In the case of *Djeroud*,¹⁵³ the Algerian applicant had been convicted of a series of serious offences in France and was issued with numerous deportation orders. Yet the European Commission of Human Rights upheld his complaint, attributing particular significance to his presence in France since infancy, notwithstanding his migrant status:

Although *legally an alien*, the applicant has his family and social ties in France and the nationality which links him to Algeria, though a legal reality, *does not reflect his actual position in human terms*.¹⁵⁴

This statement is remarkable in its willingness to look behind the applicant's legal immigration status and accord weight to his factual presence in a state of residence.

However, the ECHR has been far more hesitant to take this approach where the applicant's presence has been continually unauthorised. Until very recently, *Dalia v France* was one of the only judgments issued by the ECHR ruling on the applicability of art 8 to the exclusion of an irregular migrant.¹⁵⁵ In that instance,

¹⁴⁶ *Mehemi v France* (1997) VI Eur Court HR 1962, 1971.

¹⁴⁷ *Boutif v Switzerland* (2001) IX Eur Court HR 123, 132; *Mehemi v France* (1997) VI Eur Court HR 1962, 1970; *Bouchelkia v France* (1997) I Eur Court HR 50, 65.

¹⁴⁸ Van Dijk, above n 142, 295–8. See, eg *Gül v Switzerland* (1996) I Eur Court HR 159, 175–6. But see 178–85 (Dissenting Opinion of Judge Martens).

¹⁴⁹ *Berrehab v Netherlands* (1988) 138 Eur Court HR (ser A) 6.

¹⁵⁰ *Ibid* 16.

¹⁵¹ *Ibid*.

¹⁵² *Ibid*.

¹⁵³ *Djeroud v France* (1992) 194 Eur Court HR (ser A) 27.

¹⁵⁴ *Ibid* 35 (emphases added); Jacqueline Bhabha, 'Belonging in Europe: Citizenship and Post-National Rights' (1999) 51 *International Social Science Journal* 11, 20–2.

¹⁵⁵ *Dalia v France* (1998) I Eur Court HR 79, 92.

the Court found that the exclusion of Ms Dalia, an irregular migrant convicted of heroin trafficking, did not violate art 8. Although this result was disappointing for Ms Dalia, what is significant about this case was that her irregular status was not decisive. While unlawfully present in France, she had given birth to a son (a French citizen). The Court concluded that removing Dalia from a country where a close member of her family lived prima facie amounted to an interference in her family life.¹⁵⁶ Her unlawful status at the time did not affect this finding. Ms Dalia's case failed because of her inability to show, under art 8(2), that her deportation was not proportionate to a legitimate aim pursued in a democratic society. In light of her serious crime and her extensive social ties in Algeria, referring to 'her Algerian nationality [as] not merely a legal fact but reflect[ing] certain social and emotional links', the Court decided against her.¹⁵⁷

The ECHR seemed to strike a delicate balance with regard to the significance of Ms Dalia's undocumented status. Ms Dalia's illegal presence was apparently irrelevant to the Court's consideration of the birth of her son in France and the prima facie interference that her removal would have on her relationship with him.¹⁵⁸ However, the Court refused to accord substantial weight to this relationship when it came to ruling on the second element of the art 8 test.¹⁵⁹ The reason for this is not clear. It may be that the Court simply considered that the applicant's relationship with her son was not so significant as to outweigh France's legitimate aim of removing a migrant with a criminal record. Indeed, the Court used very strong language when describing the social detriment caused by her drug-related offences.¹⁶⁰ On the other hand, it is possible that the Court was suggesting that states have a greater interest in expelling undocumented migrants than lawful migrants and that, had Ms Dalia been living in France with lawful immigrant status, her removal from her son would have been considered disproportionate to any legitimate aim advanced by France.

The precise content of a state's interest in controlling irregular migration was considered most recently in a decision concerning an application brought by Ms Solange Rodrigues da Silva, a Brazilian mother living and working illegally in the Netherlands, and her Dutch daughter, Rachael Hoogkamer. On 31 January 2006, the ECHR ruled unanimously that the refusal to grant Ms Rodrigues da Silva a residence permit amounted to a violation of her right to private and family life under art 8.¹⁶¹

In its submissions to the ECHR, the Government of the Netherlands had emphasised the national interests at stake.¹⁶² Defending the refusal, the Netherlands had maintained, in particular, that the applicant, who was working illegally, did not pay taxes or social security contributions, and that there were ample European Union nationals or lawful migrants in the Netherlands to fill the

¹⁵⁶ Ibid 89.

