ESSAYS

THE HUMAN RIGHTS OF MIGRANTS IN GENERAL INTERNATIONAL LAW: FROM MINIMUM STANDARDS TO FUNDAMENTAL RIGHTS

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I. INTRODUCTION

The story of migrants is frequently portrayed as a story of abuse, violence, and racism. This narrative of tragedy has become commonplace for triggering attention of mass media and highlighting—consciously or not—the perils of being a migrant. This article proposes another story: Migration is a permanent feature of history, and it is framed by public international law. There is nothing surprising in this; the movement of persons across borders is international by nature since it presupposes a triangular relationship between a migrant, a state of emigration, and a state of immigration.

Though it was not free from controversies, the legal protection of migrants has a long lineage in the history of international law. One can even argue that, from its inception, international law has had a symbiotic relationship with migration. The very term "*jus gentium*" designated the set of customary rules governing the legal status of aliens under the law of ancient Rome.[1] As far back as the 16th century, this Latin expression was specifically used to refer to the law of nations, before Jeremy Bentham coined the term "international law" in 1789.[2] In the meantime, the movement of persons across borders was a typical subject of discussions among the founding fathers of international

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1. DAVID J. BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY 85 (2004).
2. JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ¶ XXV, at 236 (Batoche Books 1999) (1789).

law, such as Franciscus de Victoria,[3] Hugo Grotius,[4] and Emer de Vattel.[5]

Since then, migration has remained a topical issue of international concern, which mirrors the broader development of international law. A particularly telling case can be found in the human rights of migrants. The present article traces back their historical origins and analyses their primary features under contemporary international law. Though this issue has raised a considerable literature among contemporary scholars, human rights of migrants have been rarely approached from a general international law perspective.[6] Such an approach proves to be particularly valuable for many reasons. Most notably, it provides the global frame of migrants' rights and contributes to a better understanding of their legal environment and core content.

The systemic perspective proposed in the present article recalls that migrants' rights are anchored in international law and reflect its evolution. This underlines in turn that most migrants' rights are grounded in customary international law and are binding on every state. The legal protection of migrants has evolved from the notion of a minimum standard based on state responsibility to fundamental rights consecrated in human rights law, and, as such, available to every individual. As a result of this longstanding process, migrants' rights are universal and must be respected, because migrants' rights are human rights.

Against such a frame, part II of this article provides a historical account about the law of state responsibility for injuries committed to aliens. This was a classic question of international law which was crystallized through the notion of international minimum standards at the end of the 19th century and

3. FRANCISCUS DE VICTORIA, *The First Reflectio: On the Indians Lately Discovered*, *in* DE INDIS ET DE IVRE BELLI RELECTIONES, ¶ 386, at 151 (Ernest Nys ed., John Pawley Bate trans., Carnegie Institute of Washington 1917) (1532).

4. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES ¶ XXIV, at 253 (James Brown Scott ed., Francis W. Kelsey trans., Clarendon Press, 1925) (1625).

5. EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY ¶ 225, at 224 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758).

6. The academic literature devoted to the human rights of migrants is prolific. *See generally* RYSZARD CHOLEWINSKI, MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT (1997); Joan Fitzpatrick, *The Human Rights of Migrants*, *in* MIGRATION AND INTERNATIONAL LEGAL NORMS 169 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); Guy S. Goodwin-Gill, *Migration: International Law and Human Rights*, *in* MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME? 160 (Bimal Ghosh ed., 2000); IRREGULAR MIGRATION AND HUMAN RIGHTS: THEORETICAL, EUROPEAN AND INTERNATIONAL PERSPECTIVES (Barbara Bogusz et al. eds., 2004); RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW (1984); MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS' RIGHTS (Paul de Guchteneire et al. eds., 2009) [hereinafter MIGRATION AND HUMAN RIGHTS]; 2 MONDIALISATION, MIGRATION ET DROITS DE L'HOMME: LE DROIT INTERNATIONAL EN QUESTION/GLOBALIZATION, MIGRATION AND HUMAN RIGHTS: INTERNATIONAL LAW UNDER REVIEW (Vincent Chetail ed., 2007) [hereinafter MONDIALISATION]; SYLVIE SAROLÉA, DROITS DE L'HOMME ET MIGRATIONS: DE LA PROTECTION DU MIGRANT AUX DROITS DE LA PERSONNE MIGRANTE (2006); CARMEN TIBURCIO, THE HUMAN RIGHTS OF ALIENS UNDER INTERNATIONAL AND COMPARATIVE LAW (2001); DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS (2008); Ryszard Cholewinski, *The Human and Labor Rights of Migrants: Visions of Equality*, 22 GEO. IMMIGR. L.J. 177 (2008).

the first half of the 20th century. Part III demonstrates how international human rights law has progressively encapsulated the notion of international minimum standards before constituting nowadays the primary source of protection. Part IV then focuses on the principle of non-discrimination as the ultimate benchmark of migrants' rights.

II. THE ORIGINS OF THE INTERNATIONAL MINIMUM STANDARD AND THE LAW OF STATE RESPONSIBILITY

Traditionally, the responsibility of states for injuries to aliens was a branch of international law on its own and, in fact, one of its most important branches.[7] In the century after 1840, some sixty mixed-claims commissions were set up to deal with disputes arising from this specific field.[8] Philip Jessup observed in 1948 that "[t]he international law governing the responsibility of states for injuries to aliens is one of the most highly developed branches of that law."[9] Its primary rationale was based on Vattel's well-known fiction: "Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen."[10]

According to this traditional stance, aliens are worthy of protection as nationals because they personify their own state. The legal status of aliens under classical international law is the result of a purely inter-state relationship: Both in practice and principle, aliens are under the dual dependency of the territorial state (where they sojourn) and of the personal state (of which they have nationality). This traditional position is well synthesized by the arbitral award delivered in 1928 in the famous *Island of Palmas* case: "Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights . . . each State may claim for its nationals in foreign territory."[11]

This overlapping between the territorial and personal jurisdictions is

7. Among a rich literature, see C. F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1967); Dionisio Anzilotti, *La Responsabilité Internationale Des États À Raison Des Dommages Soufferts Par Les Étrangers*, *in* 13 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 5, 5-29, 110-30 (photo. reprint 1987); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS (1925); A. DECENCIÈRE-FERRANDIÈRE, LA RESPONSABILITÉ INTERNATIONALE DES ÉTATS À RAISON DES DOMMAGES SUBIS PAR DES ÉTRANGERS (Rousseau & Co. ed., 1925); FREDERICK SHERWOOD DUNN, THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW (1932); Jacques Dumas, *La Responsabilité Des Etats à Raison Des Crimes Et Délits Commis Sur Leur Territoire Au Préjudice D'Etrangers*, *in* 36 RECUEIL DES COURS 183 (1931); F. V. GARCÍA AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974); F. V. García Amador, *State Responsibility: Some New Problems*, *in* 94 RECUEIL DES COURS 365 (1958); INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (Richard B. Lillich ed., 1983).

8. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 500 (6th ed. 2003); MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS: PAST AND FUTURE 196 (1944).

9. PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 94 (1948).

10. VATTEL, *supra* note 5, at 298, § 71.

11. Island of Palmas (U.S. v. Neth.), Hague Ct. Rep. 2d (Scott) 83, 93 (Perm. Ct. Arb. 1928).

inherent to alienage. It further explains the longstanding interest of international law towards aliens. By contrast, classical international law has long been indifferent to the treatment of nationals within their own country who were left at the discretion of their sovereign state. As Hersch Lauterpacht observed, "the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as the citizen of his own State."[12]

This paradox corresponds to a specific stage in the evolution of international law when the individual was literally considered an object of international law and not a subject in his own right.[13] The treatment reserved to aliens was not an exception but, on the contrary, a confirmation of this purely inter-state legal system. Individuals could be protected only because they embodied their state of nationality. This was epitomized by the *Mavrommatis* Judgment delivered in 1924 by the Permanent Court of International Justice:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights-its right to ensure, in the person of its subjects, respect for the rules of international law.[14]

This inter-state monologue is further exacerbated by the discretionary nature of diplomatic protection. As restated by the ICJ, "[t]he State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease."[15]

Thus, one should not be surprised that diplomatic protection has been a persistent source of tension among states—especially between western states and newly independent ones (notably in Latin America). Aliens in question were generally entrepreneurs from industrialized countries in search of new markets; furthermore, diplomatic protection was used as a common pretext for intervention in disregard of the principles of sovereign equality and non-interference in the domestic affairs of states, in this case developing

12. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 121 (photo. reprinted 1968) (1950).

13. *See* Walter George Frank Philimore, *Droits Et Devoirs Fondamentaux Des Etats*, *in* 1 RECUEIL DES COURS 62, 63 (1923). *See also* Vincent Chetail, *Le Droit D'avoir Des Droits En Droit International Public: Réflexions Sur La Subjectivité Internationale De L'Individu*, *in* LIRE HANNAH ARENDT AUJOURD'HUI: POUVOIR, GUERRE, PENSÉE, JUGEMENT POLITIQUE 217 (M. C. Caloz-Tschopp ed., 2008).

14. Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3, ¶ 21 (Aug. 30). *See also* Panevezys-Saldutiskis Railway (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28).

15. Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3, ¶ 79 (Feb. 5).

states. As a result, "[t]he history of the development of the international law on the responsibility of states for injuries to aliens is thus an aspect of the history of 'imperialism,' or 'dollar diplomacy.'"[16]

The conflicting interests at stake have been reflected by two opposite conceptions of the standard of treatment granted to aliens. First, developing states have advanced the doctrine of national treatment: Aliens must be treated on an equal footing with nationals (with the obvious exception of political rights).[17] As a result, aliens cannot claim more rights than those granted to nationals and only a difference of treatment can trigger the responsibility of the host state. The doctrine of national treatment was endorsed at the First International Conference of American States held in Washington in 1889-1890.[18] It has been reinforced at the regional level in several treaties, including the 1902 Convention relative to the Rights of Aliens,[19] the 1928 Convention on the Status of Aliens,[20] as well as the famous Montevideo Convention on the Rights and Duties of States adopted in 1933.[21]

Nonetheless, international initiatives carried out by Latin American states have been primarily confined within their own region. At the universal level, the first Conference for the Codification of International Law, held in 1930 under the auspices of the League of Nations, demonstrated the absence of a broader consensus. The conference was unable to adopt the draft "Convention on Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners" mainly because of the two different conceptions on the applicable standard: Seventeen states supported the doctrine of national treatment, whereas thirty-one others were opposed to it.[22]

In contrast to the national treatment, Western states have promoted the

16. JESSUP, *supra* note 9, at 96. *See also Barcelona Traction*, 1970 I.C.J. at 246 (separate opinion of Judge Padilla-Nervo). Among other well-known instances, the Boer War from 1899 to 1902 was officially justified by the UK in order to protect the British mine owners of Witwatersrand. *South African War*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/555806/South-African-War (last updated Dec. 14, 2013).