¹⁵⁷ Ibid 91.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid 92.

¹⁶⁰ Ibid.

¹⁶¹ *Rodrigues da Silva and Hoogkamer v the Netherlands*, Application No 50435/99 (Unreported, European Court of Human Rights, Grand Chamber, 31 January 2006) ('*Rodrigues*').

¹⁶² Ibid [38].

job she was occupying.¹⁶³ On these bases, the Deputy Minister of Justice and the Regional Court of the Hague had both considered that the interests of the economic well-being of the country outweighed Ms Rodrigues da Silva's right to reside in the Netherlands — her daughter's state of nationality.¹⁶⁴

Nevertheless, the ECHR held that Ms Rodrigues da Silva's expulsion would have far-reaching consequences on her family life with her young daughter and that it was clearly in Rachael's best interests for her mother to stay in the Netherlands.¹⁶⁵ After the relationship between Ms Rodrigues da Silva and Mr Hoogkamer had dissolved, custody of Rachael had been awarded to her father. This was decided on the basis that Rachael's interests were best served by remaining in the Netherlands and that there was no guarantee, due to Ms Rodrigues da Silva's irregular migration status, that her mother would be in a position to continue residing there to care for her.¹⁶⁶ The ECHR determined, as a result of this custody decision, that deporting Ms Rodrigues da Silva would sever almost all contact with Rachael, who would remain in the Netherlands. The fact that Rachael would not be able to live with her mother in Brazil loomed large in the Court's balancing test of the proportionality of the visa refusal decision.¹⁶⁷

The ECHR then turned to the significance of Ms Rodrigues da Silva's irregular immigration status. At no point had Ms Rodrigues da Silva been entitled to a right of lawful presence in the Netherlands.¹⁶⁸ The Court took into account the fact that Ms Rodrigues da Silva and Mr Hoogkamer were both aware, from the outset of their relationship, that the continued existence of their family life within the Netherlands was precarious because of her illegal immigration status.¹⁶⁹ In the balancing test, it could be imagined that this would create an equity against Ms Rodrigues da Silva since this 'illegality was mainly the result of the first applicant's own actions, or lack thereof'.¹⁷⁰ However, the ECHR declined to take such an approach, holding instead that:

Lawful residence in the Netherlands would have been possible on the basis of the fact that the first applicant and Mr Hoogkamer had a lasting relationship between June 1994 and January 1997. Although there is no doubt that a serious reproach may be made of the first applicant's cavalier attitude to Dutch immigration rules, this case should be distinguished from others in which the Court considered that the persons concerned could not have any time reasonably expected to be able to continue family life in the host country.¹⁷¹

The ECHR ultimately determined that:

the economic well-being of the country does not outweigh the applicants' rights under Article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth. Indeed, by attaching such paramount

¹⁶³ *Ibid* [17].

¹⁶⁴ *Ibid* [17].

¹⁶⁵ *Ibid* [43].

¹⁶⁶ *Ibid* [12].

¹⁶⁷ *Ibid* [41]–[44].

¹⁶⁸ *Ibid* [43].

¹⁶⁹ *Ibid* [39].

¹⁷⁰ *Ibid* [34].

¹⁷¹ *Ibid* [43].

importance to this latter element, the authorities may be considered to have indulged in excessive formalism.¹⁷²

It has been suggested that ECHR jurisprudence generally provides a valuable framework for the determination of the rights of irregular migrants, because, when a deportation places obstacles to the unity of a family, the margin of appreciation afforded to states in immigration control markedly narrows.¹⁷³ *Rodrigues da Silva and Hoogkamer v the Netherlands* represents a further conceptual advancement in judicial gloss on states' margin of appreciation when regulating illegal migration for three reasons. First, the applicants' challenge before the ECHR related not to a deportation order but to the Minister's refusal to grant residency. This means that, in finding in favour of the applicants, the ECHR held that irregular migrants' right to family life can engage a positive obligation to permit residence on the part of host states. Secondly, the judgment explicitly extends the entitlements of undocumented migrants to include family-based rights, where the *Migrant Workers Convention* had afforded the right to family unity to regular migrants alone.¹⁷⁴ Thirdly, the Court, in this case, approaches unlawful immigration status in a vein similar to *Djeroud*,¹⁷⁵ attributing value to Ms Rodrigues da Silva's factual presence in the Netherlands and her putative right to have regularised her situation in the past, rather than relying on her strict legal status alone.¹⁷⁶ To have fixed attention on her current immigration status would have been, in the words of the Court, to have engaged in 'excessive formalism'.¹⁷⁷

In these ways, the ECHR has established standards which avoid the enforcement pitfalls of the *Migrant Workers Convention* framework. Rather than invoking formal rights which irregular migrants are unable to access for fear of detection, the jurisprudence concerning the *European Convention* provides that states may be obliged to grant full residence to undocumented migrants to safeguard their right to family unity.¹⁷⁸ Irregular status alone does not dislodge a reasonable expectation to be able to continue family life in the host country. By way of comparison, the human rights regime in the Americas, although taking a markedly different approach, also manages to protect migrants' rights, notwithstanding their unauthorised status.

B *The Inter-American Court of Human Rights*

In its *Advisory Opinion on the Legal Status and Rights of Undocumented Migrants* ('*Advisory Opinion*') of 17 September 2003, the IACHR ruled that

¹⁷² Ibid [44].

¹⁷³ Nicholas Blake, 'Developments in the Case Law of the European Court of Human Rights' in Barbara Bogusz et al (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2005) 431, 443.

¹⁷⁴ *Migrant Workers Convention*, above n 13, art 44.

¹⁷⁵ *Djeroud v France* (1992) 194 Eur Court HR (ser A) 27, 36.

¹⁷⁶ *Rodrigues*, Application No 50435/99 (Unreported, European Court of Human Rights, Grand Chamber, 31 January 2006) [44].

¹⁷⁷ Ibid.

¹⁷⁸ See *ibid*.

international principles of non-discrimination provide workplace protections for undocumented migrant workers.¹⁷⁹

The background to the *Advisory Opinion* was the 2002 US Supreme Court case of *Hoffman Plastic Compounds, Inc v National Labor Relations Board* ('*Hoffman Plastic*').¹⁸⁰ This case arose after José Castro, an irregular Mexican worker at a plastics factory in the US, was illegally fired for union organising.¹⁸¹ The US National Labor Relations Board ('NLRB') held that the employer's decision to fire the worker had violated the applicable domestic labour protection laws.¹⁸² A dispute then arose between the employer and the NLRB over the remedies — the employer argued that Mr Castro was not entitled to compensation for the time he missed work since he had not legally been entitled to work under immigration law.¹⁸³

The Supreme Court ruled that Mr Castro's unlawful immigration status displaced his right to recover back pay for lost wages (which was the only direct remedy available to him for wrongful dismissal). In the Court's view, the imperatives of immigration enforcement justified this carve out in labour protections. Writing for the majority, Chief Justice Rehnquist stated that the NLRB could not order back pay for unperformed work which the worker could not lawfully have undertaken, because such remedies encourage illegal immigration.¹⁸⁴ On the other hand, the dissenting judgments took a more pragmatic approach. They pointed out that full remedies would actually further the objectives of immigration control by discouraging employers from hiring undocumented workers.¹⁸⁵ It was argued that equal enforcement of labour laws on par with the protections enjoyed by authorised workers would raise the cost for employers and thus reduce the economic incentive to hire undocumented workers.¹⁸⁶

The Mexican Government responded to this decision through diplomatic channels, conveying its concern about the impact of the decision on Mexicans working in the US. The response provides an exceptional example of the deployment of international human rights strategies in shaping foreign policy, especially those related to international population flows. Mexico then sought an advisory opinion from the IACHR on the rights of undocumented workers, as

¹⁷⁹ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003) 13.

¹⁸⁰ 535 US 137 (2002).