17. 6 M. CHARLES CALVO, LE DROIT INTERNATIONAL: THEORIE ET PRATIQUE 230, § 256 (Paris, Arthur Rousseau, 5th ed. 1896). For further discussions, see also Alberto Guani, *La Solidarité Internationale Dans L'Amérique Latine*, *in* 8 RECUEIL DES COURS 209, 287 (1925); 1 J. DE LOUTER, LE DROIT INTERNATIONAL PUBLIC POSITIF 296-98 (1920); 2 ERNEST NYS, LE DROIT INTERNATIONAL: LES PRINCIPES, LES THEORIES, LES FAITS 266 (1912); J. M. Yepes, *Les Problèmes Fondamentaux Du Droit Des Gens En Amérique*, *in* 47 RECUEIL DES COURS 1, 106 (1934); Hormodio Arias, *The Non-Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection, or a Civil War*, 7 AM. J. INT'L L. 724 (1913).

18. THE INTERNATIONAL CONFERENCES OF AMERICAN STATES 1889-1928, at 45 (James Brown Scott ed., 1931).

19. *Id.* at 415-16.

20. *Id.*

21. Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. As to the previous convention, the US made a reservation to Art. 9. *Id.*

22. *Conference for the Codification of International Law*, League of Nations Doc. C.351M.145 1930 V, at 188 (1930).

notion of minimum international standards, traditionally defined in the following terms:

> Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.
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> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world . . . . If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.[23]

Thus, according to such a notion, aliens shall not be treated below a minimum standard which is required by general international law regardless of how a state treats its own nationals. This doctrine has been endorsed in a substantial amount of treaties and jurisprudence.[24] The content of the international minimum standard is, however, particularly vague. It has raised many controversies among states, some of them considering the ambiguity of the notion as the perfect excuse for justifying arbitrary interferences in host states. Nevertheless, as a result of these inter-state disputes, a considerable body of arbitral awards has progressively identified and refined the international minimum standard on a case-by-case basis. This incremental process has been crystallised in a core set of fundamental guarantees, including the right to life and respect for physical integrity, the right to recognition as a person before the law, freedom of conscience, prohibition of arbitrary detention, the right to a fair trial in civil and criminal matters, and the right to property (save public expropriation with fair compensation).[25]

23. Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. SOC'Y INT'L PROC. 16, 20-21 (1910).

24. Among numerous arbitral awards, see most notably Hopkins v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. 41, 47 (Perm. Ct. Arb. 1926); Neer v. United Mexican States (U.S. Mex.), 4 R.I.A.A. 60, 64, 65 (Perm. Ct. Arb. 1926); Roberts v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. 77, 79-80 (Perm. Ct. Arb. 1926); British Claims in Spanish Zone of Morocco (U.K. v. Spain), 2 R.I.A.A. 615, 635, 644 (Perm Ct. Arb. 1925). *See also* Treaty of Friendship and Establishment, Egypt-Persia, arts. IV-VI, Nov. 28, 1928, 93 L.N.T.S. 381; Convention Respecting Conditions of Residence and Business and Jurisdiction arts. 1, 2, 13, 14, 17, July 24, 1923, 31 L.N.T.S. 11.

25. *See* S. Basdevant, *Théorie Générale De La Condition De L'étranger*, *in* 8 REPERTOIRE DE DROIT INTERNATIONAL 31-61 (A. De Lapradelle & J. P. Niboyet eds., 1930); ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 507-30 (1st ed. 1938); ANDREAS H. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 185-86 (1949); Alfred Verdross, *Les Règles Internationales Concernant Le Traitement Des Étrangers*, *in* 37 RECUEIL DES COURS 323, 353-406 (1931).

As is apparent from this enumeration, the minimum standard of treatment has been the forerunner of human rights law at the international level. It has been critical for infusing the rule of law in the field of migration. Nowadays, while it still retains some residual value, the international minimum standard is to a large extent absorbed by human rights treaties and customary law.

III. THE EMERGENCE OF INTERNATIONAL HUMAN RIGHTS LAW AS THE PRIMARY SOURCE OF PROTECTION

The law of aliens inherited from the traditional notion of state responsibility has been progressively marginalized and arguably replaced by human rights law.[26] This reflects a more general and systemic evolution whereby human rights law is profoundly reshaping general international law.[27] Even the ICJ acknowledged in the *Diallo* Judgment of 2007 that:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[28]

Upon closer review, human rights law constitutes a normative synthesis between the two traditional conceptions of the treatment granted to aliens by international law. On the one hand, this branch of law ensures that a core content of basic rights is guaranteed by international law in line with the very notion of a minimum standard. On the other hand, human rights law asserts equality of treatment between citizens and non-citizens in accordance with

26. For further discussions about the impact of international human rights law on the law of state responsibility see Thomas E. Carbonneau, *The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement*, 25 VA. J. INT'L L. 99, 100-02, 117, 136, 140 (1985); Alexandre-Charles Kiss, *La Condition Des Étrangers En Droit International Et Les Droits De L'Homme*, *in* MISCELLANEA: W.J. GANSHOF VAN DER MEERSCH 499, 509 (1972); Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AM. J. INT'L L. 432, 443, 452, 454, 461 (1976).

27. On this evolution, see generally Pierre-Marie Dupuy, *L'Individu et let Droit International: Théorie des Droits de L'Homme et Fondements du Droit International*, *in* 32 ARCHIVES DE PHILOSOPHIE DU DROIT: LE DROIT INTERNATIONAL 119 (Paris, Sirey 1987); THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW (Menno T. Kamminga & Martin Scheinin eds., 2009); Theodor Meron, *International Law in the Age of Human Rights*, *in* A GENERAL COURSE ON PUBLIC INTERNATIONAL LAW, 301 RECUEIL DE COURSE 301 (2003); ANTONIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW *JUS GENTIUM* (The Hague Acad. of Int'l Law Monographs Ser. No. 8, 2013); Michel Virally, *Droits De L'Homme Et Théorie Générale Du Droit International*, *in* 4 RENE CASSIN AMICORUM DISIPULORUMQUE LIBER 323, 329 (1972); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869, 876 (1990); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 6 (1982).

28. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 582, 599, ¶ 39 (May 24).

the national standard. Myres McDougal, Harold Lasswell, and Lung-chu Chen acknowledge in this sense:

> In sum, the principal thrust of the contemporary human rights movement is to accord nationals the same protection formerly accorded only to aliens, while at the same time raising the standard of protection for all human beings, nationals as well as aliens, far beyond the minimum international standard developed under the earlier customary law. . . . The consequence is thus . . . that continuing debate about the doctrines of the minimum international standard and equality of treatment has now become highly artificial; an international standard is now authoritatively prescribed for all human beings.[29]

Nevertheless, merging the old law of aliens and the new law of human rights has been progressive and it is still an ongoing process. One of the first systematic attempts was carried out by the International Law Commission (ILC). In 1953 the UN General Assembly requested that the ILC "undertake the codification of the principles of international law governing State responsibility."[30] García Amador was appointed as Special Rapporteur in 1955 and, from 1956 to 1961, he submitted six reports focusing on the responsibility of States for injuries caused to aliens within their territory.[31] His great ambition was "to change and adapt traditional law so that it will reflect the profound transformation which has occurred in international law. In other words, it will be necessary to bring the 'principles governing State responsibility' into line with international law at its present stage of development."[32]

According to Amador, traditional conceptions have shown their own limits for establishing clear-cut rules in this field.[33] They must be reassessed in

29. McDougal et al., *supra* note 26, at 464. Among many other similar accounts, see Charles G. Fenwick, *The Progress of International Law During the Past Forty Years*, *in* 79 RECUEIL DES COURS 44 (1951); Alwyn V. Freeman, *Human Rights and the Rights of Aliens*, 45 AM. SOC'Y INT'L L. PROC. 120, 122-23, 129 (1951); R.Y. Jennings, *The Responsibility of States*, *in* 121 RECUEIL DES COURSE 473, 480, 486-88 (1967); Kiss, *supra* note 26, at 509; HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 72 (1980).

30. G.A. Res. 799 (VIII), U.N. GAOR, 8th Sess., Supp. No. 17, U.N. Doc. A/2630, at 52 (Dec. 7, 1953).

31. *Special Rapporteurs of the International Law Commission (1949–2013)*, INT'L L. COMM'N, http://legal.un.org/ilc/guide/annex3.htm (last updated Aug. 21, 2013).

32. *Special Rapporteur F. V. García Amador's International Responsibility*, [1956] 2 Y.B. Int'l L. Comm'n 173, at 176, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

33. *Id.* at 175:

> [T]he subject of responsibility has always been one of the most vast and complex of international law; it would be difficult to find a topic beset with greater confusion and uncertainty. The cause lies not so much in the dominant part played by political factors in the shaping and development of this branch of international law, as in the glaring inconsistencies of traditional doctrine and practice. Perhaps because of the existence and influence of extraneous factors which are not always compatible with the law, artificial legal concepts and principles have been evolved which often appear markedly incongruent.