¹⁸¹ *Ibid* 149.

¹⁸² *Ibid* 152.

¹⁸³ *Ibid* 149–50.

¹⁸⁴ *Ibid* 150.

¹⁸⁵ *Ibid* 158.

¹⁸⁶ *Ibid* 155.

this was the only legal mechanism open to it.¹⁸⁷ Since the US had not ratified the *American Convention on Human Rights* ('*American Convention*'),¹⁸⁸ the dispute could not fall within the contentious jurisdiction of the IACHR.

The *Advisory Opinion* has been described as 'a watershed' for undocumented migrants.¹⁸⁹ In a unanimous opinion, the Court found that the principles of equality and non-discrimination prohibit the denial of human rights to migrants on the basis of their immigration status.¹⁹⁰ Indeed, the Court concluded that non-discrimination norms have the status of *jus cogens*, or peremptory norms of international law.¹⁹¹ This was the first time an international tribunal had reached this conclusion, which imposes obligations *erga omnes* on all states.¹⁹² The IACHR acknowledged that governments have the sovereign right to deny employment to undocumented immigrants,¹⁹³ but held that, once an employment relationship is established, such workers are equally protected by human rights in the workplace.¹⁹⁴

The decision was based partly on art 24 of the *American Convention*, which provides that '[a]ll persons are equal before the law. Consequently, all persons are entitled, without discrimination, to equal protection of the law', as well as arts 3(1) and 17 of the *Charter of the Organization of American States* (proclaiming human rights for all without discrimination); art 2 of the *American Declaration of the Rights and Duties of Man*¹⁹⁵ (equality before the law); arts 1,

¹⁸⁷ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003) 1–4, 10. Note that the American Federation of Labor and the Congress of Industrial Organisations ('AFL-CIO') and the Confederation of Mexican Workers ('CTM') also filed petitions before the ILO in relation to this case, citing breaches of trade union rights under the *Convention (No 87) concerning Freedom of Association and Protection of the Right to Organize*, adopted 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950) ('*ILO Convention No 87*'), the *Convention (No 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, adopted 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951) ('*ILO Convention No 98*') and the ILO Declaration on Fundamental Principles and Rights at Work: ILO, Committee on Freedom of Association, 332nd Report of the Committee on Freedom of Association (GB288/7(Part I), 288th sess, November 2003) [551]. The ILO Committee on Freedom of Association has held that irregular migrants have the right to participate in union activities and are entitled to a meaningful remedy should that right be denied. The Committee concluded that the remedies remaining after *Hoffman Plastics* were 'likely to afford little protection to undocumented workers who can be indiscriminately dismissed for exercising freedom of association rights without any direct penalty aimed at dissuading such action': at [609]. See also, Paoletti, above n 45; Lyon, 'New International Human Rights Standards on Unauthorised Immigrant Worker Rights', above n 41, 556.

¹⁸⁸ Opened for signature 22 November 1969, 1144 UNTS 123, art 62(3) (entered into force 18 July 1978). Any state party to the Organization of American States has a right to request an advisory opinion of the IACHR: art 64(1)–(2).

¹⁸⁹ Paoletti, above n 45.

¹⁹⁰ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003) 100.

¹⁹¹ *Ibid.*

¹⁹² Sarah H Cleveland, 'Legal Status and Rights of Undocumented Workers. Advisory Opinion OC-18/03' (2005) 99 *American Journal of International Law* 460, 462; Lyon, 'The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere', above n 62, 587.

¹⁹³ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003) 105–6.

¹⁹⁴ *Ibid.* 106.

¹⁹⁵ Organization of American States, *American Declaration of the Rights and Duties of Man*, OAS Res XXX (1948).