Id.

accordance with the dramatic transformations of contemporary international law deriving from the UN Charter and the international recognition of human rights:

> International law is not now concerned solely with regulating relations between States, for one of the objects of its rules is to protect interests and rights which are not truly vested in the State. Hence it is no longer true, as it was for centuries in the past, that international law exists only for, or finds its sole *raison d'être* in, the protection of the interests and rights of the State; rather, its function is now also to protect the rights and interests of its other subjects who may properly claim its protection . . . . International law today recognizes that individuals and other subjects are directly entitled to international rights, just as it places upon them certain international obligations.
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> . . . .
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> The basis of this new principle would be the "universal respect for, and observance of, human rights and fundamental freedoms" referred to in the Charter of the United Nations and in other general, regional and bilateral instruments. The object of the "internationalization" (to coin a term) of these rights and freedoms is to ensure the protection of the legitimate interests of the human person, irrespective of his nationality. Whether the person concerned is a citizen or an alien is then immaterial: human beings, as such, are under the direct protection of international law.[34]

Against such a "new" normative frame, the Special Rapporteur proposed in 1957 a draft Convention on international responsibility of the State for injuries caused in its territory to the person or property of aliens.[35] In its final version published in his last Report of 1961, article 1, paragraph 1 of the draft postulates that "aliens enjoy the same rights and the same legal guarantees as nationals," while specifying that as a minimum "these rights and guarantees shall in no case be less than the 'human rights and fundamental freedoms' recognized and defined in contemporary international instruments."[36] Its second paragraph then offers a non-exhaustive list of such fundamental human rights.[37]

34. *Id.* at 184, 192, 203.

35. *Special Rapporteur F. V. García Amador's International Responsibility: Second Report*, [1957] 2 Y.B. Int'l L. Comm'n 104, at 127-28, U.N. Doc. A/CN.4/SER.A/1957/Add.1.

36. *Special Rapporteur F. V. García Amador's International Responsibility: Sixth Report*, [1961] 2 Y.B. Int'l L. Comm'n 1, 46, U.N. Doc A/CN.4/SER.A/1961/Add.1.

37. *Id.* at 46-47:

> The 'human rights and fundamental freedoms' referred to in the foregoing paragraph are those enumerated below: (*a*) The right to life, liberty and security of person; (*b*) The right to own property; (*c*) The right to apply to the courts of justice or to the competent organs of the State,

At the time, however, this pioneer work was a "somewhat revolutionary approach," as Amador himself acknowledged.[38] In fact his draft received scant attention from the ILC and several members criticised his approach on the grounds that the individual was not a subject of international law and that the identification of human rights pertained to a different topic of codification than that of state responsibility.[39] A new Special Rapporteur, Roberto Ago, was designated with the aim to focus exclusively on the secondary rules of state responsibility.[40] That is to say, to define the general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences to flow therefrom.[41] As a result of this new approach, primary rules—and in particular the substantive and more sensitive obligations regulating the protection of aliens—were excluded from the work of the ILC.[42]

This failed attempt at reconciling the old law of aliens with the new law of human rights was largely due to the political and legal context of the time. During the 1950s and 1960s, Latin American states were not yet ready to abandon their own doctrine of national treatment for another one so similar to the notion of minimum standard. In Africa and Asia, newly independent states were also unwilling to codify the rights of aliens which were associated with imperialism and the diplomacy of their former colonial powers. Further-

by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms; (*d*) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the substantiation of any criminal charge or in the determination of rights and obligations under civil law; (*e*) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to present his defence personally or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released." Article 1, paragraph 3 of the final draft further specifies that: "[t]he enjoyment and exercise of the rights and freedoms specified in paragraph 2 (*a*) and (*b*) are subject to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality, or to secure respect for the rights and freedoms of others.

38. Int'l Law Comm'n, Summ. Recs. of the 416th mtg. 169, at ¶ 18, U.N. Doc. A/CN.4/SR.416 (June 13, 1957).

39. *Special Rapporteur F. V. García Amador's International Responsibility: Third Report*, [1958] 2 Y.B. Int'l L. Comm'n 47, at 48-50, U.N. Doc A/CN.4/SER.A/1958/Add.1.

40. Georg Nolte, *From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations*, 13 EUR. J. INT'L L. 1083, 1097 (2002).

41. *Special Rapporteur Roberto Ago's First Report on State Responsibility*, [1969] 2 Y.B. Int'l L. Comm'n 125, at 127, U.N. Doc A/CN.4/SER.A/1969/Add.1; *Special Rapporteur Roberto Ago's Second Report on State Responsibility*, [1970] 2 Y.B. Int'l L. Comm'n 177, U.N. Doc A/CN.4/SER.A/1970/Add.1 (Part 2).

42. Three succeeding Rapporteurs followed, finally leading to the adoption in 2001 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. *See* G.A. Res. 56/83, ¶ 1, U.N. Doc. A/RES/56/83 (Jan. 28, 2002); *Report of the Commission to the General Assembly on the Work of Its 53d Session*, [2001] 2 Y.B. Int'l L. Comm'n ¶¶ 69-71, at 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

more, communist states still viewed human rights as a product of capitalism and thus resisted their international recognition. As a result of the cold war and the decolonisation process, it was not the moment to codify the legal status of aliens, and even less to relate it to human rights.

These political impediments were reinforced by purely legal ones. In 1961 when Amador submitted his final report,[43] the only universal instrument addressing human rights in a comprehensive way was the non-binding Universal Declaration of Human Rights.[44] At the regional level, only one treaty had been adopted, the European Convention for the Protection of Human Rights and Fundamental Freedoms.[45] Against such a background, merging the old and controversial law of aliens with the new and emerging field of human rights was bound to fail. It was simply too early.

The history of migrants' rights under international law steadily exemplifies that, in this area as well as in many others, the avant-garde of today frequently becomes the reality of tomorrow. However, quite ironically, while the notion of minimum standard was the forerunner of human rights on the international scene, the latter has been emancipated from the former to such an extent that the law of aliens now stands in the shadow of human rights law. Still, today the rights of non-citizens remain the poor cousins of human rights.

From a general international law perspective, the rights of non-citizens have been (re)discovered quite recently as a side effect of the normative expansion of international human rights law.[46] After a decade of lengthy discussions, the General Assembly adopted in December 1985 the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live.[47] The added value of this Declaration is more symbolic than substantial. While restating the plain applicability of human rights to non-nationals, it signals that the international protection of migrants is working in tandem with the development of human rights law.

Since then, due respect for the human rights of migrants has been restated on multiple occasions. Among the more well-known examples are the 1993 Vienna Conference on Human Rights;[48] the International Conference on

43. *Special Rapporteur F. V. García Amador's International Responsibility: Sixth Report*, [1961] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc A/CN.4/SER.A/1961/Add.1.

44. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948) [hereinafter UDHR].

45. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, C.E.T.S. No. 005 (entered into force Mar. 9, 1953).

46. For a similar process regarding the rights of refugees under international law, see Vincent Chetail, *Are Refugee Rights Human Rights?: An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law*, *in* HUMAN RIGHTS AND IMMIGRATION 19 (Ruth Rubio-Marin ed., 2014).

47. G.A. Res. 40/144, U.N. Doc. A/RES/40/144 (Dec. 13, 1985).

48. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶¶ 33-35, U.N. Doc. A/CONF.157/23 (July 12, 1993).

Population and Development held the following year in Cairo;[49] the Summit for Social Development in Copenhagen in March 1995;[50] the fourth World Conference on Women organized in Beijing in September 1995;[51] and the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance held in Durban.[52] Alongside similar restatements of regional organizations,[53] the UN General Assembly has further reaffirmed "the need for all States to protect fully the universally recognized human rights of migrants, especially women and children, regardless of their legal status."[54] From a systemic perspective, the very term "human rights of migrants" testifies to the appropriation of alienage by human rights law. However, such evolution is progressive and still incomplete in practice.

Despite the ancient lineage of migrants' rights in international law, it was not until 1990 that the UN adopted a specific convention on migrant workers: the International Convention on the Protection of the Rights of All Migrant

49. International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Report of the International Conference on Population and Development*, at 135, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994).

50. World Summit for Social Development, Copenhagen, Den., Mar. 6-12, 1995, *Report of the World Summit for Social Development*, at 99, U.N. Doc. A/CONF.166/9 (Apr. 19, 1995).

51. Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Report of the Fourth World Conference on Women*, IV(D), U.N. Doc. A/CONF.177/20 (Oct. 17, 1995).

52. *See* World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Aug. 31-Sept. 8, 2001, Durban, S. Afr., *Durban Declaration and Programme of Action*, ¶ 48, U.N. Doc. A/CONF.189/12 (Sept. 8, 2001).

53. *See* African Common Position on Migration and Development, Exec. Council of the Afr. Union, 9th Sess., June 25-29, 2006, ¶¶ 3.7-3.9, Doc. EX.CL/277 (IX), (June 29, 2006); ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 12th ASEAN Summit, Cebu, Phil., ¶¶ 1-4 (Jan. 13, 2007); Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families, I(A)(1), Doc. AG/RES. 2141 (XXXV-O/05) (June 7, 2005); European Council, The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, 2010 O.J. (C 115) 1, §§ 6.1.4-4.1.6.

54. G.A. Res. 58/190, ¶ 9, U.N. Doc. A/RES/58/190 (Dec. 22, 2003); G.A. Res. 57/218, ¶ 7, U.N. Doc. A/RES/57/218 (Dec. 18, 2002); Protection of Migrants, G.A. Res. 56/170, ¶ 5, U.N. Doc. A/RES/56/170 (Dec. 19, 2001); G.A. Res. 55/92, ¶ 5, U.N. Doc. A/RES/55/92 (Dec. 4, 2000); G.A. Res. 54/166, ¶ 4, U.N. Doc. A/RES/54/166 (Dec. 17, 1999). With slight changes in the wording, see Declaration of the High-Level Dialogue on International Migration and Development, G.A. Draft Res. 68/L.5, ¶ 5, U.N. Doc. A/68/L.5 (Oct. 3-4, 2013); G.A. Res. 67/172, ¶ 1, U.N. Doc. A/RES/67/172 (Dec. 20, 2012); G.A. Res. 66/172, ¶ 1, U.N. Doc. A/RES/66/172 (Dec. 19, 2011); G.A. Res. 65/212, ¶ 1, U.N. Doc. A/RES/65/212 (Dec. 21, 2010); G.A. Res. 64/166, ¶ 1, U.N. Doc. A/RES/64/166 (Dec. 18, 2009); G.A. Res. 63/184, ¶ 1, U.N. Doc. A/RES/63/184 (Dec. 18, 2008); G.A. Res. 62/156, ¶ 1, U.N. Doc. A/RES/62/156 (Dec. 18, 2007); G.A. Res. 61/165, ¶ 1, U.N. Doc. A/RES/61/165 (Dec. 19, 2006); G.A. Res. 60/169, ¶ 5, U.N. Doc. A/RES/60/169 (Dec. 16, 2005); G.A. Res. 59/194, ¶ 7, U.N. Doc. A/RES/59/194 (Dec. 20, 2004). The Millennium Declaration also endorses such a position. *See* United Nations Millennium Declaration, G.A. Res. 55/2, ¶¶ 24-25, U.N. Doc. A/RES/55/2 (Sept. 8, 2000). For the same idea in earlier resolutions inviting states to take all necessary and appropriate measures to ensure that the fundamental human rights, irrespective of their immigration status, are fully respected under their national legislation, see also Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers, G.A. Res. 32/120, ¶ 2(c), U.N. Doc. A/RES/32/120 (Dec. 16, 1977); Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers, G.A. Res. 31/127, ¶ 2(c), U.N. GAOR, 31st Sess., U.N. Doc A/RES/31/127, at 107 (Dec. 16, 1976). For a similar account among U.N. agencies, see International Labour Organization, Tripartite Meeting of Experts, *ILO Multilateral Framework on Labour Migration, Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration*, § 8, ILO Doc. TMMFLM/2005/1 (Rev.) (Oct. 31-Nov. 2, 2005).

Workers and Members of Their Families (ICRMW).[55] Though it mainly restates and sometimes specifies the applicability of rights already enshrined in more general instruments,[56] this Convention conspicuously confronted a slow ratification process, leading to both a late entry into force and a small number of parties. It experienced the longest period for its entry into force of any of the core binding UN human rights instruments. Adopted in December 1990, the ICRMW entered into force almost thirteen years later in July 2003.[57] Even today, it remains poorly ratified compared to the other core human rights treaties. The Convention counts only forty-seven parties,[58] with ratification by major western immigrant-receiving countries still lacking.[59]

A similarly poor number of ratifications can be observed with regard to the two conventions adopted by the International Labor Organization (ILO) for dealing with the specific situation of migrant workers. The 1949 Convention Concerning Migration for Employment (Revised) (No. 97)[60] is currently ratified by forty-nine states,[61] whereas the 1975 Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143)[62] counts only twenty-three parties.[63]

However, this limited number of ratifications does not reflect the norma-

55. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *adopted* Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter ICRMW].

56. For a similar account, see United Nations, Human Rights Office of the High Comm'r, Europe Reg'l Office, Rights of Migrant Workers in Europe, at 11 (2011) (Marie D'Auchamp); ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 169 (2010); Virginia A. Leary, *Labour Migration*, *in* MIGRATION AND INTERNATIONAL LEGAL NORMS 227, 235 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); David Weissbrodt & Stephen Meili, *Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?*, 28 REFUGEE SURV. Q. 34, 43-44 (2010).

57. Ratification Status, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, UNITED NATIONS TREATY COLLECTION (Mar. 17, 2014, 12 PM), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en.

58. *Id.*

59. This number is still far from attaining the 193 States having ratified the Convention on the Rights of the Child, which was adopted only one year before the ICRMW. Obstacles to the ratification of the ICRMW have raised a substantial literature. Aside from the books on the ICRMW already quoted above in the introduction, see generally Shirley Hune & Jan Niessen, *Ratifying the UN Migrant Workers Convention: Current Difficulties and Prospects*, 12 NETH. Q. HUM. RTS. 393 (1994); Beth Lyon, *The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the 'Brown Collar' Migration Paradigm*, 42 N.Y.U. J. INT'L L. & POL. 389 (2010); Patrick Taran, *Status and Prospects for the UN Convention on Migrants' Rights*, 2 EUR. J. MIGRATION & L. 85 (2000); Dirk Vanheule, Marie Claire Foblets, Sander Loones & Steven Bouckaert, *The Significance of the UN Migrant Workers' Convention of 18 December 1990 in the Event of Ratification by Belgium*, 6 EUR. J. MIGRATION & L. 285 (2005).

60. Convention Concerning Migration for Employment, July 1, 1949, I.L.O. No. 97, 120 U.N.T.S. 70 (entered into force Jan. 22, 1952).

61. *Ratifications of C097*, INT'L LABOUR ORG. (Mar. 16, 2014, 8 PM), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO.

62. Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975, I.L.O. No. 143, 1120 U.N.T.S. 323.

63. *Ratifications of C143*, INT'L LABOUR ORG. (Mar. 16, 2014, 8 PM), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288:NO.

tive density of the matter for two main reasons. First, a wide range of regional and bilateral treaties have been adopted for regulating various aspects of migration (including for labor purposes). To give only a few instances, more than 120 states are involved in regional economic integration schemes aimed at facilitating the movement of persons between states parties.[64] Furthermore, countries from the Organization for Economic Cooperation and Development (OECD) have alone entered into more than 176 bilateral labor recruitment agreements in 2004, a fivefold increase since 1990.[65]

Second, all human rights treaties—though drafted for a more general purpose—are still plainly relevant in the field of migration. Despite and because of the lack of worldwide ratification of treaties specifically devoted to migrant workers, general human rights instruments are bound to play a vital role. Indeed they are generally applicable to everyone irrespective of nationality and/or frequently include specific provisions applying to noncitizens. Besides the general principle of non-discrimination and equality before the law,[66] these instruments notably enshrine the right to leave any country and to return one's own country,[67] the right of children to acquire a nationality,[68] due process guarantees governing expulsion,[69] and protection against *refoulement*.[70] The added value of general human rights treaties is not only normative but also institutional: Their treaty bodies are crucial for advancing the protection of migrants within their respective mandates and

64. Patrick Taran, Rethinking Development and Migration: Some Elements for Discussion 4 (unpublished working paper) (on file with the author).

65. D. Bobeva & J.-P. Garson, *Overview of Bilateral Agreements and Other Forms of Labour Recruitment*, in OECD & Federal Office of Immigration, Integration and Emigration, MIGRATION FOR EMPLOYMENT. BILATERAL AGREEMENTS AT A CROSSROADS, OECD Publishing, 2004, 12.

66. *See* Convention on the Rights of Persons with Disabilities, arts. 1, 3(a), 4, 5, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3 [hereinafter CRPD]; Convention on the Rights of the Child, art. 2, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention on the Elimination of All Forms of Discrimination against Women, arts. 1, 2, 15(1), *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Covenant on Civil and Political Rights arts. 2(1), 26, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]); International Convention on the Elimination of All Forms of Racial Discrimination, arts. 1, 2, 5(a), *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

67. *See* CRPD, *supra* note 66, art. 18(1)(d); CRC, *supra* note 66, art. 10(2); CEDAW, *supra* note 66, art. 15(4); ICCPR, *supra* note 66, arts. 12(2), 4; ICERD, *supra* note 66, art. 5(d)(ii).

68. *See* CRPD, *supra* note 66, art. 18(1)(a-b), (2); CRC, *supra* note 62, art. 7; CEDAW, *supra* note 66, art. 9; ICCPR, *supra* note 66, arts. 24(2), 3; ICERD, *supra* note 66, art. 5(d)(iii).

69. *See* ICCPR, *supra* note 66, art. 13. *See also* CRC, *supra* note 66, art. 10(1) (regarding family reunification).

70. *See* International Convention for the Protection of All Persons from Enforced Disappearances art. 16, *adopted* Dec. 20, 2006, 2715 U.N.T.S. Doc. A/61/448; Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 3, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85. Furthermore, in line with other regional supervisory bodies, the Human Rights Committee and the Committee on the Rights of the Child have construed their respective instruments as encompassing an implicit duty of *non-refoulement*. *See* United Nations, Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005); United Nations, Human Rights Comm., General Comment No. 20: Article 7 (Prohibition of Torture and Cruel Treatment or Punishment), ¶ 9, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Mar. 10, 1992).

instruments.[71] General comments adopted by UN treaty bodies not only restate the applicability of human rights to noncitizens, but they also usually devote particular attention to migrants.[72]

Furthermore, their concluding observations on State reports frequently address the rights of migrant workers as inferred from their relevant instruments. While the Human Rights Committee (HRC) is less systematic than the others,[73] the Committee on Economic, Social and Cultural Rights

71. For a similar account, see D. Weissbrodt & J. Rhodes, *UN Treaty Bodies and Migrant Workers*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 303-28 (Vincent Chetail & Céline Bauloz eds., 2014). *But see* Isabelle Slinckx, *Migrants' Rights in UN Human Rights Conventions*, *in* MIGRATION AND HUMAN RIGHTS 122, 143-148 (Paul de Guchteneire, Antoine Pécoud & Ryszard Cholewinski eds., 2009).

72. *See* United Nations, Comm. on Econ., Soc., & Cultural Rights, General Recommendation No. 27 on Older Women and Protection of Their Human Rights, ¶¶ 18, 50, U.N. Doc. CEDAW/C/GC/27 (Dec. 16, 2010); United Nations, Comm. on Econ., Soc., & Cultural Rights, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 12, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010); United Nations, Comm. on Econ., Soc., & Cultural Rights, General Recommendation No. 26 on Women Migrant Workers, ¶ 27, U.N. Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008); United Nations, Comm. on Econ., Soc., & Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, ¶ 30, U.N. Doc. E/C.12/GC/20 (July 2, 2009); United Nations, Comm. on Econ., Soc., & Cultural Rights, General Comment No. 19: The Right to Social Security, ¶¶ 36, 56, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008); United Nations, Comm. on Econ., Soc., & Cultural Rights, General Comment No. 18: The Right to Work, ¶¶ 18, 23, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006); United Nations, Comm. on Econ., Soc., & Cultural Rights, General Comment No. 15: The Right to Water, ¶ 16(f), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); United Nations, Comm. on Econ., Soc., & Cultural Rights, General Comment No. 13: The Right to Education, ¶ 16, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999); United Nations, Int'l Human Rights Instruments, 1 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 287, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (May 27, 2008) (Committee on the Elimination of Discrimination Against Women's General Recommendation No. 25 on Gender-Related Dimensions of Racial Discrimination); United Nations, Int'l Human Rights Instruments, 2 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 303, 306, 34, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (May 27, 2008) (Comm. on the Elimination of Racial Discrimination's General Recommendation No. 30 on Discrimination Against Non-Citizens); United Nations, Int'l Human Rights Instruments, 1 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 189, 34, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008) (Human Rights Committee's General Comment No. 15 on the Position of Aliens Under the Covenant); United Nations, Human Rights Comm., General Comment No. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶ 9, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007); United Nations, Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); United Nations, Human Rights Comm., General Comment No. 23, ¶ 5(2), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 26, 1994); United Nations, Comm. on the Rights of the Child, General Comment No. 11: Indigenous Children and Their Rights Under the Convention, ¶ 51, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009); United Nations, Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 27, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

73. See mainly the following concluding observations of the HRC, United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, ¶ 18, U.N. Doc. CCPR/C/KWT/CO/2 (Nov. 18, 2011) (regarding Kuwait); United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, ¶¶ 334-53, U.N. Doc. A/49/40 (Vol. 1) (Sept. 29, 1994) (regarding Slovenia); United Nations, Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, ¶ 4, U.N. Doc. CCPR/C/79/Add.27 (Nov. 4, 1993) (regarding Norway).