2(1) and 7 of the *Universal Declaration of Human Rights* ('UDHR')¹⁹⁶ (the principles of human dignity, non-discrimination and equality before the law); and arts 2(1), 2(2), 5(2) and 26 of the *ICCPR* (general obligations to implement the Covenant with non-derogation and equality before the law, and without discrimination).¹⁹⁷

The IACHR had earlier addressed the applicability of art 24 to non-nationals, distinguishing discrimination from the mere act of noting differences or factual inequalities.¹⁹⁸ In discerning whether differences in legal treatment amount to discrimination, the Court had suggested it would evaluate whether the differences are 'in themselves offensive to human dignity', or whether they had a 'legitimate purpose' that would not 'lead to situations which are contrary to justice, to reason or to the nature of things'.¹⁹⁹

In the *Advisory Opinion*, the IACHR drew upon this principle of equality and non-discrimination, reiterating that states may, in accordance with art 24, grant some 'distinct treatment' between undocumented migrants and documented migrants, or between migrants and nationals.²⁰⁰ However, expanding on its earlier dicta, the IACHR maintained that the differential treatment is only permissible to the extent that it is 'reasonable, objective, proportionate and does not harm human rights'.²⁰¹ By way of concrete example, the Court acknowledged that states are permitted to distinguish between nationals and non-nationals in terms of who has the right to employment,²⁰² but once 'undocumented workers are engaged, they immediately become possessors of the labour rights corresponding to workers and may not be discriminated against because of their irregular situation'.²⁰³ Migrant workers are entitled to workers' rights because these rights derive from the individual being engaged in remunerated work, regardless of the background context coloured by the individual's immigration status. States may not further their immigration policies by denying basic workplace protections to undocumented employees.

On its face, this prohibition on employment-related discrimination appears to go no further than the corresponding stipulation in the *Migrant Workers Convention*.²⁰⁴ However, it constitutes a significant advancement for several reasons. First, the IACHR substantially enlarges the rights owed to undocumented migrant workers under the *Migrant Workers Convention*. It extends the obligation not to discriminate in regards to: the payment of fair wages for work performed; reasonable working hours; safe and healthy working

¹⁹⁶ GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948).

¹⁹⁷ The IACHR's jurisdiction is exceptionally broad, extending not only to questions regarding the interpretation of the *American Convention*, above n 188, but also questions reliant on the interpretation of 'other treaties concerning the protection of human rights in the American states': art 64(1).

¹⁹⁸ IACHR, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica (Advisory Opinion)* 4 (ser A) (1984) [56].

¹⁹⁹ *Ibid* 15.

²⁰⁰ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003) 9, 100–2.

²⁰¹ *Ibid*.

²⁰² *Ibid* 106.

²⁰³ *Ibid*.

²⁰⁴ *Migrant Workers Convention*, above n 13, art 25.

conditions; social security; a right to rest and compensation; protection for women workers; judicial and administrative guarantees;²⁰⁵ access to state health services; and contributions to state pension systems.²⁰⁶ In contrast, the *Migrant Workers Convention* reserves several of these rights for regular migrants only.²⁰⁷ No doubt in reference to the Supreme Court's judgment in *Hoffman Plastic*, Judge Ramírez especially emphasised the obligation to provide due process and unrestricted access to effective judicial remedies to migrant workers for violations of workplace rights:

undocumented workers usually face severe problems of effective access to justice. These problems are due not only to cultural factors and lack of adequate resources or knowledge to claim protection from the authorities with competence to provide it, but also to the existence of norms or practices that obstruct or limit delivery of justice by the State. This happens because the request for justice can lead to reprisals against the applicants by authorities or individuals, measure of coercion or detention, threats of deportation, imprisonment or other measures that, unfortunately, are frequently experienced by undocumented migrants.²⁰⁸

Second, in a sweeping judgment, undocumented workers have gained non-discrimination protection based on a broad body of human rights law, including the *ICCPR* and the *UDHR*, rather than the poorly-ratified *Migrant Workers Convention*.²⁰⁹ This was accomplished by the IACHR's reliance on the general principles of equality and non-discrimination and its determination that the applicability of these protections extend to unauthorised migrant workers, notwithstanding their 'definitional status as lawbreakers'.²¹⁰ Indeed, it has been observed that, as a result of the Court's opinion in this matter,

whilst only eight of the thirty-five ... [Organization of American States] member states are parties to the ... [*Migrant Workers Convention*], those states which are not have at least been openly advised that they must in large part observe the obligations enshrined therein.²¹¹

Finally, the decision of the IACHR is explicitly geared towards ensuring the effective exercise of human rights by undocumented migrant workers on equal footing with all other workers in the state of employment. In this respect, it appears to go further than the *Migrant Workers Convention* by requiring that irregular migrants be able to enforce workplace rights without fear of immigration-related retaliation. This is a departure from the more nominal or formal approach that was the outcome of the uneasy compromise brokered in

²⁰⁵ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003) 108.