(CESCR),[74] the Committee on the Elimination of Racial Discrimination (CERD),[75] the Committee on the Elimination of Discrimination Against

74. See the following concluding observations of the CESCR, United Nations, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶¶ 20, 27, U.N. Doc. E/C.12/KAZ/CO/1 (July 1, 2010) (regarding Kazakhstan); United Nations, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶ 22, U.N. Doc E/C.12/GBR/CO/5 (June 12, 2009) (regarding United Kingdom); United Nations, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶¶ 14-15, 18, 21-22, U.N. Doc. E/C.12/CYP/CO/5 (June 12, 2009) (regarding Cyprus); United Nations, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶¶ 22, 49, U.N. Doc. E/C.12/CAN/CO/4 (May 22, 2006) (regarding Canada); United Nations, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶¶ 10-11, 27-29, U.N. Doc. E E/C.12/1/Add.109 (June 23, 2005) (regarding Norway); United Nations, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶¶ 24, 53, 89, 114, 116, 124, 126, U.N. Doc. E/C.12/1/Add.107 (May 13, 2005) (regarding China); United Nations, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶¶ 17, 36, U.N. Doc. E/C.12/1/Add.103 (Dec. 14, 2004) (regarding Italy); United Nations, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶ 17, U.N. Doc. E/C.12/1/Add.94 (Dec. 12, 2003) (regarding Russian Federation); United Nations, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶¶ 15, 37, U.N. Doc. E/C.12/1/Add.82 (Dec. 19, 2002) (regarding Poland); United Nations, Comm. on Econ., Soc., & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, ¶ 34, U.N. Doc. E/C.12/1/Add.16 (Dec. 12, 1997) (regarding Dominican Republic).

75. See in particular the following concluding observations of the CERD, United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶ 11, U.N. Doc. CERD/C/MDV/CO/5-12 (Sept. 14, 2011) (regarding Maldives); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶ 20, U.N. Doc. CERD/C/CZE/CO/8-9 (Sept. 2, 2011) (regarding Czech Republic); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶ 18, U.N. Doc. CERD/C/ISL/CO/19-20 (Mar. 25, 2010) (regarding Iceland); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶ 16, 22, U.N. Doc. CERD/C/KAZ/CO/4-5 (Apr. 6, 2010) (regarding Kazakhstan); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶¶ 30, 33, U.N. Doc. CERD/C/CHN/CO/10-13 (Sept. 15, 2009) (regarding China); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶ 12, U.N. Doc. CERD/C/NGA/CO/18 (Mar. 27, 2007) (regarding Nigeria); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶¶ 15, 23, 25, U.N. Doc. CERD/C/IRL/CO/2 (Apr. 14, 2005) (regarding Ireland); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶ 15, U.N. Doc. CERD/C/BHR/CO/7 (Apr. 14, 2005) (regarding Bahrain); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶¶ 7, 10-11, U.N. Doc. CERD/C/64/CO/4 (May 10, 2004) (regarding Libya); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶ 11, U.N. Doc. CERD/C/64/CO/3 (Apr. 28 2004) (regarding Lebanon); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶¶ 4, 10, U.N. Doc. CERD/C/63/CO/9 (Dec. 10, 2003) (regarding Republic of Korea); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶¶ 16-20, U.N. Doc. CERD/C/62/CO/8 (Mar. 21, 2003) (regarding Saudi Arabia); United Nations, Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, ¶¶ 12, 17, U.N. Doc. CERD/C/304/Add.81 (Apr. 12, 2001) (regarding Chile).

Women (CEDAW),[76] and the Committee on the Rights of the Child (CRC)[77] regularly insist on the need for protecting migrant workers under their respective instruments.

76. *See, e.g.*, United Nation, Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Albania, ¶¶ 19, 40-41, U.N. Doc. CEDAW/C/ALB/CO/3 (Sept. 16, 2010); United Nation, Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Australia, ¶¶ 44-45, U.N. Doc. CEDAW/C/AUS/CO/7 (Jul. 30, 2010); United Nation, Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Egypt, ¶¶ 35-36, U.N. Doc. CEDAW/C/EGY/CO/7 (Feb. 5, 2010); United Nation, Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: United Arab Emirates, ¶¶ 10, 26-27, 36-37, U.N. Doc. CEDAW/C/ARE/CO/1 (Feb. 5, 2010); United Nation, Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Bahrain, U.N. Doc. CEDAW/C/BHR/CO/2 (Nov. 14, 2008); United Nation, Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Netherlands, ¶¶ 15-19, 21, 27-28, U.N. Doc. CEDAW/C/NLD/CO/4 (Feb. 2, 2007); United Nation, Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination against Women: Philippines, ¶¶ 21-22, U.N. Doc. CEDAW/C/PHI/CO/6 (Aug. 25, 2006); Rep. of the Comm. on the Elimination of Discrimination Against Women, 30th Sess., Jan. 12-30, 2004, ¶¶ 76-77, 79, U.N. Doc. A/59/38 (Part I) (Mar. 18, 2004) (regarding Kuwait); Rep. of the Comm. on the Elimination of Discrimination Against Women, U.N. GAOR, 58th Sess., Supp. No. 38, at 91, U.N. Doc. A/58/38 (Aug. 18, 2003) (regarding Costa Rica); Rep. of the Comm. on the Elimination of Discrimination Against Women, U.N. GAOR, 21st Sess., Supp. No. 38, at 33, U.N. Doc. A/54/38/Rev.1 (Feb. 5, 1999) (regarding Hong Kong Special Administrative Region).

77. See in particular the following concluding observations of the CRC, United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶ 62, U.N. Doc. CRC/C/ITA/CO/3-4 (Oct. 31, 2011) (regarding Italy); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 36-37, U.N. Doc. CRC/C/ISL/CO/3-4 (Oct. 6, 2011) (regarding Iceland); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 36, 68-69, U.N. Doc. CRC/C/KOR/CO/3-4 (Oct. 6, 2011) (regarding Republic of Korea); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 10, 29-30, U.N. Doc. CRC/C/CRI/CO/4 (June 17, 2011) (regarding Costa Rica); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 37, 45, U.N. Doc. CRC/C/JPN/CO/3 (June 20, 2010) (regarding Japan); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 70-71, U.N. Doc. CRC/C/HND/CO/3 (May 3, 2007) (regarding Honduras); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 29, 63, U.N. Doc. CRC/C/CHL/CO/3 (Apr. 23, 2007) (regarding Chile); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 24-25, 59-60, U.N. Doc. CRC/C/OMN/CO/2 (Sept. 29, 2006) (regarding Oman); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 24-25, U.N. Doc. CRC/C/15/Add.233 (Jun. 30, 2004) (regarding Panama); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 24-25, U.N. Doc. CRC/C/15/Add.231 (Feb. 26, 2004) (regarding Japan); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 31-32, 58-59, U.N. Doc. CRC/C/15/Add.197 (Mar. 18, 2003) (regarding Republic of Korea); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶ 27, U.N. Doc. CRC/C/15/Add.185 (June 13, 2002) (regarding Spain); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶¶ 26-27, U.N. Doc. CRC/C/15/Add.151 (July 17, 2001) (regarding Denmark); United Nation, Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, ¶ 32, U.N. Doc. CRC/C/15/Add.149 (Feb. 21, 2001) (regarding Palau).

Finally, migrants can also bring individual complaints to the seven existing UN supervisory bodies currently competent (namely the HRC, the CERD, the CAT, the CEDAW, the CESCR, the Committee on Enforced Disappearances, and the Committee on the Rights of Persons with Disabilities). The CAT is by far the most solicited UN treaty body. It has even become an anti-deportation committee, as between 80% and 90% of all individual complaints submitted to the CAT concern alleged violations of its Article 3 devoted to the principle of *non-refoulement*.[78] At the regional level, the European Court of Human Rights is another particularly active treaty-body, which has regularly sanctioned violations of human rights committed against migrants.[79] The European Court is not the only active regional body, as virtually all are concerned, such as the Inter-American and African Courts of human rights.[80]

In sum, as a result of a longstanding evolution, the traditional law of aliens grounded on diplomatic protection has been progressively superseded by human rights law, which has become in turn the primary source of migrants' protection. This process is not confined to the specific situation of migrants, but reflects the broader evolution of general international law during the last century. The consequences of this phenomenon are both normative and institutional. Already in 1984, Richard B. Lillich rightly observed in his seminal book, *The Human Rights of Aliens in Contemporary International Law,* that:

> What the international community is witnessing today is a major change—the significance of which cannot be overstated—in the way in which the rights of aliens are protected: from the classic system of diplomatic protection by the alien's State of nationality, invoking the traditional international law governing the treatment of aliens, to the direct protection of the individual alien's rights through his use of national and international procedures to enforce a set of reformulated international norms . . . .[81]

78. Vincent Chetail, *Le Comité des Nations Unies Contre la Torture et L'expulsion des Étrangers: Dix Ans de Jurisprudence*, *in* 26 REVUE SUISSE DE DROIT INTERNATIONAL ET EUROPÉEN 63, at 66 (2006); MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 159 (Philip Alston & Vaughan Lowe eds., 2008).

79. For recent condemnations see, for example, Othman (Abu Qatada) v. United Kingdom, 2012-I Eur. Ct. H.R. 159; Jamaa v. Italy, 2012-II Eur. Ct. H.R.; M.S.S. v. Belgium & Greece, 2011 Eur. Ct. H.R.

80. For recent condemnations pronounced by the Inter-American Court of Human Rights see, for example, Dorzema v. Dominican Republic, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 12,688 (Oct. 24, 2012); Veles Loor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 12,581 (Nov. 23, 2010). Though the newly established African Court has not yet delivered a judgement in the field, the African Commission has already developed a substantial jurisprudence on the rights of migrants. *See* Good v. Bostwana, Afr. Comm'n H.R., Report No. 313/05 (2010); Modise v. Botswana, Afr. Comm'n H.R., Report No. 97/93 (2000).

81. RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 3 (Gillian M. White ed., 1984). This does not mean, however, that diplomatic protection has disappeared; this traditional institution coexists with national and supranational procedures which are comparatively more reliable simply because, as methods of enforcement, the latter are not discretionary and more objective than the former.

IV. THE PRINCIPLE OF NON-DISCRIMINATION AS THE ULTIMATE BENCHMARK OF MIGRANT RIGHTS

The impact of international human rights law is not only procedural, but also substantial. It has substantially eroded the traditional *summa divisio* based on the distinction between citizens and non-citizens. This is all but surprising, for human rights are by definition inherent to human dignity without regard to nationality. The Universal Declaration of Human Rights and the two UN Covenants proclaim in the first recital of their preambles that human rights derive from the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."[82] Similarly, the preamble of the American Convention of Human Rights recalls in more explicit terms that, "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality."[83]

This philosophical and normative underpinning is reinforced by the principle of non-discrimination, which has been endorsed in all human rights treaties including Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR):

> 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, [color], sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[84]

82. ICCPR, *supra* note 66, pmbl.; UDHR, *supra* note 44, pmbl.

83. American Convention on Human Rights pmbl., ¶ 2, July 18, 1978, 1144 U.N.T.S. 123.

84. ICCPR, *supra* note 66, art. 2(1). Though nationality is not mentioned *expressis verbis* in this non-exhaustive list of prohibited grounds of discrimination, it is clearly covered by the one referring to "national origin." For further developments about the scope and content of the principle of non-discrimination *see* ODDNY MJYLL ARNARDOTTIR, EQUALITY AND DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2003); CURTIS F. J. DOEBBLER, THE PRINCIPLE OF NON-DISCRIMINATION IN INTERNATIONAL LAW (2007); WARWICK MCKEAN, EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL LAW (1983); DANIEL MOEKLI, HUMAN RIGHTS AND NON-DISCRIMINATION IN THE 'WAR ON TERROR' (2008); WOUTER VANDENHOLE, NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES (2005); E. W. VIERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW (1973); LI WEIWEI, EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL HUMAN RIGHTS LAW (2004); Anne F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 H.R.L.J. 1, 1-2 (1990); M. BOSSUYT, L'INTERDICTION DE LA DISCRIMINATION DANS LE DROIT INTERNATIONAL DES DROITS DE L'HOMME (1976); Mel Cousins, *The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?*, 16 J. SOC. SEC. L. 3, 120-38 (2009); Aaron X. Fellmeth, *Non-discrimination as a Universal Human Right*, 34 YALE J. INT'L L. 558, 558-95 (2009).

The principle of non-discrimination is a well-recognized norm of general international law[85] and its impact on the legal position of non-citizens is quite straightforward. Interpreting Article 2(1) of the ICCPR, the HRC underlined:

> In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness . . . . Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens . . . . Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens.[86]

The HRC further delineated the basic rights of aliens deriving from the ICCPR. The list enumerated in its General Comment No. 15 on The Position of Aliens under the Covenant proves to be extensive:

> Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of Article 27, they shall not be denied the right, in community with other members of their

85. According to the Inter-American Court of Human Rights, this is even a norm of *jus cogens*. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003).

86. United Nations, Int'l Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 18-19, ¶¶ 1-2, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994) (General Comment No. 15: The Position of Aliens Under the Covenant).

> group, to enjoy their own culture, to profess and [practice] their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.[87]

The fundamental rights listed therein are not only applicable to non-citizens; most of them are generally considered part of customary international law.[88] Hence, the general applicability of human rights to non-citizens combined with the customary law nature of these fundamental rights have the consequence of anchoring migrants' rights within general international law.

However, the position of migrants under public international law is qualified by two main considerations. First, some of the rights listed above are conditioned by the legal status of their beneficiaries. It is true that such rights are not numerous; only two rights proclaimed in the ICCPR require a legal presence within the territory. Nevertheless, their impact is both significant and representative because the two rights in question specifically refer to the movement of persons: A regular presence is required for the right to liberty of movement and freedom to choose a residence within the territory,[89] as well as for due process guarantees governing expulsion from the territory.[90]

The combination of these two provisions graphically exhibits the specificities and the limits of the legal status of migrants under contemporary international law. A non-citizen must be lawfully within the territory of a state in order to benefit within that territory from the right to liberty of movement and freedom to choose his/her residence. But, even when lawfully within the territory, he or she may still be deported from that territory as long as some basic conditions and procedural guarantees are fulfilled.[91] This

87. *Id.* at 19, ¶ 7. Needless to say that all the rights consecrated in the ICCPR have been reaffirmed in many other human rights treaties notably at the regional level.

88. There is no room here for a detailed analysis of the customary law nature of the human rights referred therein. Among a plethora of literature, see, for example, LOUIS HENKIN, THE AGE OF RIGHTS 19 (1990); MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 272 (1980); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 79-135 (1989); OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW 50-56 (2010); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 287-397 (1995); Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1 (1996); Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133 (1977). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

89. ICCPR, *supra* note 66, art. 12(1).

90. ICCPR, *supra* note 66, art. 13.

91. ICCPR, *supra* note 66, art. 13 ("An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be

tension is a defining feature of alienage.

The rationale behind limiting rights based on an alien's legal status is clearly related to the traditional power of states to regulate entries and stays within their own territory.[92] As acknowledged by the HRC, "the question whether an alien is 'lawfully' within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations."[93] While states retain a substantial margin of appreciation, this does not mean that they have a purely discretionary power for deciding upon admission of non-citizens. Here again the legal position of migrants mirrors a broader transformation of the international legal order, which has evolved from a law of coexistence towards a law of interdependence. As a result of this structural evolution of public international law, territorial sovereignty is both a competence and a responsibility. Against such normative background, the competence to regulate admission in domestic legislation must be exercised in due accordance with the legal norms of international law.

The international legal norms governing migration control are more substantial and numerous than is frequently assumed by policy-makers. The most relevant ones are the principle of *non-refoulement*, the right to family unity, the prohibition of arbitrary detention, the prohibition of collective expulsion, and states' duties to admit their own nationals. Though their respective content and legal basis cannot be detailed here, each of these norms is not only acknowledged in numerous treaties but also arguably grounded in customary international law.[94]

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allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."). Similar conditions governing the deportation process can be found in other treaties. *See, e.g.*, Arab Charter on Human Rights art. 26(b), *adopted* May 23, 2004 *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) (entered into force Mar. 15, 2008); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 22, 1984, 1525 U.N.T.S. 195; African Charter on Human and Peoples' Rights art. 12(5), June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986); American Convention on Human Rights, *supra* note 79, art. 22(6); Convention Relating to the Status of Refugees art. 32, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

92. For further discussions see AM. SOC'Y OF INT'L LAW, THE MOVEMENT OF PERSONS ACROSS BORDERS 1-22 (Louis B. Sohn & Thomas Buergenthal eds., Studies in Transnational Legal Policy No. 23, 1992); Vincent Chetail, *Migration, Droits de L'Homme et Souveraineté: Le Droit International Dans Tous Ses Etats*, in MONDIALISATION, *supra* note 6, at 13-133; GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES (1978); David A. Martin, *The Authority and Responsibility of States*, *in* MIGRATION AND INTERNATIONAL LEGAL NORMS 31-45 (Thomas Alexander Aleinikoff & Vincent Chetail eds., 2003); RICHARD PLENDER, INTERNATIONAL MIGRATION LAW (2d ed. 1988); James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 804-47 (1983).

93. United Nations, Int'l Covenant on Civil & Political Rights, Human Rights Comm., General Comment No. 27: Freedom of Movement, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999).

94. For further discussions about their legal basis and content under customary international law see Vincent Chetail, *The Transnational Movement of Persons Under General International Law: Mapping the Customary Law Foundations of International Migration Law*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 1-74 (Vincent Chetail & Celine Bauloz eds., 2014).

Besides the limits deriving from the state's competence in the field of admission, the general principle of non-discrimination is subject to a second type of impediment closely related to the nature of the rights at stake. Indeed the position of migrants under general international law is more precarious when it comes to economic, social, and cultural rights.[95] From a purely legal perspective, this may be surprising for, in contrast to civil and political rights, none of the rights endorsed in the ICESCR[96] are conditioned by the nationality or legal status of their beneficiaries. However, most of these rights are progressively applicable depending on the resources available in each state.[97] The principle of non-discrimination is nonetheless well acknowledged as a basic guarantee which "is neither subject to progressive implementation nor dependent on available resources."[98]

This obligation of immediate implementation relies on the mandatory terms of Article 2(2) of ICESCR which requires each state party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[99] The CESCR rightly inferred from this fundamental and straightforward obligation that "[t]he Covenant rights apply to everyone including

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95. For an overview, see, Vincent Chetail & Gilles Giacca, *Who Cares?: The Right to Health of Migrants*, *in* REALIZING THE RIGHT TO HEALTH 224–34 (Andrew Clapham & Mary Robinson eds., 2009); RYSZARD CHOLEWINSKI, STUDY ON OBSTACLES TO EFFECTIVE ACCESS OF IRREGULAR MIGRANTS TO MINIMUM SOCIAL RIGHTS (2005); Ryszard Cholewinski, *Economic and Social Rights of Refugees and Asylum Seekers in Europe*, 14 GEO. IMMIGR. L.J. 709, 709-55 (2000); Ockert Dupper, *Migrant Workers and the Right to Social Security: An International Perspective*, 18 STELLENBOSCH L. REV. 219–54 (2007); Sylvie Da Lomba, *Immigration Status and Basic Social Rights: A Comparative Study of Irregular Migrants' Right to Health Care in France, the UK and Canada*, 28 NETH. Q. HUM. RTS. 1, 6 (2010); Aliya Haider, *Out of the Shadows: Migrant Women's Reproductive Rights under International Human Rights Law*, 22 GEO. IMMIGR. L.J. 429 (2007-2008); Haina Lu, *The Personal Application of the Right to Work in the Age of Migration*, 26 NETH. Q. HUM. RTS. 1, 43-77 (2008); Ben Saul, *Waiting for Dignity in Australia: Migrant Rights to Social Security and Disability Support under International Human Rights Law*, 3 U.C. LONDON HUM. RTS. REV. 72 (2010).

96. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

97. As underlined in Article 2(1) of the U.N. International Covenant on Economic, Social and Cultural Rights (ICESCR), "[e]ach States Parties to the present Covenant undertakes to take steps, individually and through international assistance and co-operation . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant." ICESCR, *supra* note 95, art. 2(1).

98. United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 18: The Right to Work, ¶ 33, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006). *See* United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, ¶¶ 2, 7, U.N. Doc. E/C.12/GC/20 (July 2, 2009); United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 9: The Domestic Application of the Covenant, ¶ 9, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998); United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations, ¶ 287, at 83, U.N. Doc. E/1991/23, Annex III (Dec. 14, 1990). *See also* The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, ¶ 11, at 16, U.N. Doc. E/C.12/2000/13 (Oct. 2, 2000); United Nations, Comm'n on Human Rights, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶ 35, U.N. Doc. E/CN.4/1987/17, Annex I (Jan. 8, 1984) [hereinafter Limburg Principles].

99. ICESCR, *supra* note 96, art. 2(2).

non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."[100]

Nonetheless, contrary to its counterpart in the ICCPR, the principle of non-discrimination under the ICESCR is limited by a noteworthy—albeit circumstantiated—exception. According to Article 2(3), "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."[101] As any exception to a principle, this one should be restrictively interpreted (especially when the principle at stake is so fundamental and represents one of the funding backbones of the Covenant). Furthermore, the wording of this provision is circumscribed by three substantial cumulative conditions regarding the states concerned, the nature of the rights subjected to this exception, and the degree of permissible restrictions to them.

Regarding the first condition (the states concerned), Article 2(3) is a permissive, not a mandatory, provision which can be invoked only by "developing countries."[102] The notion of developing countries being a factual rather than a legal one, it is commonly understood as including "countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries."[103] Although this kind of qualification referring to a particular type of State may be found in international trade law and other related areas, it remains quite unique in the field of human rights law. This specificity must be understood in the historical context which prevailed during the drafting of the ICESCR. Article 2(3) is a remnant of the traditional law of aliens and the longstanding debates between newly independent states and western states. The delegate of Indonesia who proposed this provision explained that its only purpose was to protect the rights of nationals of former colonies against the abuses deriving from "the dominant economic position enjoyed by [mostly western] foreigners as a result of the colonial system."[104] In summing up the debates between the delegations, the Third Committee of the General Assembly further insisted that:

100. United Nations, Comm. on Econ., Soc., & Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, ¶ 30, U.N. Doc. E/C.12/GC/20 (July 2, 2009). *See also* United Nations, Comm. on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶¶ 12, 18, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

101. ICESCR, *supra* note 96, art. 2, ¶ 3.

102. *Id.*

103. Limburg Principles, *supra* note 98, ¶ 44.

104. U.N. GAOR, 17th Sess., 1118th mtg. at 258, ¶ 37, U.N. Doc. A/C.3/SR.1185 (Nov. 16, 1962). Although the Committee on Economic, Social and Cultural Rights has not specified for the moment the meaning of this provision, the Limburg Principles reassert that "[t]he purpose of article 2(3) was to end the domination of certain economic groups of non-nationals during colonial times." Limburg Principles, *supra* note 98, ¶ 43.

> [T]he sole aim of the proposals in question was to rectify situations which frequently existed in the developing countries particularly those which recently won their independence. In such countries, the influence of non-nationals on the national economy—a heritage of the colonial era—was often such that nationals were prevented from enjoying the economic rights set forth in the draft Covenant.[105]

Article 2(3) was finally adopted by a small majority of states: forty-one votes to thirty-eight, with twelve abstentions.[106]

The second range of conditions governing Article 2(3)'s scope relates to the rights concerned by this exception to the principle of non-discrimination. Article 2(3) is exclusively limited to the "economic rights recognized in the present Covenant."[107] Although this notion is not explicitly defined in the Covenant, the ordinary meaning of the terms presupposes that the rights in question primarily consist of the right to work and other related rights,[108] such as the enjoyment of just and favourable conditions of work.[109] This excludes both social and cultural rights for which non-discrimination remains plainly operational.

Third, according to the cautious and restrictive wording of Article 2(3), developing countries are not allowed to suspend the rights of non-nationals, they can only "determine to what extent they would guarantee the[ir] economic rights."[110] They can thus merely envisage restrictions to the exercise of economic rights, which must be determined "with due regard to human rights and their national economy" as explicitly required by Article 2(3).[111] Possible restrictions on the economic rights of non-nationals are therefore deemed acceptable as long as they do not impair the enjoyment of other human rights. Following this stance, a general prohibition of the right to work imposed to non-citizens would not be justified if no welfare assistance is instead provided to them.[112]

In any event, Article 2(3) cannot justify any breach of economic rights and other related guarantees provided by other treaties. For example, it cannot be

105. U.N. GAOR, 17th Sess., 5365th plen. mtg. ¶ 68, U.N. Doc. A/5365 (Dec. 17, 1962).

106. U.N. GAOR, 17th Sess., 1206th mtg. ¶¶ 42-45, U.N. Doc. A/C.3/SR.1206 (Dec. 10, 1962).

107. ICESCR, *supra* note 96, art. 2, ¶ 3.

108. ICESCR, *supra* note 96, art. 6.

109. ICESCR, *supra* note 96, art. 7. *See also* CHOLEWINSKI, *supra* note 6, at 59; M. MAGDALENA SEPULVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 415 (Sch. of Human Rights Research Ser. Vol. 18, 2003); E. V. O. Dankwa, *Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 230, 239-40 (1987).

110. ICESCR, *supra* note 96, art. 2, ¶ 3. During the drafting of Article 2(3), the delegate of Indonesia underlined that this provision "recognised the principle that non-nationals were entitled to enjoy the same economic rights as the nationals of a State; it was only the extent of such enjoyment that could be limited by the State." U.N. GAOR, 17th Sess., 1204th mtg. ¶ 2, U.N. Doc. A/C.3/SR.1204 (Dec. 6, 1962).

111. ICESCR, *supra* note 96, art. 2, ¶ 3.

112. *See also* Alice Edwards, *Human Rights, Refugees, and the Right 'to Enjoy' Asylum*, INT'L J. REFUGEE L. 293, 325-26 (2005).

used to avoid articles 17, 18, and 19 of the Refugee Convention governing access to employment.[113] Article 5(2) of the ICESCR ensures indeed that more favourable treatments granted by any other domestic legislation and treaties remain plainly applicable.[114] This safeguard clause has further far-reaching effects with regard to more favourable treatment enshrined in regional human rights treaties, for both the 1981 African Charter on Human and Peoples Rights[115] and the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights[116] guarantee the right to work without any discrimination. In such case, Article 2(3) is literally neutralised.

In addition to due respect for other human rights and more favourable treatment, restrictions on the economic rights of non-citizens are further conditioned by the state of their national economy. Although developing countries retain a substantial margin of appreciation, some commentators have argued that Article 2(3) can be triggered "only when the state of the economy of the nation as a whole so warrants."[117] In sum, despite the apparent vagueness of its wording, Article 2(3) represents a limited and balanced exception to the principle of non-discrimination. More fundamentally, it remains—for the moment at least—a rather virtual exception, for "no developing State has sought to invoke it."[118] Save for a possible future invocation of Article 2(3), the principle of non-discrimination constitutes thus an "immediate and cross-cutting obligation" binding all state parties.[119]

From the broader perspective of general international law, the prohibition of discrimination is acknowledged as a well-established principle. Nonetheless, its concrete implications are not always obvious as the principle of non-discrimination does not prohibit all differences of treatment. A differential treatment is still permissible provided that it has a legitimate aim and the criteria for such differentiation are "reasonable and objective."[120] The

113. Convention Relating to the Status of Refugees arts. 17-19, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

114. ICESCR, *supra* note 96, art. 5, ¶ 2.

115. African Charter on Human and People's Rights art. 15, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

116. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 6, Nov. 17, 1988, O.A.S.T.S. No. 69 (entered into force Nov. 16, 1999) ("Protocol of San Salvador").

117. Dankwa, *supra* note 109, at 242.

118. SEPULVEDA, *supra* note 109, at 415. *See also* Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights*, *in* AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK 101, 111 (Raija Hanski & Markku Suksi eds., 2d rev. ed. 1999).

119. United Nations, Comm. on Econ., Soc., and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, ¶ 7, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

120. Gaygusuz v. Austria, 1996-IV Eur. Ct. H.R. 12, ¶ 42 (1996); United Nations, Comm. on Econ., Soc., and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, ¶ 13, U.N. Doc. E/C.12/GC/20 (July 2, 2009); United Nations, Comm. on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination Against Non-citizens, ¶ 4, U.N. Doc. CERD/C/64/Misc.11/Rev.3 (Oct. 1, 2004).

differentiation between citizens and non-citizens must thus be proportionate to the aims pursued by states.[121] This requires a subtle case-by-case assessment which confers on states a relatively broad margin of action.