²⁰⁶ *Ibid* 108–9.

²⁰⁷ The *Migrant Workers Convention* accords only regular migrants rights to liberty of movement (art 39), family unity (art 44), to form a trade union (art 40) or protection from unreasonable expulsions (art 56). Strikingly, irregular migrants are afforded no general protection against discrimination on the basis of immigration status (art 7).

²⁰⁸ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003) 9, 100–2.

²⁰⁹ *Ibid* 107–9.

²¹⁰ Lyon, 'New International Human Rights Standards on Unauthorised Immigrant Worker Rights', above n 41, 563.

²¹¹ Israel de Jesús Butler, 'Recent Advisory Opinions and Contentious Cases of the Inter-American Court of Human Rights' (2004) 4 *Human Rights Law Review* 125, 136.

drafting the *Migrant Workers Convention*.²¹² According to the Court, when fear of deportation or denial of free public legal services to immigrants prevents immigrants from asserting their rights, the right to judicial protection is violated.²¹³ In particular, Judge Ramírez stated that governments should not sanction violations of immigration law with measures unrelated to the migratory offence:

Non-compliance with migratory provisions would entail the relevant consequences, but should not produce effects in areas that are unrelated to the matter of the entry and residence of migrants.²¹⁴

Here, the Court is de-coupling the protections necessary to alleviate the vulnerable position of undocumented migrants while working in their host state from the infraction against domestic law.

V CONCLUSION

Migrants who live or work without authorisation lead extremely precarious lives. Many migrants face structural barriers such as language difficulties or lack understanding about local institutions and laws.²¹⁵ However, irregular migrants occupy positions of even more extreme social vulnerability since they often work in undesirable jobs avoided by nationals and legal migrants, and live in constant fear of removal or possible prosecution as a result of their unlawful status.²¹⁶ In an effort to assist advocates to promote the rights of undocumented migrants, this article has identified bodies of jurisprudence developed by regional human rights courts which represent major conceptual advancements in the international standards of treatment of unauthorised migrants.

My purpose in canvassing progressive doctrine emanating from the case law of regional human rights courts is not to suggest that these forums guarantee redress for rights violations experienced by undocumented workers. Nor do I claim that litigation before these regional bodies signals the only way forward for advocates seeking to assist undocumented migrants in attaining justice. Just outcomes for claimants appearing before these international forums require enforcement mechanisms which do not yet exist at the international level. In the case of the IACHR, jurisprudence emanating from its advisory jurisdiction is not binding.²¹⁷ Indeed, the US has taken no steps to reinstate direct remedies for undocumented workers fired in violation of labour laws, as required by the IACHR pursuant to the *ICCPR*. In relation to the ECHR, the inconsistency of its case law has been disparaged as amounting to a 'lottery'.²¹⁸ In part, this is due to the source of the rights itself, art 8, which has been described as 'easily the most

²¹² See above Part III(B).

²¹³ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003) 106.

²¹⁴ *Ibid* 6.

²¹⁵ Pécoud and de Guchteneire, above n 38, 3.

²¹⁶ Bosniak, above n 12, 747.

²¹⁷ Jo M Pasqualucci, 'Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law' (2002) 38 *Stanford Journal of International Law* 241, 246.

²¹⁸ Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (1998) 280.

comprehensive yet obscure provision of the Convention'.²¹⁹ At the same time, it is a result of the case by case approach taken to art 8 cases, which has received a great deal of criticism from dissenting judges.²²⁰ Moreover, although the ECHR's attention to immigrants' rights has encouraged a degree of legislative reform within member states,²²¹ the ECHR has no power to award anything other than compensation and costs — it cannot order the state to take, or refrain from taking, any particular action.²²²

Given the significant enforcement limitations of the international human rights system, much depends on whether and how advocates take up the discourse of rights. My aim in exploring the jurisprudence issuing from these regional bodies is to provide advocates with a language and a conceptual framework through which to engage states and international organisations. Opportunities for advocacy are many. Indeed, the Committee on Migrant Workers, established pursuant to the *Migrant Workers Convention*, will soon begin to issue general comments interpreting the precise contours of the obligations of states parties.²²³ Since so many domestic legal systems rely on the doctrine of territorial sovereignty in determining the rights of migrants, the fact that this doctrine finds its source in international law makes domestic policy especially susceptible to developments in international law that restrict the prerogative of the sovereign.

This article has explored the ways in which both the ECHR and IACHR have significantly departed from the logic of international human rights law treaties by recognising that, in order to provide effective protection, the undocumented migrant's immigration status must be quarantined from his or her ability to claim substantive rights. Nevertheless, this acknowledgement poses a real challenge as to how to accomplish this objective. While both bodies of jurisprudence read down the significance of unauthorised immigration status in claiming certain substantive rights, they propose quite different conceptual frameworks.

The *Advisory Opinion* of the IACHR suggests that certain rights of undocumented workers should not be affected by their unlawful immigration status. It distinguishes immigration enforcement policies that violate the human rights of undocumented workers from those that do not. The IACHR observes that states may deny immigrants some political rights, regulate the entry and deportation of undocumented migrants, deny them permission to work and

²¹⁹ Sally Frontman-Cain, 'Boultif v Switzerland: The ECHR Fails to Provide Precise Criteria for Resolving Article 8 Deportation Cases' (2003) 25 *Loyola Los Angeles International and Comparative Law Review* 323, 324.

²²⁰ Ann Sherlock, 'Deportation of Aliens and Article 8 ECHR' (1998) 23 *European Law Review: Human Rights Survey 1998* HR/62, HR/70. See, eg, *Beldjoudi v France* (1992) 234 Eur Court HR (ser A) 6 (Dissenting Opinion of Judge Pettiti).

²²¹ French law was amended in 2003 to embrace the guarantee expressed in Article 8: Law No 2003-1119, enacted on 26 November 2003, JO of 27 November 2003, 20136. However, it has been pointed out that the law has become more restrictive in other ways: see Sophie Robin-Olivier, 'Citizens and Noncitizens in Europe: European Union Measures against Terrorism after September 11' (2005) 25 *Third World Law Journal* 197, 202.

²²² Luke Clements, Nuala Mole and Alan Simmons, *European Human Rights: Taking a Case under the Convention* (2nd ed, 1999) 79.

²²³ See Committee on Migrant Workers, Office of the United Nations High Commissioner of Human Rights, *Monitoring the Protection of the Rights of All Migrant Workers and Members of Their Families* (2007) <www.ohchr.org/english/bodies/cmw/index.htm> at 18 May 2007.

regulate the entry and residence of guest workers in particular economic sectors.²²⁴ However, once an employment relationship has been established, the migrant acquires rights as a worker irrespective of his or her irregular status in the state of employment.²²⁵ When it comes to enforcing these protected workplace rights, the IACHR suggests the need for unauthorised workers to be guaranteed immigration confidentiality. In other words, according to the IACHR, undocumented workers have certain rights as workers notwithstanding their lack of status as members of the political community in their country of employment. Further analysis is required to structure a concrete basis for determining workplace rights which cannot be denied on the basis of migration status and those which can.

The ECHR takes a markedly different perspective by linking the rights held by irregular migrants to their standing as members of European state communities. Whereas the IACHR found that undocumented migrants lack membership status (and sought to quarantine this position from migrants' ability to enforce workplace protections), the ECHR ruled that migrants' constant presence and social ties create a *de facto* citizenship. Indeed, the equities gained by continuous presence and local family relationships may include a reasonable expectation to be able to continue family life in the host country.

Both bodies of jurisprudence suggest novel approaches which assist lawyers and policy-makers as they continue to evolve standards and remedies which offer effective protection against grave abuses of rights. Under both international law and domestic laws, these standards will inevitably grapple with the philosophical tensions raised by the presence of unauthorised migrants, including whether or not they are granted status as community members in the state of employment and whether or not that matters.

²²⁴ IACHR, *Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion)* 18 (ser A) (2003), 105, 119.

²²⁵ *Ibid* 108.