Against such a frame, though equal access of non-citizens to economic and social rights remains controversial, there is a growing consensus for considering that this should be the case for a minimum core obligation. Equal access to the core content of economic and social rights has been notably endorsed by the CESCR. It has reaffirmed for instance that "[a]ll persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care."[122] In particular, "[r]efugees, stateless persons and asylum-seekers . . . should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards."[123]

This general trend finds additional support in the general prohibition against degrading and inhuman treatment, a well-established norm of customary international law.[124] Indeed, violating a minimum of subsistence rights can cross the threshold of degrading treatment.[125] A similar evolution

121. *Gaygusuz v. Austria*, 1996-IV Eur. Ct. H.R. 12, ¶ 42; United Nations, Comm. on Econ., Soc., and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, ¶ 13, U.N. Doc. E/C.12/GC/20 (July 2, 2009); United Nations, Comm. on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination Against Non-citizens, ¶ 4, U.N. Doc. CERD/C/64/Misc.11/Rev.3 (Oct. 1, 2004).

122. United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 19: The Right to Social Security, ¶ 37, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008). *See also* United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 34, U.N Doc. E/C.12/200/4 (Aug. 11, 2000).

123. United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 19: The Right to Social Security, ¶ 38, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008). As far the right to education, "the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status." United Nations, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 13: The Right to Education, ¶ 34, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999). Article 3 of the Convention against Discrimination in Education also obliges States Parties to "give foreign nationals resident within their territory the same access to education as that given to their own nationals," without mentioning the nature of their migratory status. Convention against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93 (entered into force May 22, 1962).

124. Its customary law nature has been notably acknowledged by the International Court of Justice. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 1996 I.C.J. 639, ¶ 87 (Nov. 30).

125. This interpretation has been notably confirmed by the European Court in the *M.S.S.* case. M.S.S. v. Belgium & Greece, ¶¶ 365-67, 2011 Eur. Ct. H.R. Although it recalls, in line with its previous jurisprudence, that Article 3 does not "entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living," the Court acknowledges the particular vulnerability of asylum-seekers: "[t]he Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive." *Id.* ¶¶ 249, 251. While referring to the complementary obligation to provide decent material conditions under the EU Reception Directive, the Court concludes that "the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential

highlighting the interdependent and interrelated nature of human rights can be observed with regard to some of the core labour rights reaffirmed in several widely ratified ILO treaties.[126]

Besides the widespread and representative participation to these treaties, the customary nature of the basic norms enshrined therein can be inferred from the ILO Declaration on Fundamental Principles and Rights at Work:

> All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.[127]

needs . . . . have attained the level of severity required to fall within the scope of Article 3 of the Convention." *Id.* ¶ 263.

126. *See* International Labour Organization, Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932); International Labour Organization, Convention Concerning Freedom of Association and Protection of the Right to Organise, July 9, 1948, 68 U.N.T.S. 17 (entered into force July 4, 1950); International Labour Organization, Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951); International Labour Organization, Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953); International Labour Organization, Convention Concerning the Abolition of Forced Labour Convention, June 25, 1957, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959); International Labour Organization, Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960); International Labour Organization, Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, 115 U.N.T.S. 298 (entered into force June 19, 1976); International Labour Organization, Convention the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 233 U.N.T.S. 161 (entered into force Nov. 19, 2000).

127. International Labour Conference, Geneva, Switz., June 18, 1998, *International Labour Organization Declaration on Fundamental Principles and Rights at Work and Its Follow-up*, at 1237-38, 37 I.L.M. 1237 (Annex rev. June 15, 2010). For further discussions about the customary law nature of the core rights reaffirmed in the ILO Declaration, see Yves Daudet, *Preface to* LAURENCE DUBIN, LA PROTECTION DES NORMES SOCIALES DANS LES ÉCHANGES INTERNATIONAUX, 3, 3-4 (Presses Universitaires d'Aix-Marseilles ed., 2003); Federico Lenzerini, *International Trade and Child Labour Standards*, *in* ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 287, 308 (Francesco Francioni ed., 2001); Edward E. Potter, *A Pragmatic Assessment from the Employers' Perspective*, *in* WORKERS' RIGHTS AS HUMAN RIGHTS 118, 123 (James A. Gross ed., 2003); Phillip Alston, *'Core Labour Standards' and the Transformation of International Labour Rights Regime*, 15 EUR. J. INT'L L. 457, 493 (2004); Janice R. Bellace, *The ILO Declaration of Fundamental Principles and Rights at Work*, 17 INT'L J. COMP. LAB. L. & INDUST. REL. 269, 272-73 (2001); Jason F. Hellwig, Note and Comment, *The Retreat of the State?: The Massachusetts Burma Law and Local Empowerment in the Context of Globalization(s)*, 18 WIS. INT'L L.J. 477, 504-05 (2000); Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights*, 16 EUR. J. INT'L L. 439, 457-58 (2005); Jan Wouters & Bart De Meester, *The Role of International Law in Protecting Public Goods: Regional and Global Challenges* 21 (Leuven

The plain applicability of these basic rights to migrants has been further confirmed in 2004 at the 92nd International Labour Conference:

> The fundamental principles and rights at work are universal and applicable to all people in all States, regardless of the level of economic development. They thus apply to all migrant workers without distinction, whether they are temporary or permanent migrant workers, or whether they are regular migrants or migrants in an irregular situation.[128]

At the regional level, the Inter-American Court of Human Rights has come to a similar conclusion in its Advisory Opinion on *Juridical Condition and Rights of the Undocumented Migrants*.[129] The Court has deduced from the principle of non-discrimination and equality before the law some far-reaching assertions regarding labour rights of migrant workers:

> A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination. In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment.[130]

V. CONCLUSION

Migration is framed by general international law. This has always been the case even if the trivialisation of immigration control has contributed to obscuring the role of international norms to such an extent that this field is

Interdisciplinary Research Grp. on Int'l Agreements & Dev., Working Paper No. 1, 2003). One should add that discrimination in employment is defined by Art. 1(1) of ILO Convention No. 111 as comprising "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." International Labour Organization, Convention Concerning Discrimination in Respect of Employment and Occupation art. 1, ¶ 1, June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960). However, the prohibited ground of "national origin" that is traditionally retained in this kind of non-discrimination clause was substituted by the more ambiguous term "national extraction." *Id.*

128. International Labour Conference, June 1-17, 2004, *Towards a Fair Deal for Migrant Workers in the Global Economy*, ¶ 229.

129. Juridicial Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

130. *Id.* ¶¶ 133-34. The rights in question notably include the prohibition of forced labour and child labour, freedom of association and to organize and join a trade union, fair wages and social security. *Id.* ¶ 157. For other regional restatements of non-discrimination in relation to economic and social rights of migrants, see Inst. for Human Rights & Dev. in Afr. (IHRDA) v. Republic of Angola, Comm. No. 292/2004, 2008 AHRLR 43, ¶ 80 (ACHPR 2008); International Federation of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003, ¶¶ 30-32 (Eur. Comm. of Social Rights May 4, 2005), *available at* http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/CC14Merits_en.pdf.

frequently confused with domestic jurisdiction. This article makes clear that the human rights of migrants are an integral part of public international law and mirror its broader evolution.

The main challenge remains in its implementation at the domestic level. This is arguably not so different from many other branches of international law which are at the crossroads of state sovereignty and individuals' rights (such as the law of armed conflicts). Nevertheless it has become a common place to observe the "gulf between proclaimed standards and their application to migrants," as regularly denounced by non-governmental organizations and the UN.[131] Migrants are structurally vulnerable to abuses as non-citizens, and their undocumented status can aggravate such vulnerability.[132] Other external factors—such as recurrent economic crises, the spectre of terrorist violence, political manipulations, and electioneering—have led to an environment fertile to violations of migrants' rights.

Nonetheless, the last decade has witnessed a growing awareness of their vulnerability and the corresponding need to ensure due respect for migrants' rights. A plethora of initiatives and instruments have been adopted by states and international organisations[133] with the result that "migrants' rights today are more clearly recognizable as human and labour rights."[134] From a more general perspective, this ongoing tension between rights and reality echoes the schizophrenic nature of an international legal system which is grounded on two contradictory driving forces. On the one hand, due respect of non-discrimination is primarily ensured by a decentralised scheme entrusted to nation states. On the other hand, the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction" is acknowledged as one of the founding principles of the international legal

131. Cholewinski, *supra* note 6, at 180.

132. Jorge A. Bustamante, *Extreme Vulnerability of Migrants: The Cases of the United States and Mexico*, 24 GEO. IMMIGR. L.J. 565, 565-66 (2010).

133. In addition to the already substantial number of resolutions and related soft law instruments mentioned above from footnotes 47 to 54, see U.N. High Comm'r for Refugees, Refugee Protection and Mixed Migration: A 10-Point Plan of Action (Jan. 2007); Council of Eur., Comm. of Ministers, *Twenty Guidelines on Forced Return*, 925th mtg., Doc. No. CM/Del/Dec(2005)924/10.1 (2005); Eur. Parl. Ass., *Resolution 1509: Human Rights of Irregular Migrants*, Doc. No. 10924 (2006); International Organization for Migration, *International Agenda for Migration Management: Common Understandings and Effective Practices for a Planned, Balanced, and Comprehensive Approach to the Management of Migration* 26-30 (Dec. 16-17, 2004). Though it cannot be confused with soft law instruments adopted by States and international organizations, similar academic initiatives can play a role for raising awareness of migrant's rights and promoting their effective respect. This is the noble purpose of the International Migrant Bill of Rights Initiative, which started in 2008 as a student-led project through Georgetown Law's Global Law Scholars Program. This twenty-three-article Bill of Rights mainly restates, sometimes elaborates and further develops well-established norms of international law though. INT'L MIGRANTS BILL OF RIGHTS (Int'l Migrants Bill of Rights Initiative 2014), *available at* http://www.law.georgetown.edu/academics/centers-institutes/isim/imbr/IMBR-Info.cfm, 28 GEO. IMMIGR. L.J. 9 (2014). As rightly observed by Gerald Neuman, it appears to be "a manifesto in the shape of a restatement." Gerald Neuman, *A Migrants' Bill of Rights—Between Restatement and Manifesto*, 24 GEO. IMMIGR. L.J. 685, 686 (2010).

134. Ryszard Cholewinski, *Human Rights of Migrants: The Dawn of A New Era?*, 24 GEO. IMMIGR. L.J. 585, 614 (2010).

order instituted by the UN Charter.[135] But much more remains to be done to draw all the normative and practical consequences for those who are not nationals of the country in which they live.

135. U.N. Charter, art. 55, para. c.